Civil Trial Update & Board Certification Review 2018

COURSE CLASSIFICATION: ADVANCED LEVEL

February 1-2, 2018

Live and Webcast Presentation:
Tampa Airport Marriott
4200 George J. Bean Pkwy.
Tampa, FL 33607
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Visit www.floridabar.org/memberbenefits for a complete list of member benefits.
Common Questions About CLER

1. What is CLER?
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. What is the requirement?
   Over a 3 year period, each member must complete 33 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness, and 3 hours in technology.

3. Where may I find information on CLER?
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org/rules.

4. Who administers the CLER program?
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. How often and by when do I need to report compliance?
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date by logging in to your member portal at member.floridabar.org.

6. Will I receive notice advising me that my reporting period is upcoming?
   Four months prior to the end of your reporting cycle, you will receive a CLER Reporting Affidavit, if you still lack hours.

7. What happens if I am late or do not complete the required hours?
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

8. Will I receive any other information about my reporting cycle?
   Yes, you will receive reminders prior to the end of your reporting cycle, if you have not yet completed your hours.

9. Are there any exemptions from CLER?
   Rule 6-10.3(c) lists all valid exemptions. They are:
   1) Active military service
   2) Undue hardship (upon approval by the BLSE)
   3) Nonresident membership (see rule for details)
   4) Full-time federal judiciary
   5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
   6) Inactive members of The Florida Bar
10. Other than attending approved CLE courses, how may I earn credit hours?
    Credit may be earned by:
    1) Lecturing at an approved CLE program
    2) Serving as a workshop leader or panel member
    3) Writing and publishing in a professional publication or journal
    4) Teaching (graduate law or law school courses)
    5) University attendance (graduate law or law school courses)

11. How do I submit various activities for credit evaluation?
    Applications for credit may be found on our website, www.floridabar.org.

12. How are attendance hours posted on my CLER record?
    You must post your credits online by logging in to your member portal at member.floridabar.org.

13. How long does it take for hours to be posted to my CLER record?
    When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

14. How may I find information on programs sponsored by The Florida Bar?
    You may wish to visit our website, www.floridabar.org/cle, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

15. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?
    Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):
    ... CLER credit may not be counted for more than one reporting period and may not be carried forward to subsequent reporting periods.

16. Will out-of-state CLE hours count toward CLER?
    Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

17. If I have questions, whom do I call?
    You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

    While online checking your CLER, don’t forget to check your Basic Skills Course Requirement status.
PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent but does not have an official view of their work products.

CLER CREDIT
(Maximum 15.0 hours)

General ........................................... 15.0 hours  Ethics .............................................. 2.0 hours  Technology ....................................... 1.0 hour

CERTIFICATION CREDIT
(Maximum 15.0 hours)

Appellate Practice ................................................................. 2.0 hours  Business Litigation ............................................................. 15.0 hours  Civil Trial ................................................................. 15.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date you will be sent a Reporting Affidavit (must be returned by your CLER reporting date). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be ADVANCED.
TRIAL LAWYER SECTION

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Mindy McLaughlin, Tampa — Chair-elect

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US. Magistrate Judge Mac R. McCoy, Fort Myers
A. Woodson Isom, Jr., Tampa
Joseph H Varner, III, Tampa

CLE COMMITTEE

Jenifer S. McCaffrey Lehner, Tampa — Chair
Terry L. Hill — Director, Programs Division

For a complete list of Member Services visit our web site at www.floridabar.org.
LECTURE PROGRAM

Thursday, February 1, 2018

8:30 a.m. - 8:50 a.m.  Late Registration

8:50 a.m. - 9:00 a.m.  Opening Remarks
Edward K. Cheffy, Naples - Program Chair

9:00 a.m. - 10:45 a.m.  Civil Procedure
Matthew J. Conigliaro, Tampa

10:45 a.m. - 11:00 a.m.  Break

11:00 a.m. - 12:15 p.m.  Trial Skills: Opening and Closing
F. Gregory Barnhart, West Palm Beach

12:15 p.m. - 1:30 p.m.  Lunch (included in registration fee) & Remarks about the Certification Exam
A. Woodson Isom, Jr., Tampa

1:30 p.m. - 2:45 p.m.  Trial Skills: Preserving the Record for Appeal
Jack J. Aiello, West Palm Beach

2:45 p.m. - 3:00 p.m.  Break

3:00 p.m. - 4:00 p.m.  Recent Developments in Business Litigation
Joseph H Varner, III, Tampa

4:00 p.m. - 5:15 p.m.  Trial Skills: Voir Dire
William E. Hahn, Tampa

Friday, February 2, 2018

9:00 a.m. - 10:45 a.m.  Ethics
Edward K. Cheffy, Naples - Program Chair

10:45 a.m. - 11:00 a.m.  Break

11:00 a.m. - 12:00 p.m.  Electronic Discovery
US. Magistrate Judge Mac R. McCoy, Fort Myers
Carlos A. Baradat, Naples

12:00 p.m. - 1:15 p.m.  Lunch (on your own)
1:15 p.m. - 2:30 p.m.  
Recent Developments in Personal Injury and Wrongful Death  
Gary D. Fox, Miami

2:30 p.m. - 3:30 p.m.  
Electronic Data and the Erosion of the Rules Against Hearsay Evidence  
Stephen A. Marino, Jr., Miami

3:30 p.m. – 4:30 p.m.  
There’s More to Experts Than Daubert & Frye  
Professor Charles H. Rose, III, St. Petersburg
# TABLE OF CONTENTS

## CIVIL PROCEDURE
*Matthew J. Conigliaro, Tampa*

I. Preservation .............................................................................................................................. 1.3  
II. Liaison ...................................................................................................................................... 1.3  
III. Informal Discovery About Location and Types of Systems ................................................... 1.3  
IV. Proportionality and Costs ......................................................................................................... 1.3  
V. Search ........................................................................................................................................ 1.4  
VI. Phasing ..................................................................................................................................... 1.4  
VII. Production ................................................................................................................................ 1.4  
VIII. Privilege ................................................................................................................................... 1.4  

## TRIAL SKILLS: OPENING AND CLOSING
*F. Gregory Barnhart, West Palm Beach*

I. Opening Statement .................................................................................................................... 2.2  
II. Pretrial Motions ...................................................................................................................... 2.3  
III. Closing Argument .................................................................................................................... 2.7  

## TRIAL SKILLS: PRESERVING THE RECORD FOR APPEAL
*Jack J. Aiello, West Palm Beach*

I. Introduction and Policy Matters .............................................................................................. 3.1  
II. Pre-Trial Proceedings .............................................................................................................. 3.5  
III. Jury Selection ........................................................................................................................ 3.10  
IV. Evidentiary Objections ........................................................................................................... 3.16  
V. Motions Testing Sufficiency of the Evidence ......................................................................... 3.21  
VI. Jury Instructions ................................................................................................................... 3.25  
VII. Closing Argument ................................................................................................................ 3.26  
VIII. The Verdict ......................................................................................................................... 3.30  
IX. Jury Misconduct .................................................................................................................... 3.34  
X. Selected Appellate Principles ................................................................................................. 3.37  

## RECENT DEVELOPMENTS IN BUSINESS LITIGATION
*Joseph H Varner, III, Tampa*

I. Recent Cases and Developments in Florida Deceptive and Unfair Trade Practice Act ("FDUTPA") Claims ........................................................................................................ 4.1  
II. Economic Loss Rule .............................................................................................................. 4.14  
III. Mortgage Foreclosure .......................................................................................................... 4.27  
IV. Attorney’s Fees .................................................................................................................... 4.43  
V. Offers and Proposals for Judgement and Stttement ................................................................. 4.46  
VI. Florida’a Arbitration Code .................................................................................................... 4.56  

v
RECENT DEVELOPMENTS IN PERSONAL INJURY AND WRONGFUL DEATH
Gary D. Fox, Miami
Amy S. Farrior, Tampa
Raymond T. Elligett, Jr., Tampa

I. General Concepts ..................................................................................................................... 8.1
II. Automobile .............................................................................................................................. 8.22
III. Premises Liability .................................................................................................................... 8.32
IV. Wringful Death ........................................................................................................................ 8.38
V. Products Liability ..................................................................................................................... 8.44
VI. Miscellaneous (Tort -Related Decisions That D Not Fit Above)............................................ 8.50

ELECTRONIC DATA AND THE EROSION OF THE RULES AGAINST HEARSAY EVIDENCE
Stephen A. Marino, Jr., Miami

THERE’S MORE TO EXPERTS THAN DAUBERT & FRYE
Professor Charles H. Rose, III, St. Petersburg

I. There’s More to Experts than Daubert & Frye – Overview ..................................................... 10.1
AUTHORS/LECTURERS

JACK J. AIELLO has been board certified in appellate practice since 2001 and is currently practicing appellate advocacy and litigation support at Gunster, Yoakley & Stewart, P.A. in West Palm Beach. He completed his undergraduate studies at the University of Akron and attended law school at the University of Florida, where he graduated with High Honors and as a member of the Order of the Coif. Mr. Aiello is a member of The Florida Bar and is admitted to practice before the federal courts for the Southern and Middle Districts of Florida, the United States Court of Appeals for the Eleventh Circuit, the Third Circuit, and the United States Supreme Court. He is a past chair of The Florida Bar’s Appellate Practice Section. He is also a past chair of the Appellate Court Committee of the Palm Beach County Bar Association.

CARLOS A. BARADAT is the founding member of the Law Office of Carlos A. Baradat, P.A., where he focuses his practice on business, eDiscovery and technology related issues. He has been an adjunct professor at Hodges University since 2014, where he teaches eDiscovery, Social Media & Privacy Law, Intellectual Property and Mediation. He has served at the University’s Academic Committee and was instrumental in creating the first certificate program on eDiscovery offered by a university in the state of Florida. With more than 15 years of professional experience working in business, administration, law and information technology, Mr. Baradat started The Baradat Group, LLC, an innovative business and IT consulting company that provides law firms with assistance in trial preparation, electronic discovery, litigation and technology. Mr. Baradat is the author of a variety of articles and publications on law firm technology and has presented on various topics related to electronic discovery in today’s legal practice.

F. GREGORY BARNHART is an honors graduate of Vassar College and The Cornell Law School. He is a frequent lecturer and author in the jury trial field. Mr. Barnhart has served as treasurer, secretary, and president of the Florida Justice Association. He is the past President of the Federal Bar Association. In addition to being named in The Best Lawyers in America, for the past 21 years. He is also listed in Law and Leading Attorneys and has been recognized as one of the "Legal Elite" in Florida Trend Magazine, as well as being recognized as one of the "top lawyers" in South Florida Magazine, and as one of Florida's "Top 100 Superlawyers," and was named Best Lawyer's Lawyer of the Year for both 2010 and 2015 in personal injury litigation. Mr. Barnhart was appointed to sit on the 15th Circuit Judicial Nominating Commission as well as the Fourth District Court of Appeal Judicial Nominating Commission where he served as Chair of the Commission from 2011 to 2012. Mr. Barnhart is a Board Certified Civil Trial Lawyer. Mr. Barnhart has over 80 million dollar and multi-million dollar verdicts and settlements for his clients in personal injury cases, product liability cases, auto and truck collision cases, medical malpractice cases, aviation and railroad disasters and large commercial and will contest cases. Mr. Barnhart has also enjoyed teaching lawyers and others about trial work and has lectured regularly in Florida and other states. Indeed, Mr. Barnhart has been honored with the "Distinguished Lecturer" award by the Florida Justice Association. This past fall Greg Barnhart taught a Trial Techniques course at the Cornell Law School to third year law students. Mr. Barnhart has also been inducted into the International Academy of Trial Lawyers which is limited to the top 500 trial lawyers, as well as the American College of Trial Lawyers.

EDWARD K. CHEFFY is certified by The Florida Bar as a specialist in both Civil Trial Law and Business Litigation Law. He is a Fellow in the American College of Trial Lawyers as well as the International Academy of Trial Lawyers. In 2000, he received the “Lion of the Law” Award for Professionalism from the Collier County Judiciary. He has been voted by his peers as
one of “The Top 100 Super Lawyers” in Florida, and he is included in Florida Trend’s “Legal Elite Hall of Fame.” He is also included in Best Lawyers in America, and that publication has named him as Lawyer of the Year for the Naples/Ft. Myers area on six occasions: in 2011 and 2015 for "Bet-the-Company Litigation;" in 2012 for Construction Litigation; and in and 2013, 2016 and 2018 for Real Estate Litigation. Since 2005, he has served as Chair of The Florida Bar's annual Board Certification Review Course for Civil Trial Law, and he has lectured on "Ethical Issues Facing the Civil Trial Lawyer" at that seminar since 1996. He graduated with honors from Harvard University with a degree in History and Literature, and he received his law degree, with honors, from The Ohio State University. He practices with Cheffy Passidomo, P.A. in Naples.

MATTHEW J. CONIGLIARO is an attorney and a shareholder with Carlton Fields in Tampa. He is board certified by The Florida Bar in appellate practice. Mr. Conigliaro concentrates his practice on appellate and complex commercial litigation. His work principally involves tort and products litigation, commercial disputes, coverage, intellectual property, and constitutional issues. Mr. Conigliaro served as law clerk to the Honorable Jacqueline R. Griffin of Florida’s 5th District Court of Appeal from 1995 to 1997 and served as a Deputy Solicitor General of Florida from 2001 to 2002. He received his J.D. degree, cum laude, from Tulane Law School, where he was a member of the Tulane Law Review, and his B.A. degree from the University of North Carolina. He has served as Chair of the Appellate Practice Section and of the Council of Sections of The Florida Bar and currently serves as Chair of the Appellate Law Section of the St. Petersburg Bar Association. He is A/V rated by Martindale-Hubbell and has been recognized by Best Lawyers in America, Chambers USA Guide to America’s Leading Business Lawyers, Florida Trend’s Legal Elite, and Florida Super Lawyers.

CHARLES W. EHHRARDT is the Ladd Professor Emeritus at the Florida State University College of Law. Prior to joining the faculty in 1967, he was the law clerk to a judge on the United States Court of Appeals for the Eighth Circuit and an Assistant United States Attorney, He was a visiting professor at the University of Georgia College of Law and the Wake Forest Law School. Professor Ehrhardt has taught state trial judges at the National Judicial College in Reno, Nevada, and United States District Judges for the Federal Judicial Center in Washington, D.C. Professor Ehrhardt has published widely in law reviews and has written an evidence book that has been cited over 500 times by the appellate courts. He also served as a Commissioner of the National Conference of Commissioners on Uniform State Laws and is a member of the F.S.U. Sports Hall of Fame.

RAYMOND T. (TOM) ELLIGETT, JR. is a board certified appellate lawyer and shareholder in Buell & Elligett, P.A., Tampa, Florida. He received his B.A. in mathematics with high honors from the University of Florida in 1975, and his J.D., cum laude, from Harvard University in 1978. He is a former chair of The Florida Bar Appellate Practice Section, and author with the late Judge John M. Scheb of Florida Appellate Practice and Advocacy (7th Ed. 2015). The book is available at www.Amazon.com.

AMY S. FARRIOR is a board certified appellate lawyer and shareholder in Buell & Elligett, P.A., Tampa, Florida. She received her B.A. in English Literature, with distinction, from the University of Virginia in 1981, and her J.D., cum laude, from the University of Michigan Law School in 1986. She was elected to the Florida Bar Board of Governors in 2017. She is a Past President of the Hillsborough County Bar Association, former Chair of the Hillsborough County Bar Association Trial Lawyers and Appellate Sections, and former President of the Ferguson-
White American Inn of Court. She is also the President Elect of the Hillsborough County Bar Foundation.

**GARY D. FOX** was selected as the 2013 Trial Lawyer of the Year by the Florida Chapters of the American Board of Trial Advocates. He is a member of the Inner Circle of Advocates, the International Society of Barristers and a past president of FLABOTA and the Miami Chapter of ABOTA. By appointment of the Florida Supreme Court he has served a 5-year term on the Board of Bar Examiners and has also been a past Chairman of The Florida Bar’s Code and Rules of Evidence Committee and the Rules of Judicial Administration Committee. He has been a board-certified civil trial lawyer by the Florida Bar and the National College of Trial Advocacy for more than 30 years and practices law with the Miami firm of Stewart Tilghman Fox Bianchi & Cain. P.A.

**WILLIAM E. (BILL) HAHN** is a Florida civil trial attorney whose practice is dedicated to helping injured plaintiffs throughout the west coast of Florida in medical malpractice, legal malpractice and serious personal injury cases. Mr. Hahn has successfully tried many personal injury, and professional negligence cases to verdict before juries and since 1987, has been designated as a Board Certified Civil Trial Lawyer, by The Florida Bar Board of Legal Specialization and Education. His peers have recognized him, many times over for his exceptional legal skills. Mr. Hahn is listed in *Best Lawyers in America*, Florida's *Super Lawyers*, and Florida’s Leading Attorneys in the categories of personal injury law and medical malpractice. Mr. Hahn was named Trial Lawyer of the Year in 2009 by the Florida Chapters of the American Board of Trial Advocates. Similarly, *Best Lawyers in America* named Mr. Hahn the "Tampa Bay Best Lawyers Personal Injury Litigator of the Year for 2009". This was the very first time this award was given. *Best Lawyers in America* also named him the “Tampa Bay Medical Malpractice Litigator of the year in 2010, 2012, and 2017. In addition, Mr. Hahn has received the prestigious AV rating from Martindale-Hubbell, signifying the highest ethical standards and legal ability. In 2010 Mr. Hahn was elected to The American Law Institute. In 2011, the Trial and Litigation section of the Hillsborough County Bar Association recognized Mr. Hahn with the “Michael A. Fogarty Memorial, In the Trenches Award”, for excellence in civil litigation. In 2013 Mr. Hahn was inducted into the International Society of Barristers.

**STEPHEN A. MARINO, JR.** is a shareholder with the law firm of Ver Ploeg & Lumpkin, P.A., with offices in Miami and Orlando, Florida. Mr. Marino focuses his practice on insurance coverage and bad faith litigation. After receiving his B.A. in 1990 from Columbia University, he graduated *cum laude* from the University of Miami Law School in 1995. A former architect, he brings technical and applied science knowledge to his litigation practice. He is a frequent speaker on bad faith litigation and insurance coverage issues.

**HON. MAC RICHARD McCOY** serves as a United States Magistrate Judge in the Fort Myers Division of the United States District Court for the Middle District of Florida. Prior to his appointment, Judge McCoy was a Shareholder in the National Trial and National Class Actions Practice Groups at Carlton Fields, P.A. in Tampa, Florida. Judge McCoy received his Juris Doctor, *cum laude*, from Stetson University College of Law and a dual Bachelor of Arts, *magna cum laude*, in Political Science and French from Stetson University. Judge McCoy is a member of the Federal Court Practice Committee of The Florida Bar. He is also an active leader within the Business Law Section of the American Bar Association (ABA) and, among other leadership roles, serves as a member of the Section Council, a Co-Vice Chair of the Business and Corporate Litigation Committee, and an Executive Editor of *Business Law Today*. Judge McCoy is also a member of the Federal Bar Association, the Southwest Florida Federal Court Bar Association,
the Lee County Bar Association, the Hillsborough County Bar Association, and the Federal Magistrate Judges Association. Within the United States District Court for the Middle District of Florida, Judge McCoy serves on the Rules of Practice, Procedure, and Administration Committee, the Criminal Justice Act Advisory Committee, and the Bench Bar Fund Committee.

PROFESSOR CHARLES H. ROSE III is the director of the Center for Excellence in Advocacy at Stetson University College of Law where he holds a chair as the Professor of Excellence in Trial Advocacy. Professor Rose is a nationally and internationally recognized expert in persuasion. He teaches and researches in the areas of advocacy, criminal procedure, military law, evidence, and professional ethics. Professor Rose’s published works in these fields include numerous law review articles, two casebooks on trial advocacy, and legal treatises on military criminal law and evidentiary law. Professor Rose joined the Stetson College of Law faculty in 2005, he also served as an associate professor of law at the Judge Advocate Generals School, United States Army (2000 - 2003), and as an adjunct professor at Notre Dame Law School (2003 - 2005). Prior to joining the faculty in 2005, Professor Rose spent twenty years on active duty in the United States Army. He served as a linguist, intelligence analyst, intelligence officer, and judge advocate. As a judge advocate, Professor Rose's practice included international law, the law of war, federal torts, administrative law and criminal justice. He prosecuted and defended criminal cases for more than five years, and served as a criminal law professor at the Judge Advocate General's School U.S. Army in Charlottesville, Va. Professor Rose earned his J.D. in 1993 from the Notre Dame U.S. Law School, where he served as a member of the Barrister’s Trial Team. Professor Rose earned his B.A. with distinction from Indiana University at South Bend in 1987, where he received awards for excellence in political science and public speaking while attending on academic and rotc scholarships. Professor Rose lectures nationally and internationally, and is available for commentary to outside organizations on an individually requested basis. His primary areas of scholarly interest are focused on the effective development of advocacy persuasion techniques during pre-trial, trial and appellate presentations, the federal rules of evidence, and the intersection of criminal law and the law of war as it relates to the war on terror.

JOSEPH H. VARNER, III is a partner with Holland & Knight and is a distinguished trial lawyer. He has tried cases ranging from medical malpractice wrongful death to $100 million shareholder disputes to patent infringement to $400 million unfair competition cases. He is a Board Certified Civil Trial Lawyer, a Fellow in the American College of Trial Lawyers, and has been named one of the Top 10 lawyers in Florida by Florida SuperLawyers for six of the last seven years. Mr. Varner is in the Florida Trend Legal Elite Hall of Fame, is named in Best Lawyers In America in Commercial Litigation and Bet-The-Company Litigation, and is a past recipient of the HCBA Trial Lawyers Section Michael A. Fogarty In The Trenches Award and the Tampa Bay Chapter of the Federal Bar Association George C. Carr Memorial Award. Most recently, Mr. Varner received the Thirteenth Judicial Circuit Professionalism Award. He graduated from the University Of Virginia School Of Law in 1983 and has practiced in the Tampa area since then.
CIVIL PROCEDURE

By

Matthew J. Conigliaro
Tampa
Mr. Conigliaro thanks Bruce J. Berman, who prepared the original version of these materials.
FEDERAL RULES OF CIVIL PROCEDURE
2017 AMENDMENTS

Rule 4(m) technical amendment providing that subdivision (m) does not apply to notices of condemnation actions under Rule 71.1(d)(3)(A).

SD LR 5.3(b)-(c) parties are now required to retrieve exhibits and supply them in electronic format

SD LR 5.4(b) additional requirements for filing documents under seal

SD LR 16.4 new rule requiring notices of settlement within 2 days

SD ESI Checklist new checklist for use with LR 16.1 and Rule 26(f) conferences regarding electronically stored information
In connection with the Federal Rule of Civil Procedure 26(f) conference and in preparing the Local Rule 16.1(b)(2) conference report, the Court encourages the use of the following checklist. The usefulness of any particular topic may depend on the nature and complexity of the matter.

I. Preservation
- The ranges of creation or receipt dates for any ESI to be preserved.
- The description of ESI from sources that are not reasonably accessible because of undue burden or cost and that will not be reviewed for responsiveness or produced, but that will be preserved in accordance with Federal Rule of Civil Procedure 26(b)(2)(B).
- The description of ESI from sources that: (a) the party believes could contain relevant information; but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved.
- Whether to continue any interdiction of any document-destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically recorded material.
- The number and names or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., “HR head,” “scientist,” “marketing manager”).
- The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- Any disputes related to scope or manner of preservation.

II. Liaison
- The identity of each party’s e-discovery liaison, who will be knowledgeable about and responsible for each party’s ESI.

III. Informal Discovery About Location and Types of Systems
- Identification of systems from which discovery will be prioritized (e.g., e-mail, finance, HR systems).
- Descriptions and location of systems in which potentially discoverable information is stored.
- How potentially discoverable information is stored.
- How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and Costs
- The amount and nature of the claims being made by either party.
- The nature and scope of burdens associated with the proposed preservation and discovery of ESI.
- The likely benefit of the proposed discovery.
• Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic-discovery vendor or a shared document repository, or other cost-saving measures.

• Limits on the scope of preservation or other cost-saving measures.

• Whether there is relevant ESI that will not be preserved in accordance with Federal Rule of Civil Procedure 26(b)(1), requiring discovery to be proportionate to the needs of the case.

V. Search

• The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.

• The quality-control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

VI. Phasing

• Whether it is appropriate to conduct discovery of ESI in phases.

• Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Federal Rule of Civil Procedure 34 document discovery.

• Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.

• Custodians (by name or role) most likely to have discoverable information and whose ESI will be included in the first phases of document discovery.

• Custodians (by name or role) less likely to have discoverable information from whom discovery of ESI will be postponed or avoided.

• The time period during which discoverable information was most likely to have been created or received.

VII. Production

• The formats in which structured ESI (database, collaboration sites, etc.) will be produced.

• The formats in which unstructured ESI (e-mail, presentations, word processing, etc.) will be produced.

• The extent, if any, to which metadata will be produced and the fields of metadata to be produced.

• The production format(s) that ensure(s) that any inherent searchability of ESI is not degraded when produced.

VIII. Privilege

• How any production of privileged or work-product protected information will be handled.

• Whether the parties can agree on alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.

• Whether the parties will enter into a Federal Rule of Evidence 502(d) stipulation and order that addresses inadvertent or agreed production.
FEDERAL RULES OF CIVIL PROCEDURE
2016 AMENDMENTS

KEY POINTS

Rule 6  electronic service no longer eligible for 3 additional days

SD LR 7.1(c)(1) amended to provide no additional days following electronic service or hand-delivery

SD LR 7.1(c)(2) one-motion limit on summary judgment motions does not preclude a motion addressing immunity from suit and a later motion addressing remaining issues

SD LR 11.1(e) permits certain post-discharge communications between attorneys and jurors unrelated to case

SD LR 26.1(g) permits the 30-day time to file discovery motions to be extended by 7 days through unfiled written stipulation

SD AO 2016-70 within 3 days of conclusion of trial or other proceeding, counsel must e-file exhibits and complete Certificate of Compliance (administrative order in effect until local rules amended)

FEDERAL RULES OF CIVIL PROCEDURE
2015 AMENDMENTS

KEY POINTS

Rule 4  service period reduced from 120 days to 90 days

Rule 16(b)(2) scheduling order must issue within 90 days of any defendant being served/appearing, absent good cause
<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>16(b)(3)</td>
<td>scheduling order may direct that, before moving for order relating to discovery, the movant request a court conference</td>
</tr>
<tr>
<td>26(b)(1)</td>
<td>discovery must now be “proportional to the needs of the case,” considering the importance of the issues and the discovery, the amount in controversy, the parties’ resources and relative access to information, and whether the burden/expense outweighs likely benefit</td>
</tr>
<tr>
<td>26(d)(2)</td>
<td>RFP’s may be served more than 21 days after service of process, even though prior to Rule 26(f) conference, and are considered to have been served at the conference</td>
</tr>
<tr>
<td>34(b)(2)</td>
<td>grounds for objections must be stated with specificity and must state whether any responsive materials are being withheld based on the objection; also, responding party may state it will produce copies of documents or ESI instead of permitting inspection, must be completed no later than time for inspection stated in the request or another reasonable time stated in the response</td>
</tr>
<tr>
<td>37(e)</td>
<td>restricts when court may order relief based on the loss of ESI: where prejudice, measures may cure, but an adverse presumption or instruction may not be used, nor may an action be dismissed, absent a finding that the party losing the information acted with intent to deprive another party of the information’s use in the litigation</td>
</tr>
<tr>
<td>Forms</td>
<td>all now abrogated, except rule 4 contains a service waiver form</td>
</tr>
</tbody>
</table>
NOTICE OF REVISION OF THE LOCAL RULES
OF THE NORTHERN DISTRICT OF FLORIDA

The United States District Court for the Northern District of Florida has revised its Local Rules. The revised rules are now in effect. The revised rules include significant changes from the prior rules. And the revised rules include changes from the draft that was circulated for public comment in May 2015. The comments resulted in substantial improvements.

This notice summarizes the most significant changes, starting with Rule 7.1 and then addressing other changes in number order.

Rule 7.1 retains the requirement for an attorney conference before filing a motion, still with limited exceptions. Rule 7.1(B) adds details intended to require a meaningful conference—not just a last-minute email or other ineffective effort.

Rule 7.1(F) changes the limit on the length of a memorandum in support of or in opposition to a motion. The limit is now 8,000 words, not 25 pages. The rule specifies which parts of the memorandum are counted. And the rule requires a certificate stating the number of words in the memorandum. Setting the limit in words and requiring a certificate follow the procedure adopted in 1998 for appellate briefs. See Fed. R. App. P. 32(a)(7)(B) & (C).

Rule 7.1(F) also adds a prohibition on tendering a longer memorandum before obtaining leave to do so. The rule retains the prohibition on reply memoranda (except on summary-judgment motions, as addressed below) and prohibits tendering a reply memorandum before obtaining leave to do so.

Rule 7.1(J) authorizes and establishes limits on notices of supplemental authority; the rule generally tracks Federal Rule of Appellate Procedure 28(j).

Rule 2.1 is new and includes definitions that apply to all the rules. The goal is to promote clarity. Under Rule 2.1(F), references in other rules to an “attorney” include a party proceeding pro se unless the context clearly indicates the contrary. This has allowed deletion of cumbersome references to pro se parties in other rules.

Rule 5.1(C) adds a requirement that filings use 14-point font. This matches the
requirement for Eleventh Circuit filings and is intended to make papers easier to read.

Rule 5.5 is new and sets out procedures for filing materials under seal.

Rule 6.1 allows the parties to stipulate, without a court order, to extend a deadline for responding to a specific discovery request or for making a Federal Rule of Civil Procedure 26 disclosure, so long as the extension does not interfere with the time for completing all discovery, submitting or responding to a motion, or trial. This accords with the Federal Rules of Civil Procedure but departs from prior practice in the District. The goal is to save attorney and judge time.

Rule 11.1(A) makes a substantial change on membership in the District’s bar. Only members of the Florida Bar are eligible. Previously, an attorney who was a member in good standing of another state’s bar could become a member of the District’s bar, even without being a member of the Florida Bar. A grandfather provision allows an attorney who is already a member of the District’s bar to retain that status, so long as the attorney does not violate Florida law on the unauthorized practice of law and there are no other grounds for the attorney's removal from the District's bar. Under the new rule, an attorney who is not a Florida Bar member will be allowed to appear only pro hac vice. Note that none of this affects the prohibition on the unauthorized practice of law—with limited exceptions, a Florida resident could not before and still cannot practice law in Florida without being a member of the Florida Bar.

New Rule 11.1(G)(3) automatically suspends or removes from the District’s bar an attorney who is suspended or disbarred from the Florida Bar. New Rule 11.1(G)(2) requires an attorney to give notice of any Florida Bar suspension or disbarment.

Rule 26.2 retains the general approach to discovery in criminal cases. The rule conforms time periods to the revised counting rules in Federal Rule of Criminal Procedure 45 and changes some of the periods. New Rule 26.2(G)(5) addresses specific kinds of protected material.

Rule 54.1 still provides that attorney’s fees will be awarded only when contemporaneous time records are maintained. But the rule drops the requirement to file the attorney’s fee records each month during the pendency of a case; the records are to be filed only when necessary to decide a motion for a fee award.

Rule 56.1 changes summary-judgment procedures. The rule drops the list-and-respond procedure—the requirement for a separate statement of allegedly undisputed facts and a specific response to the statement. Instead, the facts are to be set out as part of the supporting and opposing memoranda, as was done prior to adoption of the list-and-respond procedure (and as is routinely done, for example, in appellate briefs or in support of or opposition to other motions).

Rules 56.1(B) and (C) change the limit on the length of memoranda in support of or in opposition to a summary-judgment motion to 8,000 words, the same as under Rule 7.1. Rule 56.1(C) increases to 21 days the time to respond to a summary-judgment
motion. Rule 56.1(D) allows a reply memorandum in support of a motion, limited to 3,200 words, and allows 7 days for its filing. Rule 56.1(E) requires pinpoint record citations.

Rule 77.2 allows attorneys to bring into the courthouse electronic devices, including cell phones, tablets, and laptops. The rule regulates their use. The rule addresses media requests to bring in electronic devices.

Rule 88.1 requires any sentencing memorandum to be filed at least 3 days before a sentencing hearing.

Rule 88.2 incorporates by reference the local patent rules of the Northern District of Georgia.

The revisions are the result of work by separate subcommittees on civil and criminal rules. The District’s judges have modified some of the subcommittee proposals and have approved publication of the entire set of rules for public comment. The members of the Local Rules Committee’s Subcommittee on Civil Rules include:

Judge Robert L. Hinkle, chair
Judge Gary R. Jones
Jessica J. Lyublanovits, Clerk of Court
Gwendolyn P. Adkins
Philip A. Bates
James Nixon Daniel III
David McKinnon Delaney
Edward P. Fleming
Jonathan Alan Glogau
Pam Moine
Michael Patrick Spellman
Timothy M. Warner

The members of the Local Rules Committee’s Subcommittee on Criminal Rules include:

Judge C. Roger Vinson, chair
Judge Elizabeth Timothy
Jessica J. Lyublanovits, Clerk of Court
Barry William Beroset
Christopher P. Canova
Thomas Marshall Findley
Robert Stephen Griscti
Stephen M. Kunz
Pam Lassiter
Randall Lockhart
David Lee McGee
Gilbert Alden Schaffnit
Dustin Scott Stephenson

ONE NORTH PALAFOX STREET
PENSACOLA, FLORIDA 32502-5658
850.435.8440
FLORIDA RULES OF CIVIL PROCEDURE
2017 AMENDMENT

Form 1.983 amended juror questionnaire to require attorneys to redact month/day from birth date before filing

FLORIDA RULES OF CIVIL PROCEDURE
2016 AMENDMENTS

KEY POINTS

Rule 1.110(c) all pleadings must now name all parties in caption (not motions, orders, other documents)

Rule 1.140(a)(3) 10-day period to serve responsive pleading where motion denied/deferred starts with filing of the court’s order

Rule 1.431 alternate jurors no longer limited to 1 or 2, and time to seek juror interview expanded from 10 to 15 days from rendition of the verdict

Rule 1.545 new rule on Final Disposition Form but text moved from former 1.100(c)(3)
### ADMISSION OF FLORIDA COUNSEL

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>None</td>
<td>ND 11.1</td>
<td>To be admitted to the bar of Florida federal district court, a lawyer must be a Florida Bar member in good standing. The Middle District also requires certificates of two members of the Florida and Middle District bars, attesting to good moral character or a certificate of good standing from either the Northern or Southern Districts, and a certificate certifying that the applicant has read and is familiar with the Federal Rules of Evidence, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Court’s local rules. The Southern District also requires the applicant to pass a written examination.</td>
</tr>
<tr>
<td>MD 2.01</td>
<td>SD Special Rules Governing Admission and Practice of Attorneys 1 &amp; 2</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### SPECIAL ADMISSION OF FOREIGN COUNSEL

<table>
<thead>
<tr>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.510</td>
<td>None</td>
<td>The Florida Rules of Judicial Administration and the local federal district court rules provide a procedure for pro hac vice admission of foreign counsel, but the Federal Rules do not. Only the Florida rule requires a verified motion. Rule 2.510 provides strict eligibility requirements and requires that a Florida Bar member in good standing be associated as an attorney of record. Rule 2.510 prohibits a Florida resident holding a valid out-of-state law license, but who has been suspended, or disbarred from the Florida Bar, from practicing before Florida courts. Subdivision (b) lists the mandatory contents of the verified motion, including subdivision (b)(3)’s requirement to include in the verified motion a statement identifying all jurisdictions in which the attorney has been disciplined within the preceding five years or in which the attorney has pending disciplinary matters. In the Southern and Middle Districts, the movant must designate a member of the local bar (in the Southern District, a member of the trial bar), to be accountable for their actions, whereas the Northern District has no such requirement.</td>
</tr>
<tr>
<td>ND 11.1(C)</td>
<td>SD Special Rules Governing Admission and Practice of Attorneys 4(b)</td>
<td></td>
</tr>
</tbody>
</table>
### SERVICE OF PROCESS - TIME FOR SERVICE

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
</table>
| 1.070(j) | 4(m) | None | Florida continues to require service of process to be effectuated within 120 days absent good cause. The 2015 amendments to federal Rule 4(m) reduce the time period to 90 days.
| | | | Both provide for dismissal without prejudice. Rule 1.070(j) now permits the Court, on its own initiative or on motion, to authorize an extension of time for service and clarifies that such an extension may be obtained prior to the expiration of 120 days. Further, the Florida rule states that if a motion for leave to amend or proposed amended complaint sufficiently identifies the new party or parties and contains a short set of facts for which relief will be demanded, then the 120-day period for service of the amended complaint shall begin upon the entry of the order granting leave to amend. See Totura & Co., Inc. v. Williams, 754 So. 2d 671 (Fla. 2000). The motion for leave to amend a complaint must attach a copy of the proposed amended complaint, pursuant to Florida Rule 1.190(a). Federal Rule 4(i) requires service on the United States in addition to the officer or employee when an officer or employee is sued in their individual capacity for acts or omissions in the performance of duties on behalf of the United States. This is so even if the employment relationship has been terminated.

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### SERVICE OF PROCESS — WAIVER

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
</table>
| 1.070(i) | 4(d) | None | Both the Florida and federal Rules provide a procedure for mail and waiver of service of process and shifting the cost of traditional service to the defendant for refusal to waive. The Florida rule allows 20 days to return the waiver and 60 days to respond to the complaint, similar to federal Rule 4(d). The form to be used under the Florida
### CHOICE OF FORUM

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.061</td>
<td>12</td>
<td>None</td>
<td>A dismissal for forum non conveniens may be sought in Federal court by motion. Florida Rule 1.061 provides that an action may be dismissed if a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida and lists the factors the trial court may consider. Section (a)(1), clarifies that the alternative forum outside of Florida must have jurisdiction over all parties for the trial court to grant a dismissal based on forum non conveniens. Subsection (g) requires that a motion for forum non conveniens be served within 60 days after service of process. Subsection (h) states that the dismissing court retains jurisdiction to enforce any conditions or stipulations to enforce its dismissal. Florida has adopted the Federal doctrine of forum non conveniens as set forth in <em>Kinney Sys., Inc. v. Continental Ins. Co.</em>, 674 So. 2d 86 (Fla. 1996).</td>
</tr>
</tbody>
</table>

### SERVICE/FORMAT OF PLEADINGS, PAPERS/FACSIMILE

<table>
<thead>
<tr>
<th>Federal</th>
<th>Local Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.080(a) 5(b)</td>
<td>ND 5.1</td>
</tr>
<tr>
<td>2.516</td>
<td>MD 1.07(c)</td>
</tr>
<tr>
<td></td>
<td>SD 5.2</td>
</tr>
</tbody>
</table>

Effective September 1, 2012, the Florida rules require all documents after the initial pleading to be served by e-mail; exceptions include unrepresented parties who have not designated e-mail addresses. The federal rules do not contain such a requirement, although each federal district in Florida has its own Electronic Case Filing rules that separately provide for service by clerk's notice. The Florida, federal, and Middle District rules authorize service by facsimile (the federal rule referring only to “electronic” service) but the Florida and Middle District rules require back-up service by any other appropriate method. The Northern District does not authorize service by facsimile. Under the Florida rules, e-mail service is complete when the e-mail is sent; facsimile service occurs when the transmission is complete.
Federal Rule 5(b)(2)(E) provides only for electronic service “consented [to] in writing” by the person served.

Florida Rule 2.516, which governs service by e-mail, contains a number of specific requirements. For instance, attorneys are required to file designations indicating a primary and up to two secondary e-mail addresses for service. Attorneys should be served at the designated addresses or, if no e-mail address is designated, at the address on file with The Florida Bar. There are exceptions for attorneys excused by a court from e-mail service and pro se persons who have not designated e-mail addresses. A service e-mail must contain the words “SERVICE OF COURT DOCUMENT” along with the case number and case style in the subject line, and the body of the e-mail must contain the names of the first parties listed on each side, the court, the case number, and the serving attorney’s name and telephone number.

Matte v. Caplan, 140 So. 3d 686 (Fla. 4th DCA 2014), rejected fee-shifting under § 57.105 because the pre-filing service copy of the § 57.105 motion was sent as a Word file, not a PDF file, and by an e-mail that lacked the correct language in the subject line. Matte required strict compliance with Florida Rule 2.516.

The Third District has agreed with Matte in the context of proposals for settlement, Wheaton v. Wheaton, 217 So. 3d 125 (Fla. 3d DCA 2017), but three districts (including the Fourth District) have held that Florida Rule 2.516 does not require e-mail service (and thus strict compliance with the rule) in certain contexts. Oldcastle Southern Group, Inc. v. Railworks Track Sys., Inc., 2017 WL 6521324 (Fla. 1st DCA Dec. 21, 2017) (PFS); McCoy v. RJ Reynolds Tobacco Co., 229 So. 3d 827 (Fla. 4th DCA 2017) (PFS) (does not cite Matte); Boatright v. Philip Morris USA Inc., 218 So. 3d 962 (Fla. 2d DCA 2017) (PFS).

The Northern District’s 2015 local rule amendments added a requirement (Rule 5.1(C)) that documents be double-spaced with at least 14-point font.
### COMPUTATION OF TIME

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.090</td>
<td>6(a), (e)</td>
<td>SD 7.1(c)(1)</td>
<td>*** As of December 1, 2016, the federal rules no longer permit mail days to be added following electronic service. But note that mailing days may still be added if permitted by local rules. Florida still allows additional mailing days (5) following electronic service, as discussed below.</td>
</tr>
<tr>
<td>2.514</td>
<td></td>
<td></td>
<td>Computation of time in Florida is now largely controlled by the Rules of Judicial Administration.</td>
</tr>
<tr>
<td>2.516</td>
<td></td>
<td></td>
<td>Under Florida Rule 2.514, intervening weekends and defined legal holidays are not included in the time computation if the time allowed is less than 7 days. The 2009 federal amendments removed a similar exclusion from Federal Rule 6(a), for time periods of “less than 11 days” after changing various 10- and 20-day time limitations to 14 and 21 days.</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>Florida Rule 2.514(b) adds 5 days to time periods for service effectuated by e-mail or mail. Note that 5 days are added to what would otherwise be the due date, so any bump forward because, for example, the 10th day falls on a weekend would occur before the 5 days are added—a counting method that differs from the way many practitioners calculated due dates under the former computation of time rule. The First District utilized this interpretation in McCray v. State, 151 So. 3d 449 (Fla. 1st DCA 2014).</td>
</tr>
<tr>
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<td>Florida Rule 2.516(b)(1) provides that when service is made by a means in addition to e-mail, then any differing time limits applicable to that other means control. Thus, if service by e-mail and facsimile (which in Florida is considered delivery), 5 days are not added to the response period.</td>
</tr>
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<td></td>
<td>Florida Rule 1.442(f) provides that 5 days are not added to the response period regarding proposals for settlement.</td>
</tr>
</tbody>
</table>
### ELECTRONIC FILING

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.080(b)</td>
<td>5(d)</td>
<td>ND 5.4</td>
<td>Florida utilizes electronic filing. Florida Rule 1.080(b) provides that documents must be filed in conformity with Judicial Administration Rule 2.525, which requires electronic filing.</td>
</tr>
<tr>
<td>2.525</td>
<td>6(d)</td>
<td>MD 1.01(a)</td>
<td></td>
</tr>
<tr>
<td>77</td>
<td>77</td>
<td>SD 5.1</td>
<td></td>
</tr>
</tbody>
</table>

Federal courts are now all electronic, with some specific exceptions. Local rules provide the requirements for non-“CM/ECF” filing (Case Management/Electronic Case filing); separate rules now exist in each of the federal districts for electronic filing (see, e.g., S.D.Fla. CM/ECF Administrative Procedures, M.D.Fla. Administrative Procedures for Electronic Filing in Civil and Criminal Cases, and N.D.Fla. CM/ECF Attorney User’s Guide, all of which are available on the respective courts’ websites). The federal rules allow for electronic transmission (e-mail) of service to other parties, if the receiving party consents in writing. If the sending party knows that the receiving party did not receive the transmission, then the service is not valid.

Rule 77 allows the courts to give notice of orders or judgments through electronic service, if the party consents to receipt in such manner.

### PLEADINGS/REPLIES IN AVOIDANCE

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.100(a)</td>
<td>7(a)</td>
<td>None</td>
<td>The Federal rule does not permit a reply in response to an answer unless specifically ordered by the court. Such an order is within the court’s discretion. The Florida rule permits a reply only in “avoidance” of an affirmative defense (otherwise admitted per Florida Rule 1.110 (e)).</td>
</tr>
</tbody>
</table>

1.16
### PLEADING/ATTACHMENT OF DOCUMENTS

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.130</td>
<td>None</td>
<td>None</td>
<td>Only Florida state court procedures require that copies of documents upon which an action is brought, or a defense is made, be attached to or sufficiently incorporated into the pleading.</td>
</tr>
</tbody>
</table>

### PLEADINGS/AMENDMENT

| 1.190(a) | ND 15.1  | MD 4.01     | SD 15.1     | The Florida rule and Southern District rule require attachment of the proposed amended pleading to a motion seeking leave to amend. The Northern District requires that the motion seeking leave to amend and the proposed amended pleaded each be separately filed and docketed, the amended pleading becoming effective if the court grants leave to amend. |
| 1.190(f) | None    | None        | Florida Rule 1.190(f), Claims for Punitive Damages, sets forth the requirements for obtaining leave of court to amend a pleading to assert a claim for punitive damages. See *Beverly Health & Rehab. Servs., Inc. v. Meeks*, 778 So. 2d 322 (Fla. 2d DCA 2000). Subdivision (f) includes the term “a reasonable showing” as seen in § 768.72, which governs pleading claims for punitive damages. The motion to amend can be filed before the supporting evidence or proffer; however, the evidence or proffer is required to be served at least 20 days before the hearing. |

### CLASS ACTIONS

| 1.220   | ND 23.1  | MD 4.04     | SD 23.1     | Notice: For claims and defenses under subdivisions (b)(1) and (b)(2) of the Florida and federal rules, notice is mandatory in state courts and discretionary in federal courts. For claims and defenses under (b)(3), notice is mandatory in both state and federal courts. |

**Timing of Class Certification Motion:** Both the federal and Florida rules require the determination of whether the case is to be maintained as a class action as soon as “practicable.” The local rules of the Northern and Middle
### The Rules of Civil Procedure
A Comparative Analysis of Selected Provisions of the Florida and Federal Rules Including Local Federal Court Rules

<table>
<thead>
<tr>
<th>Federal</th>
<th>Florida</th>
<th>Local Rules</th>
<th>Explanation</th>
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</thead>
<tbody>
<tr>
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<td>Districts require that the plaintiff move for a determination within 90 days of filing a pleading calling for class certification.</td>
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<tr>
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<td></td>
<td><strong>Hearing:</strong> Only the Florida rule requires a hearing for determination of class certification (along with express findings). See Rule 1.220(d). There is no such requirement in Federal Rule 23(c).</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Aggregation of Claims:</strong> Neither the federal nor Florida rule addresses the issue of aggregation of small claims to meet subject matter jurisdictional minimums (for Florida circuit court cases or federal diversity actions). State courts have always permitted it; federal courts, while previously refusing to do so, now permit aggregation, under the Class Action Fairness Act of 2005, where either one class member’s claim exceeds the limit or where total claims exceed $5 million.</td>
</tr>
<tr>
<td></td>
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<td></td>
<td><strong>Counsel:</strong> Rule 23(g) deals with appointment of class counsel, providing that unless a statute provides otherwise, a court that certifies a class must appoint class counsel, who must fairly and adequately represent the interest of the class. There is no comparable provision in the Florida rule. Rule 23(h) contains specific provision for the determination of fees and costs, not found in the Florida rule (<em>i.e.</em>, that fees/costs claims must be made by motion, at a time set by the court, upon notice to all parties, and for motions by class counsel, directed to class members in a reasonable manner).</td>
</tr>
</tbody>
</table>

### Constitutional Challenges

<table>
<thead>
<tr>
<th>1.071</th>
<th>5.1(a)</th>
<th>ND 24.1</th>
<th>MD 1.06(d)</th>
<th>SD 24.1</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>The federal and Florida rules require various forms of notice when a state or federal law is challenged. Florida Rule 1.071 requires the filing of a notice (using Form 1.975) and service on the Attorney General or the local state attorney through registered or certified mail. Federal Rule 5.1(a) requires the filing of a notice and service on the appropriate attorney general. Federal Rule 5.1(b) requires the court to certify to the appropriate attorney general, under 28 U.S.C. §2403, that a statute has been</td>
<td></td>
</tr>
</tbody>
</table>
challenged.

The Northern District requires compliance with Rule 5.1 and adds service requirements where a political subdivision’s ordinance or rule is challenged.

The Middle District requires a party challenging a federal law to provide notice to the clerk. Note that this rule predates the adoption of federal Rule 5.1.

The Southern District requires compliance with § 86.091, Fla. Stat., where a state statute, charter, ordinance, or franchise is challenged. The Southern District is the only district whose rule states that failure to comply with the rule is not grounds for waiver.

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### THIRD PARTY PRACTICE

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.180</td>
<td>14</td>
<td>None</td>
<td>The federal and Florida rules allow for contribution and indemnification claims to be brought by a defendant against a third party. Both rules limit the claim to one for contribution or indemnification, however, as long as the defendant has a contribution or indemnification claim against a third party, that defendant may also bring any other claims arising out of the same transaction or occurrence that is the subject of the original plaintiffs claim. Additionally, the rules provide for different times (20 days in state court; 14 days in federal court) during which the third party complaint may be served, absent leave of court.</td>
</tr>
</tbody>
</table>

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### INTERVENTION

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.230</td>
<td>24</td>
<td>None</td>
<td>The Florida and federal rules provide for discretionary intervention by an interested person or entity. The Federal rule also provides for intervention as a matter of right, in specified circumstances. Unlike the Federal rule, the Florida rule requires intervention to be in subordination to the main proceeding. Intervention in both court systems is by motion.</td>
</tr>
<tr>
<td>JURY DEMAND/WAIVER</td>
<td></td>
<td></td>
<td>Federal</td>
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<tr>
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<tr>
<td>1.430</td>
<td>38</td>
<td>None</td>
<td>The rules are similar except that the Florida rule provides that where a jury trial has been waived by failure to comply with the rule, the parties may agree to have a trial by jury for any issues so triable. The Federal rule differs only by the addition of an express requirement for filing the demand with the court required by Rule 5(d).</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>INJUNCTIONS</th>
<th></th>
<th></th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.610</td>
<td>65</td>
<td>ND None</td>
<td>MD 4.05, 4.06</td>
<td>SD None</td>
<td>State court injunctions are referred to only as temporary injunctions. Federal procedure has separate provisions for temporary restraining orders and preliminary injunctions. Federal TRO’s cannot last more than 14 days; state court temporary injunctions last until further order, but may be dissolved upon motion requiring hearing within 5 days of request (federal TRO’s without notice can be dissolved upon 2 days notice). The remaining provisions of the respective rules are substantially similar. Middle District rules 4.05, Temporary Restraining Orders, and 4.06, Preliminary Injunctions, generally mirror the requirements of the Federal rule. Federal Rule 65(f) applies to copyright impoundment proceedings. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice to the affected party is likely to defeat the relief sought. Such no-notice procedures are also authorized in trademark infringement proceedings.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>MOTIONS TO DISMISS</th>
<th></th>
<th></th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.140</td>
<td>12</td>
<td>None</td>
<td>Only in the state courts is it necessary to set forth with particularity in a responsive pleading or motion, under rule 1.140, the grounds upon which a defense is based and the substantive matters of law intended to be argued. All federal districts require memoranda of law, as generally do complex business litigation divisions of the circuit</td>
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</table>
Only the Federal rules expressly contemplate treating motions to dismiss (under Rule 12) as motions for summary judgment (under Rule 56).

Federal Rule 12(a)(3) complements Rule 4(i)(3), relating to the requirement of service on the United States in an action that asserts individual liability of an officer or employee occurring within the scope of employment, requiring that the time to answer be extended to 60 days.

### MOTIONS — CERTIFICATION OF COUNSEL

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.380(a) and (d)</td>
<td>26(c)</td>
<td>ND 7.1 ND CJEDRP at Page 15 MD 3.01 (g) SD 7.1(a)(3)</td>
<td>Florida does not have a general rule requiring conferences with opposing counsel prior to filing any motion. By comparison, the Florida federal district courts all generally require certifications of conferral with opposing counsel, with listed exceptions for certain types of motions. The federal and Florida rules require good faith, meet-and-confer efforts by counsel to resolve discovery disputes before bringing them before the courts. Subdivision (a)(4) of Florida’s rule provides that a party should not be awarded its expenses for filing a motion that might have been avoided by conferring with opposing counsel. Similarly, subdivision (d) requires that, where a party failed to file any response to a Rule 1.340 interrogatory or a Rule 1.350 request, the discovering party should attempt to obtain such responses before filing a motion for sanctions. Federal Rule 26(c) requires certification of good faith efforts for resolution prior to moving for a protective order. Middle District Rule 3.01(g) imposes pre-filing and post-filing conference obligations when opposing counsel was unavailable for conference prior to filing a motion. After a post-filing conference the moving party is obligated to supplement the motion with a statement certifying</td>
</tr>
</tbody>
</table>
whether and to what extent the parties resolved the issues presented.

### MOTIONS & MEMORANDA OF LAW

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>None</td>
<td>ND 7.1</td>
<td>No memoranda are required in state practice (unless by local rule in an individual circuit).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>MD 3.01</td>
<td>By comparison, all Florida federal districts generally require a written memorandum of law to accompany motions (with limited, listed exceptions) and where a motion is opposed.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>SD 7.1, 7.2</td>
<td>Only the Southern District permits reply memoranda absent leave of court strictly limited to rebuttal of matters raised in opposition memoranda, except that the Northern District’s 2015 local rule amendments (Rule 7.1(I)) authorize reply memoranda as a matter of course with summary judgment motions.</td>
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<tr>
<td></td>
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<td></td>
<td>The Middle and Southern Districts use page limitations. As of 2015, Northern District Rule 7.1(F) and (I) utilize word limits for memoranda. Northern District Rule 5.1(C) requires all filings to utilize a 14-point font.</td>
</tr>
<tr>
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<td></td>
<td>Under Southern District Rule 7.1(c), all materials in support of a motion, response, or reply must be served with the filing, and under Rule 7.1(b).</td>
</tr>
<tr>
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<td></td>
<td>Southern District Rule 7.2, regarding motions pending on removal or transfer, allows the moving party 10 days from the date of filing of the Notice of Removal, or the entry of an Order of Transfer, within which to file a supporting memorandum irrespective of any motion to remand.</td>
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<td>Southern District Rule 7.1(c)(2) prohibits the filing of multiple motions for partial summary judgment, absent prior permission of the court, with an exception where the initial summary judgment motion is based on immunity.</td>
</tr>
</tbody>
</table>
**MOTIONS - TIME REQUIREMENTS**

<table>
<thead>
<tr>
<th>Rule</th>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.090(d)</td>
<td>6(d)</td>
<td>None</td>
<td></td>
<td>Under Florida Rule 1.090(d), a written motion must generally be served within a <em>reasonable</em> time before a hearing. Under Florida case law, a reasonable time has been defined to be no less than 5 working days. Rule 1.510(c) requires a summary judgment motion to be served at least 20 days before a hearing. The Federal rule states written motions and notices of hearing must be served at least 14 days before a hearing. For summary judgment motions, supporting affidavits must be filed with the motion under both federal and state procedure. Opposing affidavits must be served, under the state procedure, at least 5 days before the hearing if mailed, or delivered to the movant’s attorney no later than 5:00 p.m. two business days prior to the hearing day. Under the Federal rule, opposing affidavits must be served no later than 7 days before the hearing.</td>
</tr>
<tr>
<td>1.510</td>
<td>56</td>
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</table>

**DISMISSAL — SHAM PLEADINGS**

<table>
<thead>
<tr>
<th>Rule</th>
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<th>Local Rules</th>
<th>Explanation</th>
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<tbody>
<tr>
<td>1.150</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>Only in the state court is there a specific procedure for attacking an alleged sham pleading. The procedure requires a <em>verified</em> motion that may be supported by an affidavit, and requires the court to hear the motion and take evidence. If the motion is sustained, the sham pleading shall be stricken. While there is no exact federal equivalent, Federal Rule 11, like Florida’s Rule of Judicial Administration 2.515, both requiring signatures of counsel on pleadings and other papers, can accomplish a like result, although only the Florida rule focuses on striking the document, with the federal rule focused on attorney sanctions and requiring a safe harbor period after non-filed service.</td>
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**THE RULES OF CIVIL PROCEDURE**

A Comparative Analysis of Selected Provisions of the Florida and Federal Rules
Including Local Federal Court Rules

<table>
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<tr>
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<tbody>
<tr>
<td>1.420(e)</td>
<td>41(b)</td>
<td>None</td>
<td>Subdivision (e) of the Florida rule provides that an action may not be dismissed for lack of prosecution without prior notice to the claimant and adequate opportunity for the claimant to re-commence prosecution of the action to avert dismissal. The relevant period for a determination of failure to prosecute is 10 months. Federal Rule 41(b) refers to dismissal, with prejudice, “[i]f the plaintiff fails to prosecute.” However, this rule contains no defined time period for lack of prosecution.</td>
</tr>
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</table>

**CASE MANAGEMENT/PRETRIAL CONFERENCES**

| 1.200, 16 | ND CJEDRP at pp. 7-10 MD 3.06 SD 16.1 SD ESI Checklist | | Both federal and Florida rules provide for conferences to supervise the progress of the litigation and to attempt to streamline the trial (although the Florida rules recently added a separate and more extensive provision, more similar to the federal procedure, for the management of “complex” litigation). Each of the procedures differs as to timing, but all expressly provide for sanctions for failure to attend, and for various other non-compliance. Florida’s complex litigation rule requires that a “client representative” attend the initial case management conference with counsel. Under the Florida rules, the conference procedure is not automatic; it must be invoked by party notice or by the court, whereas under the Federal rules the conference procedure is mandatory, and may include initial scheduling conferences, intermediate pretrial or status conferences, and a final pretrial conference immediately prior to trial. Federal Rule 16(b)(3)(B)(iii) allows the court in its scheduling order to provide for the disclosure or discovery of electronically stored information (“ESI”). In crafting these provisions, the court may consider the |

1.24
parties’ views and proposals in the discovery plan.

Similarly, Rule 16(b)(3)(B)(iv) permits the court to include in its scheduling order any agreements the parties reach regarding these issues.

In 2012, Florida rule 1.200 was amended to reference ESI (and other documents) with respect to case management conferences, giving notice the court may consider admissions and voluntary exchanges, stipulations regarding authenticity, the need for advance rulings on admissibility, and agreements on preservation, the forms of production, the order of discovery, and other matters. Rule 1.201 contains similar references for complex litigation.

The Southern District utilizes a “Differentiated Case Management” system that places cases along an Expedited, Standard, or Complex Track. The parties are to recommend a track in their proposed scheduling order, and confirming a track is one of the items to be resolved at the scheduling conference.

**DISCOVERY — GENERALLY**

<table>
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<tr>
<th></th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
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</thead>
<tbody>
<tr>
<td>1.280</td>
<td>26</td>
<td>ND 26.1</td>
<td>The post-1993 federal rules require substantial initial disclosures of enumerated information without any discovery request, following a meeting of counsel before a scheduling conference is held, and limits on the scope of discovery. The required disclosures include, as to all disputed facts alleged with particularity: the names, addresses, and phone numbers of anyone likely to have discoverable information, the description and location of all relevant documents, computations of damages and supporting documentation and insurance policies which will provide payment should liability be assessed. No formal discovery may take place (except early Rule 34 requests for production, which under the 2015 amendments to Rule 26(d)(2) may be served more than 21 days after service on a party) until the parties meet to form a discovery schedule.</td>
</tr>
<tr>
<td>1.351</td>
<td>MD 3.02, 3.03, 3.05</td>
<td>SD 16.1, 26.1(g)(3)</td>
<td></td>
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<tr>
<td>1.410(a)</td>
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</table>
The federal rule provides a duty to supplement responses. No such duty exists in Florida’s courts.

As of 2017, the Southern District has an ESI Checklist on its website for use in a Rule 26(f) conference and a LR 16.1 conference report.

Both the Florida and federal rules provide procedures regarding the disclosure of the basis for a testifying expert witness’ opinion, as well as requiring parties to identify and describe discovery withheld on grounds of privilege.

Two material distinctions now exist between the basic federal and Florida discovery standards. First, Rule 26 limits the scope of discovery to information that is “relevant to the claim or defense,” whereas one could previously obtain information that was “relevant to the subject matter involved in the pending action,” which remains the standard under Florida Rule 1.280(b)(1). If a party wishes to obtain information in federal court that it claims was “relevant to the subject matter involved in the pending action” it must file a motion with the court showing good cause for the broader discovery.

Second, the federal rules now utilize “proportionality.” As of the 2015 amendments, Rule 26 authorizes discovery “proportional to the needs of the case” and lists considerations including the importance of the issues at stake, the amount in controversy, the parties’ resources and relative access to information, and whether the burden or expense outweighs its likely benefit. The notes accompanying the amendment indicate that it was aimed at e-discovery.

Federal Rule 26(b)(4) applies work product privilege to drafts reports of testifying expert witnesses and protects communications between a party’s attorney and that party’s testifying expert witness. The rule provides, however, that communications between a party’s lawyer and its expert about the following remain open to discovery: (1) compensation for the expert’s study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and
(3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

Form 52 includes a section stating, “Disclosure or discovery of electronically stored information should be handled as follows: (brief description of parties’ proposals).” Also, the Form includes a section stating, “The parties have agreed to an order regarding claims of privilege or of protection as trial preparation material asserted after production, as follows: (brief description of provisions of proposed order).”

### FILING LIMITATIONS: DISCOVERY AND SENSITIVE INFORMATION

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
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<tbody>
<tr>
<td>1.280(f)</td>
<td>ND 26.1(A)</td>
<td></td>
<td>In 2011, the Florida Supreme Court adopted Rule 2.425, which introduced a new era of protecting sensitive information from being unnecessarily filed as public records face wider and growing dissemination in electronic format. The rule restricts the filing of sensitive information in all types of cases except traffic and criminal proceedings.</td>
</tr>
<tr>
<td>2.425</td>
<td>SD 5.4(b)</td>
<td>SD 26.1</td>
<td></td>
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</table>

In 2011, the Florida Supreme Court amended Rule 1.280(f), effective October 1, 2011, to prohibit filing discovery except when good cause exists to do so. By the amendment’s text, the good cause requirement will be satisfied only where the filing of the information is allowed or required by another rule of procedure or a court order, and all filings shall comply with new rule 2.425, Florida Rules of Judicial Administration.

The new general prohibition on filing discovery and the new judicial administration rule restricting the filing of sensitive information together provide increased privacy protection to parties and others referenced in legal proceedings by limiting the information in public records that can be electronically accessed and distributed, including distribution over the Internet.

The Northern District’s Rule 26.1 generally prohibits filing discovery or deposition transcripts unless the court
orders the filing, the material is needed to determine a pending motion or issue, or the material is admitted into evidence.

The Southern District’s Rule 26.1 prohibits the filing of most discovery materials “unless they are used in the proceeding or the court orders their filing.”

In 2015, the Southern District amended its Rule 5.4(b) to address the electronic filing of motions to seal an entire case and motions to file sealed individual filings. The rule requires the use of conventional service.

### DEPOSITIONS — GENERALLY

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<tr>
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<tbody>
<tr>
<td>1.290</td>
<td>27</td>
<td>ND</td>
<td></td>
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<tr>
<td>1.300</td>
<td>28</td>
<td>CJEDRP at 14</td>
<td></td>
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<tr>
<td>1.310</td>
<td>29</td>
<td>14 MD 3.02(b)</td>
<td></td>
</tr>
<tr>
<td>1.380</td>
<td>30</td>
<td>SD 26.1(i)</td>
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Federal Rule 30 limits the number of depositions that can be taken to 10, each in a single, 7-hour day, absent leave of court. Both the Florida and federal rules limit objections at depositions to those that are non-suggestive and non-argumentative, delineate the few instances in which an attorney may instruct a deponent not to answer, provide sanctions for unauthorized instructions not to answer, as well as for improper objections and unreasonably prolonged depositions, and set out the grounds for terminating a deposition. The Florida rule also authorizes the imposition of costs against counsel who violate such rules and Rule 1.310(c) specifically targets improper objections by counsel. Florida attorneys are required to make objections in a concise, non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce an instruction by court order or to terminate the deposition.

Rule 26(b)(2) allows the courts to limit the number of depositions and interrogatories by a case-specific order. Rule 26(f) eliminates the need for a face to face meeting between the attorneys prior to a scheduling conference. Federal Rule 30(f) also clarified that depositions should only be filed when necessary (like 5d).

The Middle District limits depositions to 10 per side.
Northern District Rule 26.1(B) states that, absent a court order for cause, a party who asserts a claim (other than fees and costs) can be required to appear once in the district for deposition, and any other party can be required to appear only where a nonparty witness could be required to appear.

As to notice, Florida state courts require only that “reasonable” notice be given prior to taking a deposition. The Federal rule provides that if a party does not receive at least 11 days notice for a deposition, a promptly filed motion for protective order will preclude use of the deposition (but does not excuse appearance or preclude the taking of the deposition). The Southern District requires a minimum of 7 days’ notice for in-state depositions and 14 days’ notice for out-of-state, with shorter notice obviating the need for a protective order.

The Florida rules were amended in 2010 to make clear that Florida Rule 1.351 is the only procedure for obtaining documents or things by subpoena from nonparties without deposing the custodian of the records.

### DEPOSITIONS — VIDEOTAPE

<table>
<thead>
<tr>
<th>Florida</th>
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</thead>
<tbody>
<tr>
<td>1.310</td>
<td>30(b)(2)None</td>
<td>32(c)</td>
<td>The Florida rule provides for videotape depositions as a matter of right, subject to procedural requirements, including stenographic notes (but not necessarily a transcript) and notice of intent to videotape. An amendment to Florida Rule 1.310(b)(4) mandates that any subpoena served on a deponent must state the method for recording the testimony. A majority of the judges of the circuit may make a uniform order governing the use of videotaped depositions, subject to modification by the presiding judge upon motion. While Federal Rule 30(b)(3) permits depositions to be recorded by audio, audiovisual, or stenographic means, the Florida rule conditions use of a videotape deposition at trial upon the filing and prior service on opposing counsel of a copy of the stenographic transcript (or partial transcript if only...</td>
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</tbody>
</table>
THE RULES OF CIVIL PROCEDURE
A Comparative Analysis of Selected Provisions of the Florida and Federal Rules
Including Local Federal Court Rules

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>1.340</td>
<td>33</td>
<td>MD 3.03(a) SD 26.1(g)</td>
<td>Both the Florida and Federal Rules provide for limitations on the number of interrogatories that can be propounded without leave of court (30 and 25, respectively, including subparts). In Florida state courts, if the Supreme Court has approved form interrogatories for a specific type of case (personal injury, medical malpractice and automobile negligence), the initial interrogatories in that case must be on one of the approved forms, unless one or more of the form interrogatories are either unnecessary or inappropriate. Both the Florida and Federal Rules provide that a party objecting to an interrogatory must state the grounds for the objection, but the Federal Rule provides that the objection is waived unless stated with specificity. The Florida rule contains provisions not present in the federal rule: (1) that parties utilize form interrogatories approved by the supreme court; (2) that answers are not binding on a co-party; (3) that a party responding based on knowledge other than “personal” knowledge, provide the information the responding party has and identify the source; and (4) new in 2012, provisions stating that if the option to produce business records is selected and the records consist of electronically stored information, then they shall be produced in the forms in which they are ordinarily maintained or in reasonably usable forms. The federal rule contains the following provisions not present in the Florida rule: (1) that objections are to be specifically stated; (2) waiver of any ground for objection not timely made; and (3) a prohibition of using the responses prior to a Rule 26(f) meeting.</td>
</tr>
</tbody>
</table>

| 1.285   | 26(b)(5)(b) None | Florida Rule 1.285 was adopted by the Florida Supreme Court in 2010. The rule provides that a party, person, or entity who inadvertently discloses privileged materials |
may assert the applicable privilege after the disclosure. To assert the privilege, the party, person, or entity must serve written notice of the assertion of the privilege on the party to whom the materials were disclosed within ten days of actually discovering the inadvertent disclosure.

Like the federal rule, the Florida rule imposes a duty on the party receiving notice of the assertion of a privilege to promptly return, sequester, or destroy the materials. The Florida rule goes beyond the federal counterpart by providing the grounds on which a party may challenge a notice of privilege. The grounds include: (1) the materials are not privileged; (2) the disclosing party lacks standing to assert the privilege; (3) the disclosing party failed to serve timely notice of the privilege; or (4) the disclosing party has waived its assertion that the material is protected by a privilege.

**PRODUCTION & PRODUCTION OF ESI**

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<tr>
<th>Federal</th>
<th>Florida</th>
<th>Local Rules</th>
<th>Explanation</th>
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</thead>
<tbody>
<tr>
<td>1.350(b) 26, 34</td>
<td>SD 26.1(g)(3) (B)(ii)</td>
<td></td>
<td>The 2015 amendments to Rule 26(d)(2) permit requests for production to be served more than 21 days after service on a party, which in essence authorizes a possible exception to the general rule in federal practice against serving discovery prior to the initial Rule 26(f) conference. Note that the response date runs from the conference date, not the service date. The 2015 amendments to Rule 34(b)(2)(B) permit a party responding to a production request to produce copies of documents or ESI no later than the time for inspection specified in the request or another reasonable time specified in the response. The 2015 amendments to Rule 34(b)(2)(C) require that an objection state whether responsive materials are being withheld on the basis of that objection. Federal Rule 34 (Producing Documents, etc.) makes clear that ESI is included in the term “documents” as subdivision (a) allows a party to serve on another party a request to produce both documents and ESI. Subdivision (b)(1)(C), on procedure, provides that a requesting party</td>
</tr>
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</table>
may specify the form or forms in which it wishes the ESI to be produced. Under subdivision (b)(2)(D) the responding party may object, stating its reason(s) for objecting, both to the content and the form of the ESI it is requested to produce. If the responding party objects to the form of a request, or if no particular form was requested, “the responding party must state the form or forms it intends to use.” If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

Effective September 1, 2012, the Florida rules, including Rule 1.350, were amended to address ESI. Florida Rule 1.350 and Federal Rule 34 are now substantially the same regarding ESI, except that Federal Rule 34(b)(2)(E)(iii) provides that a party need not produce the same ESI in more than one form.

The Southern District requires that an attorney asserting a privilege with respect to a production demand for documents, which includes electronically stored information, provide certain information. This information includes, to the extent that it is readily obtainable, the type of document and the software application used to create it; the general subject matter of the document; the date of the document; and other such information as is sufficient to identify the document.

As of 2017, the Southern District has an ESI Checklist on its web site for use in Rule 26(f) conferences.

REQUEST FOR ADMISSIONS

<table>
<thead>
<tr>
<th>Florida</th>
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<th>Explanation</th>
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</thead>
<tbody>
<tr>
<td>1.370</td>
<td>36</td>
<td></td>
<td>Florida Rule 1.370(a) now limits requests for admissions to 30 absent a stipulation or court order permitting more. The limited number requires parties to be more selective in submitting requests, thus preventing abusive practices without diminishing the intended purpose of the rule to narrow the issues for trial.</td>
</tr>
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</table>
## DISCOVERY SANCTIONS

<table>
<thead>
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<tbody>
<tr>
<td>1.280</td>
<td>37</td>
<td></td>
<td>Both the Florida and federal rules provide that a matter is admitted unless, within 30 days of being served, the party to whom the request is served provides a written response or objection. The Florida rule, however, qualifies the 30-day time period for defendants by stating that a defendant is not required to serve answers or objections before the expiration of 45 days after service of the process and initial pleading on the defendant.</td>
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<tr>
<td>1.380</td>
<td>41(b)</td>
<td></td>
<td>DISCOVERY SANCTIONS</td>
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<td>In the past, some Florida courts have dealt harshly with false testimony by plaintiffs. See Morgan v. Campbell, 816 So. 2d 251 (Fla. 2nd DCA 2002) and Simmons v. Henderson, 745 So. 2d 1031 (Fla. 2nd DCA 1999), while other courts have been less punitive. See Cross v. Pumpco, Inc., 910 So. 2d 324 (Fla. 4th DCA 2005). The Florida rule provides that a court must award reasonable expenses, which may include attorney’s fees, to a requesting party when an opposing party has failed to admit the genuineness of a document or the truth of a matter. The rule requires the court make such an award when the requesting party proves the genuineness of the document or the truth of the matter, instead of waiting till the end of the trial. Additionally, under the federal rule, both a party and counsel are subject to paying the adverse parties’ reasonable expenses for failure to comply with an order, whereas only the party is liable under the Florida rule. Federal Rule 37 allows a court to strike from trial any witness or information due to a party’s failure to disclose. Federal Rule 37 requires that motions contain a certification that the movant has, in good faith, attempted to confer with the opposition. Federal Rule 37(c)(1) also subjects a party to sanctions for failure to supplement disclosures or responses.</td>
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### Setting Actions for Trial

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<thead>
<tr>
<th>Rule</th>
<th>1.440</th>
<th>40</th>
<th>ND 3.1</th>
<th>SD None (40.1 was repealed)</th>
</tr>
</thead>
</table>

The Florida rule sets forth the procedures by which parties notify the Court when an action is at issue. If the Court finds the case is at issue and ready for trial, the Court sets a trial date not less than 30 days from service of the notice of trial. Federal Rule 40 requires district courts to establish their own procedures for setting actions for trial according to the rule’s guidelines.

The Northern District is divided into four divisions (Pensacola, Panama City, Tallahassee, and Gainesville). All civil cases in which venue properly lies in one of the divisions shall be filed and remain there unless transferred. All cases removed to the Northern District will be docketed in the division of the district which includes the county from which it was removed.

### Subpoenas

<table>
<thead>
<tr>
<th>Rule</th>
<th>1.410</th>
<th>45</th>
</tr>
</thead>
</table>

Rule 45 expressly includes ESI, and provides that a subpoenaed party may object to producing ESI “in the form or forms requested.” This provision mirrors the Rule 34 provision on the party on whom a request for production is served. With Florida’s electronic discovery amendments effective September 1, 2012, both the Federal Rule and Florida Rule now provide that on motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost; if that showing is made, the court may nonetheless order discovery from such sources, including on conditions, if
the requesting party shows good cause. The Federal Rule provides that a person responding to a subpoena need not produce the same ESI in more than one form.

Florida Rule 1.410(d) was amended in 2010 to reflect that a subpoena for the production of documents and things by a nonparty without deposition may be served by affidavit of the person making service or as provided in Rule 1.351(c).

<table>
<thead>
<tr>
<th>PROVISION</th>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.460</td>
<td>None</td>
<td>ND 6.1</td>
<td>None</td>
<td>The Florida rule requires the party requesting a continuance to sign the motion, absent good cause shown. A party seeking to continue a federal trial may move under Rule 6(b) for an enlargement of time. The federal rules require good cause and an order of the court.</td>
</tr>
<tr>
<td>2.545(e)</td>
<td>but see</td>
<td>MD 3.09</td>
<td>gen. 6(b)</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>SD 7.6</td>
<td></td>
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</tbody>
</table>

**INSTRUCTIONS TO JURY; OBJECTIONS; PRESERVING A CLAIM OF ERROR**

<table>
<thead>
<tr>
<th>PROVISION</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.470</td>
<td>51</td>
<td>SD 16.1(k)</td>
<td>Federal Rule 51 encompasses the following interpretations that have emerged in state court practice:</td>
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<td>Rule 51(a) recognizes the court’s authority to direct that requests to instruct the jury on issues raised by the evidence be submitted before trial;</td>
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<td></td>
<td>Rule 51(a)(2)(B) expressly recognizes the trial court’s discretion to act on any timely request for instruction;</td>
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<td></td>
<td>Rule 51(b)(1) requires the court to inform the parties before instructing the jury and before final arguments related to the instruction, of the proposed instruction, as well as the court’s proposed action on instruction requests.</td>
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<td></td>
<td>Rule 51(b)(2) complements Rule 51(b)(1) by providing for the opportunity to object established by Rule 51. It makes explicit the opportunity to object on the record.</td>
</tr>
</tbody>
</table>
Rule 51(b)(3) authorizes instruction to the jury at any time after trial begins and before the jury is discharged;

Rule 51(c) recognizes the right to object to an instruction or the failure to give an instruction; and,

Rule 51(d)(1)(B) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

In 2006, Florida Rule 1.431(c)(1) was amended to ensure that prospective jurors may be challenged for cause based on bias in favor of, or prejudice against, nonparties against whom liabilities or blame may be alleged in accordance with the decisions of Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) as well as Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996).

Florida Rule 1.470 differs from the federal rule by requiring that state trial judges use the Florida Standard Jury Instructions to the extent those instructions are applicable, unless the trial judge expressly determines that the standard instruction is either erroneous or inadequate.

### MASTERS / MAGISTRATES

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.490</td>
<td>53</td>
<td>ND 72.1-73.1 MD Chpt. 6 SD (See Magistrate Judge Rules)</td>
<td>Under state law, no referral can be made to any magistrate without the consent of all parties. In the federal practice, however, consent is required only for a magistrate to conduct a trial on the merits. Federal Rule 53 allows masters to be appointed to perform pretrial, trial (with party’s consent) and post-trial functions. The Florida rule affords a 10-day period for objections to a ruling making a referral. The federal rule extends the period to 14 days.</td>
</tr>
</tbody>
</table>
SUMMARY JUDGMENT/DIRECTED VERDICT

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
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</thead>
<tbody>
<tr>
<td>1.510</td>
<td>56</td>
<td>ND 56.1</td>
<td>The 2010 federal amendments brought very significant changes to the organization of Rule 56 and to many of its details, with subdivisions no longer easily corresponding to the Florida rule, and thus making comparison considerably more difficult. Substantively, however, the rules remain the same, though one must look to different subdivisions to find the comparable provisions.</td>
</tr>
<tr>
<td>1.480</td>
<td>SD 56.1</td>
<td></td>
<td>Subdivision (a) of the federal rule references the standard for granting summary judgment, when there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Subdivision (c) of the Florida rule has identical language, although federal case law has distinguished the burden on the movant under the federal rule from that imposed on the movant under the Florida rule. The federal rule requires that judgment “shall” be rendered if the standard is met. The Florida rule requires that judgment “must” be rendered if the standard is met.</td>
</tr>
</tbody>
</table>

Under Federal Rule 56(b), the motion may be served at any time until 30 days after discovery closes; under Florida Rule 1.510(a), a party seeking affirmative relief cannot move until 20 days after commencement or service of the affirmative claim. The Florida rule continues to differ, too, in its timing requirements for opposition and hearing in subdivision (c), not found in the federal practice, which is governed by the rules of the individual districts, in the context of briefing requirements. The federal rule, as of 2010, added a provision not found in Florida, that the court “should” state reasons for granting or denying a motion. The 2010 federal amendments also added a new subdivision (c), adding considerable specificity to procedural aspects of the rule, including specific provision for evidentiary objections, although some provisions are transferred from other sections of the former version. Federal subdivision (f) also adds express provision for granting summary judgment to the non-moving party, or granting judgment on grounds other than those presented by the movant. Both the federal and
Florida rules continue to have similar provisions for partial summary judgment and for dealing with affidavits (or declarations, which can be utilized in the federal practice), although the federal rule makes sanctions discretionary (they are obligatory in Florida) and requires reasonable notice to the affected party and opportunity to be heard.

While the Florida and Federal Rules remain textually alike, there is a substantial distinction in judicial interpretation. Florida state courts require that the movant both affirmatively establish its own case, and the absence of disputed issues of material fact as to the non-movant’s affirmative defenses. Florida courts will reject a summary judgment motion in the face of any disputed issue of material fact. The federal standard is that applicable to directed verdicts, thus permitting a summary judgment despite a disputed issue of material fact, where the evidentiary support is insufficient to get to the jury.

Additionally, there is a different standard in federal court, where a defendant moves for summary judgment. The defendant may merely state that the plaintiff has insufficient evidence to establish a prima facie case, shifting the burden to the plaintiff to establish such prima facie case. The Northern District rule requires a short concise statement of material facts from each party if the motion for summary judgment refers to facts outside of the pleadings. The Southern District rule specifically requires the movant to file a statement of undisputed facts, which are deemed established unless specifically controverted by the statement of disputed facts required to be filed by the respondent.

Northern District Rule 56.1(F) expressly requires “pinpoint citations” to record evidence.

Southern District Rule 56.1 requires specific references to materials filed with the court to support or controvert the movant’s statement of undisputed facts. The “on file with the Court” language requires litigants to file any materials upon which they intend to rely on or to which they will
refer to support or controvert a motion for summary judgment.

The Florida rule requires at least 20 days prior notice of a summary judgment hearing, and the movant shall also serve at that time copies of any summary judgment evidence to be relied upon that has not already been filed with the court including a list of all summary judgment evidence, with opposing evidence identified by notice served 5 days prior to the hearing, or delivered by 5:00 p.m. two business days before the hearing. Under the Federal Rule, the motion must be served at least 10 days before the hearing, with opposing affidavits “served” prior to the day of the hearing. (See local Federal Court Rules for timing of required memoranda of law.) As a practical matter, however, there is rarely a hearing in federal practice. Such a hearing would only be permitted after the briefing process has concluded, and then, only with leave of court.

Florida Rule 1.510(c) ensures that all parties are given advance notice of and, where appropriate, copies of the evidentiary material upon which the other party relies in connection with a summary judgment motion. The rule is specific as to what must be provided and when.

Florida Rule 1.480(b) requires a directed verdict motion to be served within 15 days from return of a verdict, or if no verdict, 15 days after the jury is discharged.

The 2010 federal rule amendments significantly expanded the time period for the renewed motion for judgment, from 10 days to 28 days, running from the entry of judgment, or from discharge of the jury, if the motion addresses a jury issue not decided by the verdict. Second, the Florida rule provides that the motion be served within the prescribed time, while its federal counterpart provides that the motion be filed within its prescribed time.

In 2010, the Florida rule was amended “to eliminate the requirement that a party renew, at the close of all the evidence, a motion for directed verdict already made at
the close of an adverse party’s evidence,” to conform with Federal Rule 50(b), which had been so amended in 2006.

OFFER OF JUDGMENT/PROPOSAL FOR SETTLEMENT

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
</table>
| 1.442   | 68      | None        | The Florida Supreme Court considers attorney’s fees as substantive rights, and accordingly, adopted the procedural provisions of §768.79, Fla. Stat. (1991). The Legislature’s offer of judgment “rule” provides for either a plaintiff’s offer (i.e., a demand for judgment) or a defendant’s offer (i.e., an offer of judgment). Under the Florida procedure, the party rejecting an offer who is subsequently subject to a judgment under which the outcome is less favorable than the offer by a factor of 25% is subject to sanction in the amount of the offeror’s fees and costs from the time the offer was rejected, determined in accordance with the factors enumerated under subdivision (h) of the rule. The federal rule has no such factor, but awards only “costs” although some federal courts have considered attorneys’ fees to be included within the term “costs.” Subsection (c)(3) of the Florida rule states that a joint proposal for settlement must include the amount attributable to each party. However, the Supreme Court, in the 2010 amendments, added a new subdivision (c)(4), making it unnecessary to apportion as to whose liability is purely vicarious.

In *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210 (Fla. 2003), the Florida Supreme Court held that the use of a multiplier, such as a contingency risk multiplier, in awarding attorney’s fees authorized by the offer of judgment statute to be in error.

The 2013 amendments to Rule 1.442 (effective 2014) make clear that a proposal must resolve all damages that could be awarded in a final judgment, except that the proposal need not resolve attorney’s fees.

Under Rule 1.442(f), the provisions of Rule 2.514(b) that...
provide extra response time when service is by mail or e-mail do not apply to proposals for settlement.

### SANCTIONS, IN GENERAL

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.515(a) 11</td>
<td>None</td>
<td>ND 16.3</td>
<td>Florida Rule of Judicial Administration 2.515(a) applies to “every pleading and other paper of a party,” and limits the sanction to striking the pleading (resulting in its rarely being used). Federal Rules 11 and 26(g) (the latter relating only to discovery) are more limited in scope, but include attorney’s fees and other expenses incurred. Federal Rule 11 also provides for a 21-day safe harbor period during which no sanctions may be levied. If the offending document is withdrawn within 21 days of its service, no sanction may be levied. Federal Rule 37(c)(1) provides for sanctions for failure to comply with discovery rules 26(a) or (e), including the exclusion of withheld materials. This sanction power only applies when the failure to disclose was without substantial justification.</td>
</tr>
<tr>
<td>2.515(a) 26(g)</td>
<td>None</td>
<td>MD 9.01-07</td>
<td></td>
</tr>
<tr>
<td>2.515(a) 37</td>
<td>None</td>
<td>SD 16.2</td>
<td></td>
</tr>
</tbody>
</table>

Notwithstanding the limited use of Rule 2.515(a), Fla. Stat. § 57.105, brought federal “Rule 11” practice to Florida state courts. This statute exposes lawyers and their clients to sanctions (of attorney’s fees and costs) if the attorney knew or should have known that a claim or defense: (1) was not supported by the material facts necessary to establish the claim or defense; or (2) would not be supported by the application of the existing law.

### MEDIATION

<table>
<thead>
<tr>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.700</td>
<td>None</td>
<td>ND 16.3</td>
<td>The Florida and federal local rules provide for a non-binding supervised settlement conference to facilitate settlement of civil actions. The Florida rule requires agreement reached at mediation to be signed by counsel and the parties. The rules provide for differences in the qualifications of mediators, but are substantively similar both in procedure and purpose. Unless a settlement is reached, a party is not bound by anything said or done at</td>
</tr>
<tr>
<td>1.720</td>
<td>MD 9.01-07</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1.750</td>
<td>SD 16.2</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Effective January 2012, amended Rule 1.720 requires each party to file and serve a certification of authority 10 days prior to mediation, identifying the person who will attend the mediation and that the person has “full authority to settle.” Full authority to settle is defined to mean the final decision maker who has legal capacity to execute a binding settlement agreement.

Middle District Federal Local Rule 9.02(f) permits the parties and the mediator to agree to a rate of compensation for mediators or, failing that, to provide factors the court should consider in establishing a rate.

### ARBITRATION

<table>
<thead>
<tr>
<th>Rule</th>
<th>Florida</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.800-1.830</td>
<td>None</td>
<td>MD 8.01-8.06</td>
<td></td>
<td>The Florida rules provide for both court-ordered non-binding arbitration (in which the result becomes the Court’s determination unless, within 20 days of service of the decision, a party moves for a trial), and for voluntary binding arbitration, appealable to the circuit court within 30 days after service of the decision. The rule sets forth the procedure for the statutory scheme contained in Ch. 44, Fla. Stat. Pursuant to Florida Rule 1.820, a party will forfeit the right to a trial <em>de novo</em> unless a timely request is made within 20 days after the decision is rendered.</td>
</tr>
</tbody>
</table>

### TAXATION OF ATTORNEY’S FEES AND COSTS

<table>
<thead>
<tr>
<th>Rule</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.380</td>
<td>54(d)</td>
<td>ND 54.1, 54.2</td>
<td>Although entitlement to costs is statutory (<em>see</em> Ch. 57, Fla. Stats. and 28 U.S.C. §1920), costs provisions appear in both the state and Federal Rules. In addition, Florida courts are guided by the 2005 Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, approved by order of the Florida Supreme Court. The Federal Rules provide for costs, other than attorney’s fees, to be taxed by the Clerk on 14 days’ notice in favor of the prevailing party. Federal Rule 54(d) and the Local Rules,</td>
</tr>
</tbody>
</table>
as well as Florida Rule 1.525, all limit the time in which a motion for attorneys’ fees (Southern District: verified motion) may be served to 14 and 30 days respectively. Southern District Rule 7.3 governs the federal rules’ applicability to interim fee applications prior to final judgment.

Federal Rule 54(d)(2)(C) deletes the prior requirement that a judgment on a motion for attorney’s fees be set forth in a separate document. Furthermore, subdivision (d)(2)(B) requires a motion for attorney’s fees to be filed and served no later than 14 days after entry of judgment.

Florida Rule 1.525 requires that motions for attorney’s fees and costs be filed within 30 days of final judgment or dismissal, including voluntary dismissal, which judgment or notice concludes the action as to that party (2010 amendment). Moreover, it is improper to include language in a judgment attempting to retain the court’s jurisdiction to consider attorney’s fees beyond the 30 day filing requirement. See Z C Ins. Co. v. Brooks, 962 So. 2d 419 (Fla. 4th DCA 2007), citing Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598 (Fla. 2006).

Other Florida state court opinions are worthy of mention. In Gulf Landing’s Ass’n, Inc. v. Hershberger, 845 So. 2d 344 (Fla. 2d DCA 2003), the court held that a motion for attorney’s fees, which did not specify grounds for fees was insufficient, thus the party was not entitled to such fees despite the fact that the party had pled an entitlement to fees and costs and final judgment reserved jurisdiction to award fees and costs. In Wentworth v. Johnson, 845 So. 2d 296 (Fla. 5th DCA 2003), the court held a request for fees and costs contained within the complaint or answers were neither self effectuating nor sufficient, requiring a motion for fees and costs to be served within 30 days after filing of the judgment. In E & A Produce Corp. v. Superior Garlic Int’l, Inc., 864 So. 2d 449 (Fla. 3d DCA 2003), the court noted Rule 1.525 was designed to establish a bright line requirement.

Finally, the Florida Supreme Court added the words “not later than thirty days” to Rule 1.525 to clear up any
remaining confusion over whether a motion is timely if served prior to entry of judgment.

### RELIEF FROM JUDGMENT, DECREES OR ORDERS

<table>
<thead>
<tr>
<th>Rule 1.540</th>
<th>60</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Federal</strong></td>
<td><strong>Local Rules</strong></td>
</tr>
<tr>
<td>Rule 1.540(b) states that a party’s motion for relief from a final judgment, order, or proceeding shall be within a reasonable time. This rule was amended in 2003 to replace the word “made” with “filed” to clarify that motions made under this rule must be filed. The federal rule includes a catch-all ground for relief for “any other reason justifying relief from the operation of the judgment” which is not found in the Florida rule. The Florida rule also sets forth that certain matters for relief be brought within one year for mistake, inadvertence, surprise, excusable neglect, newly discovered evidence not discoverable previously to timely move for new trial or rehearing, fraud, misrepresentation and misconduct. Lastly, the Florida rule contains a savings clause granting the court authority to set aside a judgment or decree constituting a fraud upon the court without reference to a time limit.</td>
<td></td>
</tr>
</tbody>
</table>

### DISCOVERY IN AID OF EXECUTION

<table>
<thead>
<tr>
<th>Rule 1.560</th>
<th>69(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Federal</strong></td>
<td><strong>Local Rules</strong></td>
</tr>
<tr>
<td>Florida Rule 1.560 is almost identical to the last sentence of Federal Rule 69(a), except that the federal rule also provides that such discovery must accord with the procedure of the state where the court is located. In 2000, Florida Rule 1.560 added sections (b), (c), (d), and (e). Subsection (b) allows in addition to any discovery allowed in subsection (a), that the court shall order the judgment debtor to complete a Fact Information Sheet (Form 1.977) within 45 days of the order. Subsection (c) requires the court to add the “final judgment enforcement” paragraph within the final judgment upon the request of the creditor. Subsection (d) allows the creditor to obtain “information regarding assets of the judgment debtor’s spouse” if the proper predicate...</td>
<td></td>
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</tbody>
</table>
Subsection (e) requires the debtor to file a notice of compliance upon completion of Form 1.977.

### OTHER RECENT RULES/FORM CHANGES

<table>
<thead>
<tr>
<th>Rule</th>
<th>Federal</th>
<th>Local Rules</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rule 1.110.</td>
<td>Amended to delete particular pleading requirements for residential mortgage foreclosure cases, a subject now covered by new rule 1.115.</td>
<td></td>
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</tr>
<tr>
<td>Rule 1.115 &amp; Form 1.944.</td>
<td>New rule on pleading in residential mortgage foreclosure cases; new/amended forms for such cases.</td>
<td></td>
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</tr>
<tr>
<td>Rule 1.490.</td>
<td>Amended to delete references to the use of magistrates in residential mortgage foreclosure cases, a subject now covered in new rule 1.491.</td>
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<tr>
<td>Rule 1.491.</td>
<td>New rule on the use of general magistrates in residential foreclosure cases.</td>
<td></td>
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<tr>
<td>Rule 1.720(j).</td>
<td>Amended to preclude parties from agreeing on a mediator who is a senior judge.</td>
<td></td>
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</tr>
<tr>
<td>Form 1.975: Notice of Compliance when Constitutional Challenge is Brought,</td>
<td>was adopted to conform with new Rule 1.071. Notice is required by § 86.091, Fla. Stat.</td>
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<tr>
<td>Form 1.983: Amended juror questionnaire requires attorneys to redact month/day from birth date before filing.</td>
<td></td>
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<tr>
<td>Form 1.901: Caption,</td>
<td>was adopted to conform with the amendments to Rule 1.100 for <em>in rem</em> proceedings.</td>
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<tr>
<td>Form 1.923: Eviction Summons / Residential,</td>
<td>was amended to reflect that service of the written reasons objecting to a claim for money damages must now be done within 20 days after summons is served on defendant or person living with defendant - no longer after posting the claim at defendant’s home.</td>
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<tr>
<td>Form 1.985: Standard Jury Instructions: form deleted;</td>
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<tr>
<td>Federal</td>
<td>Florida</td>
<td>Federal</td>
<td>Local Rules</td>
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<td>Form 1.986:</td>
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<tr>
<td></td>
<td>Rule 2.510.</td>
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<tr>
<td></td>
<td>Rule 2.520.</td>
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<td>In 2015, the Advisory Committee successfully sought the abrogation of the dozens of forms previously accompanying the Federal Rules of Civil Procedure. Former forms 5 and 6, relating to waiver of service of process, are now appended to rule 4.</td>
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</tbody>
</table>
TRIAL SKILLS: OPENING AND CLOSING

By

F. Gregory Barnhart
West Palm Beach
The Board Certification exam is a long and involved process with multiple questions, most of them essay. It resembles The Bar exam in that it is an exam and there are factual scenarios. It is graded differently, however, in that the factual scenarios are more practical and more lifelike, and the issue spotting and grading are geared toward determining who should be a Board Certified lawyer and who should not be. Therefore, a competent and prepared trial lawyer should be able to pass the exam with some study, but also with sufficient demonstration of practical experience and skills. If it appears from the answer that the attorney is experienced and competent, that person will pass the exam.
I. OPENING STATEMENT

Florida Standard Jury Instruction 202.2 provides the standard for opening statement. Opening statements can be expected to explain to the jury the issues in the case, and explain to the jury the facts that the attorneys expect that the evidence will show. There is little specific law directed to opening statement that does not apply in closing statement as well. Opening statement is not argument, and argument by counsel is the basis for an objection. Whether the specific kind of statement made is objectionable will be addressed further on in the closing argument section of this outline.

A. As a practical matter, opening statement is vital to a well conducted trial. It is an opportunity for the attorney to weave the trial theme into a fabric that was begun in voir dire and will continue throughout the trial. The importance of a good opening statement has been well documented. Decades ago, researchers at the University of Chicago Law School found that, in the vast majority of cases, the verdict which jurors would have returned after the opening statement was the same verdict that was actually returned at the end of the case.

B. At a minimum, the opening statement should be well prepared and should explain who the players are in the trial, both witnesses and parties. Every party and every important witness must be brought into the opening, and an
An effective opening statement explains why and how they relate and what importance they may have to the case.

C. An effective opening also explains the issues the jury will determine at the end of the case and describes the standards, legal and otherwise, which experts and the Court will explain.

D. An effective opening must explain and handle trouble spots. It is far better for the attorney to explain problems with the case rather than have the jury be surprised later on in the trial. No matter how bad the situation is, bringing it up first is better than letting the other side do so. Damaging facts should be conceded, and the jury should be told why these facts are unimportant or are not material in the trial. The opening should explain, in an interesting and narrative fashion, what went wrong, why it should not have gone wrong, and what damage resulted from that wrong. An effective opening statement should also deal with problems in the case and with defenses and claims interposed by the opposition.

II. PRETRIAL MOTIONS

A. Motions in Limine. A motion in limine is designed so that parties can move the Court to exclude prejudicial and inadmissible evidence before trial and before damage is done in the trial itself. It is an efficient method to test admissibility and is certainly something that an experienced trial lawyer should have as part of his or her repertoire.
1. If a motion in limine is granted, counsel must advise all witnesses so they can avoid violating the court's order. *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156 (Fla. 5th DCA 1994).

If a motion in limine is granted and a witness testifies or opposing counsel comments on the excluded matters, the procedure to follow is (1) to ask for a mistrial, (2) move that opposing counsel or the witness be admonished, and (3) request a curative instruction. *Gonzalez v. Largen*, 790 So. 2d 497 (Fla. 5th DCA 2001); *see also Fleurimond v. State*, 10 So. 3d 1140 (Fla. 3d DCA 2009); *Ocwen Financial Corp. v. Kidder*, 950 So. 2d 480 (Fla. 4th DCA 2007), abrogated on other grounds in *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53 (Fla. 4th DCA 2016), review denied, SC16-693, 2016 WL 4537513 (Fla. 2016).

2. If a motion in limine is granted over objection, the objecting party must proffer the excluded testimony in order to preserve the issue on appeal. *Spindler v. BritoDeforge, MD.*, 762 So. 2d 963 (Fla. 5th DCA 2000). *See also Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A.*, 118 So. 3d 867 (Fla. 3d DCA 2013), *reh'g denied* (Aug. 30, 2013) (Clients failed to preserve, for purposes of appeal, trial court's alleged error in granting motion in limine precluding their expert from opining as to attorney's violation of several rules of professional conduct; trial court made no definitive ruling on the motion, but merely sustained objections to the first two questions asked of expert regarding the rules and denied clients' request for a sidebar, and clients made no proffer of the specific rules and testimony they sought
to elicit from expert, and did not request an opportunity to make such a proffer);

*Clark v. State*, 969 So. 2d 573 (Fla. 1st DCA 2007).

3. If the motion in limine is denied, prior to the objectionable testimony or evidence being offered, an objection should be raised once more so that the failure to object at trial is not seen as a waiver of the objection to the contested evidence. *But see* § 90.104(b)(1), Fla. Stat. (2017) (“If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”); *Pasha v. State*, 225 So. 3d 688, (Fla. 2017) (holding that where trial court never made a definitive ruling on defendant’s motion in limine seeking to exclude photographs, and defendant failed to make contemporaneous objection when photographs were introduced at trial, issue was not preserved for review); *McGirth v. State*, 48 So. 3d 777, 790-91 (Fla. 2010) (emphasizing need for a definitive ruling in order to avoid the contemporaneous objection requirement; holding that where defendant failed to obtain a definitive ruling in advance on any specific items of victim impact evidence and failed to raise contemporaneous objection, issue was not preserved for review); *Collins v. State*, 211 So. 3d 214, 215 (Fla. 4th DCA 2017) (holding that where there was no definitive ruling on motion in limine and counsel failed to raise contemporaneous objection when evidence came in, the issue was not preserved for appeal).

**B. Motions for Directed Verdict**

1. A motion for directed verdict may be filed at the close of the adverse party's case in compliance with Florida Rule of Civil Procedure 1.480(a) and (b). Under
the rule, a motion for directed verdict “shall state the specific grounds therefor.”

2. A motion for directed verdict should be granted “where the evidence and all inferences from the evidence, considered in the light most favorable to the non-moving party, support the movant’s case as a matter of law and there is no evidence to rebut it.” *Wald v. Grainger*, 64 So. 3d 1201, 1205 (Fla. 2011); see also *Arlington Pebble Creek, LLC v. Campus Edge Condominium Ass’n, Inc.*, 2017 WL 5076915 (Fla. 1st DCA, Nov. 6, 2017); *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 946 (Fla. 4th DCA 2012); *Atkinson v. Anderson*, 77 So. 3d 768, 769 (Fla. 4th DCA 2011), reh’g denied, (Feb. 10, 2012); *NITV, L.L.C. v. Baker*, 61 So. 3d 1249 (Fla. 4th DCA 2011); *Specialty Marine & Industrial Supplies, Inc. v. Venus*, 66 So. 3d 306 (Fla. 1st DCA 2011); *Premier Lab Supply, Inc. v. Chemplex Industries, Inc.*, 10 So. 3d 202 (Fla. 4th DCA 2009); *Natson v. Eckerd Corp.*, 885 So. 2d 945 (Fla. 4th DCA 2004). In moving for a directed verdict, for purposes of the motion, the moving party admits the facts and evidence and also admits every reasonable and proper conclusion based on the facts which is favorable to the adverse party. *Hartnett v. Fowler*, 94 So. 2d 724 (Fla. 1957); *Ferguson v. Universal Property & Cas. Ins. Co.*, 46 So. 3d 1037 (Fla. 1st DCA 2010); *CDS Holding I, Inc. v. Corporation Co. of Miami*, 944 So. 2d 440 (Fla. 3d DCA 2006). Where there is conflicting evidence or different reasonable inferences may be drawn from that evidence, then the motion should be denied. *See Freidrich v. Fetterman and Assoc.*, P.A., 137 So. 3d 362, 365 (Fla. 2014) (stating that a directed verdict is inappropriate where there is conflicting
evidence as to causation or the likelihood of causation); *Haney v. Sloan*, 214 So. 3d 718, 720 (Fla. 1st DCA 2017) (holding that “[i]t is reversible error to grant a motion for directed verdict when conflicting evidence exists regarding the causation of injuries and the attribution of expenses between them”).

C. **Motions for New Trial**

1. A motion for new trial must be served no later than fifteen (15) days after the return of a verdict in a jury trial or the date of filing of the judgment in a non jury trial. *See* Florida Rule of Civil Procedure 1.530(b). There are essentially three grounds on which a new trial may be granted: 1) the verdict shocks the judicial conscience; 2) the jury has been unduly influenced by passion or prejudice; and 3) the verdict is contrary to the manifest weight of the evidence. *Brown v. Estate of A. P. Stuckey*, 749 So. 2d 490 (Fla. 1999); *see also Philip Morris USA, Inc. v. Danielson*, 224 So. 3d 291, 294 (Fla. 1st DCA 2017) (same). The trial judge must consider the credibility of the witnesses along with the weight of all the other evidence, but must not substitute his own verdict for that of the jury, and there is no question that a trial judge, in granting a new trial, must articulate the reasons for the new trial in the order; otherwise, the new trial order is defective and reversible.

III. **CLOSING ARGUMENT**

For purposes of presenting an appropriate closing argument, the case law is vast and extensive. The kinds of conduct and the kinds of arguments which courts find to be misconduct are as varied as the imagination of the trial lawyers who create
the arguments. For purposes of the Board Certification exam, and for purposes of trial practice, the concerns echoed by the appellate courts can be divided into two broad categories: 1) comments regarding matters outside the evidence; and 2) comments which encourage jurors to deviate from their duties. In order to try an effective case, an attorney must be able to fashion an effective closing argument without violating the principles established in the case law and must be also aware of the relevant guidelines so that she may recognize improprieties in opposing counsel's arguments.

A. Comments Regarding Matters Outside the Evidence

1. The first category of improper argument is when the statements of counsel refer to matters completely outside the evidence or which cannot reasonably be inferred from the evidence. The Rules of Professional Conduct codify the impropriety of such statements. Rule 4-3.4(e) says that a lawyer may not allude to any matter that the lawyer does not reasonably believe is relevant or supported by admissible evidence, and the lawyer may not assert personal knowledge of facts and issues, state personal opinions as to the justness of a cause, the credibility of a witness or the culpability of a party. The evidence which is introduced in a particular case is known. That is not a gray area. The gray area, of course, is the scope of reasonable inferences that can be drawn from the evidence. See Patrick v. State, 104 So. 3d 1046, 1065 (Fla. 2012), cert. denied, 134 S. Ct. 85 (2013) (This Court has stated that “courts of this state allow attorneys wide latitude to argue to the jury during closing argument. Logical inferences may be drawn, and counsel is allowed to advance all legitimate
arguments.” *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999)) (citations omitted). However, counsel may not urge the jury to consider facts not in evidence. See *Jackson v. State*, 522 So. 2d 802, 808 (Fla. 1988)); see also *Borden Dairy Co. of Alabama, LLC v. Kuhajda*, 152 So. 3d 763, 765 (Fla. 1st DCA 2014) (in determining whether challenged argument is improper, trial court must consider whether attorney confined argument to facts and evidence presented and whether argument improperly invoked emotional responses from jury which could have affected the verdict) (citation omitted); *Dessaure v. State*, 891 So. 2d 455 (Fla. 2004) (state’s closing argument that defendant was source of cigarette ash found in murder victim's sink was proper; evidence showed that defendant's footprint was found by kitchen sink, near a puddle of water and a scuff mark on floor, and there was evidence that defendant was smoking cigarettes around time of murder; state's argument simply explicated reasonable inferences that could be drawn from evidence); *Gianos v. Baum*, 941 So. 2d 581, 585 (Fla. 4th DCA 2006) (comment by plaintiff that the defendant did not present any evidence from a pathologist was a fair comment on the evidence presented.); *Williams v. State*, 882 So. 2d 1082 (Fla. 4th DCA 2004) (attorney's closing remarks "must be confined to the evidence, the issues and inferences that can be drawn from the evidence") (quoting *Airport Rent-A-Car, Inc. v. Lewis*, 701 So. 2d 893, 896 (Fla. 4th DCA 1997)).

3. Counsel is allowed to discuss the lack of factual or legal support for an opposing party's argument. *Hartford Accident and Indemnity v.*
Ochoa, 472 So. 2d 1338 (Fla. 4th DCA 1985); see also Gianos v. Baum, supra. Counsel is also entitled to argue the applicable law to the jury, including addressing the effect the law will have on the verdict, i.e., reduction for comparative negligence, comparative fault of non-parties and the like. Slawson v. Fast Food Enterprises, 671 So. 2d 255 (Fla. 4th DCA 1996).

B. Comments Regarding Evidence Counsel was Successful in Excluding

In State Farm Mut. Auto. Ins. Co. v. Thorne, 110 So. 3d 66, 70 (Fla. 2d DCA 2013), at trial, Ms. Thorne’s counsel in closing argument harped on the lack of defense evidence to dispute the link between the first two shoulder injuries and the knee injury with the 2006 accident. After having successfully limited the extent of State Farm’s and Mr. Thomas’ expert testimonies, Ms. Thorne’s counsel’s closing argument repeatedly suggested to the jurors that:

— The defense did not bring a single witness to speak to the claimed knee injury;
— The defense did not bring “a single hired gun” to refute the causation of the knee injury;
— The defense had no witness to speak to the shoulder injury claim that necessitated the first two shoulder surgeries; and,
— The reason the defense called no one was because the defendants could not find such evidence.

Id. at 73.
When defense counsel objected during closing argument, the trial court overruled the objection thereby permitting Ms. Thorne’s counsel to continue on this theme. And continue on is what transpired. Ms. Thorne’s counsel’s further argument suggested a lack of a scintilla of evidence offered by the defendants and contended the defense’s theory—that the 2006 accident did not cause the damages for which the surgeries were necessary—was merely speculation and further that this speculation was “simply an attempt ... to avoid responsibility.” *Id.* at 73-74. Ms. Thorne’s counsel concluded his closing argument with multiple statements of “shame on these defendants.” *Id.* at 74.

The court held that the law on this point is clear: “Case law indicates it is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented.” *Id.* at 74 (citing *JVA Enters., I, LLC v. Prentice*, 48 So. 3d 109, 115 (Fla. 4th DCA 2010) (citing *Carnival Corp. v. Pajares*, 972 So. 2d 973, 975–76 (Fla. 3d DCA 2007))). The court found that the cumulative effect of the arguments merited a mistrial. *Id.* at 70, 74.

C. Attorney Testifying in Closing Argument

1. One of the most common, yet glaring, improprieties occurs when an attorney essentially testifies in closing argument. In *Johnnides v. Amoco Oil Co., Inc.*, 778 So. 2d 443 (Fla. 3d DCA 2001), the court reversed a judgment in favor of the defendant based on the closing argument of defense counsel. The court
noted numerous improprieties in the closing argument, but chose one, "[a]fter close
competition with several other candidates," as the worst, where the attorney
accused opposing counsel of conspiring with his expert to commit a fraud upon the
jury, without any evidence to support it. Defense counsel stated:

So what does [plaintiff's counsel] have to do? He goes
out and finds Dr. Padva and says, Dr. Padva, what we are
going to do, we are going to try to get a naive jury. And
then what we are going to do is, I need you to look at all
of these tests and somehow come up with some scientific
gobble-dee-cock that confuses the jury....

Similar instances of attorneys testifying in closing argument have resulted in
reversals. See Tampa Transit Lines v. Corbin, 62 So. 2d 10 (Fla. 1952); Borden,
Inc. v. Young, 479 So. 2d 850 (Fla. 3d DCA 1985), rev, den., 488 So. 2d 832 (Fla.
1986); Schubert v. Allstate Ins. Co., 603 So. 2d 554 (Fla. 5th DCA 1992); Lingle v.
Dion, 776 So. 2d 1073 (Fla. 4th DCA 2001).

2. Another category of impropriety involving matters outside the
evidence is where the attorney vouches for the truthfulness of his own case, or
expresses a personal opinion regarding the credibility of a witness or the justness
of the cause. See Howard v. State, 152 So. 3d 825, 829 (Fla. 2d DCA 2014) (“[I]t
is error for an attorney to bolster the testimony of a witness during closing argument
by vouching for his or her credibility, providing an opinion on the witness's
truthfulness, referring to information outside of evidence that would support the
witness's testimony, or otherwise placing ‘the prestige of the government behind
the witness.’”) (citation omitted).

2.12
In *Becker v. State*, 110 So. 3d 473, 477 (Fla. 4th DCA 2013), *reh'g denied*, (Apr. 19, 2013), the court concluded that the prosecutor’s rebuttal to the defense closing argument constituted improper prosecutorial bolstering and vouching. In essence, the prosecutor offered extra-testimonial knowledge that the informant was not receiving a deal or other special treatment from the state (an integral part of Becker’s defense), and thus impermissibly corroborated the informant’s denial of such an arrangement. The prosecutor invoked his status as an “officer of [the] court” to assure the jury that the informant was being truthful. The court found that this undermined the integrity of the judicial process and irreparably contaminated the verdict and resulting sentence. The court noted the law that: “Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness’s testimony.” *Id.* (citation omitted). However, in a footnote, the court did state: “The prosecutor was free, of course, to suggest to the jury that at no point during the trial did anyone actually testify or present any other evidence showing that a deal had been reached between the state and the informant in exchange for the informant's testimony. It is not our intent to suggest that the prosecutor intentionally propounded a closing argument that exceeded the wide latitude afforded to attorneys in arguing to a jury. Indeed, closing argument is an art form in itself. As in this case, however, attorneys must be mindful of their parameters and not get caught up in the aura of frenetic trial advocacy.” *Id.* at 477, n.1.
In *Ali v. State*, 976 So. 2d 9, 10-11 (Fla. 5th DCA 2008), the dissent noted that: “During closing argument, Mr. Mendoza used pejorative terms to characterize the appellant (see, e.g., *Pacifico v. State*, 642 So. 2d 1178 (Fla. 1st DCA 1994); gave his personal opinion regarding either the justness of the cause or the guilt of the accused (see, e.g., *Sempier v. State*, 907 So. 2d 1277 (Fla. 5th DCA 2005); referred at least inferentially to opposing counsel’s legal argument derogatorily (see *D'Ambrosio v. State*, 736 So. 2d 44, 48 (Fla. 5th DCA 1999); shifted the burden of proof to the appellant (see *Sempier*, 907 So. 2d at 1278); bolstered the credibility of the detective who purportedly coerced the appellant’s admissions (see, e.g., *Servis v. State*, 855 So. 2d 1190, 1194-97 (Fla. 5th DCA 2003); repeatedly ridiculed the appellant's theory of defense (see *Servis*); and for good measure even threw in a couple of “Golden Rule” arguments. And all this in a closing argument consisting of only fifteen pages of the transcript for opening and thirteen pages for closing. If somewhere there is a check list for improper arguments, the prosecutor hit just about all of them.” *Id.* at 10-11 (Monaco, J., dissenting).

In *Ramroop v. State*, 174 So. 3d 584, 589 (Fla. 5th DCA 2015), *quashed on other grounds*, 214 So. 3d 657 (Fla. 2017), the court found that the prosecutor's comments improperly ridiculed Ramroop's theory of defense and his defense counsel. As the court noted, “[t]aken together,… comments undoubtedly served to belittle, sarcastically or otherwise, Ramroop's theory of defense and Ramroop's counsel. The prosecutor admitted as much during a bench conference when he
evidenced his belief that he could properly disparage the defense, stating, ‘I have every right to disparage the defense. I have every right to disparage the credibility of the defendant's story.... And I am disparaging this defense and this defendant's testimony and I have every right to.’… [T]he prosecutor also acknowledged his sarcasm to the jury.”

In *Howard v. State*, 152 So. 3d 825, 829 (Fla. 2d DCA 2014), the court found that the State made several comments referring to defense counsel as a magician and implying that magicians are fraudulent and “dupe” people. Contrary to the State's assertions on appeal, the court ruled that these comments went beyond merely referring to defense counsel as a skilled tactician but instead suggest that she was relying on deceit to magically trick the jury into deciding in favor of the defendant. Notably, comments that “impugn the integrity or credibility of opposing counsel” are fundamental error by themselves. *Id.* (citing *Wicklow v. State*, 43 So. 3d 85, 88 (Fla. 4th DCA 2010)).

In *Crew v. State*, 146 So. 3d 101, 108-111 (Fla. 5th DCA 2014), the court found that the prosecutor improperly (1) misrepresented the evidence, (2) engaged in demeaning and ridiculing personal attacks on the Appellant, (3) engaged in demeaning personal attacks on defense counsel and disparaged his theory of defense, and (4) urged the jury to consider improper grounds to find Appellant guilty. The court held that the cumulative effect of the prosecutor’s arguments constituted fundamental error.
In *Augustine v. State*, 143 So. 3d 940, 941 (Fla. 4th DCA 2014), the court noted all the errors made by the prosecutor:

The transcript of the state's closing argument reads like a primer for *prosecutors* entitled, “What **Not to Say** During Closing Argument.” Indeed, the prosecutor encouraged the jury to render a verdict based on its sympathy for the victim. *See Wicklow v. State*, 43 So. 3d 85, 87 (Fla. 4th DCA 2010) (citations omitted) (finding that prosecutor's comment, “[a]s is usually the case, the victim is on trial for something,” was an improper appeal “to the jury for sympathy for the victim”); *Johns v. State*, 832 So. 2d 959, 962 (Fla. 2d DCA 2002) (finding prosecutor's request to jury that it show sympathy for the victim was “clearly improper”). The prosecutor argued that an acquittal would be “unjust.” *See Servis v. State*, 855 So. 2d 1190, 1194 (Fla. 5th DCA 2003) (“It is improper for an attorney to give a personal opinion as to the justness of the cause ....”). The prosecutor invited the jury to return a guilty verdict based on what the jurors believed the “truth” was. *See Northard v. State*, 675 So. 2d 652, 652–53 (Fla. 4th DCA 1996) (finding that prosecutor's argument improperly invited jury to find defendant guilty based on a determination of the “truth” rather than a finding that the state established guilt beyond a reasonable doubt). The prosecutor suggested the jury could find Augustine carried a firearm during commission of the offense based on the victim's belief that Augustine carried a firearm. *See Dicks v. State*, 75 So. 3d 857, 859–60 (Fla. 1st DCA 2011) (recognizing that prosecutor erred in giving an incorrect interpretation of the law during closing argument); *Butler v. State*, 602 So. 2d 1303, 1305 (Fla. 1st DCA 1992) (noting the state may not prove that defendant carried a firearm during a robbery “by presenting evidence of nothing more than the victim's subjective belief that the defendant possessed a ‘firearm’”).

Also, in *Miami v. Coin-O-Wash, Inc. v. McGough*, 195 So. 2d 227, 229 (Fla. 3d DCA 1967), the court noted that an attorney should not express his personal beliefs in closing argument, because by doing so he removes himself from his position as an advocate and an officer of the court, and becomes an additional witness for his client not subject to cross-examination. "His knowledge of the case
is purely hearsay or opinion evidence and would not be admissible from any other witness" (Ibid). Such comments have resulted in reversals in Muhammad v. Toys R Us, Inc., 668 So. 2d 254 (Fla. 1st DCA 1996), see also Silva v. Nightingale, 619 So. 2d 4 (Fla. 5th DCA 1993). In Walt Disney World Co. v. Blalock, 640 So. 2d 1156 (Fla. 5th DCA 1994), sarcasm of plaintiff's counsel was deemed improper where he characterized opposing party's witnesses as "a good soldier" or "this joker." In Lingle v. Dion, 776 So. 2d 1073 (Fla. 4th DCA 2001), the repeated use of the term "B.S." was not only clearly improper, but also highly unprofessional. Additionally, in Venning v. Roe, 616 So. 2d 604 (Fla. 2d DCA 1993), a new trial was ordered where defense counsel called plaintiff's doctor "nothing more than an unqualified doctor who prostitutes himself...for the benefit of lawyers." See also R.J. Reynolds Tobacco Co. v. Calloway, 201 So. 3d 753 (Fla. 4th DCA 2016) (multiple improper comments made); Allstate Ins. Co. v. Marotta, 125 So. 3d 956 (Fla. 4th DCA 2013) (insured's counsel's comments in closing argument in insured's action against insurer to recover uninsured motorist (UM) benefits, that insurer “made up issues” and “manufacture[d]” a defense, improperly denigrated insurer's defense and counsel); Rosario-Paredes v. J.C. Wrecker Service, 975 So. 2d 1205 (Fla. 5th DCA 2008); Carnival Corp. v. Pajares, 972 So. 2d 973 (Fla. 3d DCA 2007) (comments made by crew member's counsel during closing argument denigrating cruise ship's defense of member's negligence claim and suggesting that ship should be punished for contesting liability were improper); Dutcher v. Allstate Ins., Co., 655 So. 2d 1217 (Fla. 4th DCA 1995) (disparaging comments by defense
counsel about chiropractors was improper); *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1037-38 (Fla. 4th DCA 2003).

3. This does not mean that an attorney cannot zealously advocate his client's cause. In *Brumage v. Plummer*, 502 So. 2d 966 (Fla. 3d DCA 1987), the trial court granted a mistrial based on a statement in plaintiff’s closing argument that:

> The negligence in this case was so gross and so disturbing that to allow this doctor to walk out of the courtroom and make Danny Huet an orphan would be unconscionable.

The Third District reversed the trial court's ruling, and stated that in light of the evidence in that case, plaintiff's counsel's statement was a permissible comment upon the evidence. 502 So. 2d at 969. *See also Whigham v. State*, 97 So. 3d 274 (Fla. 1st DCA 2012) (prosecutor's rebuttal argument, that witness “told you the truth,” did not constitute improper vouching for credibility of witness; prosecutor appropriately explained witness's demeanor on the stand after defense counsel in closing argument attacked her credibility based on her demeanor and purported evasiveness on cross-examination.)

4. The prohibition against an attorney's expression of opinion does not mean that every time he or she says "I believe" or "I think" that an impropriety has occurred. *See Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010, 1029 (Fla. 2000) (use of the personal pronoun “I” during closing argument is not, in and of itself, improper). Courts have recognized that in many situations such phrases are simply figures of speech and not ethical violations,
Forman v. Wallshein, 671 So. 2d 872, 874-75 (Fla. 3d DCA 1996); Lowder v. Economic Opportunity Family Health Center, Inc., 680 So. 2d 1133, 1137 (Fla. 3d DCA 1996).

D. References to Settlements

While it has been held that defense counsel may properly make an "empty chair" argument, see Black v. Montgomery Elevator Co., 581 So. 2d 624 (Fla. 5th DCA 1991), such arguments may not include a suggestion that there has been a settlement made with a non-party, Ricks v. Loyola, M.D., 822 So. 2d 502 (Fla. 2002); see also Muhanuned v. Toys R Us, supra. That prohibition is based on the evidentiary principle that settlements are not admissible on the issue of liability, see Henry v. Beacon Ambulance Service, Inc., 424 So. 2d 914 (Fla. 4th DCA 1982), but also on the provisions of Fla. Stat. § 768.041(3), which expressly prohibits disclosure of settlements in tort actions. See also Saleeby v. Rocky Elson Const. Inc., 3 So. 3d 1078, 1085 (Fla. 2009); Taylor Imported Motors, Inc. v. Armstrong, 391 So. 2d 786 (Fla. 4th DCA 1980).

In Rubrecht v. Cone Distrib., Inc., 95 So. 3d 950, 956 (Fla. 5th DCA 2012), reh'g denied (Sept. 18, 2012), the admission of evidence of the positions taken by counsel in negotiating settlement of the claim for the first accident was inherently and highly prejudicial with respect to the disputed issue of apportionment of damages between the two accidents. Its admission, therefore, constituted reversible error.
E. **Traffic Citations**

It is a well-settled principle of evidence that reference to whether a driver has been charged with a traffic violation by a law enforcement officer is inadmissible, see *Soto v. McCulley Marine Services, Inc.*, 181 So. 3d 1223, 1225-12226 (Fla. 2d DCA 2015) (given the large number of negligence cases that have arisen from automobile accidents, it is now very well established that evidence of a citation or lack thereof is inadmissible at trial); *Vantran Industries, Inc. v. Ryder Truck Rental, Inc.*, 890 So. 2d 421, 425 (Fla. 1st DCA 2004) (“[g]enerally, ‘questions or allusions which suggest that a driver has or has not been charged with a traffic violation’ are considered sufficiently prejudicial to require a new trial”); *Galgano v. Buchanan*, 783 So. 2d 302, 307 (Fla. 4th DCA 2001); *Moore v. Taylor Concrete and Supply Co.*, 553 So. 2d 787 (Fla. 1st DCA 1989), even when negligence is not an issue, see *Budget Rent-A-Car System, Inc. v. Jana*, 600 So. 2d 466 (Fla. 4th DCA), *rev. den.*, 606 So. 2d 1165 (Fla. 1992); see also *Golden v. Tipton*, 723 So. 2d 871 (Fla. 1st DCA 1998). Such comments are deemed so harmful that even a reference in opening statement has been held to justify a new trial. *Lidos Rent-A-Car v. Stanley*, 590 So. 2d 1114 (Fla. 4th DCA 1991); see also *Vantran Industries, Inc. v. Ryder Truck Rental, Inc*, supra.

Based on those principles of evidence, any allusion in a closing argument to whether or not a party was charged is improper and can be reversible. For example,
in *Elsass v. Hankey*, 662 So. 2d 392 (Fla. 5th DCA 1995), in closing argument defense counsel said to the jury:

> I didn't hear Mike Richey say it was Cecil Hankey's fault. I didn't hear Trooper Edsall say it's Cecil Hankley's fault....

The court reversed the judgment in that case based on that impropriety.

**F. Discovery Misconduct**

Informing a jury of discovery misconduct, real or imagined, is inappropriate in closing argument, because it is not a matter within the evidence of the case, nor is it a proper consideration for the jury in determining the merits of the case. Logically, this prohibition should extend to comments regarding whether a party raised an objection to certain discovery. In *Emerson Electric Co. v. Garcia*, 623 So. 2d 523 (Fla. 3d DCA 1993), plaintiff’s counsel accused defense counsel of discovery misconduct in the presence of the jury and argued that the defendant manufacturers were concealing damaging evidence. The trial court overruled defendant's objections to that line of argument, and the Third District reversed. The court noted that no pretrial discovery violation had ever been established and, even if there had been such evidence, the appropriate sanction was for the court, not the jury. The court also noted that the trial court's overruling of the objection gave a tacit approval to the improper questioning, which thereafter became a feature of the trial. *See also SDG Dadeland Associates, Inc. v. Anthony*, 979 So. 2d 997 (Fla. 3d
DCA 2008) (It is well settled that statements by counsel in closing argument which accuse opposing counsel of hiding evidence and of fraudulently preventing the presentation of relevant evidence constitute reversible error.); Target Stores v. Detje, 833 So. 2d 844 (Fla. 4th DCA 2002); George v. Mann, 622 So. 2d 151 (Fla. 3d DCA 1993).

G. Insurance

It is, of course, well-established that evidence of insurance is not admissible in trial, and references to it by counsel, - or even allusions to it, are improper. Mercury Ins. Co. of Florida v. Moreta, 957 So. 2d 1242 (Fla. 2d DCA 2007); Nicoise v. Gagnon, 597 So. 2d 305 (Fla. 4th DCA 1992); South Motor Co. of Dade County v. Accountable Const. Co., 707 So. 2d 909 (Fla. 3d DCA 1998).

H. Calling a Witness or Party a Liar

It is not necessarily impermissible to characterize a witness or a party as being a "liar" if the evidence supports that characterization. In Craig v. State, 510 So. 2d 857, 865 (Fla. 1987), the Florida Supreme Court rejected an argument that the prosecutor's closing argument was improper because he referred to the defendant as a liar. The court stated:

Appellant argues that the prosecutor improperly made repeated references to defendant's testimony as being untruthful and to the defendant himself as a "liar." It may be true that the prosecutor used language that was somewhat intemperate but we do not believe he
exceeded the bounds of proper argument in view of the evidence. When counsel refers to a witness or a defendant as being a "liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration. There was no impropriety.

Following that decision, the Third District in *Forman v. Wallshein*, 671 So. 2d 872 (Fla. 3d DCA 1996), held that there was no impropriety in defense counsel calling the plaintiff a liar, where there was an ample evidentiary basis on which to dispute the plaintiff’s credibility. Similarly, in *Goutis v. Express Transport, Inc.*, 699 So. 2d 757, 764 (Fla. 4th DCA 1997), the court stated:

> However, it is permissible for an attorney to comment on the credibility of a witness, for example by calling the witness a liar, when it is with reference to the testimony given and the attorney is merely drawing a conclusion from the evidence. [Emphasis in original.]

In *Williams v. Crosby*, 2007 WL 1724944, *8* (M.D. Fla. June 13, 2007), the court found that the following was merely a comment on testimony presented during the trial and inferences that the jury might draw therefrom:

> "Why didn't [the prosecutor] call Wanda Ghent if she was such a big help?" In rebuttal, the prosecutor stated: "Folks, I didn't call her because, you know what, folks, she is lying. How would you feel about the fact if I called somebody to the stand who didn't tell the truth?"
And, in *Valentine v. State*, 98 So. 3d 44, 55 (Fla. 2012), the Court found that, in context, the following challenged comment was not improper:

Now, [defense counsel] wants you to believe that [Romero] is lying and to have you believe that she is lying, he has to provide you with a motivation for why she was lying and so her motivation is this Costa Rican divorce. He somehow wants you to believe and wants to suggest to you that it is this woman, as she was laying there, bound, bloodied, naked, wondering if she was going to live or die, not knowing if she would ever see her children again, she thought, “Hey, if I say [Valentine] did it, maybe he has got some property in Costa Rica and I will get an attorney, and we will do a property search, and maybe I will get half.”

The Court noted that the prosecutor did not ridicule or otherwise improperly attack the defense's theory of the case; she merely described the defense's theory of the case and stated that the defense wanted the jury to “somehow” believe that theory. *Id.* at 55-56.

This situation is to be distinguished from what occurred in *Griffith v. Shamrock Village, Inc.*, 94 So. 2d 854 (Fla. 1957). There, defense counsel stated in his closing argument that he did not believe one of the plaintiff's witnesses, and that the plaintiff only wanted money. The Supreme Court noted that this challenge to the truthfulness of critical testimony was not supported by any record evidence and, thus, was improper. The Court stated:

The remarks made by defense counsel were not discussion of the evidence of the cause nor were they in the nature of deductions or inferences which could properly be drawn from the evidence. No attempt was made to impeach plaintiff or his witnesses. Their testimony was neither contradictory nor contradicted by defendant's evidence.
The statements of defense counsel suggest perjury and collusion on the part of plaintiff and his witnesses.

These remarks, being neither based on the evidence nor proper deductions from the evidence, were improper.

Id. at 857. See also Rodriguez v. State, 210 So. 3d 750 (Fla. 5th DCA 2017) (discussing improper closing arguments by prosecutor containing repeated references to the defendant as a liar and a pedophile, misstating, misrepresenting, and inaccurately recounting evidence, and improperly inviting jury to base its verdict on reasons other than proof of guilt beyond a reasonable doubt, such as nationalistic appeals to what sexual information the people of the United States want five-year-olds to know).

I. Attacks on Opposing Counsel

While an attorney is allowed to challenge the credibility of a witness or a party, even to the point of calling them a "liar" if the evidence supports it, attacks on opposing counsel are improper. See, e.g., Coleman v. State, 126 So. 3d 1199, 1203 (Fla. 4th DCA 2012) (“Resorting to personal attacks on defense counsel is an improper trial tactic which can poison the mind of the jury.”) (quoting Wicklow v. State, 43 So. 3d 85, 87–88 (Fla. 4th DCA 2010)) (Ciklin, J. concurring specially). See also R.J. Reynolds Tobacco Co. v. Gafney, 188 So. 3d 53, 59 (Fla. 4th DCA 2016), rev. den., SC16-693, 2016 WL 4537513 (Fla. 2016) (“Consistent with our standards for proper argument, we distinguish reasoned analysis of the evidence and the credibility of testimony, which is appropriate, and disparagement through attacks on a party or opposing counsel’s character or morals. Such tactics are decidedly improper and can cause prejudicial misdirection of the jurors’ attention when those
character traits are not in issue.”). This is due to the fact that counsel’s credibility is not a matter of evidence and, therefore, it is not a proper subject for consideration by the jury. In *Owens-Corning Fiberglass Corp. v. Morse*, 653 So. 2d 409 (Fla. 3d DCA 1995), rev. den., 662 So. 2d 932 (Fla. 1995), the court ruled it was fundamental error for defense counsel to attack plaintiff's counsel as a "master of trickery" and to claim that the plaintiff had to have been given certain testimony by his attorneys. See also *Sun Supermarkets, Inc. v. Fields*, 568 So. 2d 480 (Fla. 3d DCA 1990); *Venning v. Roe*, 616 So. 2d 604 (Fla. 2d DCA 1993); *Johnnides v. Amoco Oil Co., Inc.*, 778 So. 2d 443 (Fla. 3d DCA 2001); *SDG Dadeland Associates, Inc. v. Anthony*, 979 So. 2d 997 (Fla. 3d DCA 2008) (given the absence of any evidence showing that either Dadeland or its counsel hid evidence or acted improperly, any argument by Plaintiff's counsel implying that defense counsel was hiding evidence was both egregious and prejudicial to Dadeland); *Wicklow v. State*, 43 So. 3d 85, 87 (Fla. 4th DCA 2010) (reversible error when the prosecutor made the following argument later in closing argument, “The only conflicts are between the defense attorney and the evidence. That's it. Don't be manipulated ... don't be gullible,” she was no longer focusing on the evidence, but instead on her perception of the integrity and character of defense counsel.); *Aarmada Protection Systems 2000, Inc. v. Yandell*, 73 So. 3d 893, 899-900 (Fla. 4th DCA 2011) (improper personal attacks on the defendants, defense counsel, and defense witnesses, even if in reply to defense counsel’s equally inflammatory arguments).
In *Allstate Ins. Co. v. Marotta*, 125 So. 3d 956 (Fla. 4th DCA 2013), the court found that the plaintiff’s counsel’s comments that Allstate “made up issues” and “manufacture[d]” a defense improperly denigrated Allstate’s defense and counsel. 125 So. 3d at 960-61 (citing *Carnival Corp. v. Pajares*, 972 So. 2d 973, 977 (Fla. 3d DCA 2007)).

In *Datilus v. State*, 128 So. 3d 122, 126 (Fla. 4th DCA 2013), the State’s closing argument statements, telling the jury “let’s talk about the truth,” and that they were there “not to obscure, not to look at issues,” was not improper attack on defense counsel, absent any evidence that the State resorted to personal attacks, in prosecution for impregnation of a child.

In *Crew v. State*, 146 So. 3d 101, 110 (Fla. 5th DCA 2014), the following was found erroneous by the court:

> [A]t the beginning of closing argument, the prosecutor provided that “[f]or three days, we’ve been in this courtroom and we’ve been listening to Mr. Zimmet’s denials and nonsense about his client’s involvement in a robbery.” The prosecutor repeatedly referenced the defense attorney not minding Appellant’s actions, “throwing his client under the bus,” disparaging the defense attorney’s choice of the “lowest offense the law will allow,” and sarcastically saying “Mr. Zimmet wants you to believe that his poor, misunderstood client....”

*See also Ramroop*, 174 So. 3d at 588-589; *Howard v. State*, 152 So. 3d 825, 829 (Fla. 2d DCA 2014) (It is also improper to make any statement during closing argument that denigrates defense counsel or the defense strategy, including any comments made to suggest that the defense is attempting to perpetuate a fraud on
the jury.) (citations omitted); Scala v. State, 213 So. 3d 1085, 1087 (Fla. 3d DCA 2017) (condemning improper arguments of prosecutor that implied, at the very least, that defense counsel was not acting in good faith and, at worst, that he lied to the jury and was free to do so because he was not bound by the same obligation and professional oath as the prosecutor).

Similarly, attacks on plaintiffs’ attorneys in general, or any particular segment of the legal profession, are inappropriate. Hartford v. Ochoa, supra. In Sanchez v. Nerys, 954 So. 2d 630, 632 (Fla. 3d DCA 2007), the plaintiff’s counsel's arguments to the jury that defense counsel was "pulling a fast one," "hiding something," and "trying to pull something," were tantamount to calling defense counsel liars and accusing them of perpetrating a fraud upon the court and jury. See also Chin v. Caiaffa, 42 So. 3d 300 (Fla. 3d DCA 2010) (holding improper plaintiff’s efforts to paint entire defense as “frivolous” and designed to “add [ ] insult to injury,” to accuse defense counsel of “try[ing] to fool you,” to argue that defendant was not contrite and had not apologized for accident, and to argue that defendant made bigger mistake of trying to avoid responsibility by calling witnesses who did not tell the truth in an effort to do anything to win or save the day); Health First, Inc. v. Cataldo, 92 So. 3d 859 (Fla. 5th DCA 2012).

J. Attacks of Defending or Bringing a Case

In Allstate Ins. Co. v. Marotta, 125 So. 3d 956 (Fla. 4th DCA 2013), Allstate argued that a new trial was warranted due to improper argument made by Marotta’s
counsel during closing and rebuttal argument. The following is the complained of argument during closing at 958:

“Allstate denied the undisputed medical evidence. They denied accepting responsibility. I ask you, is that what it means to be in good hands?” Marotta stated that everyone was equal under the law, “whether you’re a regular citizen or whether you’re a powerful insurance company like Allstate.”

Marotta asked whether one of Allstate’s doctors “was enlisted as part of an effort to manufacture a defense,” and stated that Allstate can pay doctors who know what Allstate “really wants.”

The complained of argument during rebuttal at 959 is as follows:

Now, what is repentance? We know what repentance is. Repentance is—it’s—It’s three-fold. It's not enough to say, Golly, gee, okay, now five years almost after this accident, yeah, the uninsured motorist in this case was negligent and caused harm and losses to Anthony Marotta and Lori Marotta. That’s not enough. We know what the other two steps are. There are two other steps. The second step is to accept full responsibility, full responsibility. Not part of the responsibility, to accept full responsibility.

And the third step is to do everything necessary to make it right, to do everything necessary to make it right. Not part of it all of it. Now, you got to do all you can to that person that that uninsured motorist hurt to make it right.

Allstate “consistently, in this case, didn’t want to accept the responsibility at all for causing the accident, the uninsured motorist carrier and they still don’t want to accept the responsibility to ... make up all of the losses and harms caused by this automobile crash.”

“Allstate could have come to this trial saying, I’m sorry, I want to fairly pay you for the injuries ... that the uninsured motorist carrier caused, but they didn’t.”

Marotta called Allstate’s experts “paid opinion courtroom doctors” and, over objection, stated that Allstate “made up issues.” Several times, Marotta stated that Allstate had built up “straw men.”
Marotta returned to the point that Allstate did not “want to accept full responsibility,” arguing that Allstate, in order to protect its money and to prevent “full repentance,” paid people “$750 an hour, $500 an hour.”

Marotta argued that the accident “created a debt” that it was time for Marotta to collect. Toward the end of Marotta’s rebuttal, Marotta requested that the jury “make Allstate repent, make them take responsibility for what was caused by that uninsured motorist and make them pay all of the harms and losses caused.”

The court found that it was improper for counsel to suggest in closing argument that a “defendant should be punished for contesting damages at trial” or that defending a “claim in court” is improper. Id. at 960 (citing Intramed, Inc. v. Guider, 93 So. 3d 503, 507 (Fla. 4th DCA 2012); Fasani v. Kowalski, 43 So. 3d 805, 809 (Fla. 3d DCA 2010) (“[I]t is improper for an attorney to ... suggest that a party should be punished for contesting a claim.”)).

The court concluded that Marotta’s comments urged the jury to punish Allstate for defending against Marotta’s claim in court and exceeded the scope of permissible argument. Id. (citing State Farm Mut. Auto. Ins. Co. v. Thorne, 110 So. 3d 66, 74 (Fla. 2d DCA 2013) (“Objectionable was ... counsel’s contention in closing that the defendants’ evidence and argument were an attempt ‘to avoid responsibility’ and, as a result, the defendants exhibited shameful conduct.”)). These improper comments were numerous, even when viewed in context, and made the argument such that it was not designed to “prompt a ‘logical analysis of the evidence in light of the applicable law.’ ” Id. (citing Intramed, 93 So. 3d at 507 (citation omitted)). As a result, the court reversed and remanded the matter for a new trial. See also R.J.
Reynolds Tobacco Co. v. Robinson, 216 So. 3d 674 (Fla. 1st DCA 2017) ("A plaintiff may not suggest to the jury that a defendant is somehow acting improperly by defending itself at trial or that a defendant should be punished for contesting damages."); Las Olas Holding Co. v. Demella, 228 So. 3d 97, 108 (Fla. 4th DCA 2017) (stating that the law is clear that it is improper for counsel to disparage opposing party’s defense of case or suggest that party should be punished for contesting a claim); R.J. Reynolds Tobacco Co. v. Calloway, 201 So. 3d 753, 760 (Fla. 4th DCA 2016) (stating that it is improper for counsel to suggest in closing arguments that a defendant should be punished for defending itself or contesting damages or to disparage a defendant for failing to take responsibility).

K. Failure to Call a Witness

Counsel are permitted to argue that a party's failure to call a witness that is peculiarly within that party's power to produce (such as an employee, retained expert, etc.), justifies an inference that the testimony would be adverse to them. See Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990); Lowder v. Economic Opportunity Family Health Center, Inc., 680 So. 2d 1133 (Fla. 3d DCA 1996). See also Community Asphalt Corp. v. Bassols, 13 So. 3d 538 (Fla. 3d DCA 2009) (closing argument did not have to be interpreted as comment on failure to call witness, but was in nature of permissible comment on lack of evidence); Gianos v. Baum, 941 So. 2d 581 (Fla. 4th DCA 2006) (trial court abused its discretion in precluding the plaintiff from commenting during closing argument that "we don't have any
pathologists on the Defendant's side;” comment was appropriate because it was fair comment on the defendant's lack of evidence to rebut the plaintiff’s evidence). Availability of the witness to testify is a prerequisite to that negative inference. See *Mayfly Aviation, Inc. v. Guild*, 605 So. 2d 1297 (Fla. 4th DCA 1992). However, availability is not a prerequisite when it is a party who does not testify. See *Fino v. Nodine*, 646 So. 2d 746 (Fla. 4th DCA 1994). In *Linehan v. Everett*, 338 So. 2d 1294 (Fla. 1st DCA 1976), the court held that the trial judge erred in refusing to allow plaintiff's counsel to comment in closing argument on the fact that defendant's retained expert physician, who had examined the plaintiff, was not called to testify at trial.

**L. Presentation of False Testimony or Other Fraud**

If a party presents demonstrably false testimony in support of their case, or engages in fabrication or suppression of evidence by bribery or spoliation, it is a reasonable inference that their case is meritless. This was summarized by Professor Wigmore in 2 *Wigmore on Evidence*, § 278 at 120 (Third Ed. 1940), see also *McCormick, Evidence* § 273 (Second Ed. 1972), 29 Am.Jur.2d, Evidence §§ 276, 292:

> It has always been understood -- the inference, indeed, is one of the simplest in human experience -- that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact...
itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.

M. **Reasonable Inferences in Wrongful Death Cases**

In *Tito v. Potachnick*, 488 So. 2d 100 (Fla. 4th DCA 1986), a wrongful death action arising out of the death of a father, defense counsel argued to the jury:

> I think each and every one of us knows that this young lady is an attractive young lady, that this boy is going to have a father.

> [This boy is going to have a father sometime in the future. There is no doubt with as attractive as she is…

> I just think that all of us would just -- society, knowing society, knowing that at some point in time Kenny Felt is going to have a father who's going to be there, who's going to have a male influence in that family.

The Fourth District reversed based on that closing argument, noting there was no evidence suggesting the mother was going to remarry and "it cannot be presumed that attractive women always remarry." The court also noted the further leap of logic that if there was a stepfather, that he would adopt the child or otherwise obligate himself for the child's support. See *Leaseco, Inc. v. Bartlett*, 257 So. 2d 629, 632-633 (Fla. 4th DCA 1972) (evidence of *possibility* of remarriage is inadmissible as it is irrelevant and too speculative) (emphasis added); *Seaboard*
Coast Line Railroad Co. v. Hill, 250 So. 2d 311, 317 (Fla. 4th DCA 1971) (evidence of remarriage inadmissible to mitigate damages of the surviving spouse versus of the decedent’s estate); Seaboard Coast Line Railroad v. Clark, 491 So. 2d 1196 (Fla. 4th DCA 1986) (testimony relating to possibility that surviving spouse may remarry should not have been admitted in wrongful death action) (emphasis added).

Similarly, in Cardona v. Gutierrez, 562 So. 2d 766 (Fla. 4th DCA 1990), the court reversed in a wrongful death case, because defense counsel suggested that the child was lucky to have an aunt and uncle who provided a fine home for her and that, as a result, the jury should minimize the intangible award to the child for the loss of her mother.

While Florida Statutes Section 768.21(6)(c) makes it clear that evidence of remarriage is admissible: “(6) The decedent's personal representative may recover for the decedent’s estate the following:… (c) Evidence of remarriage of the decedent’s spouse is admissible,” that provision is solely in the subsection regarding what damages the estate is entitled to recover and not under the subsection addressing what damages survivors are entitled to recover. See Smyer v. Gaines, 332 So. 2d 655, 657-658 (Fla. 1st DCA 1976). Thus, the holding in Seaboard Coast Line Railroad Co. v. Hill, supra.

The Smyer court stated that “[t]he placement in the act of subsection (6)(c) of Section 768.21, Florida Statutes, ‘Evidence of remarriage of the decedent’s spouse is admissible’, indicates that there are only two purposes for which the
evidence could be used: (1) it could mitigate the damages going to the decedent’s estate from the loss of net accumulation, since the loss of net accumulation can only be regained by the estate when there is a surviving spouse or lineal descendants; (2) rather than to mitigate any damages, the evidence could be introduced for the sole reason of allowing the truth to be known and to keep the court from having to participate in a fraud upon the jury.” 332 So. 2d at 658. Accordingly, the court concluded that evidence of remarriage of the decedent’s spouse was admissible so that the whole truth be known; however, it may not be considered in mitigation of any elements of damage recoverable under the act by the surviving spouse. Id. at 659.

N. Comments Encouraging Jury to Deviate from its Duty

Another category of improprieties involves attempts to encourage the jury to deviate from its duty, i.e., to violate the jury instructions which govern its deliberations. Arguments that fall into this category include those that misstate the law or mislead the jury at to the issues to be decided. See Martin v. Sowers, 42 Fla. L. Weekly D1887 (Fla. 3d DCA, Aug. 30, 2017) (holding that radiologist’s improper closing arguments that repeatedly mislead jury as to the true nature of plaintiff cancer patient’s claims and mischaracterized the record in the case constituted fundamental error).

Arguments in this category also commonly involve counsel's effort to suggest an improper motive for a particular verdict. The most obvious example of
such misconduct involves situations in which a lawyer attempts to influence the jury to return a particular verdict for reasons other than the evidence and applicable law. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. 3d DCA 2003), *apprv'd in part and quashed in part by, Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006); *see also Robinson v. State*, 211 So. 3d 59, 61-62 (Fla. 4th DCA 2017) (discussing improper argument asking jury in criminal trial to render a guilty verdict so that the victim could “move on” and “repair the rest of her life”).

**O. Arguing Effect of Law**

Attorneys are, of course, entitled to argue the applicable law to the jury in their closing arguments. *Jordan v. State*, 176 So. 3d 920, 928 (Fla. 2015) (counsel’s explanation to the jury how the law was applicable to the evidence presented at trial, i.e., that victim’s immediate death at the crime scene was not a required element of felony murder, was permissible argument); *Geralds v. State*, 111 So. 3d 778, 795 (Fla. 2010) (The purpose of closing argument is to help the jury understand the issues in a case by applying the evidence to the law applicable to the case.); *Williams v. State*, 565 So. 2d 838 (Fla. 1st DCA 1990), *rev. den.*, 576 So. 2d 295 (Fla. 1991); *Bulkmatic Transport Co. v. Taylor*, 860 So. 2d 436 (Fla. 1st DCA 2003). In fact, one of the reasons that jury instruction conferences are held prior to closing arguments is so that attorneys can relate the law, as instructed by the court, to the facts. *Taylor v. State*, 330 So. 2d 91, 93 (Fla. 1st DCA 1976); *Thomason v. Gordon*, 782 So. 2d 896 (Fla. 5th DCA 2001). An attorney is entitled to emphasize any
portion of the jury instructions deemed pertinent, and to object if opposing counsel misstates the law (Thiel).

Additionally, attorneys are allowed to argue the effect of the law on the verdict. For example, with respect to apportionment of fault pursuant to Fla. Stat. § 768.81 (otherwise known as Fabre issue), it has been held that it was error to preclude plaintiff’s counsel from arguing the effect of such apportionment on the plaintiff's damages. Slawson v. Fast Food Enterprises, 671 So. 2d 255, 259-260 (Fla. 4th DCA 1996). Such arguments are permissible because they enlighten and encourage the jury to follow the instructions and apply the law as given by the trial court. However, it is improper for a lawyer to argue in such a way as to cause the jury to deviate from its instructions, either by arguing contrary to the law or by arguing as grounds for the verdict that is not consistent with the jury instructions.

But, but . . . . .

Recently, in Harrison v. Gregory, 221 So. 3d 1273 (Fla. 5th DCA), the defendant in a fatal automobile accident case raised the issue of the decedent’s impairment under section 768.36, Florida Statutes. During closing argument, plaintiff’s counsel recommended to the jury that they answer questions on the verdict form pertaining to this issue in an order contrary to the instructions on the verdict form and also informed the jury that if they found that the decedent was 50 percent or more at fault due to his being under the influence of cocaine and/or marijuana, “there’s no recovery.” Id. at 1277. The trial court sustained defense counsel’s
objection, ruling that it was improper for counsel to tell the jury “the mathematical effect of a finding of a percentage of fault.” *Id.* The court also gave a curative instruction directing the jury to follow the instructions on the verdict form and admonishing them that counsel do not give instructions on the law. The district court found the comments to be “highly improper” and based on cumulative error, reversed the judgment awarding damages in favor of the plaintiffs, and remanded for a new trial. *Id.* at 1278.

O. **Conscience of the Community Argument**

In *Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1238-1239 (5th Cir. 1985), the court characterized improper "conscience of the community" arguments as follows:

> Our condemnation of a "community conscience" argument is not limited to the use of those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation.

That language was quoted with approval in *S. H. Investments and Development Corp. v. Kincaid*, 495 So. 2d 768, 771 (Fla. 5th DCA 1986), *rev. den.*, 504 So. 2d 767 (Fla. 1987). *See also City of Miami v. Kinser*, 187 So. 3d 921, 924 (Fla. 3d DCA 2016) (When an attorney makes “impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation,” the attorney generates unfair prejudice by creating an improper “us-against-them”
mentality, which at best is a “distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial.”) (citations omitted). These types of arguments attempt to have the jury decide the case on considerations that are not identified in the jury instructions, but rather on the basis of the self-interest of the community or on some perceived moral ground alien to the relevant legal principles.

For example, in *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016 ( Fla. 4th DCA 1996), a personal injury action in which the plaintiff was injured while hog hunting, defense counsel made the following argument:

> A verdict in this case for the Normans, a verdict in this case against Gloria Farms is going to bring an immediate halt to hog hunting in Okeechobee.

> Can you imagine any rancher, anybody that owns property in this town or community ever allowing anybody to come out and hog hunt again? Not if the news of this were to get out.

668 So. 2d at 1021.

The Fourth District reversed, noting that this was a classically improper "conscience of the community" argument, because it suggested that the jury decide the case not on the legal principles contained in the jury instructions, but rather on the community's self-interest.

In *Airport Rent-A-Car, Inc. v. Lewis*, 701 So. 2d 893, 896 ( Fla. 4th DCA 1997), the plaintiff’s counsel stated:
Tomorrow you get to go home and tell everyone about this case that you sat on and I want you to tell them what you get in Broward County if a taxi driver runs a red light and injures somebody ... I wish you could punish them, but you can't.

The Fourth District reversed, holding that the comment constituted an impermissible conscience of the community argument. See also Charriez v. State, 96 So. 3d 1127 (Fla. 5th DCA 2012) (court found that the prosecutor made an improper appeal to the jurors' community conscience by suggesting that they had a communal duty to convict Charriez in order to protect the community).

P. Lawsuit Crisis

Appeals to a community's political prejudices as justifying a particular verdict are similarly inappropriate, Kiwanis Club of Little Havana, Inc. v. deKalafe, 723 So. 2d 838 (Fla. 3d DCA 1998). In Davidoff v. Segert, 551 So. 2d 1274 (Fla. 4th DCA 1989), defense counsel's comment in a personal injury action regarding the insurance crisis situation was an improper attempt to appeal to the conscience of the community. See also Bellsouth Human Resources Administration, Inc. v. Colatarci, 641 So. 2d 427 (Fla. 4th DCA 1994) (defense counsel's references to frivolous lawsuits causing deterioration of court system); Stokes v. Wet 7NT Wild, Inc., 523 So. 2d 181 (Fla. 5th DCA 1988) (defense counsel's reference to crowded courtrooms being caused by "ridiculous" cases like the plaintiff's); Russell v. Gruden, 362 So. 2d 55 (Fla. 4th DCA 1978) (improper suggestion of relationship between verdict and rising insurance rates).
Plaintiff's counsel are not immune from making such arguments. In *Airport Rent-A-Car, Inc. v. Lewis*, supra, the plaintiff's counsel engaged in numerous improprieties, including telling the jury that he wanted them to tell the people in the community what you get "in Broward County if a taxi driver runs a red light and injures somebody...".

**Q. "Send a Message"**

Another classic impropriety is when an attorney exhorts the jury to send a message to a defendant, such as occurred in *Erie Insurance Co. v. Bushy*, 394 So. 2d 228 (Fla. 4th DCA 1981). In that case, the plaintiff’s counsel argued to the jury:

> I want you to send a message to Erie, Pennsylvania, that you can't defend a case by coming down here and just subtly hinting that we don't owe it and it must have been something else. Send a message to those people and let them know that they are going to have to pay a penalty.

See also *Fletcher v. State*, 168 So. 3d 186, 209 (Fla. 2015) (Florida Supreme Court reiterated that “send a message” statements are improper and prohibited); *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552 (Fla. 3d DCA 2000) (closing argument asking the jury to send a message was improper); *Murphy v. Murphy*, 622 So. 2d 99 (Fla. 2d DCA 1993); *Pippin v. Latosynski*, 622 So. 2d 566 (Fla. 1st DCA 1993).

In *City of Orlando v. Pineiro*, 66 So. 3d 1064 (Fla. 5th DCA 2011), the court held it was improper for the estate of a motorist, who was killed by a driver during a high speed police chase, to ask the jury during closing argument how the jury could...
put a value on the life of a loved one, for purposes of awarding damages to the
motorist's parents, and telling the jury that money could not bring the motorist back,
but it did help to tell the motorist's parents that the jury recognized that what had
been done was wrong and should not have ever happened. The court found that the
estate’s comments were an improper send-a-message argument because the jury was
being asked to award money not based on proof supporting the proper recoverable
damages allowed in a wrongful death action, but to remedy wrongful, intentional, as
opposed to negligent, conduct. 66 So. 3d at 1070-1071.

Normally, a "send a message" comment is only improper if it is coupled
with a request that the jury punish the defendant. In Florida Crushed Stone v.
Johnson, 546 So. 2d 1102 (Fla. 5th DCA 1989), counsel for the plaintiff (the
decedent's estate) argued to the jury that they should "send a message forward
about this family." The court noted that the attorney did not follow the comment
with a suggestion that the jury punish the defendant and, therefore, it was not
reversible error. See also Bluegrass Shows, Inc. v. Collins, 614 So. 2d 626 (Fla. 1st
DCA 1993).

However, in Airport Rent-A-Car, Inc. v. Lewis, supra, after plaintiff's
counsel suggested the jury send a message, he stated, "I wish you could punish
(the defendants), but you can't." The court held that did not mitigate the prejudicial
impact of his comments, but rather planted a seed to motivate the jury to include a
punitive aspect in the damage award.

2.42
The "send a message" comments are inappropriate, because they ask the jury to deviate from the instructions which limit their award of damages to compensatory losses of the plaintiff, and encouraged them to add a punitive element.

Even when both compensatory and punitive damages claims are at issue, a plaintiff may not utilize “send a message” and conscience of the community arguments when discussing whether the plaintiff should be compensated, due to the potential for the jury to punish through the compensatory award, abrogating *Ocwen Financial Corp. v. Kidder*, 950 So. 2d 480. *See R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53 (Fla. 4th DCA 2016), *rev. denied*, SC16-693, 2016 WL 4537513 (Fla. 2016).

R. Us vs. Them

Another area of impropriety is when an attorney attempts to use one party's alien status as a means of prejudicing the verdict. For example, in *Superior Industries International, Inc. v. Faulk*, 695 So. 2d 376 (Fla. 5th DCA 1997), plaintiff's counsel repeatedly emphasized to the jury the fact that the defendant was a California corporation. The court noted that those references, in conjunction with other improprieties, were intended to convey to the jury an "us vs. them" mentality, by pitting the community against a non-resident corporation. *See also Knepper v. Genstar Cop.*, 537 So. 2d 619 (Fla. 3d DCA 1988), *rev. den.*, 545 So. 2d 1367 (Fla. 1989). In *S.H. Investment v. Kincaid*, 495 So. 2d 768, 771 (Fla. 5th DCA 1986),
the court described such arguments as "an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial." Similarly, in Airport Rent-A-Car v. Lewis, supra, a reference by the plaintiff to the defendant's counterclaim was deemed improper, because it emphasized the fact that he was from another country (Jamaica), 

"[Campbell] has to make a claim because I guess he knows in America, you can make a claim like this."

S. Golden Rule

The golden rule argument is one that either directly or by implication tells the jury to assess damages by determining what they would want if they were in the plaintiff’s place. Such arguments have repeatedly been held to be improper. Bailey v. State, 998 So. 2d 545 (Fla. 2008); Sampson v. State, 213 So. 3d 1090, 1094-95 (Fla. 3d DCA 2017) (discussing improper Golden Rule arguments of prosecutor suggesting that each of them “has been underwater . . . where you get to that point where you’re losing breath and you need to get to the surface. And you get that heaving feeling in your chest,” and telling jurors that is how the alleged strangulation victim’s felt in his pain, suffering, and sense of desperation before he died); SDG Dadeland Associates, Inc. v. Anthony, 979 So. 2d 997, 1003-1004 (Fla. 3d DCA 2008) (discussing violation of the Golden Rule). Such arguments motivate a jury to deviate from the instructions to be impartial in their assessment of damages, by asking them to identify with the plaintiff and make a determination from a personal
perspective. *Coral Gables Hospital. Inc. v. Zabala*, 520 So. 2d 653 (Fla. 3d DCA 1988); *Cummins Alabama, Inc. v. Allbritten*, 548 So. 2d 258 (Fla. 1st DCA 1989), *rev. den.*, 553 So. 2d 1164 (Fla. 1989). "Golden rule" arguments are improper because they depend upon inflaming the passions of the jury and inducing fear and self-interest. *Bocher v. Glass*, 874 So. 2d 701 (Fla. 1st DCA 2004).

In *Gonzalez v. State*, 136 So. 3d 1125, 1153 (Fla. 2014) *cert. denied*, 135 S. Ct. 193 (2014), the court determined that the prosecutor violated the “golden rule” where the prosecutor created an imaginary script in which the murder victim “fearfully wondered, [w]hat will happen to my children, my precious children.” The court noted that “[w]hile the evidence showed that the children were present in the house, the imaginary script speculated about the victim’s final thoughts and invited the jurors to place themselves in the position of the victim ‘fearfully’ wondering what would happen to her children.”

In *Victorino v. State*, 127 So. 3d 478 (Fla. 2013), *reh'g denied* (Nov. 25, 2013), *cert. denied*, 134 S. Ct. 1893 (2014), the Court noted that: “‘[A] common-sense inference as to the victim's mental state’ may be the basis of proper argument” and such arguments are not improper golden rule arguments *unless* they “attempt to place the jury in the position of the victim” so that the jurors “‘imagine the victim's final pain, terror and defenselessness.’” (citations omitted) (emphasis added).

2.45
In *Gurshoff v. Delany's, Inc.*, 693 So. 2d 1068 (Fla. 4th DCA 1997), plaintiff’s counsel’s rhetorical question to the jury about how much it is worth to have novocaine when they go to the dentist was deemed an improper "Golden Rule" argument. It is not an impermissible golden rule argument to ask the jury to "think about what you would pay someone for one day of what you will hear she has to go through and for the rest of her life". *Simmonds v. Lowery, Lowery*, 563 So. 2d 183 (Fla. 4th DCA 1990).

"Golden rule" arguments are not limited to plaintiffs or to the issue of damages. In *Miku v. Olmen*, 193 So. 2d 17 (Fla. 4th DCA 1966), receded from on other grounds in, *Cleveland Clinic Florida v. Wilson*, 685 So. 2d 15 (Fla. 4th DCA 1996), the court reversed a judgment in favor of the defendants based on their counsel's closing argument in which he asked them:

> Now, I ask you, if you had been the unfortunate person who had slid into the rear end of that car, how would you want to be judged? All I ask you to do is bring back your verdict as you would want some jury to bring back a verdict for you.

The impropriety lies in asking the jury to decide the case on the basis of personal interest and bias rather than on the evidence and the jury instructions, and diverts attention from the legal principles governing their deliberations. *Stewart v. Cook*, 218 So. 2d 491 (Fla. 4th DCA 1969); *Bew v. Williams*, 373 So. 2d 446 (Fla. 3d DCA 1979).

**T. Various Damages Arguments**
1. In personal injury and wrongful death actions, it is inappropriate to argue to the jury that they should put a monetary value on the life of the plaintiff’s decedent. In *Fasani v. Kowalski*, 43 So. 3d 805, 810-811 (Fla. 3d DCA 2010), the court found the following argument about comparing Kowalski’s brain to a Picasso painting constituted improper argument:

> Now, members of the jury, you’ve got to understand that the brain is what separates people from animals. It’s what makes us human. I mean I’m sure you’ve all hear the expression, well, he may be old but he still has his mind or memories are what make us who we are. If that was a Picasso painting that was in the elevator and it got ripped, no one would argue with paying $80 million to replace it. Why is it any different when it’s a man’s brain?

In *Carnival Corp. v. Pajares*, 972 So. 2d 973 (Fla. 3d DCA 2007), in asking for an award for the plaintiff’s past and future suffering, counsel asked the jury to place a monetary value on the plaintiff’s life by comparing a $20 million Van Gogh painting, “created by one of the greatest artists in history,” to the plaintiff’s life, which “was created by the greatest creator there is.” The Third District found this argument to be highly improper. In *Public Health Trust of Dade County v. Geter*, 613 So. 2d 126 (Fla. 3d DCA 1993), the court reversed for a new trial on damages where plaintiff’s counsel argued that just as a monetary value is placed on a Boeing 747 or a scud missile, they should place a monetary value on the life of plaintiff’s decedent. In *Wilbur v. Hightower*, 778 So. 2d 381 (Fla. 4th DCA 2001), the court stated that the value of human life is not an element of damage under the law (i.e., the jury instructions) and, therefore, is not a proper subject for final argument, whereas the
value of the surviving spouse's loss of companionship and related pain and suffering is a proper measure of damages. In that case, the court found no impropriety in a reference to paintings being sold for $10 million, since it was not done in the context of a "value of the life" argument. But see Bocher v. Glass, 874 So. 2d 701 (Fla. 1st DCA 2004).

In City of Orlando v. Pineiro, 66 So. 3d 1064, 1070 (Fla. 5th DCA 2011), Pineiro’s counsel stated: “The question you may be asking is, how do I possibly put a value on the life of a loved one?” The court found that the City correctly objected on the ground that this was not the correct standard of damages. Id. (citing Fasani, 43 So. 3d at 805; Wilbur v. Hightower, 778 So. 2d 381, 383 (Fla. 4th DCA 2001)). The court noted that it was clearly error to ask a jury to place a monetary value on the life of a decedent because “‘the value of a human life is not an element of damages and is not the proper topic for closing argument.’” Id. (citing Wilbur, 778 So. 2d at 383 (quoting Russell v. Trento, 445 So. 2d 390, 392 (Fla. 3d DCA 1984)); see also Las Olas Holding Co. v. Demella, 228 So. 3d 97, 108 (Fla. 4th DCA 2017) (noting the impropriety of closing arguments asking the jury to place a monetary value on the life of a decedent because such is not an element of damages and not a proper topic for closing argument).

While it is not improper for counsel to make arguments illustrating that no amount of money would be sufficient to compensate for the loss of a loved one, counsel must be careful not to do so “in an overly dramatic manner such that it could
evoke the jury’s sympathy.” *Philip Morris, USA, Inc. v. Ledoux*, 2017 WL 4654965 (Fla. 3d DCA 2017) (condemning as improper plaintiff’s counsel’s suggestion that if twenty years ago, the surviving spouse had been offered $10 million dollars but would have had to watch his wife struggle and die, spouse would have said “thank you but keep the money,” and counsel’s statement that if surviving spouse could “wave a magic wand” and bring his wife back, he would take that option, but he did not have that choice because of what the defendants did and so, defendant’s should be held accountable).

2. It is improper for defense counsel to argue that plaintiff’s attorneys always ask for "50 times what they really do expect to get." *Donaldson v. Cenac*, 675 So. 2d 228 (Fla. 1st DCA 1996); see also *Hartford Accident and Indemnity Co. v. Ocha*, 472 So. 2d 1338 (Fla. 4th DCA 1985). Such arguments are improper not only because it addresses matters outside the evidence, but because it diverts the jury from the proper analysis of damages.

3. A plaintiff's counsel is entitled to make a "per diem" argument regarding intangible losses of his or her client. See *Perdue v. Watson*, 144 So. 2d 840 (Fla. 2d DCA 1962); *Rattner v. Arrington*, 111 So. 2d 82 (Fla. 3d DCA 1959); *Payne v. Alvarez*, 156 So. 2d 659 (Fla. 1st DCA 1963); see also *Simmonds v. Lowery*, 563 So. 2d 183, 184 (Fla. 4th DCA 1990); *Florida Supermarkets, Inc. v. White*, 667 So. 2d 848 (Fla. 3d DCA 1996).
U. Financial Resources of Party

It is improper to refer to a party's wealth or poverty in closing arguments or to contrast the relative financial status of the parties, because jurors have a tendency to favor the poor and if provoked by such an inflammatory argument, they are likely to apply the "deep pocket" theory of liability. Sossa By and Through Sossa v. Newman, 647 So. 2d 1018 (Fla. 4th DCA 1994); see also Hurtado v. Desouza, 166 So. 3d 831, 835 (Fla. 4th DCA 2015) (noting Florida’s longstanding rule that no references should be made to a party’s wealth or poverty, nor should the financial status of the parties be compared); Aarmada Protection Systems 2000, Inc. v. Yandell, 73 So. 3d 893, 899-900 (Fla. 4th DCA 2011) (improper remark about the financial disparity between the parties); Cascanet v. Allen, 83 So. 3d 759, 764 (Fla. 5th DCA 2011) (Regarding the closing argument issue, courts have consistently prohibited a party from currying sympathy from the jury for a favorable verdict and asking a jury to consider the economic status of either party or the potential impact a substantial verdict would have on a defendant.); Linzy v. Rayburn, 58 So. 3d 424 (Fla. 1st DCA 2011) (where defense counsel repeatedly stated that plaintiff would be solely responsible for any award of damages, defense counsel misled jury and improperly attempted to appeal to jury’s sympathy for plaintiff, a small business owner; trial court’s decision to grant a new trial was affirmed on appeal); Chin v. Caiaffa, 42 So. 3d 300, 308 (Fla. 3d DCA 2010) “[Caiaffa's] still sitting here in debt [with] over $80,000 in medical expenses” found to be an improper remark on wealth)
(emphasis in original); *Samuels v. Torres*, 29 So. 3d 1193, 1196 (Fla. 5th DCA 2010) (the law has long required that the rich man and the poor man stand before the jury as equals so that all parties receive a verdict unaffected by their economic status); *Hollenbeck v. Hooks*, 993 So. 2d 50 (Fla. 1st DCA 2008); *State Farm Mut. Auto Ins. v. Revuelta*, 901 So. 2d 377 (Fla. 3d DCA 2005). In *Padrino v. Resnick*, 615 So. 2d 698 (Fla. 3d DCA 1992), the court held that it was improper to ask the jury to consider the burden a verdict in favor of the plaintiff would have on the defendant. However, in *Hickling v. Moore*, 529 So. 2d 1270 (Fla. 4th DCA 1988), the court held that it was not impermissible for defense counsel to make a comment that the jury should consider the economic impact which a verdict in favor of the plaintiff would have on the defendant.

V. **Miscellaneous Improper Motives for Verdict**

It has been held to be improper for a defense lawyer to argue to the jury that they should consider the effect a medical malpractice verdict would have on the reputation of the defendant doctor. *Klose v. Coastal Emergency Services*, 673 So. 2d 81 (Fla. 4th DCA 1996). In *Goodman v. West Coast Brace & Limb, Inc.*, 580 So. 2d 193 (Fla. 2d DCA 1991), the court ruled it was prejudicial error for the trial court to allow defense counsel to argue that the bankruptcy trustee brought the personal injury action for the benefit of the injured party's creditors and not for the injured party.
W. **Sucking up to the Jury and Other Indecorous Behavior**

Comments which are designed to curry favor with the jury are improper. In *Kelley v. Mutnich*, 481 So. 2d 999 (Fla. 4th DCA 1986), the court ruled it was inappropriate for an attorney to say in closing argument that he liked the jury when he picked them and that he continued to like them. *See also, Bocher v. Glass, supra.*

In *Mercury Ins. Co. of Florida v. Moreta*, 957 So. 2d 1242, 1252 (Fla. 2d DCA 2007), the court held it was improper for counsel to tell the jury what his fourteen-year-old son would have thought about Mercury’s defense of the case. Counsel's son was not a witness who had testified at trial. If counsel's son had testified, his opinion about Mercury's litigation tactics would not have been admissible in evidence for a variety reasons. More important, irrelevant stories and information about counsel's family have no place in closing argument. The court concluded that opposing counsel's discussion of his son's hypothetical opinion was nothing more than a transparent attempt to curry favor with the jury and to further prejudice it against Mercury.

The use of vulgar language, despite its current acceptance socially, is also improper. In *Murphy v. International Robotic System, Inc.*, 766 So. 2d 1010 (Fla. 2000), the court noted that the repeated use of the phrase "B.S. detector" was improper. *See Lingle v. Dion*, 776 So. 2d 1073 (Fla. 4th DCA 2001) (use of term "B.S." inappropriate); *see also Al-Site Corp. v. Della Croce*, 647 So. 2d 296 (Fla. 3d DCA 1994) ("character attacks, name calling, and grossly inappropriate language" in
The use of the term "hired gun" to describe an expert was specifically condemned in *Budget Rent-A-Car Systems v. Jana*, 600 So. 2d 466 (Fla. 4th DCA 1992), *rev. den.*, 606 So. 2d 1165 (Fla. 1992); and *King v. Byrd*, 716 So. 2d 831 (Fla. 4th DCA 1998), *rev. den.*, 779 So. 2d 271 (Fla. 2000).

X. **Challenges and Retaliation**

There is nothing per se improper about one attorney challenging the other attorney to address matters within the evidence and issues of the case. However, challenges that require the opposing party to go outside the record or address issues that are irrelevant are not proper. In *Riggins v. Mariner Boat Works, Inc.*, 545 So. 2d 430 (Fla. 2d DCA 1989), defense counsel challenged plaintiff's attorney in closing argument to tell the jury why three witnesses were presented by deposition and were not available for trial. He claimed it was unfair to the jurors that the testimony was presented by deposition and that he could not subject the witnesses to cross-examination. The trial court overruled the plaintiff's objection to that challenge, and stated that he could respond to it in his rebuttal. The Second District found that the trial court's ruling aggravated the situation and that reversal was required, stating (545 So. 2d at 433):

> When defense counsel, however, challenged his opponent to explain the absence of the witnesses, he was challenging his opponent to either improperly testify in closing argument, or to allude to matters which his opponent knew were unsupported by the evidence. His
opponent was not ethically permitted to take either approach.

With respect to retaliation, courts have held that an attorney is entitled to retaliate within limits when counsel makes inappropriate argument. In *Owens-Corning Fiberglass Corp. v. McKenna*, 726 So. 2d 361 (Fla. 3d DCA 1999), defense counsel made comments in his opening argument that asbestos litigation was generating a living for lawyers and doctors, and that the litigation generated the plaintiff's disease. In plaintiff's objection, he stated that he thought it was "the most unethical opening statement I've ever heard." On appeal, defense counsel claimed that statement was improper and prejudicial. The Third District affirmed, stating that plaintiff's lawyer was simply defending himself and his client's case, and that his comment was an accurate description of defense counsel's tirade. Similarly, in *King v. Byrd*, 716 So. 2d 831 (Fla. 4th DCA 1998), the court rejected an argument that plaintiff's counsel had exceeded the bounds of argument by characterizing defense counsel's cross-examination of a witness as being unethical. The court found that defense counsel opened the door by the nature of his cross-examination. It should be noted that these situations are exceptions to the normal rule that a party may not challenge the opposing party's counsel in argument, since such conduct is not properly a part of the evidence in the case. It also needs to be emphasized that in retaliation, opposing counsel must limit their comments to the subject matter of the impropriety, since it is not a defense to improper comments that the other side's ethical violations were worse. See *Maercks v. Birclzanski*, 549 So. 2d 199,
200 n.1 (Fla. 3d DCA 1989) (citing Borden, Inc. v. Young, 479 So. 2d 850, 851-852 (Fla. 3d DCA 1985)). See also Scala v. State, 213 So. 3d 1085, 1088 (Fla. 3d DCA 2017) (rejecting prosecutor’s argument that improper comments he made denigrating defense counsel were “invited comment” or “fair reply” to defense counsel’s closing argument reference to the prosecutor as a “persecutor,” and stating that the proper response would have been a contemporaneous objection and request for curative instruction and admonishment of defense counsel).

Y. **Comments on the Trial Court’s Prior Rulings**

Aarmada Protection Systems 2000, Inc. v. Yandell, 73 So. 3d 893, 900 (Fla. 4th DCA 2011) (counsel made improper remark exploiting ruling on motion in limine).

Z. **Procedures after Murphy**

The most decisive pronouncement in recent times on closing argument came from the Florida Supreme Court in Murphy v. International Robotic Systems, 766 So. 2d 1010 (Fla. 2000); see also R.J. Reynolds Tobacco Co. v. Grossman, 211 So. 3d 221 (Fla. 4th DCA 2017) (reiterating standard set forth in Murphy); City of Miami v. Kinser, 187 So. 3d 921, 923 (Fla. 3d DCA 2016) (same); Carnival Corp. v. Jimenez, 112 So. 3d 513, 519 (Fla. 2d DCA 2013) (same); Santiago v. Abramovitz, 96 So. 3d 1091 (Fla. 4th DCA 2012) (same); City of Orlando v. Pineiro, 66 So. 3d 1064, 1068 (Fla. 5th DCA 2011) (same); Mercury Ins. Co. of Florida v. Moreta, 957 So. 2d 1242 (Fla. 2d DCA 2007) (same); USAA Cas. Ins. Co. v. Howell, 901 So. 2d
In *Murphy*, the Florida Supreme Court attempted to set forth procedures to organize the treatment of improper argument. In order to preserve the right to a new trial for improper argument, the opposing party must, of course, object. That has always been the rule. In some cases, however, the argument is perceived to be so toxic that a new trial may still be granted even if trial counsel failed to object. *Murphy* provides the standards. Absent an objection during the closing argument, in order to secure a new trial, the injured party must prove:

a. the challenged argument is improper;

b. that the argument is harmful;

c. that the argument is incurable; and

d. that the argument must have damaged the fairness of the trial so that the public's interest in justice requires a new trial.
TRIAL SKILLS: PRESERVING THE RECORD FOR APPEAL

By

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PRESERVATION OF ERROR FOR APPEAL

I. INTRODUCTION AND POLICY MATTERS

A. General Principles

1. Preservation of error is the process of presenting legal argument and obtaining a decision that may be subject to review.

2. Don’t hide your dissatisfaction. With limited exceptions, only issues raised and decided in the trial court may be appealed. City of Orlando v. Birmingham, 539 So. 2d 1133, 1134-35 (Fla. 1989). An issue or argument may not be raised for the first time on appeal. Dober v. Worrell, 401 So. 2d 1322, 1323-24 (Fla. 1981); see also Rosado v. DaimlerChrysler Fin. Servs. Trust, 112 So. 3d 1165, 1171 (Fla. 2013); Sunset Harbour Condo. Ass’n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005).

3. Fundamentals of a proper objection. There are 4 of them: objection must be timely, specific, decided by the court, and appear in the record.

   a. Timeliness: an objection must be made at or reasonably near the time that the objectionable decision or event occurs. This “contemporaneous objection rule” is based upon practical necessity and basic fairness in the operation of the judicial system. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Without such a rule, it is likely that the appellate courts would grind to a halt, inundated with appeals over issues the parties showed no concern about below and occupied with efforts to determine whether the errors newly complained of were harmful or harmless (in the absence of any discussion of them on the record, proffers, etc.). A contemporaneous objection places the trial judge on notice of a possible error and provides an opportunity to correct it in the proper context. Id.; see also Cemex Const. Materials v. Ross, 102 So. 3d 701, 702 (Fla. 5th DCA 2012) (explaining that had Cemex timely objected to unsworn testimony by counsel, trial court could have readily remedied the situation); Insko v. State, 969 So. 2d 992, 1001 (Fla. 2007).

   b. Specificity: when a party makes an objection, it must be specific enough to inform the judge of the alleged error and to preserve the issue for intelligent review on appeal. Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985) (refusing to review attempted manslaughter conviction because appellant argued different basis on appeal than he did at trial); see also Allen v. State, 137 So. 3d 946, 958 (Fla. 2013) (argument that a statement could be admitted as an admission of a party opponent not preserved by argument before trial court that the statement was admissible as a statement against interest); Aills v. Boemi, 29 So. 3d 1105, 1108-10 (Fla. 2010) (holding counsel did not preserve argument that post-operative negligence theory had not been pled or tried by consent where counsel objected at closing argument only to the sufficiency of the evidence to support that theory); Williams v. State, 957 So. 2d 595, 600 n.1 (Fla. 2007) (refusing to review challenged jury instruction because specific objection was not raised at trial); Jones v. State, 760 So. 2d 1057, 1058 (Fla. 4th DCA 2000) (affirming because general objection to improper closing argument did not preserve for appeal a claim that the argument included an improper personal attack); W.R. Grace & Co. v. Dougherty, 636 So. 2d 746, 749 (Fla. 2d DCA 1994) (holding hearsay challenge to admission of deposition was not
preserved for review where hearsay objection was not raised at trial); Palm Beach Aviation v. Kibildis, 423 So. 2d 1011, 1012 (Fla. 4th DCA 1982) (holding issue of admissibility of evidence was not preserved for appeal because grounds stated for the objection at trial differed from the ground argued on appeal); Williams v. State, 414 So. 2d 509, 511-12 (Fla. 1982) (“[M]agic words are not needed to make a proper objection” but counsel must be sufficiently specific to inform trial judge of alleged error and preserve the matter for appeal).

c. Decided by the court: not only must an objection be made to the trial court, but a ruling must be obtained (or indisputably pursued). See French v. Dep’t of Children and Families, 920 So. 2d 671, 676-77 (Fla. 5th DCA 2006) (declining to review the issue where hearing officer did not rule on party’s request for attorneys’ fees); Fleming v. People’s First Fin. Sav. & Loan Ass’n, 667 So. 2d 273, 274 (Fla. 1st DCA 1995) (ruling that there was nothing for the appellate court to review where trial court did not expressly rule on a motion for leave to amend a counterclaim and no implied denial of the motion appeared in the record).

d. In the record: it goes without saying – but will be said here, anyway – that a party seeking review of an evidentiary proceeding is responsible for providing a transcript so that the appellate court may actually review objections and the court’s decisions. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1980) (remanding for appellate court to affirm the trial court’s judgment where there was no record of the trial proceedings because the appellate court “cannot properly resolve the underlying factual issues so to conclude that the trial court’s judgment is not supported by the evidence or by an alternative theory”). The Fourth District Court of Appeal, in SPCA Wildlife Care Ctr. v. Abraham, declined to extend Applegate where the hearing at issue was non-evidentiary and the trial court raised an issue sua sponte. 75 So. 3d 1271, 1275 (Fla. 4th DCA 2011) (citing Seal Products v. Mansfield, 705 So. 2d 973, 975 (Fla. 3d DCA 1998) (stating that because summary judgment hearing consists of legal argument, not the taking of evidence, it is unnecessary to produce a transcript of the hearing for appellate review)); cf. Christman v. NMCR, Inc., 993 So. 2d 601, 602 (Fla. 4th DCA 2008) (concluding that appellate court departed from the essential requirements of law by failing to provide the petitioners an opportunity to ensure that the record on appeal was transmitted to the appellate court, where record on appeal was prepared but not transmitted to the appellate court because of fee issues). Lastly, in Erdman v. Bloch, the court remanded for the trial court to make findings of fact where the absence of a hearing transcript left it unclear whether the trial court considered certain factors in dismissing plaintiff’s complaint with prejudice. 65 So. 3d 62, 66 (Fla. 3d DCA 2011). The Erdman case shows that even the appellee can be hurt by the absence of a transcript. Therefore, for evidentiary hearings—and for other hearings where counsel may want to refer to statements made at the hearing or may need to show that the trial court followed a required procedure—a court reporter should be ordered. The conventional wisdom is that in almost every circumstance where an issue of substance will be discussed, a court reporter should be retained for the hearing.

4. Harmful vs. Harmless Error (No blood, no foul): Appellate court will not reverse for an error that has not materially affected the proceedings, even if the error was preserved. §59.041, Fla. Stat. (2014) (error must have resulted in a “miscarriage of justice”). Thus, preserving an error does not assure successful appellate review, even if the error is shown to have occurred. Although the standard to determine whether an error should be deemed
harmless was previously subject to some debate and fluidity, the Florida Supreme Court has recently announced the correct test for harmless error in civil trials. Special v. West Boca Med. Ctr., 160 So. 3d 1251, 1256 (Fla. 2014). “To test for harmless error, the beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict.” Id. Under this test, “the responsibility for proving harmless error remains with the beneficiary of the error, who must demonstrate that there is no reasonable possibility that the error contributed to the verdict. As the appellate court evaluates whether the beneficiary of the error has satisfied its burden, the court's obligation is to focus on the effect of the error on the trier-of-fact and avoid engaging in an analysis that looks only to the result in order to determine harmless error . . . . Unless the beneficiary of the error proves that there is no reasonable possibility that the error contributed to the verdict, the error is harmful.” Id. The standard set forth in Special does not apply retroactively. In re A.B., 186 So. 3d 544, 551 n.2 (Fla. 2d DCA 2015).

5. Invited Error Doctrine (the “Be careful what you ask for” rule): An invited error is the flip side of preserving an error for the record. Rather than objecting to a procedure or matter in the trial court, a party, by offering certain evidence or making a legal argument to the court which the court erroneously accepts or agrees with, has “invited” the trial court’s error. For that reason, the party facilitating the trial court’s error is barred from seeking appellate review if it later turns out that the strategy has somehow harmed that party’s interest. See Padovano, Florida Appellate Practice, § 8.9 (2008-09) (Invited error rule is “based on the premise that a party who has requested certain action in the lower tribunal waives the right to challenge the correctness of the action”); Harlan Bakeries, Inc. v. Snow, 884 So. 2d 336, 340 (Fla. 2d DCA 2004) (party who requests curative instruction may not appeal the giving of such instruction); Glabvo Dredging Contractors v. Brown, 374 So. 2d 607, 608 (Fla. 3d DCA 1979) (party who submits a proposed jury instruction which is adopted by the trial court may not appeal the giving of such instruction).

B. Exceptions to Objection Requirement: The Unwaivables

1. Subject Matter Jurisdiction. A powerless court’s words do not count (i.e., the power to adjudicate the pertinent class of cases). Questions of a court’s subject matter jurisdiction need not be raised during the proceedings below to entitle the party to raise the issue on appeal. 84 Lumber Co. v. Cooper, 656 So. 2d 1297, 1298 (Fla. 2d DCA 1994). The courts have reasoned that subject matter jurisdiction arises solely by virtue of law and cannot be waived by failure to raise the issue nor can it be conferred by agreement of the parties, error or inadvertence of the parties or their counsel, or by the exercise of power by the court. Florida Export Tobacco Co. v. Dept. of Revenue, 510 So. 2d 936, 943 (Fla. 1st DCA 1987); Stel-Den of America, Inc. v. Roof Structures, Inc., 438 So. 2d 882, 884 (Fla. 4th DCA 1983). Although some regard a subject matter jurisdiction question as just another breed of fundamental error, it is listed separately here because it is distinct from most other types of fundamental error.

2. Fundamental error. (If it was really, really bad, ignorance is about as good as vigilance.) If an error is one which “goes to the foundation of the case or goes to the merits of the action,” it may be considered “fundamental error.” Sanford v. Ruben, 237 So. 2d 134, 137 (Fla. 1970); see also §90.104(3), Fla. Stat. Such error need not be preserved in the record to be
pursued on appeal. It is often difficult to predict what error will be regarded as fundamental, and such error should never be presumed so as to knowingly forego objecting to preserve the record. Some examples of fundamental error are:

a. Improper closing argument (if the exacting elements established by the Supreme Court can be satisfied). Murphy v. Int’l Robotics Sys., 766 So. 2d 1010, 1030-32 (Fla. 2000).

b. Judgment entered against non-party. Beseau v. Bhalani, 904 So. 2d 641, 642 (Fla. 5th DCA 2005); Norville v. BellSouth Adver. & Publ’g Corp., 664 So. 2d 16, 17 (Fla. 3d DCA 1995).

c. Violation of due process may constitute fundamental error. Hooters of America v. Carolina Wings, Inc., 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995); Randall v. Griffin, 204 So. 3d 965, 967-68 (Fla. 5th DCA 2016); Verizon Bus. Network Services, Inc. ex rel. MCI Communications, Inc. v. Dep’t of Corr., 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008).

d. Judgment deciding issues not pled or litigated in the trial court are “voidable on appeal.” Dillingham v. Dillingham, 667 So. 2d 337, 338 (Fla. 1st DCA 1995).

e. Trial court’s reliance upon facts outside the pleadings in granting judgment on the pleadings has sometimes been found to constitute fundamental error. Jaramillo v. Dubow, 588 So. 2d 677, 677-78 (Fla. 3d DCA 1991).

f. It may be fundamental error for a jury to return an inconsistent verdict assessing more compensatory damages against an employer than against its employee, when employer was only vicariously liable for acts of the employee. Keyes Co. v. Sens, 382 So. 2d 1273, 1275 (Fla. 3d DCA 1980). But see O’Brien v. Florida Birth-Related Neurological Injury Compensation Ass’n, 710 So. 2d 51, 52-53 (Fla. 4th DCA 1998) (declining to find fundamental error, where, if an objection had been raised in the trial court, the error could have been corrected and a new trial would have been unnecessary).

g. Argument that statute is unconstitutional on its face has been found to be fundamental. Heggs v. State, 759 So. 2d 620, 624 (Fla. 2000); State v. Johnson, 616 So. 2d 1, 5 (Fla. 1993). But see Sanford v. Ruben, 237 So. 2d 134, 137 (Fla. 1970) (explaining that not every constitutional issue amounts to fundamental error and “[c]onstitutional issues, other than those constituting fundamental error, are waived unless they are timely raised.”); Cabana v. Mayo, 953 So. 2d 587, 588 (Fla. 4th DCA 2007).

h. Examples of errors not found to be fundamental: Burgess v. Mid-Florida Serv., 609 So. 2d 637, 638 (Fla. 4th DCA 1992) (jury’s failure to reduce future economic losses to present value); Wagner v. Nottingham Assocs., 464 So. 2d 166, 170 (Fla. 3d DCA 1985) (failure to state grounds for directed verdict); Papcun v. Piggy Bag Discount Souvenirs, Food and Gas Corp., 472 So. 2d 880, 881 (Fla. 5th DCA 1985) (erroneous verdict form).

i. It is important to recognize that there is no bright line distinction between fundamental and non-fundamental error and no way to be assured that the court will
accept for review a particular error which has not been preserved below. That same uncertainty
counsels lawyers to be aware of the kinds of errors that have sometimes been deemed
fundamental and to avoid creating such error that may permit the opponent to later appeal
without having preserved the record.

j. In federal court, the rule is the same, although it is usually referred
to as “plain error.” See Fed. R. Evid. 103(e).

3. Tipsy Coachman Doctrine (or the Inspector Clouseau rule). The Tipsy
Coachman Doctrine is a doctrine of appellate efficiency. The doctrine provides that if the trial
court reaches the right result but does so for the wrong reasons, the result will be upheld if there
is any proper basis which would support the judgment in the record. Dade Cnty. Sch. Bd. v.
Radio Station WQBA, 731 So. 2d 638, 644-645 (Fla. 1999). The Supreme Court has further
ruled that such an alternative basis for decision may be argued by the appellee even if that
argument was not expressly asserted in the lower court, so long as it is supported in the record.
Id. at 645. So, although the issue may not be asserted as a sword by an appellant, it may be
argued on appeal as a shield, without having preserved it, in defense of the trial court’s ruling. A
few cautions though: the First District Court of Appeal recently held that even though factual
findings were not required by the applicable law in that case, because the court could not tell
what the basis of the trial court’s ruling was, it would remand for specific findings to facilitate
“meaningful review.” See Featured Properties, LLC v. BLKY, LLC, 65 So. 3d 135, 138 (Fla. 1st
DCA 2011). The Court declined to employ the Tipsy Coachman rule and said it could not do so.
Id. Also, the Fourth District Court of Appeal recently ruled that if the alternative argument, if
accepted, would require a better result than appellees received at trial, the appellee must file a
cross-appeal to maintain the argument, such that the Tipsy Coachman argument apparently
cannot be utilized. See Miller v. Bank of New York Mellon, 189 So. 3d 359, 361-62 (Fla. 4th
DCA 2016) (even though appellee bank defended issue of notice requirement below and raised it
on appeal, because affirmance on that basis would permit an improved remedy, bank may only
raise issue by cross-appeal).

II. PRE-TRIAL PROCEEDINGS

The procedural requirements for preserving error during pre-trial proceedings are
consistent with the public policy requiring a contemporaneous objection to the opponent’s
conduct or notice to the trial court of the pleading or litigation activity that a party finds
improper. In each case, the objective is to afford the trial court an opportunity to rule upon the
issue before it is submitted to the appellate court.

A. Pleadings

1. Additional or Alternate Theories

a. An appellate court will not consider an alternative theory of
liability that was not included in the pleadings. Somatra Lines, Ltd. v. Rayne Int’l, Inc., 419 So.
2d 803, 804 (Fla. 3d DCA 1982); see also H,J,J. Inc. v. Party Productions, II, Inc., 712 So. 2d
441, 441 n.1 (Fla. 3d DCA 1998). The fundamental rule is that parties are bound by their
pleadings and may not alter their theories of recovery on appeal. United Bank of Pinellas v.
Farmer's Bank of Malone, 511 So. 2d 1078, 1080 (Fla. 1st DCA 1987); see also Hunt v. Corr. Corp. of Am., 38 So. 3d 173, 177 (Fla. 1st DCA 2010).

b. Filing an amended complaint abandons the original complaint such that, in the absence of saving language, the amended complaint supersedes the original. Stone's Throw Condo. Ass'n Inc. v. Sand Cove Apartments Inc., 749 So. 2d 520, 523 (Fla. 2d DCA 1999) (holding that amended complaint, in absence of saving language, superseded original complaint); see also Ruiz v. Aerorep Group Corp., 941 So. 2d 505, 507 (Fla. 3d DCA 2006); Arthur v. Hillsborough Cnty. Bd. of Criminal Justice, 588 So. 2d 236, 237 (Fla. 2d DCA 1991). Nevertheless, it is arguable that an appellate court may review an order of dismissal of an earlier pleading on later review of the final order. See Jennings v. Jennings, 392 So. 2d 962, 965 (Fla. 1st DCA 1980).

2. Affirmative Defenses

a. Affirmative defenses must be raised in the trial court to preserve them as issues in the appellate court. Kissimmee Utility Auth. v. Better Plastics, Inc., 526 So. 2d 46, 48 (Fla. 1988) (statute of limitations may not be argued for first time on appeal); Dober v. Worrell, 401 So. 2d 1322, 1323 (Fla. 1981) (holding that failure to raise an affirmative defense before a trial court considering a motion for summary judgment precludes raising that issue for the first time on appeal).

3. Insufficiency of a Pleading

a. A defendant must file a motion to dismiss a complaint for failure to state cause of action to preserve an appellate issue on the sufficiency of the allegations. Abrams v. Paul, 453 So. 2d 826, 827 (Fla. 1st DCA 1984); Johnston v. Hudlett, 32 So. 3d 700, 703 (Fla. 4th DCA 2010) (citing Abrams for the proposition that appellate courts will not consider failure to state a cause of action for the first time on appeal).

b. Similarly, when a litigant seeks to try a particular factual or legal theory which was not pled, the opposing party must object to trying that unpled issue or risk the court concluding that the matter was tried by consent. See Fla. R. Civ. P. 1.190(b); Fed. R. Civ. P. 15(b); Smith v. Smith, 971 So. 2d 191, 195 (Fla. 1st DCA 2007); Hemraj v. Hemraj, 620 So. 2d 1300, 1301 (Fla. 4th DCA 1993).

4. Damages Issues

a. Special Damages: special damages must be pled or it is error to award them. See Precision Tune Auto Care, Inc. v. Radcliffe, 804 So. 2d 1287, 1292 (Fla. 4th DCA 2002); Land Title of Central Florida v. Jimenez, 946 So. 2d 90, 93 (Fla. 5th DCA 2006); Fla. R. Civ. P. 1.120(g); Fed. R. Civ. P. 9(g).

b. Punitive Damages: Leave of court must be obtained before a punitive damages claim may be asserted. §768.72, Fla. Stat. (2014); Fla. R. Civ. P. 1.190(f).

(i) The statute does not mandate an evidentiary hearing per se, but the court must at least make an evidential inquiry or factual determinations. Simeon, Inc. v.
Cox, 671 So. 2d 158, 160 (Fla. 1996); Royal Caribbean Cruises, Ltd. v. Doe, 44 So. 3d 230, 233 (Fla. 3d DCA 2010); Strasser v. Yalamanchi, 677 So. 2d 22, 23 (Fla. 4th DCA 1996).

(ii) A party may not avoid the statute by presenting punitive damages evidence in the trial of the cause and then seeking to amend the complaint when the case goes to the jury. See Turner v. Fitzsimmons, 673 So. 2d 532, 535-36 (Fla. 1st DCA 1996).

(iii) Exception: there is no requirement to comply with section 768.72 before pleading punitive damages for violation of 42 U.S.C. § 1983 (Civil Rights claim). See Sanchez v. Degoria, 733 So. 2d 1103, 1107 (Fla. 4th DCA 1999). But see Sloan v. Toler, 778 So. 2d 1094, 1096 (Fla. 3d DCA 2001) (calling Sanchez into doubt, noting that the Supreme Court has made clear that §1983 does not preempt neutral state court procedural rules).

(iv) Although some earlier cases ruled otherwise, the current view of the Eleventh Circuit is that Florida Statutes section 768.72 does not apply in federal court, even to state law claims brought in federal court on diversity jurisdiction. See Cohen v. Office Depot, Inc., 184 F.3d 1292, 1299 (11th Cir. 1999) opinion vacated in part on other grounds, 204 F.3d 1069 (11th Cir. 2000). The basis for the Cohen decision was that the Florida Statute conflicts with a federal rule of civil procedure, Rule 8(a)(3), which allows a plaintiff to include a request for punitive damages in the initial complaint. Id.; see also Vacation Break USA, Inc. v. Mktg. Response Group & Laser Co., Inc., 189 F.R.D. 474, 478-79 (M.D. Fla. 1999) (discussing the history of the issue and the resolution in Cohen).

5. Attorneys’ Fees

a. A claim for attorneys’ fees must be pled, but you can say why you deserve them later. Failure to state the specific statutory or contractual basis will not result in waiver of the claim. See Caufield v. Cantele, 837 So. 2d 371, 377-78 (Fla. 2002).

(i) In federal court, there is a split of authority as to whether a request for attorneys’ fees must be pled as an item of special damages under Rule 9(g). See Fed. R. Civ. P. 9(g). Although the Eleventh Circuit has yet to address the issue, the majority of circuits that have considered it have held that attorneys’ fees are special damages that must be specifically stated in the pleadings pursuant to Rule 9(g). See, e.g., United Indus., Inc. v. Simon Hartley, Ltd., 91 F.3d 762, 764-65 (5th Cir. 1996); In re Am. Cas. Co., 851 F.2d 794, 802 (6th Cir. 1988); Atl. Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 716 n.4 (4th Cir. 1983); Maidmore Realty Co. v. Maidmore Realty Co., 474 F.2d 840, 843 (3d Cir. 1973); W. Cas. & Sur. Co. v. Sw. Bell Tel. Co., 396 F.2d 351, 356 (8th Cir. 1968). Unless the Eleventh Circuit holds otherwise, the advisable course is to plead them. When attorneys’ fees are an element of compensatory damages in a case, they must be pled under Rule 9(g). See 5A Fed. Prac. Proc. Civ. 3d § 1310.

b. When it’s time to seek and explain the basis for the fees, you must strictly meet the deadline. A party seeking attorney’s fees or costs, or both, must serve a motion no later than 30 days after filing of the judgment or the service of a notice of voluntary dismissal. Fla. R. Civ. P. 1.525. In meeting that deadline, it is acceptable if the motion is filed before the entry of final judgment. Barco v. School Board of Pinellas County, 975 So. 2d 1116, 1124 (Fla.
2008) (resolving conflict among the districts and determining that a motion filed before the entry of judgment is timely because it was filed no later than 30 days after judgment). The procedural rule was specifically amended in 2006 in an effort to clarify that the rule simply sets an outside deadline for the filing of the motion. See Fla. R. Civ. P. 1.525. Note, however, that while extensions of the 30-day period for filing a motion for costs or attorneys’ fees may be sought, they are not presumed. See Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 598-99 (Fla. 2006) (explaining that a trial court’s reservation of jurisdiction to consider attorneys’ fees does not automatically afford litigants an extension beyond the 30-day deadline to file their motion). In Saia, the Supreme Court added that although a reservation of jurisdiction does not extend the time for filing a motion for fees, the parties may expressly move for an enlargement of time to file the motion under Fla. R. Civ. P. 1.090(b). Id. at 600 n.3. If a final judgment specifically awards fees or costs but reserves jurisdiction to determine the amount of such an award, the timeliness aspect of Rule 1.525 no longer applies. Amerus Life Ins. Co. v. Lait, 2 So. 3d 203, 207-08 (Fla. 2009); see also ASAP Servs., LLC v. SA Fla. Intern., LLC, 122 So. 3d 965, 966-67 (Fla. 3d DCA 2013) (declining to create additional carve out to rule 1.525’s “bright-line” time requirement, concluding that a pending post-judgment motion to set aside a judgment does not toll the thirty-day requirement).

b. Note that in an original proceeding in appellate court, such as a petition for writ of certiorari, a request for attorneys’ fees is governed by Fla. R. App. P. 9.300, the appellate motions rule. Advanced Chiropractic and Rehab. Ctr. Corp. v. United Auto. Ins. Co., 140 So. 3d 529, 536 (Fla. 2014). “This rule does not specify any time period in which motions must be filed,” so “motions simply must be timely to provide the relief sought.” Id. (holding that motion for attorney’s fees filed six days after the district court granted the petition for writ of certiorari was timely).

B. Motion Practice

1. A motion to transfer venue for convenience of the parties based upon Florida Statutes section 47.122 must be accompanied by sworn proof. See Platt v. Health Mgmt. Assoc., Inc., 897 So. 2d 556, 557 (Fla. 2d DCA 2005) (reaffirming that a motion to transfer venue for convenience of the parties based upon section 47.122 must be accompanied by sworn proof).

2. A motion to strike a pleading as a sham must be verified, must set forth fully the facts on which the movant relies, may be supported by an affidavit, and must be considered by the court after an evidentiary hearing. Fla. R. Civ. P. 1.150.

a. There is no analog to this rule in federal court. Therefore, the allegation that a pleading is essentially a sham could properly be the subject of a Rule 12 motion to strike or, later, a motion for summary judgment. See Fed. R. Civ. P. 12(f).

3. Summary judgment

a. A litigant must object on the record or file a motion to strike to preserve error as to an affidavit offered by party in support of summary judgment. Scott v. NCNB Nat’l Bank of Florida, 489 So. 2d 221, 223 (Fla. 2d DCA 1986); see also West Town
Plaza Assocs., Ltd. v. Pines Properties, Inc., 600 So. 2d 477, 479 (Fla. 4th DCA 1992). Remember to order a court reporter.

b. To preserve the record on the defense of a summary judgment or to make a record when moving for summary judgment, a party must be sure that all relevant evidence is *filed* and authenticated, as necessary. See Fla. R. Civ. P. Rule 1.510(c); Fed. R. Civ. P. 56.

c. Merely attaching an unsworn document to a motion for summary judgment does not satisfy the procedural requirements of Rule 1.510(c). See First Union Nat’l Bank v. Ruiz, 785 So. 2d 589, 592 (Fla. 5th DCA 2001) (holding that trial court did not err in denying defendant’s procedurally deficient motion for summary judgment or in submitting plaintiff’s claim to jury when evidentiary deficiency was not cured at trial).

C. Discovery

1. Objection to discovery based on a claim of privilege may not be asserted for the first time in the appellate court. See Leonhardt v. Masters, 679 So. 2d 73, 74 (Fla. 4th DCA 1996) (trade secrets privilege).

2. Failure to provide a privilege log as required by Rule 1.280(b)(6) may waive any claim that documents are protected by the attorney-client privilege or work product doctrine. See Century Bus. Credit Corp. v. Fitness Innovations and Techs., Inc., 906 So. 2d 1156, 1156-57 (Fla. 4th DCA 2005) (affirming waiver of privilege where privilege log was months late and “completely inadequate”); Nationwide Mut. Fire Ins. Co. v. Hess, 814 So. 2d 1240, 1242 (Fla. 5th DCA 2002); TIG Ins. Corp. v. Johnson, 799 So. 2d 339, 341 (Fla. 4th DCA 2001) (addressing what information should be included in the privilege log). But see DLJ Mortgage Capital, Inc. v. Fox, 112 So. 3d 644, 645 (Fla. 4th DCA 2013) (reversing finding of waiver for failure to file a log for categorical assertions of privilege); Bankers Sec. Ins. Co. v. Symons, 889 So. 2d 93, 95 (Fla. 5th DCA 2004) (rejecting argument that insurance company waived privilege for failure to provide privilege log at the time it objected to discovery where company submitted privilege log well before hearing on motion to compel); Scottsdale Ins. Co. v. Camara de Comercio Latino-Americana de los Estados Unidos, Inc., 813 So. 2d 250, 252 (Fla. 3d DCA 2002) (rejecting argument that attorney-client and work product privileges were waived by insurer’s failure to prepare a privilege log in absence of argument to such effect in the trial court).

a. In federal court, waiver may result under Fed. R. Civ. P. 26(b)(5). See Advisory Committee Notes re 1993 Amendment.

3. Independent Medical Examinations (IME) under Fla. R. Civ. P. 1.360: Although discovery issues predominantly conform to the general principles of objections, some rulings may seem to stray somewhat and create uncertainty about what preservation steps are sufficient to protect the record. Thus, in areas of trial court discretion, where discovery has been denied, cautious counsel should request the discovery more than one time and repeat the request each time the case is reset for trial to minimize the likelihood of the appellate court finding waiver. See Gulf Industries, Inc. v. Nair, 953 So. 2d 590, 596-97 (Fla. 4th DCA 2007). In Gulf
Industries, defense counsel sought an IME because an expert witness upon whom defense counsel previously sought to rely contradicted his earlier report in deposition testimony. Defense counsel sought (and was refused) the IME five weeks before the first trial setting and, two months later, again sought and was refused an IME. Thereafter, the court denied a motion for rehearing on the issue. However, because the trial did not begin until six months later and defense counsel never again requested an IME, the appellate court ruled that the defense waived its right to appeal the denial of the IME.

III. JURY SELECTION

A. Timing of Objection: To preserve any error by the trial court in jury selection, the objection must be made at trial to the jury as finally composed. Ter Kuerst v. Miami Elevator, 486 So. 2d 547, 550 (Fla. 1986). Accepting the panel without objection will waive the error. Courts have found waivers of the following errors where the appellant failed to renew the objection before the jury panel was sworn:


3. Failure to excuse certain jurors for cause and improper restriction of the scope of voir dire questioning. Wallace v. Holiday Isle Resort & Marina, Inc., 706 So. 2d 346, 347 (Fla. 3d DCA 1998); cf. Longshore v. Fronrath Chevrolet, Inc., 527 So. 2d 922, 925 (Fla. 4th DCA 1988) (concluding that counsel preserved error to denial of challenge for cause, even though he did not move for additional peremptory challenges, where he stated that he would like to exercise additional peremptory challenges, but could not).

4. Refusal to permit backstrike after alternates chosen. Gonzalez v. Martinez, 897 So. 2d 525, 527-28 (Fla. 3d DCA 2005) (on rehearing) (concluding that plaintiff’s counsel’s identification of juror he would have stricken was equivocal and therefore did not properly preserve the issue).

5. Providing insufficient number of venire members to allow challenges for cause after all peremptory challenges were exhausted. See Hutchinson Island Club Condo. Ass’n v. Degraw, 774 So. 2d 37, 39 (Fla. 4th DCA 2001).

B. Challenges for Cause

1. When a challenge for cause is denied:

   a. To preserve error, all peremptory challenges must have been exhausted and a request made for an additional peremptory challenge. Sebring Assocs., Ltd. v. Aumann, 673 So. 2d 875, 877 (Fla. 2d DCA 1996).

   b. Complaining party must indicate that the additional peremptory challenge is necessary because an earlier peremptory challenge was used to strike a juror as to
whom a challenge for cause was denied. Hammond v. State, 727 So. 2d 979, 980 (Fla. 2d DCA 1999), rev. dismissed, 752 So. 2d 559 (Fla. 2000); Trotter v. State, 576 So. 2d 691, 692-93 (Fla. 1990) (aggrieved party must show that he was forced to accept the challenged juror). But see Hernandez v. State, 763 So. 2d 1144, 1145 (Fla. 4th DCA 2000) (disagreeing with Hammond and ruling it is not necessary for counsel to remind the court of the denied challenge for cause when requesting additional peremptory challenges).

c. The record must reflect the basis for the challenge for cause.

d. Objection must be renewed before the panel is sworn. Franqui v. State, 699 So. 2d 1332, 1334 (Fla. 1997); see also Zack v. State, 911 So. 2d 1190, 1204 (Fla. 2005).

2. Granting of a challenge for cause: must object to preserve error.

C. Discrimination-based Peremptory Challenges

Preserving the appellate record for review of discrimination-based peremptory challenges . . . is a notable accomplishment. The process has numerous potential pitfalls.

1. Discriminatory exercise of peremptory challenges is unconstitutional under both the United States and the Florida Constitutions. Batson v. Kentucky, 476 U.S. 79, 89 (1986); Nowell v. State, 998 So. 2d 597, 602 (Fla. 2008) (“Potential jurors have an equal protection right under both state and federal constitutions ‘to jury selection procedures free from stereotypical presumptions that reflect and reinforce patterns of historical discrimination.’”).

2. Prohibition against discriminatory use of peremptory challenges also applies in civil cases. City of Miami v. Cornett, 463 So. 2d 399, 402 (Fla. 3d DCA), rev. dismissed, 469 So. 2d 748 (Fla. 1985).

3. A peremptory challenge is discriminatory if the following elements are present:

a. The challenged juror must be a member of a distinctive group.

The rule against discriminatory use of peremptory challenges has been applied to the following groups:

(i) Race. State v. Neil, 457 So. 2d 481 (Fla. 1984), receded from on other grounds by State v. Johans, 613 So. 2d 1319, 1321 (Fla. 1993). Note that a peremptory challenge against a white venire member may be found to be discriminatory. Curtis v. State, 685 So. 2d 1234, 1237 (Fla. 1996) (explaining guidelines apply to each venire person who is a member of a distinct racial group).


(iii) Gender. Abshire v. State, 642 So. 2d 542, 544 (Fla. 1994).

(v) It is not unlawful to base a peremptory challenge on the age of the juror. *Saffold v. State*, 911 So. 2d 255, 256 (Fla. 3d DCA 2005).

b. To be objectionable, the juror’s membership in the distinctive group must be the basis for the challenge. *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996); see also *Betancourt v. State*, 650 So. 2d 1021, 1023 (Fla. 3d DCA) (trial court erroneously refused to permit Hispanic defendant to challenge Hispanic juror, reasoning that objectionable challenges usually involve a prospective juror that belongs to a group whose “general characteristics would seem to be adverse to the position of the challenger”), *rev. denied*, 659 So. 2d 272 (Fla. 1995).

4. Procedures to be applied by the court and parties for an objection based on discriminatory use of a peremptory challenge:

a. Step 1 (opponent of the peremptory challenge). Must ask court to make the “Neil inquiry”: make a timely objection, show that the venire person is a member of a distinctive group, and request that the court ask the striking party its reason for the strike. *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996). If the court declines to conduct the inquiry and then overrules the objection, the appellate record is preserved. *State v. Johans*, 613 So. 2d 1319, 1321 (Fla. 1993).

(i) The objecting party must establish on the record that the challenged juror is a member of a distinct group. *Davis v. State*, 691 So. 2d 1180, 1182 (Fla. 3d DCA 1997). It is not necessary at this point to show that a challenge is being used impermissibly. *State v. Holiday*, 682 So. 2d 1092, 1094 (Fla. 1996). Any doubt as to whether the objecting party has met its initial burden should be resolved in favor of making the inquiry. *Id.*, at 1093.

(ii) The objecting party need not show a pattern of discrimination to trigger the inquiry. *Pickett v. State*, 922 So. 2d 987, 993 (Fla. 3d DCA 2005). However, if there is a pattern of discrimination, the objection is timely so long as it is made before the panel is sworn. *Fernandez v. State*, 746 So. 2d 516, 517 (Fla. 3d DCA 1999); *Murphy v. State*, 708 So. 2d 612, 614 (Fla. 1st DCA 1998) (objection was timely even though not made until after state peremptorily challenged every African-American on the panel).

(iii) Specific challenges to the sufficiency of the objection must be made to the trial court. *Smith v. State*, 662 So. 2d 1336, 1337 n.3 (Fla. 2d DCA 1995). Failure to challenge the sufficiency on a specific ground will waive any argument on appeal as to that ground. *Stanford v. State*, 706 So. 2d 900, 901 (Fla. 1st DCA 1998) (defendant failed to argue to trial court that state had not actually objected and requested Neil inquiry).

b. Step 2 (proponent of the strike). The burden of production shifts to the proponent of the strike to come forward with a non-discriminatory explanation. See *Melbourne*, 679 So. 2d at 764.

(ii) The stated reason must have some basis in fact and be supported by the record. See, e.g., *Dorsey v. State*, 868 So. 2d 1192, 1202 (Fla. 2003) (prospective juror’s lack of interest was not an appropriate reason to strike juror where such observation was contradicted by opposing counsel and not confirmed by the trial court); *Melbourne*, 679 So. 2d at 764, n.9 (the explanation need not be non-racial and reasonable, but must be truly non-racial); *Wright v. State*, 586 So. 2d 1024, 1029 (Fla. 1991) (prospective juror’s bare looks and gestures are not acceptable reasons to strike unless observed by the trial court and confirmed by the judge on the record); *Georges v. State*, 723 So. 2d 399, 400 (Fla. 4th DCA 1999) (trial court erred in determining that the state’s exercise of a peremptory challenge against a black juror was nondiscriminatory when nothing in the record supported the prosecutor’s stated basis for excusing the juror). But see *Bowden v. State*, 787 So. 2d 185, 190 (Fla. 1st DCA 2001) (affirming peremptory strike against prospective juror based on his body language, although trial judge did not note such body language on the record); *English v. State*, 740 So. 2d 589, 589 (Fla. 3d DCA 1999) (defendant should have been allowed to exercise peremptory challenge against prospective juror who rolled his eyes, even though gesture was not observed by the trial court, where court did not deny that the conduct occurred).

(iii) Some explanations that have been held not to be facially neutral: Attorney’s statement, “I don’t like him.” *Franqui v. State*, 699 So. 2d 1332, 1335 (Fla. 1997); a party’s wish to seat other jurors further down the panel, *Henry v. State*, 724 So. 2d 657, 658 (Fla. 2d DCA 1999); lawyer’s “bad feeling” about prospective juror, *Bullock v. State*, 670 So. 2d 1171, 1172 (Fla. 3d DCA 1996).

(iv) Some explanations that have been held to be facially neutral: juror’s disagreement with the principal legal theory discussed during voir dire, *Soto v. State*, 751 So. 2d 633, 637 (Fla. 4th DCA 1999); juror’s inability to comprehend the proceedings, *Burris v. State*, 748 So. 2d 332, 334 (Fla. 4th DCA), rev. denied, 767 So. 2d 454 (Fla. 2000); juror’s inability to read, when case involved written information on charts and complicated scientific evidence, *Johnson v. State*, 717 So. 2d 1057, 1062 (Fla. 1st DCA 1998), approved, 761 So. 2d 318 (Fla. 2000); juror’s inability to understand English, *Dilorenzo v. State*, 711 So. 2d 1362, 1364 (Fla. 4th DCA 1998); juror’s expression that he was a strong family man and that seeing defendant’s family in courtroom could affect his decision on recommendation of death penalty, *Hudson v. State*, 708 So. 2d 256, 261-62 (Fla. 1998); juror’s inattentiveness and unresponsiveness, *Dean v. State*, 703 So. 2d 1180, 1182 (Fla. 3d DCA 1997); juror’s status as recovering alcoholic, *Plaza v. State*, 699 So. 2d 289, 290-91 (Fla. 3d DCA 1997), rev. dismissed, 717 So. 2d 58 (Fla. 1998); juror’s youth and absence of life experience, *Saffold v. State*, 911 So. 2d 255, 256 (Fla. 3d DCA 2005). But see *Nowell v. State*, 998 So. 2d 597, 604 (Fla. 2008) (trial court improperly allowed peremptory strike of Hispanic juror because of his youth when young white juror was not challenged).
c. Step 3 (court). If the explanation is not facially neutral, the inquiry is over and the strike will be denied. Melbourne, 679 So. 2d at 764 n.7. If the explanation is facially neutral, and if the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. Id. at 764.

(i) If the explanation appears to be pretextual, the trial court must conduct a more penetrating inquiry. See Haile v. State, 672 So. 2d 555, 556 (Fla. 2d DCA 1996). Purely subjective reasons are not per se pretextual but are highly suspect and must be closely scrutinized. See Washington v. State, 773 So. 2d 1202, 1204 (Fla. 3d DCA 2000). When the trial judge has made the same observations about the juror and can confirm the genuineness of counsel’s reasons, the strike should be allowed. Id. If the judge was attentive but did not observe the alleged behavior, the strike should be denied. Id.

(ii) Although the focus is not on the reasonableness of the explanation but rather its genuineness, reasonableness is a factor the court may consider in assessing genuineness. Melbourne, 679 So. 2d at 764 n.9. In assessing genuineness of the reason, the court should evaluate the credibility of the person offering the explanation as well as the credibility of the asserted reasons. Johnson v. State, 717 So. 2d 1057, 1062 (Fla. 1st DCA 1998).

(iii) Argument that the stated reason is pretextual will be waived unless presented to the trial court. See Heggan v. State, 745 So. 2d 1066, 1069 (Fla. 3d DCA 1999). The argument must also be supported by the record. Davis v. State, 691 So. 2d 1180, 1182 (Fla. 3d DCA 1997) (record failed to show that disparate treatment of jurors was based on racial grounds); see also Hoskins v. State, 965 So. 2d 1, 11-12 (Fla. 2007) cert. denied, 1285 S. Ct. 1112 (2008) (record failed to show that prosecutor singled out prospective juror).

(iv) The burden of persuasion always remains on the opponent of the strike to prove purposeful discrimination. See Melbourne, 679 So. 2d at 764.

(v) Because peremptory challenges are presumed to be exercised in a nondiscriminatory manner, the trial court’s decision turns primarily on an assessment of credibility; thus, the court’s decision will be affirmed on appeal so long as the correct inquiry is made, unless the ultimate ruling is clearly erroneous. See Melbourne, 679 So. 2d at 764-65; see also Allstate Ins. Co. v. Thornton, 781 So. 2d 416, 419 (Fla. 4th DCA 2001) (court’s ruling was clear error where based on evaluation of the prospective juror’s credibility rather than assessment of the attorney’s credibility); Michelin North America, Inc. v. Lovett, 731 So. 2d 736, 742 (Fla. 4th DCA), rev. denied, 751 So. 2d 51 (Fla. 1999) (court committed clear error where the record reflected that the court’s assessment of credibility was tainted by counsel’s inaccurate recollection of jurors’ responses).

5. Argument with respect to discriminatory use of peremptory challenges as well as nondiscriminatory explanation for the challenge must be made during voir dire to preserve the issues. Hall v. Daee, 602 So. 2d 512, 515-16 (Fla. 1992).
6. If the court sustains the objection, the court should either seat the improperly challenged juror or dismiss the entire jury venire and re-start voir dire with a new venire. See Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993).

7. Further steps must be taken to preserve any error as to the court’s ruling:
   a. Renew the objection before the panel is sworn. See Joiner, 618 So. 2d at 176; see also Carratelli v. State, 961 So. 2d 312, 318 (Fla. 2007); and
   b. Either move to strike the panel (although this is not the preferred method) or accept the jury subject to the earlier objection. See Joiner, 618 So. 2d at 176; see also Suggs v. State, 620 So. 2d 1231, 1232 (Fla. 1993).

D. Juror Misconduct

1. To determine whether concealment by a juror during voir dire warrants a new trial, a court must apply the three-part test of De La Rosa v. Zequeira, 659 So. 2d 239, 241 ( Fla. 1995):
   a. The complaining party must establish that the information is relevant and material to jury service in the case.
      (i) Materiality is based on the facts and circumstances of each case. Garnett v. McClellan, 767 So. 2d 1229, 1230 (Fla. 5th DCA 2000). Although there is no bright-line test, factors bearing on materiality include remoteness in time, the character and extensiveness of the juror’s litigation experience, and the juror’s posture in concealed litigation. Roberts v. Tejada, 814 So. 2d 334, 340-43 (Fla. 2002); Palm Beach Cnty. Health Dep’t v. Wilson, 944 So. 2d 428, 430 (Fla. 4th DCA 2006).
      (ii) Nondisclosure is considered material if it is so substantial and important that if the facts were known, the party may have been influenced to peremptorily challenge the juror. See Garnett, 767 So. 2d at 1230.
      (a) Undisclosed information (such as a juror’s accident history) may be deemed immaterial if peremptory challenges were not exercised against other jurors who did reveal the same type of information. See Garnett, 767 So. 2d at 1231.
      (iii) Prejudice is not a factor in determining materiality. See State Farm Fire and Cas. Co. v. Levine, 837 So. 2d 363, 365 (Fla. 2002).
   b. The juror must have provided false information during questioning. Active concealment of information by the juror is not required. See Chester v. State, 737 So. 2d 557, 558 (Fla. 3d DCA 1999) (“A juror’s false response during voir dire, albeit unintentional, which results in the nondisclosure of material information relevant to jury service in that case justifies a new trial as a matter of law.”).
c. The failure to disclose the information must not have been attributable to the complaining party’s lack of diligence. The court will not reward poor questioning. Garnett, 767 So. 2d at 1231.

(i) The due diligence test requires that counsel provide a sufficient explanation of the type of information which potential jurors are being asked to disclose. Thus, the questions must have reasonably called for the undisclosed information. Roberts v. Tejada, 814 So. 2d 334, 343-44 (Fla. 2002). For examples of the types of questions deemed sufficient to satisfy the due diligence requirement, see Davis v. Cohen, 816 So. 2d 671, 671-75 (Fla. 3d DCA 2002).

(ii) Failure to inquire further into responses to generalized questions of prior involvement in “lawsuits” shows lack of diligence. Silva v. Lazar, 766 So. 2d 341, 343 (Fla. 4th DCA 2000), disapproved of on other grounds by, Roberts v. Tejada, 814 So. 2d at 344 n.4. However, counsel need not consult the public records at the time of jury selection. Roberts v. Tejada, 814 So. 2d at 343-44.

(iii) When a juror’s response is ambiguous, failure by counsel to clarify the ambiguity is a lack of diligence. Tran v. Smith, 823 So. 2d 210, 213 (Fla. 5th DCA 2002); Birch v. Albert, 761 So. 2d 355, 358 (Fla. 3d DCA 2000).

2. Failure to establish each element of the three-part test will waive any issue as to juror concealment. See Mazzouccolo v. Gardner, McLain & Perlman, M.D., P.A., 714 So. 2d 534, 536 (Fla. 4th DCA 1998).

3. Once a party shows that a juror concealed information during questioning that is relevant and material to serving on the jury in that case and that the non-disclosure is not caused by the party’s own lack of diligence, inherent prejudice to the party is presumed and the party is entitled to a new trial. Young v. State, 720 So. 2d 1101, 1103-04 (Fla. 1st DCA 1998).

IV. EVIDENTIARY OBJECTIONS

Although the procedural requirements for preserving evidentiary objections continue to pursue the public policy requiring a contemporaneous objection and a meaningful opportunity for the trial court to rule on the issue, be aware that there is a recent change in the law relating to the impact of a definitive pre-trial evidentiary ruling (to be addressed in this section).

A. Exclusionary Rulings; Offers of Proof (Tell what you were going to say)

1. Except where the substance of the evidence is apparent from the context of the record, excluded evidence must be proffered at trial to preserve the record for appellate review. See §90.104(1)(b), Fla. Stat.; Fla. R. Civ. P. 1.450(a); Fed. R. Evid. 103(a)(2); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 174, 109 S. Ct. 439, 452, 102 L. Ed. 2d 445 (1988); Roberts v. Halloway, 581 So. 2d 619, 621 (Fla. 4th DCA 1991). The substance of the evidence must be made sufficiently clear to the court to have a fair opportunity to rule. See Johnson v. State, 494 So. 2d 311, 312-13 (Fla. 1st DCA 1986) (proposed testimony about a fight and argument about prior altercations being relevant to self-defense without explaining that the witness would have testified to circumstances showing his need to self-defend was an
insufficient proffer so that challenge to exclusionary ruling was not preserved). Documents should also be proffered, at least to ensure that the excluded document is marked as an exhibit for identification only. See Brantley v. Snapper Power Equip., 665 So. 2d 241, 243 (Fla. 3d DCA 1996). A proffer allows the reviewing court to determine what was excluded and whether the exclusion was prejudicial. Musachia v. Terry, 140 So. 2d 605, 608 (Fla. 3d DCA 1962). The proffer of excluded evidence must be timely enough to give the trial judge a meaningful opportunity to rule on the evidence when it is offered. Diaz v. Rodriguez, 384 So. 2d 906, 907 (Fla. 3d DCA 1980) (proffer made at time of post-trial motions was untimely). The rule applies identically in jury trials and non-jury trials. In a non-jury trial, even though the judge is also the finder of fact, the judge is presumed to disregard improper evidence heard during the trial, including during proffers. See Petion v. State of Florida, 48 So. 3d 726, 730 (Fla. 2010). The clerk must keep a record of the excluded evidence. Brantley, 665 So. 2d at 243.

a. The proffer should ordinarily be made outside the presence of the jury (noting that the Florida rule of civil procedure says the court “may” require the offer to be made out of the hearing of the jury while the corresponding federal rule uses the more urgent – and appropriate – term “must”). Fla. R. Civ. P. 1.450; §90.104(2), Fla. Stat.; Fed. R. Evid. 103(d). A proffer may be made by the testimony of the pertinent witness or by counsel’s written or oral statement on the record. Fla. R. Civ. P. 1.450(a).

b. When a proffer is made outside the presence of the jury, the witness should be permitted to answer the questions asked. See Musachia, 140 So. 2d at 608. If the trial judge prevents or shortens a proffer, prejudice will be presumed. Thunderbird Drive-In Theatre, Inc. v. Reed, 571 So. 2d 1341, 1345 (Fla. 4th DCA 1990), receded from on other grounds by, Love v. Garcia, 611 So. 2d 1270 (Fla. 4th DCA 1993); see also Davis v. Pfund, 479 So. 2d 230, 231 (Fla. 3d DCA 1985), rev. denied, 491 So. 2d 280 (Fla. 1986); cf. Florida E. Coast Ry. Co. v. Morgan, 213 So. 2d 632, 634 (Fla. 3d DCA 1968) (trial judge’s refusal to permit proffer was not error where the substance of the proposed testimony was in the record and was cumulative to other evidence).

c. A ruling must be obtained from the court on admissibility after the proffer is made to safely preserve the record for appellate review. See Smith v. State, 217 So. 2d 359, 360 (Fla. 3d DCA 1968), cert. denied, 225 So. 2d 534 (Fla. 1969).

d. Caution: Recent Rule Change. Historically, a proffer has been required after evidence is excluded by an order granting a motion in limine. See, e.g., Adamo v. Manatee Condo., Inc., 548 So. 2d 287, 288 (Fla. 3d DCA 1989). However, in 2003, the Florida Evidence Code was amended to add the following language to section 90.104(1)(b):

If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

This new section was formally approved by the Florida Supreme Court in 2005. See In re Amendments to the Florida Evidence Code - Section 90.104, 914 So. 2d 940, 941 (Fla. 2005). Although only time will tell how the addition to section 90.104 will affect future decisions on
preservation of the record where a motion in limine was heard and decided, it continues to be the safer course to make a proffer and renew it in context at trial after the court excludes evidence by granting a motion in limine. In federal court, the rule is the same and is found in Fed. R. Evid. 103(b).

(i) An additional caution regarding the new addition to section 90.104 is that it does not affect counsel’s responsibility to object if a party violates an order granting a motion in limine by offering the proscribed evidence. As always, an objection is required and, if sustained, must be followed by a motion to strike and request for curative instruction along with potential consideration of a motion for mistrial (as discussed later in this outline).

2. Where substance of evidence is apparent from context

a. A failure to proffer may not be fatal if the reviewing court finds that the substance of the evidence to be offered was apparent from the context. §90.104(1)(b), Fla. Stat.; Fed. R. Evid. 103(a)(2). For example, where the trial court excludes an entire class of evidence, a proffer may be found to be unnecessary. See, e.g., O’Shea v. O’Shea, 585 So. 2d 405, 407-08 (Fla. 1st DCA 1991); see also Pacifico v. State, 642 So. 2d 1178, 1185 (Fla. 1st DCA 1994) (proffer unnecessary on issue of victim’s consent where the substance of the statements sought to be admitted was apparent from the context of the questions). It is a risky proposition to forego a proffer, however.

3. The offering party must assert at trial the ground for admissibility of evidence. E.g., Rezzarday v. West Fla. Hosp., 462 So. 2d 470, 470 (Fla. 1st DCA 1985) (failure to assert exception to hearsay rule precluded review).

B. Objecting to Admission of Evidence; Motions in Limine

1. An objection must be made contemporaneously and must state a specific legal ground so the judge can rule (or the ground must be apparent from the context). §90.104(1)(a), Fla. Stat.; Fed. R. Evid. 103(a)(1); Wykle v. State, 659 So. 2d 1287, 1289 (Fla. 5th DCA 1995). For example, a motion made during the cross-examination of a witness seeking to strike testimony given on direct is not timely and does not substitute for a timely objection. Dowd v. Star Mfg. Co., 385 So. 2d 179, 180-81 (Fla. 3d DCA 1980). However, an objection is timely when it is made at some point in the line of impermissible questioning. Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984); Evans v. State, 800 So. 2d 182, 188 (Fla. 2001) (citing Jackson).

   a. The goal of the contemporaneous objection rule is to give the trial judge notice of possible error and to give the judge an opportunity to correct it as soon as possible in the proceedings. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978); Diaz v. State, 957 So. 2d 104, 108 (Fla. 4th DCA 2007) (citing Castor). After making an objection, the objecting party must obtain a ruling—unless the trial court refuses to rule—or suffer a waiver of the objection. Newton v. South Florida Baptist Hosp., 614 So. 2d 1195, 1196 (Fla. 2d DCA 1993).

   b. An appellate court will only consider objections which were actually made in the trial court. W.R. Grace and Co. v. Dougherty, 636 So. 2d 746, 749 (Fla. 2d
DCA), rev. denied, 645 So. 2d 457 (Fla. 1994) (hearsay objection to admission of deposition testimony was found insufficient to preserve the argument that the unavailability of the witness had not been established prior to the court’s admission of the deposition); Jackson v. State, 738 So. 2d 382, 386 (Fla. 4th DCA 1999) (holding that a general lack of foundation objection was not sufficient to preserve error in admitting business records); Tabasky v. Dreyfuss, 350 So. 2d 520, 521-22 (Fla. 3d DCA 1977) (objection to admission of memorandum on the basis that it had not been offered with the deposition of the pertinent witness did not sufficiently preserve an argument on appeal based upon hearsay).

2. Renewal of objections

a. An objecting party is not required to repeat objections to the same type of testimony from the same witness so long as the court has previously overruled the objection. Fincke v. Peeples, 476 So. 2d 1319, 1323 (Fla. 4th DCA 1985); LeRetilley v. Harris, 354 So. 2d 1213, 1214-15 (Fla. 4th DCA), cert. denied, 359 So. 2d 1216 (Fla. 1978). A caution with regard to this general rule is that the objecting party should be certain, before foregoing an objection, that the testimony is truly of the same type and that the court has unambiguously overruled the objection previously.

3. Motions in limine

a. As mentioned above, the law relating to preservation of objections after a ruling on a motion in limine is changing. Historically, even though the court had entered a clear ruling denying a motion in limine, an objection had to be made at trial when the objectionable evidence was tendered. See, e.g., Swan v. Florida Farm Bureau, 404 So. 2d 802, 804 (Fla. 5th DCA 1981). The logic of this “second” objection to the same evidence was that the trial judge, now hearing the evidence and the objection to it in context, might reconsider his ruling on the motion in limine and sustain the objection. As the Swan court recognized, sometimes the objection to the motion in limine is generally phrased and may change in validity during the “shifting pattern of actual trial.” Swan, 404 So. 2d at 804. Nevertheless, the 2003 amendment to section 90.104 may relieve parties in many of these circumstances from repeating an objection at trial after a trial court has made a “definitive ruling on the record” relating to the evidence. See §90.104(1)(b), Fla. Stat.; see also Fed. R. Evid. 103(b) (added in 2000). One of the primary purposes for the change in the rule, as the Florida Supreme Court noted, is the laudable one of lessening the problem of “inadvertent waiver” that may preclude appellate review and the related purpose of reducing the number of motions for post-conviction relief under Florida Rule of Criminal Procedure 3.850. In re: Amendments to the Florida Evidence Code - Section 90.104, 914 So. 2d at 941. However, caution must be exercised in relying upon this relatively new amendment to section 90.104. For example, if the trial court modifies, or arguably modifies, the motion in limine at some point before trial to require objections to be raised at trial, the parties should no longer rely upon the earlier ruling on the motion in limine. See, e.g., Kevan Boyles, Esq., as guardian of the property of Roman Vonkomarnicki, III v. A & G Concrete Pools, Inc., 149 So. 3d 39 (Fla. 4th DCA 2014) (where trial judge granted motion in limine eighteen months before trial and successor judge instructed the parties to raise objections to evidence at trial, party that failed to object to admission of expert testimony about whether surgeries performed on plaintiff were unnecessary, notwithstanding that earlier order on motion in limine excluded such evidence, was found to have waived any objection). Thus,
notwithstanding the change in the statute, the preferred and better practice is to re-raise the objection when the evidence is tendered at trial, both to assure that the appellate record is preserved and to avail the party of the possibility that the trial court will change its ruling. The amended rule is available in the event of an inadvertent failure to re-raise the objection and may salvage appellate review in some cases.

(i) The Self-Punch: After the trial court has unequivocally denied a motion in limine, the party making the motion does not waive any objection to it by introducing part or all of the evidence in an effort to mitigate its prejudicial impact. Counsel may strategically opt to discuss the harmful evidence first to assure more delicate handling, to facilitate rebuttal of it, and perhaps to steal the opponent’s thunder. That issue, previously in doubt, was definitively resolved by the Supreme Court in 2001. Sheffield v. Superior Ins. Co., 800 So. 2d 197, 202-03 (Fla. 2001). Although in Sheffield the parties had made a stipulation that the introduction of the disputed evidence by the movant would not serve to waive the objection, the better reading of Sheffield is that litigants automatically have the flexibility necessary to mitigate the impact of evidence which the trial court has unambiguously ruled shall be admitted. That reading of Sheffield is especially valid in the face of the 2003 Amendment section 90.104(1)(b), which seeks to obviate the need for a renewal of an objection after a definitive ruling on the motion in limine. See, e.g., Rodgers v. State, 948 So. 2d 655, 666 (Fla. 2006) (holding that counsel preserved claim for error despite admitting evidence of old IQ test scores he sought to exclude). Note that in federal court, there is a split of authority as to whether the “self-punch” amounts to a waiver. See, e.g., Judd v. Rodman, 105 F.3d 1339, 1342 (11th Cir. 1997) (finding issue preserved on appeal where plaintiff presented evidence of her prior sexual history on direct examination, as a trial strategy to soften the blow, only after the trial court overruled her motion in limine to exclude the evidence) (citing Reyes v. Missouri Pac. R.R., 589 F.2d 791, 793 n.2 (5th Cir. 1979)).

4. A motion to strike and a request for a curative instruction should be made immediately when an inadmissible answer is given or an objectionable question is asked in conjunction with a successful objection. See Simmons v. Baptist Hosp., 454 So. 2d 681, 682 (Fla. 3d DCA 1984) (curative instruction given the next day did not cure the sinister nature of the error). Also consider moving for a mistrial, particularly where the adverse party’s conduct is outrageous or severely prejudicial. See Roadway Express, Inc. v. Dade Cnty., 537 So. 2d 594, 595 (Fla. 3d DCA 1987). As noted above, this procedure is required even if the evidence was a violation of an order granting a motion in limine, notwithstanding section 90.104(1)(b).

   a. If the evidence is admissible only with a limiting instruction, the limiting instruction must be requested and given at the time of the admission of the evidence. See §90.107, Fla. Stat.; Fed. R. Evid. 105.

5. Motion for mistrial (“Be careful what you ask for,” Part 2)

   a. No motion for mistrial is ordinarily required when an objection is overruled. Simmons v. Baptist Hosp., 454 So. 2d 681, 681 (Fla. 3d DCA 1984). However, if the judge offers the opportunity to move for a mistrial and indicates an inclination to grant it, failure to accept the offer may constitute a waiver of the right to a new trial based on the erroneous admission of evidence. See Saxon v. Chacon, 539 So. 2d 11, 12 (Fla. 3d DCA 1989); see also
Celtano v. Banker, 728 So. 2d 244, 246 (Fla. 4th DCA 1998) (attorney waived error by advising the court he did not want a mistrial); cf. MCI Express, Inc. v. Ford Motor Co., 832 So. 2d 795, 798-99 (Fla. 3d DCA 2002) (holding that objection was not waived when the party did not refuse to move for a mistrial but merely did so on the condition that the trial court reserve ruling until after the jury returned its verdict).

C. Preserving Objection to Expert Testimony

1. Before July 1, 2013, Florida had adhered to the admissibility standard set forth in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Under that standard, where an expert witness’s opinion draws upon scientific principles, methodology or theory, the underlying scientific principle, methodology, or theory is only admissible in evidence if it is generally accepted in the relevant field or community from which it derives. However, on July 1, 2013, Section 90.702, Florida Statutes, was amended to conform to its federal counterpart, Fed. R. Civ. P. 702, as presented in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). See Chapter 2013-107, § 1, Laws of Florida (stating intent to “requir[e] the courts of this state to interpret and apply the principles of expert testimony in conformity with specified United States Supreme Court decisions”). See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Fed. R. Evid. 702. Under Daubert, it is not absolutely required that the expert’s opinion draw upon scientific principles, methodology, or theory that is generally accepted in the relevant field or community from which it derives. Instead, it is sufficient for admissibility if the trial court determines that the evidence is both reliable and helpful. Further, Daubert charges the trial court to be the gatekeeper for all expert testimony, requiring a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, i.e., reliable, and whether the methodology properly can be applied to the facts in issue. The trial court’s gatekeeping function is performed, as in all preliminary questions of admissibility, under the procedure set forth in § 90.105, Fla. Stat.

2. A party must object before the expert testifies to preserve an argument that the expert’s testimony does not meet the standards of Daubert, Correia v. State, 695 So. 2d 461, 464 (Fla 4th DCA 1997).

3. A party must make a timely, specific objection to preserve for appeal the trial court’s refusal to hold a Daubert hearing before allowing the expert to testify. Timot v. State, 738 So. 2d 387, 389 (Fla. 4th DCA 1999).

4. As noted above, in federal court, the standard set forth in Daubert is applied.

V. MOTIONS TESTING SUFFICIENCY OF THE EVIDENCE

A. Motion for a Directed Verdict (Can’t take “no” for answer)

1. The directed verdict procedure is used to challenge the sufficiency of the evidence to go to the jury (i.e., legal sufficiency). Historically, to preserve the record on that issue, the motion for directed verdict had to be made both at the close of the plaintiff’s case and again at the close of all the evidence. Waltman v. Prime Motor Inns, Inc., 446 So. 2d 185, 186 (Fla. 3d DCA 1984). However, Fla. R. Civ. P. 1.480 was amended in 2010. The 2010
Amendment, which became effective on January 1, 2011, eliminated the requirement for renewing a motion for directed verdict at the close of all of the evidence if the party had already made the motion at the close of an adverse party’s evidence. See Fla. R. Civ. P. 1.480, Committee Notes re 2010 Amendment.

a. If a motion is made prematurely (by a party at the close of its own case), failure by the adversary to object to the procedure may waive any error in granting the motion. See Williams v. Salem Free Will Baptist Church, 784 So. 2d 1232, 1232-33 (Fla. 1st DCA 2001).

b. In federal court, the motion need only be made once before the case is submitted to the jury and is one seeking a “judgment as a matter of law.” Fed. R. Civ. P. 50(a).

2. A motion for directed verdict must state specific grounds or risk waiver of unstated grounds. See Fla. R. Civ. P. 1.480(a); see also Perlman v. Ferman Corp., 611 So. 2d 1340, 1341 (Fla. 4th DCA 1993). Parties should specifically request directed verdict on affirmative defenses. See Smith v. Hooligan’s Pub & Oyster Bar, Ltd., 753 So. 2d 596, 598-99 (Fla. 3d DCA 2000) (plaintiff’s motion for directed verdict on “liability” did not preserve challenge to comparative fault as improper defense); see also Fed. R. Civ. P. 50(a)(2).

3. Motion for involuntary dismissal in bench trial: in a non-jury trial, the analogue to a motion for directed verdict is simply a motion to dismiss under Fla. R. Civ. P. 1.420(b). As in the case of a jury trial, that motion may be brought at the conclusion of the plaintiff’s case. At that point, the court, as the trier of the facts, may determine whether the party seeking affirmative relief has shown any right to relief and either enter judgment or decline to enter judgment until the close of all the evidence. Id.

a. Caveat: under current Florida law, the trial court may not properly grant a motion for dismissal at the conclusion of plaintiff’s case and also alternatively determine that, even if the motion to dismiss should not have been granted, the court would have eventually ruled in favor of the defendant based upon the evidence. That is so because where the motion to dismiss should not be granted, the plaintiff is entitled to the opportunity to shore up its proofs during the defense case. See McCabe v. Hanley, 886 So. 2d 1053, 1056 (Fla. 4th DCA 2004) (finding that a prima facie case had been made in plaintiff’s case and remanding for completion of defense case where the trial court granted motion to dismiss and made alternative ruling that even if the case were considered on all the evidence she would have entered judgment in favor of the defendants). The lesson from McCabe is that if the trial court grants a motion to dismiss at the conclusion of plaintiff’s case and articulates an alternative ruling in favor of the defendant “on the evidence,” defense counsel should immediately state that the defense rests, based upon the trial court’s alternative ruling. Defense counsel should probably also reserve the right to seek to reopen the evidence in the event that the appellate court overrules both bases for the decision stated by the trial court.

b. Note that in the case of a motion to dismiss in a non-jury trial, there is no obligation to renew the motion to dismiss at the conclusion of all evidence in order to preserve an error for review. That is so because at the conclusion of all of the evidence, the
matter is ripe for ultimate decision by the trial court, whether on the basis of pertinent factual findings or any available legal ground.

c. In federal court, the analogous motion in a bench trial is one seeking a judgment on partial findings and may relate to any or all issues. See Fed. R. Civ. P. 52(c).

B. Motion for Judgment in Accordance with Prior Motion for Directed Verdict (still called JNOV by busy people)

1. If the motion for directed verdict at the close of all the evidence is denied or the court reserves ruling, the movant should also file a motion for judgment in accordance with motion for directed verdict within 15 days after the verdict or discharge of the jury. See Fla. R. Civ. P. 1.480(b); see also Fed. R. Civ. P. 50(b) (note that the deadline in federal court is 28 days after entry of judgment or discharge of jury). To preserve the issue for appeal, the movant must file such a motion where the trial court has not ruled on the prior motion made at the conclusion of the evidence – i.e., the movant must obtain a ruling. Note, however, that the Supreme Court has ruled that a motion for new trial, under the right circumstances, may suffice as a motion for judgment in accordance with the prior motion for directed verdict. See Fulton Cnty. Admin. v. Sullivan, 753 So. 2d 549, 553-54 (Fla. 1999) (“[W]hen a motion for new trial encompasses the same legal basis upon which a motion for directed verdict was made during the trial and at the close of all the evidence, our courts should look to the substance of the motion and rule on the basis of the legal issue raised in the motion.”).

2. Failure to move for a directed verdict at trial waives the right to file a post-trial motion for judgment in accordance with the motion for directed verdict. Allstate Ins. Co. v. Gonzalez, 619 So. 2d 318, 320 (Fla. 3d DCA 1993). The motion may be joined with a motion for new trial. Fla. R. Civ. P. 1.480(c); Fed. R. Civ. P. 50(b).

3. The grounds for a motion for judgment in accordance with motion for directed verdict are limited to those asserted in the motion for directed verdict made at trial. See Houghton v. Bond, 680 So. 2d 514, 522 (Fla. 1st DCA) (stating it was error to base order granting a post-trial motion for directed verdict on post-trial affidavits challenging evidence presented at trial), rev. denied, 682 So. 2d 1099 (Fla. 1996); Fed. R. Civ. P. 50(b) and Committee Notes.

4. The law permits a non-movant plaintiff to cure a deficiency in its case during the defense case. Therefore, if defendant moved for a directed verdict at the close of the plaintiff’s case and was entitled to it, but the trial court denied it anyway, the plaintiff may cure the deficiencies based upon evidence admitted during the defendant’s case. The reason is that the trial court’s ruling on a directed verdict motion at the end of the case is based upon all of the evidence. McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992) (citing Gulf Heating & Refrigeration Co. v. Iowa Mut. Ins. Co., 193 So. 2d 4 (Fla. 1966)).

C. Motion for a New Trial

1. To raise the issue of whether the verdict is contrary to the manifest weight of the evidence, a motion for new trial must be served within 15 days after the return of the
verdict in a jury trial and 15 days after the filing of the order in non-jury cases. Fla. R. Civ. P. 1.530(b); Fed. R. Civ. P. 59(b) (note that deadline in federal court is 28 days after entry of judgment). The trial court lacks jurisdiction to grant an untimely motion for new trial. Melton v. Schwingener, 678 So. 2d 470, 471 (Fla. 5th DCA 1996). In addition, an untimely motion for new trial does not toll the time for filing a notice of appeal. Id. at 472.

a. The time for appeal from an order granting a new trial runs from the date of the order even if there remains pending additional previously filed post-judgment motions. See Fla. R. App. P. 9.020(i). The rule in federal court proceedings, to the contrary, is that the time for appeal runs for all parties from the entry of the order disposing of the last authorized motion. See Fed. R. App. P. 4(a)(4).

2. A motion for new trial is not required to seek review of issues that are not related to the sufficiency of the evidence, including such legal rulings as evidentiary rulings and jury instructions. Winn and Lovett Grocery Co. v. Luke, 24 So. 2d 310, 313-14 (Fla. 1945). If a motion for new trial is joined with a motion for judgment in accordance with a motion for directed verdict, because the motions are mutually inconsistent, the judge may grant one of the motions and alternatively grant the other but may not grant both outright. See Frazier v. Seaboard Sys. R.R., Inc., 508 So. 2d 345, 346-47 (Fla. 1987).

a. In federal court, if the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for new trial. Fed. R. Civ. P. 50(c).

3. If the court grants a motion for mistrial before the jury is discharged, any motions for new trial or for judgment in accordance with a motion for directed verdict are nullified. It becomes as though the verdict was never returned. If the court reserves ruling on a motion for mistrial until after the jury is discharged, the motion is properly treated as a motion for new trial. See Keene Bros. Trucking, Inc. v. Pennell, 614 So. 2d 1083, 1085-86 (Fla. 1993).

4. On appeal, only the grounds specified in the order granting a new trial may be considered. Grushoff v. Denny’s, Inc., 693 So. 2d 1068, 1070 (Fla. 4th DCA), rev. dismissed, 698 So. 2d 839 (Fla. 1997). So, for example, the Tipsy Coachman rule does not apply to the granting of a motion for a new trial.

5. The standard of appellate review is abuse of discretion, whether “reasonable persons could differ as to the priority of the action taken.” See Van v. Schmidt, 122 So. 3d 243, 253 (Fla. 2013). In assessing the manifest weight of the evidence, the trial court is not required to defer to the jury’s weighing of conflicting testimony but must necessarily consider the credibility of the witnesses along with the weight of all of the other evidence and then intervene only when the manifest weight of the evidence dictates such action. Id. The appellate court then applies the abuse of discretion standard to assess the trial court’s decision. Id.

D. Motion for Rehearing in Non-Jury Trial: When Required

1. Ordinarily, a motion for rehearing is not necessary to preserve issues for appeal with respect to a final judgment entered in a case tried without a jury. One significant
exception, however, is when the objection to a final judgment is the failure to include findings of fact that are required under the applicable law. If a litigant contends that a final judgment lacks sufficient findings of fact, the litigant must raise that issue to the trial court in a motion for rehearing or suffer a finding of waiver on appeal. This is an issue that often arises in family law cases. See Owens v. Owens, 973 So. 2d 1169, 1170 (Fla. 1st DCA 2007) (discussing that issue was not properly preserved for review where appellant asserted that final judgment lacks sufficient findings of fact to allow meaningful appellate review but never challenged the adequacy of the findings in a motion for rehearing or any other means available in the trial court); Mathieu v. Mathieu, 877 So. 2d 740, 741 (Fla. 5th DCA 2004) (party may not complain on appeal about inadequate findings in a dissolution case unless the alleged defect was brought to the trial court’s attention in a motion for rehearing in order to allow the judge a contemporaneous and useful opportunity to correct the omission while the case is fresh in his mind), rev. denied, 909 So. 2d 862 (Fla. 2005); Broadfoot v. Broadfoot, 791 So. 2d 584, 585 (Fla. 3d DCA 2001) (finding issue not preserved for appeal where the court generally declines to consider claims which were not presented in the first instance in the trial court and where there is no indication that the need for statutory findings was called to the attention of the trial court); but see Badgley v. Sanchez, 165 So. 3d 742, 744 (Fla. 4th DCA 2015) (remanding for trial court’s failure to make statutory-required findings despite appellant’s failure to bring deficiency to attention of trial court and provide appellate court with a transcript of the hearing).

VI. JURY INSTRUCTIONS

A. Jury Instructions Requested

1. Instructions must be requested in writing within the time set in the pretrial order and no later than the close of all the evidence. See Fla. R. Civ. P. 1.470(b); Florida Motor Lines Corp. v. Barry, 27 So. 2d 753, 756-57 (Fla. 1946); Fed. R. Civ. P. 51(a) (in federal court, this rule allows flexibility to file requested instructions after close of evidence on issues that could not reasonably have been anticipated earlier). The instructions must be brought to the court’s attention so a ruling may be obtained. Luthi v. Owens-Corning Fiberglass Corp., 672 So. 2d 650, 651 (Fla. 4th DCA 1996); Gary Massey Chevrolet, Inc. v. Ritch, 507 So. 2d 713, 715-16 (Fla. 1st DCA 1987).

2. If a written instruction is rejected, an oral request for an alternative instruction may preserve the issue as to the alternative instruction, if preparing an alternative instruction would have been difficult or impossible. See Morowitz v. Vistaview Apts., 613 So. 2d 493, 496 (Fla. 3d DCA), rev. denied, 626 So. 2d 210 (Fla. 1993). It is best to have an alternative instruction ready, if possible.

3. No party may appeal the failure to give an instruction unless that party requested the same. Fla. R. Civ. P. 1.470(b); Fed. R. Civ. P. 51(d) (but note that federal law expressly recognizes a plain error exception to the obligation to preserve error regarding jury instructions, found in Rule 51(d)(2)). When a written instruction is rejected by the court, there is no requirement for an additional objection by the requesting party to preserve that issue for appeal. Luthi, 672 So. 2d at 652. However, objection is required to preserve the issue as to any other party. See Triana v. Fi-Shock, Inc., 763 So. 2d 454, 457 (Fla. 3d DCA 2000).
a. Note that in federal court, the rules expressly require an objection on the record even if the trial judge has already declined to give an instruction offered by the party (unless the judge’s rejection of the requested instruction is on the record). Fed. R. Civ. P. 51(d)(1)(B).

B. Jury Instructions Opposed

1. A party may not claim as error the giving of an instruction unless the party objects to the instruction at the charge conference. See Fla. R. Civ. P. 1.470(b); City of Sunrise v. Bradshaw, 470 So. 2d 804, 806-07 (Fla. 4th DCA 1985); see also Fed R. Civ. P. 51(c)(1), (d)(1)(A).

2. Similar to most other objections, a party must articulate specific grounds. Feliciano v. Sch. Bd. of Palm Beach Cnty., 776 So. 2d 306, 308 (Fla. 4th DCA 2000) (finding party failed to preserve objection to jury instruction on the grounds that it improperly included “animosity” as an additional element in the claim, where party failed to specifically object to the inclusion of the word “animosity”); Middelven v. Sibson Realty, Inc., 417 So. 2d 275, 276-77 (Fla. 5th DCA 1982) (finding issue not preserved for appellate review where statement that “I wish to object to the plaintiffs’ instruction number 3” was too general and insufficient because it failed to give the trial court the opportunity to rule on the relevant issue of law).

3. In federal court, as with regard to jury instructions requested, a party failing to object to a jury instruction given by the court, in rare circumstances, may be saved on appeal by the plain error doctrine. See Fed. R. Civ. P. 51(d)(2).

3.26

3. If the court errs in the actual reading of the instructions to the jury, a party must make a timely objection – during or immediately following the charge to the jury – to preserve the error. Klepper v. J. C. Penney, Co., 340 So. 2d 1170, 1171 (Fla. 4th DCA 1977).

VII. CLOSING ARGUMENT

A. Inadequate Time Allowed for Opening or Closing

1. If possible, object and ask for additional time before argument begins. Strong v. Mt. Dora Growers Co-op., 495 So. 2d 1238, 1240 (Fla. 5th DCA 1986) (holding that court committed reversible error where counsel preserved the issue by asking for more time before argument began and claimed he could not present case within the 20 minutes allowed).

2. If the court will listen, suggest to the court the matters it should consider in setting time limits: e.g., length of trial, number of witnesses, amount of evidence, importance of the case, number and complexity of the issues, amount involved and press of time. Woodham v. Roy, 471 So. 2d 132, 134 (Fla. 4th DCA) (finding abuse of discretion where court deducted cross-examination time from closing argument time, allowing 12 minutes for closing), rev. denied, 480 So. 2d 1295 (Fla. 1985).

3. Counsel should renew the objection and seek more time when the court indicates time is up and counsel has not completed the argument.
B. Improper Conduct of Counsel


   a. Examples of objectionable conduct:

      (i) “Golden rule” arguments – where jury is exhorted to put itself in a party’s place. See, e.g., Stewart v. Cook, 218 So. 2d 491, 493 (Fla. 4th DCA 1969).

      (ii) Appeals to the jurors’ “community conscience” and “civic responsibility.” See Kiwanis Club of Little Havana, Inc. v. De Kalafe, 723 So. 2d 838, 842 (Fla. 3d DCA 1998).


      (iv) Remarks that directly appeal to jurors’ passions and prejudices and are calculated to produce a verdict based on fear and self-interest. See, e.g., Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1020-24 (Fla. 4th DCA) (finding improper arguments suggesting that any verdict for plaintiff would immediately endanger recreational use of land for hog hunting in Okeechobee County), rev. denied, 680 So. 2d 422 (Fla. 1996); cf. Murphy v. Int’l Robotics Sys., Inc., 710 So. 2d 587, 589 (Fla. 4th DCA 1998) (distinguishing from Norman, stating “we do not think improper, but unobjected-to, closing argument in a civil case is something which is so fundamental that there should be an exception to the rule requiring an objection.”).

      (v) Racial remarks. F.J.W. Enter., Inc. v. Johnson, 746 So. 2d 1145, 1146-47 (Fla. 5th DCA 1999) (reversing for mistrial due to comment that defense counsel had “played the race card”); Reynolds v. State, 580 So. 2d 254, 255 (Fla. 1st DCA 1991) (reversing for new trial where prosecutor’s comments repeatedly injected defendant’s race into a rape trial).

      (vi) Statements accusing opposing counsel of lying or defrauding court. Owens Corning Fiber Glass Corp. v. Morse, 653 So. 2d 409, 411 (Fla. 3d DCA 1995) (finding such statements to be fundamental error); see also Johnnides v. Amoco Oil Co., Inc., 778 So. 2d 443, 444-45 (Fla. 3d DCA 2001) (reversing for a new trial where counsel accused opposing counsel of conspiring with expert to commit a fraud on the jury).

      (vii) Reference to matters not in evidence. See Tito v. Potashnick, 488 So. 2d 100, 101 (Fla. 4th DCA 1986); Schubert v. Allstate Ins. Co., 603 So. 2d 554, 555 (Fla. 5th DCA 1992) (reference to medical expert’s tendency to find a permanent injury when retained).
(viii) Reference to failure of witness to testify. See Lowder v. Econ. Opportunity Family Health Ctr., Inc., 680 So. 2d 1133, 1135 (Fla. 3d DCA 1996) (improper to argue that jury should draw adverse inference based upon witness’s failure to testify unless can show that the non-testifying witness was peculiarly within the adverse party’s power to produce).

(ix) Comments disparaging defense counsel for contesting an issue that is in dispute at trial and on which plaintiff has the burden of proof. See R.J. Reynolds Tobacco Company v. Robinson, 216 So. 3d 674, 681-82 (Fla. 1st DCA 2017).

(x) Comments which violate the Rules of Professional Conduct. See, e.g., Davis v. S. Fla. Water Mgmt. Dist., 715 So. 2d 996, 998-99 (Fla. 4th DCA 1998) (affirming because no objection was made but commenting that it was improper for attorney to refer to himself as an “officer of the court” and a lawyer for a state agency and other authorities); Sacred Heart Hosp. v. Stone, 650 So. 2d 676, 680 (Fla. 1st DCA), rev. denied, 659 So. 2d 1089 (Fla. 1995); Stokes v. Wet ‘N Wild, Inc., 523 So. 2d 181, 182 (Fla. 5th DCA 1988); Schreier v. Parker, 415 So. 2d 794, 795 (Fla. 3d DCA 1982).

Rule 4-3.4(e) of the Rules Regulating the Florida Bar provides:

“A lawyer shall not . . . in trial, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will be not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused.” R. Regulating Fla. Bar 4-3.4(e) (2014).

Rule 4-3.5(a) provides:

“A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.” R. Regulating Fla. Bar 4-3.5(a) (2014).

Practitioners should be aware that the courts may report to The Florida Bar attorneys who make unethical arguments, that the Bar investigates unethical conduct on its own when it reads about it in an opinion, and that the Florida Supreme Court has publicly reprimanded or suspended lawyers for unethical argument. See Murphy v. Int’l Robotics Sys., Inc., 710 So. 2d 587, 590-91 (Fla. 4th DCA 1998), approved, 766 So. 2d 1010 (Fla. 2000).

b. Opening the door: objections to improper argument may be waived by making arguments that invite inappropriate comments. Wal-Mart Stores, Inc. v. Sommers, 717 So. 2d 178, 178 (Fla. 4th DCA 1998).

c. Objecting party must state the specific objection. Padilla v. Buell, 797 So. 2d 609, 609 (Fla. 3d DCA 2001).
d. Requesting permission to defer making any objections until the conclusion of the opposing party’s argument may not preserve any error (even if other party agrees to the procedure). *James v. State*, 741 So. 2d 546, 549 (Fla. 4th DCA 1999); cf. *Garbutt v. LaFarnara*, 807 So. 2d 83, 83 (Fla. 2d DCA 2002) (concluding that issue of improper argument was preserved by motion for mistrial made before the case was submitted to the jury, where objection was made to some, but not all, of the improper arguments).

2. Obtain a ruling from the court. *Newton v. S. Fla. Baptist Hosp.*, 614 So. 2d 1195, 1196 (Fla. 2d DCA), rev. denied, 621 So. 2d 1066 (Fla. 1993); *Schreidell v. Shoter*, 500 So. 2d 228, 233 (Fla. 3d DCA), rev. denied, 511 So. 2d 299 (Fla. 1987). A few cases put responsibility on the trial court to make a specific ruling, but it is unsafe to rely upon that. E.g., *Colvin v. Williams*, 564 So. 2d 1249, 1250 (Fla. 4th DCA 1990); cf. *Carratelli v. State*, 832 So. 2d 850, 856-57 (Fla. 4th DCA 2003) (distinguishing its earlier *Colvin* decision). The ruling must be audible and make it into the record or it serves no purpose. Don’t accept a frown from the court as a ruling.

   a. If the court overrules the objection and the same improper comment is repeated, subsequent objections may not be necessary. *LeRetilley v. Harris*, 354 So. 2d 1213, 1214-15 (Fla. 4th DCA), cert. denied, 359 So. 2d 1216 (Fla. 1978). However, it is wiser, from an appellate perspective, to keep objecting.

3. If the court sustains an objection to improper argument, must move for mistrial to preserve the error. (“Be careful what you ask for,” part 3)


   b. The court must rule on the motion for mistrial for the issue to be preserved. *LeRetilley v. Harris*, 354 So. 2d 1213, 1214 (Fla. 4th DCA 1978).

   c. If the court merely gives a curative instruction, the appellate court may hold that the instruction cured the improper effect of the argument. See *Albertson’s Inc. v. Brady*, 475 So. 2d 986, 989 (Fla. 2d DCA 1985), rev. denied, 486 So. 2d 595 (Fla. 1986).

   d. Importantly, the requirement of moving for a mistrial is the rule for attorney misconduct at any time during the trial. In order to preserve the right to seek a new trial from the trial court on the basis of attorney misconduct during the trial, an objection must be made and, if sustained, a motion for mistrial must be timely made. If that procedure is not followed, the conduct issue is subject only to fundamental error analysis. *Companioni v. City of Tampa*, 51 So. 3d 452, 456 (Fla. 3d DCA 2010).

4. Appealability of unobjected-to argument

   a. For unobjected-to argument to serve as the basis for an appeal seeking a new trial, the litigant must have submitted a motion for new trial and satisfied the four-
part test established by the Florida Supreme Court.  

**Murphy v. Int’l Robotic Sys., Inc.,** 766 So. 2d 1010, 1027-31 (Fla. 2000).

(i) The argument was improper;

(ii) The argument was harmful (it must have reached “into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments”);

(iii) The argument was incurable; that is, an instruction by the trial court to the jury to disregard the comment would not have been sufficient to eliminate the likelihood that the argument resulted in an improper verdict;

(iv) The argument was so damaging to the fairness of the trial that the public’s interest in our system of justice requires a new trial.

An order that grants a new trial based on unobjected-to argument must specifically identify the improper comments and the jury’s actions resulting from those comments.  

**Murphy,** 766 So. 2d at 1030.

b. The improper conduct must be reflected in the record.  

**See Platz v. Auto Recycling and Repair, Inc.,** 795 So. 2d 1025, 1026 (Fla. 2d DCA 2001) (noting that conduct which did not even merit a comment or notation for the record, let alone an objection or rebuke, could not have been so extensive or pervasive as to warrant a new trial).

c. In ruling on a motion for new trial, the court may consider the cumulative impact of preserved and unpreserved error.  

**See Allstate Insurance Company v. Marotta,** 125 So. 3d 956, 960-61 (Fla. 4th DCA 2013) (preserved improper closing arguments, in conjunction with unpreserved improper closing arguments, warranted reversal for new trial);  

**Robinson, supra,** 216 So. 3d at 683, n. 10.

d. In federal court, the standard for appealing unobjected-to improper remarks during closing argument is somewhat similar.  

The appealing party must demonstrate “plain error.”  

**See United States v. Soto,** 591 F.2d 1091, 1101 (5th Cir. 1979).  

To demonstrate plain error, it must be shown that: (1) an error occurred; (2) the error is “plain” (or, essentially, “obvious”); (3) the error affects substantial rights (or, in other words, was so prejudicial that it affected the outcome of the district court proceedings); and (4) that the error “seriously affects the fairness, integrity or public reputation of judicial proceedings.”  


VIII. **THE VERDICT**

A. **Verdict Form**

1. The appellate court will review error in the form of the verdict only if a timely objection was made.  

**See, e.g., Hurley v. Government Employees Ins. Co.,** 619 So. 2d 477, 480 (Fla. 2d DCA 1993) (court’s refusal to use special or itemized verdict form). If a party wishes to preserve an objection to the use of a general verdict form, the party is required to
submit a special verdict form along with explanatory instructions. Whitman v. Castlewood Int’l Corp., 383 So. 2d 618, 620 (Fla. 1980). In the absence of fundamental error or timely objection, any issue regarding the verdict cannot form the basis of a motion for new trial.

2. Requesting an erroneous verdict form is “invited error” which cannot be corrected in a motion for new trial or on appeal. See Schaffer v. Pulido, 492 So. 2d 1157, 1157-58 (Fla. 3d DCA 1986); see also Letzter v. Cephas, 792 So. 2d 481, 487-88 (Fla. 4th DCA 2001), rev. granted, 796 So. 2d 535 (Fla. 2001) (noting that litigant could not complain about lack of more definitive jury finding when it was he who objected to a specific question on the particular issue).

3. Two-Issue Rule

a. The Florida Supreme Court has defined the two issue rule this way: where no proper objection is made to the use of a general verdict, reversal is improper when no error is found as to any one of two or more issues submitted to the jury. The reason: the appellant is unable to establish that he has been prejudiced. Whitman v. Castlewood Int’l Corp., 383 So. 2d 618, 619 (Fla. 1980); see also Marriott Int’l, Inc. v. Perez-Melendez, 855 So. 2d 624, 627 (Fla. 5th DCA 2003) (applying two-issue rule).

b. The two-issue rule indulges a presumption against the existence of error. If the logic of the verdict form, as completed by the jury, does not compel the conclusion that prejudicial error occurred as to a particular claim or defense, the court will presume that all issues were correctly decided in favor of the prevailing party. Thus, if two or more theories of liability seeking the same elements of damage are submitted to the jury on a general verdict form, the appellate court will affirm if no error is found as to at least one of the theories. Colonial Stores, Inc. v. Scarborough, 355 So. 2d 1181, 1185-86 (Fla. 1977); see also Zimmer, Inc. v. Birnbaum, 758 So. 2d 714, 715 (Fla. 4th DCA) (where two standards were asserted for determination of liability, and where one of the standards was proper, two-issue rule precluded review of asserted error as to the other standard), rev. denied, 786 So. 2d 1193 (Fla. 2000); Padovano, Florida Appellate Practice § 9.9 (2008-09 Ed.). The same logic applies when the jury returns a general verdict in favor of the defendant, except the analysis focuses upon the defenses. So long as no error is found as to one of the defenses, an appellate claim of error as to any other defense will not be considered. Barth v. Khubani, 748 So. 2d 260, 261-62 (Fla. 1999).

c. The two-issue rule only applies where two or more theories of liability can support a single basis for damages such that a finding of liability on one claim entitles the plaintiff to receive the total amount of damages attributable to both theories of liability. First Interstate Dev. Corp. v. Ablanedo, 511 So. 2d 536, 538 (Fla. 1987). If the verdict can be sustained on either theory and error is not shown as to both theories, the judgment should not be reversed for a new trial.

d. The way to avoid the problems caused by the two-issue rule is to use a special verdict or interrogatory verdict form that reveals more precisely the reasoning or legal theory upon which the jury made its decision.
e. Interesting note regarding federal two-issue rule: although a party challenging the ruling on a post-trial motion for judgment notwithstanding the verdict must demonstrate error with regard to both theories of recovery in order to obtain reversal, the federal courts will grant a motion for \textit{new trial} based upon the insufficiency of the evidence on only one of the claims. Richards v. Michelin Tire Corp., 21 F.3d 1048, 1055-56 (11th Cir. 1994). In other words, the two-issue rule does not apply to a motion for new trial in federal court.

f. The two-issue rule applies to damage awards. Where a verdict form does not itemize the various types of damages – for example, economic and non-economic damages – the two-issue rule will apply to require the challenger to show error as to both types of damages to obtain a reversal. See, e.g., Barhoush v. Louis, 452 So. 2d 1075, 1077 (Fla. 4th DCA 1984) (question centered upon error in allowing expert testimony on economic loss; court could not determine whether prejudice occurred because there was no itemization in the verdict as to economic and non-economic damages); Odom v. Carney, 625 So. 2d 850, 851 (Fla. 4th DCA 1993) (PIP setoff issue where lumping together medical expenses and lost earnings prevented court from determining whether any damages implicated PIP benefits); Evering v. Smithwick, 526 So. 2d 185, 187 (Fla. 3d DCA 1988) (applying two-issue rule to punitive damage award where the award was not separated as to two defendants).

B. Inconsistent Verdicts

1. To preserve the appellate record to challenge the receipt of an internally inconsistent verdict, a party must object before the jury is discharged and specifically request that the matter be resubmitted to the jury. Such a timely objection will give the court the opportunity to allow the jury to resolve the inconsistency. Grossman v. Sea Air Towers, Ltd., 513 So. 2d 686, 689 (Fla. 3d DCA 1987), rev. denied, 520 So. 2d 584 (Fla. 1988); Isenberg v. Ortona Park Recreational Ctr., Inc., 160 So. 2d 132, 134 (Fla. 1st DCA 1964); see also Barreto v. Wray, 40 So. 3d 779, 779 (Fla. 3d DCA 2010) (to preserve error, in addition to objecting that the verdict is inconsistent, counsel must specifically request to resubmit the matter to the jury).

2. Verdicts can be found to be inconsistent where: the jury finds the party both vicariously liable and actively negligent, Grossman, 513 So. 2d at 689; where defendant was found negligent on plaintiff’s claim but not negligent on the cross-claim, Linquist v. Covert, 279 So. 2d 44, 44-45 (Fla. 4th DCA 1973); where the jury finds negligence in the design or manufacture of a machine and also that there is no defect in it, Adoro Mktg., Inc. v. Da Silva, 623 So. 2d 542, 543 (Fla. 3d DCA 1993); where the jury found plaintiff comparatively negligent without assessing a percentage of fault against plaintiff, Southland Corp. v. Crane, 699 So. 2d 332, 334 (Fla. 5th DCA 1997).

a. Note that the federal rules itemize the alternatives available to a trial court where the jury’s verdict and any answers to written questions are consistent or, on the other hand, inconsistent. See Fed. R. Civ. P. 49. In order to preserve an objection to the trial court’s failure to comply with Rule 49, a party must make a timely objection on the record, sufficient to apprise the trial court of the basis for the objection and to allow the court to consider applying one of the alternatives available in Rule 49. See Wilbur v. Corr. Servs. Corp., 393 F.3d 1192, 1200 n.4 (11th Cir. 2004).
3. Where the thrust of a party’s objection to the verdict is inconsistency, that party may not circumvent the waiver rule by later arguing that the verdict is inadequate or contrary to the manifest weight of the evidence. FDOT v. Stewart, 844 So. 2d 773, 774-75 (Fla. 4th DCA 2003). There is some confusion in the case law as to whether an error with respect to a damage award is an inconsistent verdict or, rather, an inadequate verdict. Where it is considered an inadequate verdict, a party may object by filing a motion for new trial and has not waived an objection by allowing the jury to be discharged before raising the issue. Compare Cowart v. Kendall United Methodist Church, 476 So. 2d 289, 290 (Fla. 3d DCA 1985) (“[W]e specifically hold that a contemporaneous objection to a zero verdict in a derivative personal injury claim, even though accompanied by a money award in the nonderivative one, is not required to preserve the claim that the award of no damages is inadequate or contrary to the weight of the evidence.”), with Holland American Cruises v. Underwood, 470 So. 2d 19, 20-21 (Fla. 2d DCA 1985) (holding issue was waived by defendant’s failure to object before jury was discharged where similar verdict challenged as being inconsistent). See also Allstate Ins. Co. v. Manasse, 707 So. 2d 1110, 1111-12 (Fla. 1998) (quashing opinion of 4th DCA that had found a verdict determining plaintiff was permanently injured and awarding damages for future medical expenses but none for future intangible damages was inadequate as a matter of law; also noting that the standard jury instructions do not require consistency in verdicts which award economic and non-economic damages, thus holding the verdict was not inadequate; not deciding whether plaintiff was required to object to this verdict before the jury was discharged). In any event, this issue is a pitfall for the unwary, and close scrutiny should be given to the verdict before the jury is discharged.

C. Excessive or Inadequate Verdict

1. Inadequate verdicts are challenged by a motion for new trial, which may include a request for additur or remittitur. Kirkland v. Allstate Ins. Co., 655 So. 2d 106, 108 (Fla. 1st DCA 1995). A motion for remittitur or additur may be made without a motion for new trial. Aurbach v. Gallina, 721 So. 2d 756, 758 (Fla. 4th DCA 1998). If such a motion is filed, the court is required to give the adversely affected party a choice between remittitur or additur and a new trial on damages. Id.; §768.74(4), Fla. Stat. (2014); Olivas v. Peterson, 969 So. 2d 1138, 1139-40 (Fla. 4th DCA 2007); Shalhub v. Andrews Roofing and Improvement Co., Inc., 530 So. 2d 1052, 1053 (Fla. 3d DCA 1988). But see Lorillard Tobacco Co. v. Alexander, 123 So. 3d 67, 78 (Fla. 3d DCA 2013) (holding that party was estopped from arguing entitlement to a new trial where it requested and received a remittitur and failed to object to the remitted amount or to request a new trial on that ground).

2. Note that in non-jury cases, a motion for new trial to attack the adequacy of damages is not necessary to preserve the issue because the trial judge has already ruled upon the damages issue. The argument then becomes whether the record evidence is insufficient to support the award, which may be made on appeal without further motion. Dorvil v. Purolator Courier Corp., 578 So. 2d 294, 295 (Fla. 3d DCA 1991); Fla. R. Civ. P. 1.530(e). However, a party should be careful to object to evidence presented if that is the basis of the objection to the ultimate award. See O’Donnell v. Marks, 823 So. 2d 197, 199 (Fla. 4th DCA 2002).
IX. JUROR MISCONDUCT

A. Motion to Interview Juror

1. Where a party believes grounds may exist, the party should move for an order permitting an interview of the pertinent juror(s) to determine whether there is a valid challenge to the verdict. Fla. R. Civ. P. 1.431(h). Effective January 1, 2017, the motion must be served within 15 days (increased from 10 days under the old rule) after rendition of the verdict unless good cause is shown for the failure to make that deadline. Id. The grounds for the challenge and the juror(s) to be interviewed must be specified in the motion. Id. Such an interview is not permissible unless the movant has offered sworn factual allegations that, if true, would require a new trial. Baptist Hosp. of Miami, Inc. v. Maler, 579 So. 2d 97, 100 (Fla. 1991) (affidavits essentially alleging the purported opinions of two jurors about the reason they reached a verdict did not provide a basis for judicial inquiry). But see Ramirez v. State, 922 So. 2d 386, 388-89 (Fla. 1st DCA 2006) (noting that sworn allegation is not a precondition to post-trial inquiry of jurors, citing Fla. R. Crim. P. 3.575 and R. Regulating Fla. Bar 4-3.5(d)(4)).

2. If the party knows of an incident potentially compromising the jury before the verdict is returned but fails to bring the matter to the court’s attention, the issue is waived. (No-“two-bites” principle). See Rooney v. Hannon, 732 So. 2d 408, 410 (Fla. 4th DCA), rev. denied, 744 So. 2d 456 (Fla. 1999); see also Lorillard Tobacco Co. v. Alexander, 123 So. 3d 67 (Fla. 3d DCA 2013) (citing Rooney).

3. There is a strong public policy against juror interviews, which is strengthened where the jury has been polled and has affirmed their verdict. See Alicot v. Dade Cnty., 132 So. 2d 302, 303-04 (Fla. 3d DCA 1961) (even where there is a question as to the propriety of the process adopted in arriving at the verdict, a later polling of the jury and their individual affirmations relieves the verdict from all objection); see also Thyssenkrupp Elevator Corp. v. Lasky, 868 So. 2d 547, 549 (Fla. 4th DCA 2003) (counsel was not permitted to interview juror where juror initially objected to verdict, but assented to final verdict after Allen charge was given); Florida Dep’t of Transp. v. Weggies Banana Boat, 545 So. 2d 474, 476 (Fla. 2d DCA 1989) disapproved of on other grounds by Keene Bros. Trucking, Inc. v. Pennell, 614 So. 2d 1083 (Fla. 1993) (where one juror alleged his will was overborne by another juror but juror, upon polling, responded affirmatively that verdict rendered is his/her verdict, such juror should not be permitted, after discharge, to recant the vote); Kirkland v. Robbins, 385 So. 2d 694, 695-96 (Fla. 5th DCA 1980), rev. denied 397 So. 2d 779 (Fla. 1981) (where verdict is pronounced in the presence of all jurors, it is against public policy to inquire into the motives and influences by which their deliberations were governed; the inquiry is proper only in cases involving matters extrinsic to the verdict; proper procedure for judge is to poll the jury and then, if appropriate, order a new trial or remittitur).

4. Failure to seek a jury interview may sometimes result in a denial of a motion for new trial. In Lonschein v. Mount Sinai of Greater Miami, Inc., 717 So. 2d 566, 567 (Fla. 3d DCA 1998), the court ruled that plaintiff’s motion for new trial based on juror’s misconduct was properly denied where plaintiff alleged that certain jurors misrepresented whether they had been involved in prior litigation, but failed to request a juror interview, which was necessary to determine whether actual juror misconduct occurred.
B. Types of Misconduct Found Insufficient to Warrant Juror Interview

1. A juror interview is not appropriate to seek a juror’s testimony on any matter which “essentially inheres in the verdict.” §90.607(2)(b), Fla. Stat. (2014). For example, inquiry into the emotions and mental processes of the jurors essentially inhere in the jury verdict and may not be a subject of inquiry. Rabun & Partners, Inc. v. Ashoka Enter., Inc., 604 So. 2d 1284, 1286 (Fla. 5th DCA 1992). In State v. Hamilton, 574 So. 2d 124, 129-30 (Fla. 1991), the Supreme Court pointed out that there can be no bright line test but rather that the courts must balance two competing interests: the right of a particular defendant to a fair trial in compliance with federal and Florida law and the policy that jurors must be shielded from needless prying and harassment.

2. Where letter ostensibly from jury foreman indicated that, during plaintiff’s testimony, defense counsel mouthed the word “liar” toward the jury box, the letter was neither a sworn statement nor substantively sufficient to warrant a jury interview and, at most, it was a proffer of a juror’s opinion about why the jury arrived at its verdict. Travelers Ins. Co. v. Jackson, 610 So. 2d 680, 681 (Fla. 5th DCA 1992).

3. Allegation that jury decided to rule against one party because he was a rich doctor and did not need the money, called for prohibited inquiry into the emotions and mental processes of the jurors and did not warrant interview of juror. Rabun & Partners, Inc., 604 So. 2d at 1286. Similarly, where a juror stated that he was influenced to rule against plaintiff because he sympathized with the defendant doctor and did not want to ruin his reputation, a juror interview was not warranted. Carcasses v. Julien, 616 So. 2d 486, 488 (Fla. 3d DCA 1993).

4. Jurors’ discussion of irrelevant matters heard during the course of the trial and which judge instructed jurors to disregard, is inherent in the trial process and does not warrant new trial. Devoney v. State, 717 So. 2d 501, 505 (Fla. 1998).

5. The analogous federal rule provides more detail about proscribed and proper inquiry of a juror. See Fed. R. Evid. 606. Under that rule, a juror “may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.” Fed. R. Evid 606(b). The rule expressly provides that a juror “may testify about whether (a) extraneous prejudicial information was improperly brought to the jury’s attention; (b) an outside influence was improperly brought to bear upon any juror; or (c) a mistake was made in entering the verdict onto the verdict form.” Fed. R. Evid 606(b)(2).

C. Types of Misconduct Which Have Supported a Juror Interview

1. Matters that do not inhere in the verdict and, for example, relate to external and overtly prejudicial acts are most likely to support a juror interview. For example, where there is an express agreement between jurors to disregard the instructions and the oaths that they have taken and to decide the case by game of chance, by lot, or by averaging the individual jurors’ votes, a juror interview will likely be upheld. Baptist Hosp. of Miami, Inc. v. Maler, 579 So. 2d 97, 100 (Fla. 1991); Greens to You, Inc. v. Gavelek, 967 So. 2d 318, 320 (Fla.
3d DCA 2007) (permitting juror interviews and granting new trial where jurors entered improper quotient verdict). Improper contact between a juror and a party or his agent, or the attorneys or trial judge, may be considered extrinsic to the verdict and sufficient to warrant a juror interview. Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1019 (Fla. 4th DCA) (trial juror conversing during breaks with his brother, who was an employee of the defendant’s liability insurer and had actually participated in the claim investigation), rev. denied, 680 So. 2d 422 (Fla. 1996); Wright v. CTL Distrib., Inc., 650 So. 2d 641, 643 (Fla. 2d DCA 1995) (bailiff answering jury’s question without submitting it to the judge). Where any person other than the deliberating jurors (even including an alternate juror), is present during deliberations, a new trial is required. Bouey v. State, 762 So. 2d 537, 539 (Fla. 5th DCA 2000).

a. As noted above, Federal Rule of Evidence 606 sets forth a few examples of circumstances that will support a juror interview.

2. Some decisions have arguably encroached upon Florida Statutes section 90.607(2)(b) and permitted a jury interview on matters that seem to inhere in the verdict. See, e.g., Wilding v. State, 674 So. 2d 114, 118 (Fla. 1996) (where jurors discussed a concern about the defendant having access to their private information, such discussions were considered overt acts of misconduct); Powell v. Allstate Ins. Co., 652 So. 2d 354, 357 (Fla. 1995) (open discussion by jurors of racial bias). In Devoney v. State, 717 So. 2d 501, 504 (Fla. 1998), the Supreme Court discussed its decisions in Wilding and Powell and sought to distinguish them, essentially attributing those decisions to the likelihood that the introduction of a racial-biased discussion or concerns about the defendant imposing retribution upon them came from knowledge obtained from an external source. The Court also stated, “We recede from the portion of Wilding which says that, while the juror’s subjective beliefs inhere in the verdict, any discussion of them can become an overt act of misconduct.” Id. at 505. Wilding and Powell remain somewhat difficult to reconcile with the statute and the policy relating to juror interviews.

D. The Alleged Misconduct Must have Presumptively Affected the Verdict

1. If juror misconduct is shown, there is a rebuttable presumption of prejudice requiring a new trial. State v. Hamilton, 574 So. 2d 124, 129 (Fla. 1991); Pozo v. State, 963 So. 2d 831, 837 (Fla. 4th DCA 2000).

2. The burden of showing there is no reasonable possibility that the juror misconduct affected the verdict is on the party seeking to preserve the verdict. See Baptist Hosp. of Miami, Inc. v. Maler, 579 So. 2d 97, 100 n.1 (Fla. 1991). The moving party is entitled to a new trial unless the opposing party can demonstrate that there is no reasonable possibility that the juror misconduct affected the verdict. See Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1020 (Fla. 4th DCA), rev. denied, 680 So. 2d 422 (Fla. 1996).

E. Opponent of jury interview must make a contemporaneous objection to preserve any error in granting the interview. See Scoggins v. State, 726 So. 2d 762, 767 (Fla. 1999).

F. Attorney Improprieties in Challenging a Juror

1. No member of the Florida Bar may interview a juror without giving notice of an intent to interview and otherwise complying with Fla. R. Civ. P. 1.431(h). See Rule 4-
3.5(d)(4) of the Rules Regulating The Florida Bar. The rule of civil procedure together with the ethical rule are designed to protect the jurors and to allow both parties to have the opportunity both to object and to participate in a jury interview without tainting of any information obtained.

2. Where plaintiff’s counsel contacted a juror by telephone after a jury verdict in favor of the defendant, counsel violated Fla. R. Civ. P. 1.431(h) and also Rule 4-3.5(d)(4); therefore, trial court’s order granting a new trial was improper and was reversed. Walgreens, Inc. v. Newcomb, 603 So. 2d 5, 5 (Fla. 4th DCA 1992), rev. denied, 613 So. 2d 7 (Fla. 1993); see also Seymour v. Solomon, 683 So. 2d 167, 168 (Fla. 3d DCA 1996), rev. denied, 717 So. 2d 538 (Fla. 1998) (where attorney contacted juror without prior motion, trial court could not properly consider the motion for new trial or to grant a juror interview based on any information obtained in direct violation of the governing rule).

G. Review of Order Granting Interview: An order granting a jury interview may be reviewed by way of a petition for writ of certiorari because allowing an unwarranted intrusion into the private thought processes of jurors would constitute a departure from the essential requirements of law which could not be corrected on plenary appeal. See Pesci v. Maistrellis, 672 So. 2d 583, 585 (Fla. 2d DCA 1996).

H. Juror Misconduct Discovered During Trial: Party must object to juror continuing deliberations and move for mistrial to preserve error. See Lucas v. Mast, 758 So. 2d 1194, 1196 (Fla. 3d DCA 2000) (finding issue was not preserved where plaintiffs’ counsel learned during deliberations that a juror had misrepresented prior involvement in litigation, but failed to object to juror continuing and did not move for mistrial).

X. SELECTED APPELLATE PRINCIPLES (that every trial lawyer should know)

A. Certiorari and Interlocutory Appeals Not Mandatory

1. A party need not seek review by certiorari or non-final appeal of an interlocutory order that is eligible for such review in order to preserve the issue for final appeal. Accent Realty of Jacksonville, Inc. v. Crudele, 496 So. 2d 158, 160-61 (Fla. 3d DCA 1986), rev. denied, 506 So. 2d 1040 (Fla. 1987); Fla. R. App. P. 9.130(h). In addition, unless the court decides a petition for writ of certiorari “on the merits,” a party may re-raise the issue in a plenary appeal from the final judgment. As a practical matter, however, some errors that may be reviewed by certiorari (e.g. “cat-out-of-the-bag” discovery issues or denial of motion to disqualify counsel), if not challenged immediately, may leave counsel with little or no meaningful remedy after judgment.

2. Note that in federal court, although the same general principle applies, litigants have less flexibility in choosing whether to appeal an interlocutory order. There is no general privilege to seek review by certiorari of a non-final order in the federal appellate circuits and permissible non-final appeals are primarily those specified by statutes or court rules. See, e.g., 28 U.S.C. § 1292 and Fed. R. Civ. P. 23(f). For some types of issues, section 1292(b) requires the trial court to perform a gatekeeping function by determining whether a non-final order should be immediately appealable. 28 U.S.C. § 1292(b). A litigant that obtains a trial
court ruling permitting an appeal under section 1292(b) must thereafter seek the still-discretionary review of the appellate court. 28 U.S.C. § 1292(b), Fed. R. App. P. 5.

B. Final Judgments and Partial Final Judgments

1. Where an order fully and finally adjudicates all issues between two or more parties, it must be appealed within 30 days of the rendition of the order, except as provided in Rule 9.140(c)(3) (for criminal cases). Fla. R. App. P. 9.110(b) (as amended and effective January 1, 2015). Relatedly, an order that totally disposes of the case as to any party is final as to that party and must be appealed within 30 days of rendition. Fla. R. App. P. 9.110(k). It does not matter that claims remain pending against other parties.

   a. This rule, requiring an appeal within thirty days of the rendition of the order, has been applied to an order denying a motion to intervene. See Superior Fence & Rail of N. Fla. v. Lucas, 35 So. 3d 104, 105 (Fla. 5th DCA 2010) (because the order constitutes a final determination of the proceeding as to the parties seeking to intervene, it is a final order appealable as a matter of right under Fla. R. App. P. 9.110(k)).

   b. Note that orders disposing of fewer than all the claims or fewer than all the parties are handled differently under the federal rules. Federal Rule of Civil Procedure 54 provides that a litigant seeking to obtain the entry of a final judgment as to fewer than all the claims or all of the parties must make a motion to the district court. Fed. R. Civ. P. 54(b). The district court may only enter such a “partial” final judgment if the court “expressly determines that there is no just reason for delay.” Id.

2. To be distinguished from a partial final judgment that totally disposes of the case as to a party, a partial final judgment that disposes of a separate and distinct cause of action that is not interdependent with other pleaded claims may be appealed either within 30 days of the rendition of the partial final judgment or after final judgment in the entire case. Fla. R. App. P. 9.110(k).

3. An order that merely grants a dispositive motion but does not include language of finality signifying the end to all judicial labor is not yet a final order and is not appealable as one. Boyd v. Goff, 828 So. 2d 468, 469 (Fla. 5th DCA 2002); see also Zabawa v. Penna, 868 So. 2d 1292, 1293 (Fla. 5th DCA 2004) (order was non-final and therefore non-appealable; fact that order was labeled “Second Amended Final Judgment” did not control); but see Heart Surgery Ctr. V. Thomas J. Bixler, II, M.D., P.A., 128 So. 3d 169, 176 (Fla. 1st DCA 2013) (certifying conflict with Zabawa). However, an order that enters judgment for a party and concludes all claims between those parties is final and must be appealed within 30 days. Boyd v. Goff, 828 So. 2d at 469. The Fourth DCA has ruled that such an order must be appealed even if it is a money judgment that does not include the words “for which let execution issue.” Friedman v. Friedman, 825 So. 2d 1010, 1011 (Fla. 4th DCA 2002) (dismissing party’s appeal as untimely where amended order sought to add words of execution and an appeal was not filed until after that second order).

C. Tolling Rendition of a Final Order

3.38
1. Certain post-judgment motions, if both timely and filed, toll the time for filing a notice of appeal of a final order until the entry of a signed, written order that disposes of such post-judgment motions. Fla. R. App. P. 9.020(i). Such motions include a motion for new trial, motion for rehearing, motion for certification, motion to alter or amend, motion for judgment in accordance with prior motion for directed verdict, motion for arrest of judgment, and motion to challenge the verdict. Id.; cf. Marin v. Limonte, 143 So. 3d 1099, 1100 (Fla. 3d DCA 2014) (court ruled that where there was no substantive difference between the rights adjudicated in the order granting summary judgment (i.e. an interlocutory order) and the final summary judgment, the court would treat the motion for rehearing as an authorized, premature motion, tolling the time for filing a notice of appeal). If such a motion is pending and the movant files a notice of appeal before decision on the motions, the appeal is held in abeyance until the filing of a signed, written order disposing of the last such motion. Fla. R. App. P. 9.020(i)(3) (recently changed to conform to the corresponding Federal rule). See Fed. R. App. P. 4(a)(4)(B)(i).

2. To postpone rendition, the motion must be both timely and authorized. Therefore, the motion must be served and filed within the timeframes set forth in the Rules of Civil Procedure. Fire and Cas. Ins. Co. of Connecticut v. Sealey, 810 So. 2d 988, 990 (Fla. 1st DCA 2002). For example, a motion for new trial and for judgment notwithstanding the verdict must be served within 15 days after the return of the verdict. Fla. R. Civ. P. 1.480(b), 1.530(b). Similarly, a motion for remittitur is considered a conditional motion for new trial and must be served within 15 days after the return of the verdict. Sealey, 810 So. 2d at 991; Hauss v. Waxman, 866 So. 2d 758, 759 (Fla. 4th DCA 2004) (holding, under previous rule providing for 10 days only, motion for remittitur was untimely where motion was not filed within 10 days after the return of the verdict). A motion to alter or amend the judgment must be served within 15 days after the judgment. Fla. R. Civ. P. 1.530(g). If the motion is filed within 15 days but the rule of civil procedure calls for service within 15 days, failure to prove timely service results in the motion being untimely and does not toll the deadline for the notice of appeal. Thompson v. Millender, 32 Fla. L. Weekly D121 (Fla. 1st DCA 2006) (opinion later abandoned for other reasons).

   a. Although the same general rule applies in federal court that the motion must be both timely and authorized, the rule is easier to apply because each of the authorized motions referred to in the appellate rules bases timeliness on the time of filing. See Fed. R. App. P. 4(a)(4)(A); Fed. R. Civ. P. 50(b), 52(b), 54, 58, 59 and 60.

3. A motion for relief from judgment under Fla. R. Civ. P. 1.540 is not considered a motion for rehearing or to otherwise alter a judgment, but is a collateral proceeding. Therefore, such a motion, even if filed within 15 days after the judgment, does not toll the time for filing a notice of appeal. A motion for relief from judgment can cause some confusion about the jurisdiction of the trial court pending appeal. See Stoppa v. Sussco, 943 So. 2d 309, 314 (Fla. 3d DCA 2006) (trial court may not consider motion to vacate final judgment while appeal of final judgment is pending before appellate court); cf. Kennedy v. Alberto, 649 So. 2d 286, 288 (Fla. 4th DCA 1995) (distinguishing a Rule 1.530 tolling motion from a Rule 1.540 motion for relief from judgment and concluding that a notice of appeal does not waive or abandon a pending motion under Fla. R. Civ. P. 1.540; although suggesting that the adjudication of the 1.540 motion would await the outcome of the appeal). Because some of the grounds for relief under Fla. R.
Civ. P. 1.540 require a motion to be brought within one year, and because that one-year statute of limitations is not tolled by the filing of an appeal from the original judgment, litigants face the risk of the limitations period expiring during the appeal from the original judgment. An often-recommended solution is to file a motion for relinquishment in the appellate court, seeking permission for the trial court to consider the Fla. R. Civ. P. 1.540 motion before the appeal proceeds. See Stoppa, 943 So. 2d at 313. One other note about a motion for relief from judgment: it is not a way to revive a tardy appeal or to get a second bite at the apple. In an appeal of an order on motion for relief from judgment, a party may not reach back to appeal other issues involving the trial or the final judgment but may only obtain review of the propriety of the court’s decision on the motion.

a. Unlike the state court rules, the federal court rules permit a motion for relief from judgment to serve as a tolling motion if the motion is filed no later than 28 days after the judgment is entered. See Fed. R. App. 4(a)(4)(A)(vi); Fed. R. Civ. P. 60.

4. Important caution about interlocutory appeals: there is no motion that can be filed after an interlocutory order to toll rendition of the order for purposes of bringing either an interlocutory appeal or a petition for writ of certiorari. That is so because there is no such motion that is authorized by the Rules of Civil Procedure. Although the trial court may entertain a motion to rehear or reconsider an interlocutory order, it has no impact upon the appellate time periods. Decktight Roofing Servs., Inc. v. Amwest Sur. Ins., 841 So. 2d 667, 668 (Fla. 4th DCA 2003) (“[U]nlike authorized and timely motions directed to a final order (which defers rendition until the disposition thereof), motions for reconsideration or rehearing of non-final orders are unauthorized and do not toll the time for filing a notice of appeal or petition for writ of certiorari.”); Quarterman v. McNeil, 1 So. 3d 392, 392-93 (Fla. 1st DCA 2009) (order denying a motion for relief from an order denying rehearing and from an order denying motions for disqualification are not authorized and, therefore, not appealable). In other words, a non-final appeal under Fla. R. App. P. 9.130 or a petition for writ of certiorari absolutely must be filed within 30 days of the entry of the order to be reviewed.

D. Waiver

1. The general rule is that any issue not raised by the appellant or appellee in their principal brief is waived. See, e.g., Chaachou v. Chaachou, 135 So. 2d 206, 221 (Fla. 1961); Ramos v. Phillip Morris Cos., Inc., 743 So. 2d 24, 29 (Fla. 3d DCA 1999); cf. R & B Holding Co. Inc., v. Christopher Adver. Grp., 994 So. 2d 329, 336 (Fla. 3d DCA 2008) (Cope, J. concurring) (“While the general rule is, as stated above, that an error not raised in the brief is waived, the rule is subject to exceptions.”).

2. A more difficult issue arises in assessing whether a waiver has occurred when the appellee chooses not to appeal an adverse ruling entered before the final judgment in a case where the judgment was fully favorable to the appellee. Some Florida case law suggests that while it is permissible for an appellee to cross-appeal to seek review of an adverse ruling that did not affect the final judgment, a few cases have gone further to find that the failure to raise such an issue may constitute a waiver in the event that the case is remanded for further proceedings. Cf. Allington Towers North, Inc. v. Weisberg, 452 So. 2d 1122, 1123 (Fla. 4th DCA 1984) (suggesting that the appellee would have done well to file a “contingent cross-
appeal” in the event that the judgment was reversed but that appellee was not required to file such a cross-appeal), with AirVac, Inc. v. Ranger Ins., Co., 330 So. 2d 467, 469 (Fla. 1976) (where successful appellee did not cross-appeal to raise issue of denial of amendment to answer, upon reversal of judgment and remand, appellee was not permitted to seek an amendment to the answer in conjunction with the re-trial). Although the Court in AirVac apparently ruled that the basis of its decision was “law of the case,” the actual basis was waiver, as the court explained in a later case. See Soffer v. R.J. Reynolds Tobacco Co., 187 So. 3d 1219, 1229 (Fla. 2016); Florida Dep’t of Transp. v. Juliano, 801 So. 2d 101, 107 (Fla. 2001). Where the appellee’s remedy would improve if an argument is accepted by the appellate court, the appellee must raise the issue by cross-appeal or it is waived. Miller, supra, 189 So. 3d at 361-62.
INDEX TO PRESERVATION OF ERROR FOR APPEAL (Jan. 2017)

I. INTRODUCTION AND POLICY MATTERS ................................................................. 1
   A. General Principles .................................................................................................. 1
   B. Exceptions to Objection Requirement: The Unwaivables ................................. 3

II. PRE-TRIAL PROCEEDINGS .................................................................................. 5
   A. Pleadings ................................................................................................................ 5
   B. Motion Practice ...................................................................................................... 8
   C. Discovery ............................................................................................................... 9

III. JURY SELECTION .................................................................................................. 10
   A. Timing of Objection ............................................................................................. 10
   B. Challenges for Cause ........................................................................................... 10
   C. Discrimination-based Peremptory Challenges ..................................................... 11
   D. Juror Misconduct ................................................................................................. 15

IV. EVIDENTIARY OBJECTIONS ............................................................................... 16
   A. Exclusionary Rulings; Offers of Proof (Tell what you were going to say) .......... 16
   B. Objecting to Admission of Evidence; Motions in Limine ................................... 18
   C. Preserving Objection to Expert Testimony .......................................................... 21

V. MOTIONS TESTING SUFFICIENCY OF THE EVIDENCE ....................................... 21
   A. Motion for a Directed Verdict (Can’t take “no” for answer) ............................... 21
   B. Motion for Judgment in Accordance with Prior Motion for Directed Verdict (still called JNOV by busy people) ......................................................... 23
   C. Motion for a New Trial ........................................................................................ 23
   D. Motion for Rehearing in Non-Jury Trial: When Required .................................... 24

VI. JURY INSTRUCTIONS .......................................................................................... 25
   A. Jury Instructions Requested ................................................................................. 25
   B. Jury Instructions Opposed .................................................................................... 26

VII. CLOSING ARGUMENT ....................................................................................... 26
   A. Inadequate Time Allowed for Opening or Closing .............................................. 26
   B. Improper Conduct of Counsel ............................................................................ 27

VIII. THE VERDICT ..................................................................................................... 30
   A. Verdict Form ......................................................................................................... 30
TABLE OF CONTENTS
(continued)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. Inconsistent Verdicts</td>
<td>32</td>
</tr>
<tr>
<td>C. Excessive or Inadequate Verdict</td>
<td>33</td>
</tr>
<tr>
<td>IX. JUROR MISCONDUCT</td>
<td>34</td>
</tr>
<tr>
<td>A. Motion to Interview Juror</td>
<td>34</td>
</tr>
<tr>
<td>B. Types of Misconduct Found Insufficient to Warrant Juror Interview</td>
<td>35</td>
</tr>
<tr>
<td>C. Types of Misconduct Which Have Supported a Juror Interview</td>
<td>35</td>
</tr>
<tr>
<td>D. The Alleged Misconduct Must have Presumptively Affected the Verdict</td>
<td>36</td>
</tr>
<tr>
<td>E. Opponent of jury interview must make a contemporaneous objection</td>
<td>36</td>
</tr>
<tr>
<td>F. Attorney Improprieties in Challenging a Juror</td>
<td>36</td>
</tr>
<tr>
<td>G. Review of Order Granting Interview</td>
<td>37</td>
</tr>
<tr>
<td>H. Juror Misconduct Discovered During Trial</td>
<td>37</td>
</tr>
<tr>
<td>X. SELECTED APPELLATE PRINCIPLES (that every trial lawyer should know)</td>
<td>37</td>
</tr>
<tr>
<td>A. Certiorari and Interlocutory Appeals Not Mandatory</td>
<td>37</td>
</tr>
<tr>
<td>B. Final Judgments and Partial Final Judgments</td>
<td>38</td>
</tr>
<tr>
<td>C. Tolling Rendition of a Final Order</td>
<td>38</td>
</tr>
<tr>
<td>D. Waiver</td>
<td>40</td>
</tr>
</tbody>
</table>
RECENT DEVELOPMENTS IN BUSINESS LITIGATION

By

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RECENT DEVELOPMENTS IN COMMERCIAL LITIGATION
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I. RECENT CASES AND DEVELOPMENTS IN FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICE ACT ("FDUTPA") CLAIMS

A. Purpose of FDUTPA. The primary purpose of FDUTPA is "to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive or unfair acts or practices in the conduct of any trade or commerce." Section 501.202(2), Fla. Stat. (2014). "[T]he remedies of the FDUTPA 'are in addition' to other remedies available under state and local law. A practice is unfair under FDUTPA if it offends established public policy, is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. The Florida Supreme Court has held that the statute 'applies to private causes of action arising from single unfair or deceptive acts in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract.'" Furmanite Am., Inc. v. T.D. Williamson, Inc., 506 F. Supp. 2d 1134, 1145 (M.D. Fla. 2007) (citations omitted).

Section 501.202, Fla. Stat., states that FDUTPA shall be construed liberally to promote the following policies; (1) To simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive and unfair trade practices; (2) To protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce; and (3) To make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

B. Parties under FDUTPA.

1. Proper Party Plaintiffs.

   a. Businesses as plaintiff. A "consumer" may be an individual or a business. Section 501.203(7), Fla. Stat;

   b. Non-consumers as plaintiffs. Courts are split whether a non-consumer can bring a FDUTPA claim. Compare Gibson v. Resort at Paradise Lakes, LLC, No. 8:16-cv-791 2017 WL 3421532 (M.D. Fla. Aug. 9, 2017) (“District courts in this Circuit are divided over whether the 2001 amendment extended FDUTPA to non-consumers, and the Eleventh Circuit has yet to resolve this split . . . . This Court agrees with the recent district court decisions which analyze the legislative history of the amendment and apply a more narrow interpretation of the term ‘person’ under FDUTPA . . .
Accordingly, Plaintiffs, as non-consumers, are not entitled to monetary damages under FDUTPA.”); with Chiron Recovery Center, LLC, v. AmeriHealth Hmo of New Jersey, Inc., 2017 WL 4390169, 9:16-CV-82043 (S.D. Fla. Oct. 2017) (“The Court aligns itself with the line of cases finding that non-consumers have standing under FDUTPA. Despite the existence of a split in the federal district courts, the state appellate courts that have ruled on the issue have determined that non-consumers have standing under FDUTPA.”)

Non-Florida residents as plaintiffs. Courts are split whether a non-Florida resident can be a plaintiff under FDUTPA. The recent focus is on the nexus between Florida and the alleged wrongful conduct. In OCE Printing Systems USA, Inc. v. Mailers Data Services, Inc., 760 So. 2d 1037 (Fla. 2d DCA 2000), the Court ruled that FDUTPA applied only to an in-state consumer. In Hutson v. Rexall Sundown, Inc., 837 So. 2d 1090 (Fla. 4th DCA 2003), the Fourth District held that FDUTPA did not apply to the claims of non-Florida residents. In Millennium Communications & Fulfillment, Inc. v. Office of the Atty. Gen. Dept. of Legal Affairs, State of Fla., 761 So. 2d 1256 (Fla. 3d DCA 2000), the Third District ruled that FDUTPA applied to a non-Florida consumer because the offending conduct occurred in Florida. In Renaissance Cruises, Inc. v. Glassman, 738 So. 2d 436 (Fla. 4th DCA 1999), the Court upheld class certification even though the class included non-Florida residents. The Court based its opinion, in part, on the fact that the "common injury" to members of the class occurred in Florida. The Court also applied a "significant contacts" test to decide if non-residents should be able to sue for alleged FDUTPA violations. See also Bank of Am., N.A. v. Zaskey, No. 9:15-CV-81325, 2016 WL 2897410, at *9 (S.D. Fla. May 18, 2016) (applying FDUTPA to non-Florida residents and providing analysis of Florida law).

2. FDUTPA Defendants.

a. Officers, shareholders and directors of a corporation. A corporate officer or director may be a defendant in a FDUTPA claim if they are a "direct participant" in the deceptive practice. KC Leisure, Inc. v. Haber, 972 So. 2d 1069 (Fla. 5th DCA 2008). In re Xenerga, Inc., 449 B.R. 594 (M.D. Fla. 2011) (finding that an officer or director may be a direct participant and it is not necessary to pierce the corporate veil).

b. Direct Participants. A person who "directly participates" in a violation may be sued under FDUTPA even if the violation was

C. **Jurisdiction.** A plaintiff may waive Florida jurisdiction and agree that a FDUTPA claim can only be brought in another state. *SAI Ins. Agency, Inc. v. Applied Systems, Inc.*, 858 So. 2d 401 (Fla. 1st DCA 2003); *World Vacation Travel S.A., de C.V. v. Brooker*, 799 So. 2d 410 (Fla. 3d DCA 2001); and *Farmers Group, Inc. v. Madio & Co., Inc.*, 869 So. 2d 581 (Fla. 4th DCA 2004). But see *Contractor's Management Systems of NH, Inc. v. Acree Air Conditioning, Inc.*, 799 So. 2d 320 (Fla. 2d DCA 2001); *Michaluk v. Credorax (USA), Inc.*, 164 So. 3d 719 (Fla. 3d DCA 2015). The forum selection clause requiring a FDUTPA claim to be brought outside of Florida will be held unenforceable if the lawsuit is a class action or if the cause of action is not available in the foreign jurisdiction. *America Online, Inc. v. Pasieka*, 870 So. 2d 170 (Fla. 1st DCA 2004).

D. **Exemptions from FDUTPA.** Because FDUTPA was enacted to provide consumer protection remedies when none existed before, the Florida legislature exempted from its scope matters covered by then existing regulation and protection. Pursuant to Section 501.212(1), *Fla. Stat.*, FDUTPA does not apply to an act or practice required or specifically permitted by federal or state law. This is often referred to as the FDUTPA "safe harbor" provision. As an example, a warning approved by the Federal Drug Administration is not the proper subject of a FDUTPA claim. *Prohias v. AstraZeneca Pharm. L.P.*, 958 So. 2d 1054 (Fla. 3d DCA 2007); *Berenguer v. Warner-Lambert Co.*, No. 02-05242, 2003 WL 24299241 (Fla. 13th Cir. July 31, 2003). Publication of EPA fuel economy figures is exempted from FDUTPA. *Brett v. Toyota Motor Sales USA, Inc.*, No. 6:08-cv-1168-Orl-286JK, 2008 WL 4329876 (M.D. Fla. September 15, 2009).

FDUTPA does not apply to a claim for personal injury or wrongful death or a claim for damage to property other than the property that is the subject of the consumer transaction. Section 501.212(3), *Fla. Stat.*

FDUTPA also exempts from its terms the following:


2. Insurance activities. Any person or activity regulated by the office of insurance regulation is exempt from FDUTPA claims. Section 501.212(4)(a) and (b), *Fla. Stat.*
3. Banking. Institutions regulated by the federal government or by the Florida Department of Banking and Finance are exempted from FDUTPA. Section 501.212(4)(b) and (e), Fla. Stat. This exemption does not, however, apply to bank subsidiaries, affiliates or agents. Bankers Trust Co. v. Basciano, 960 So. 2d 773 (Fla. 5th DCA 2007); State of Florida, Office of the Atty. Gen., Dept. of Legal Affairs v. Commerce Commercial Leasing, LLC, 946 So. 2d 1253 (Fla. 1st DCA 2007).

4. Real Estate. Certain types of real property transactions, especially those involving real estate brokers, are exempted. Section 501.212(6) and (7), Fla. Stat.

5. Public Service Commission regulated industries. FDUTPA does not apply to entities regulated by the public service commission. Section 501.212(5), Fla. Stat.; Extraordinary Title Services, LLC v. Florida Power & Light Co., 1 So. 3d 400 (Fla. 3d DCA 2009).

E. **Elements of the cause of action.** Consumer claims for damages under FDUTPA require three elements: (1) A deceptive or unfair trade practice; (2) causation; and (3) actual damages. See Kia Motors America Corp. v. Butler, 985 So. 2d 1133 (Fla. 3d DCA 2008); KC Leisure Inc. v. Haber, 972 So. 2d 1069 (Fla. 5th DCA 2008); City First Mortgage Corp. v. Barton, 988 So. 2d 82 (Fla. 4th DCA 2008); McGuire v. Ryland Group, Inc., 497 F. Supp. 2d 1347, 1355 (M.D. Fla. 2007).

1. A deceptive or unfair trade practice.
   a. "[U]nfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful. Zlotnick v. Premier Sales Group, Inc., 480 F. 3d 1281, 1284 (11th Cir. 2007); Furmanite Am. Inc., 506 F. Supp. 2d at 1145.
   b. Deceptive practice. "Deception occurs if there is a representation, omission or practice that is likely to mislead the [person] acting reasonably in the circumstances, to the [person's] detriment." Zlotnick, 480 F. 3d at 1284; accord, Beale v. Biomet, Inc., 492 F. Supp. 2d 1360, 1372 (S.D. Fla. 2007); Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. 2d DCA 2007).
   c. Deception required showing of "probable, not possible, deception" likely to cause injury to a reasonable person relying on the representation, omissions, or practice. Zlotnick, 480 F. 3d at 1284 (citations omitted); accord, Grillasca v. Amerada Hess Corp., 2006 WL 3313719, at *4 (M.D. Fla. Nov. 14, 2006); Trent v. Mortg. Electronic Registration Sys., Inc., 618 F. Supp. 2d 1356, 1364 (M.D. Fla. 2007).

e. Unfair practice. "An unfair practice is one that offends established public policy and . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Beale, 492 F. Supp. 2d at 1372 (citation and internal quotation marks omitted); accord, Butland, 951 So. 2d at 869;

i. Porsche Cars North America, Inc. v. Diamond, 140 So. 3d 1090 (Fla. 3d DCA 2014), recently adopted the definition of “unfairness” from the Federal Trade Commission’s 1980 Policy Statement – Unfairness requires that the injury to the consumer: 1) must be substantial; 2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and 3) must be an injury that consumers themselves could not reasonably have avoided. But see Democratic Republic of the Congo v. Air Capital Grp., LLC, 614 F. App'x 460, 471 (11th Cir. 2015) (providing negative treatment relating to subjective approach).

2. Causation.¹

a. "[F]or the consumer to be entitled to any relief under FDUTPA, the consumer must not only plead and prove that the conduct complained of was unfair and deceptive but the consumer must also plead and prove that he or she was aggrieved by the unfair and deceptive act." Grillasca v. Amerada Hess Corp., 2006 WL 3313719, at *4 (M.D. Fla. Nov. 14, 2006).

b. Plaintiffs must show that the behavior that is alleged violates FDUTPA, and not that defendant's actions generally, aggrieved plaintiffs. Berry v. Budget Rent A Car Sys., 497 F. Supp. 2d 1361, 1368 (S.D. Fla. 2007).

c. Even if defendant's behavior was unfair and deceptive, if plaintiff cannot affirmatively establish that the behavior proximately caused

¹ See also Subsection G below discussing various jurisdictions’ treatment of a plaintiff’s reliance on the alleged deceptive or unfair act.

d. Plaintiffs cannot show causation where they allege that production and marketing of Lipitor caused them damages, but concede that they continue to purchase Lipitor despite their knowledge of its alleged lack of benefits. Prohias v. Pfizer, Inc., 485 F. Supp. 2d 1329, 1334-37 (S.D. Fla. 2007).

3. Actual damages.

a. Plaintiffs seeking money damages under FDUTPA must show they suffered actual damages from the defendants' misrepresentation. Jones, 2007 WL 2298020, at *8 (citations omitted).

b. "[T]he measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." Rollins, Inc. v Heller, 454 So. 2d 580, 585 (Fla. 3d DCA 1984) (hereinafter "Heller"), quoted in Beale, 492 F. Supp. 2d at 1374 n.12; see Rodriguez v. Recovery Performance & Marine, LLC, 38 So. 3d 178 (Fla. 3d DCA 2010); accord Tri-County Plumbing Servs., Inc. v. Brown, 921 So. 2d 20, 22 (Fla. 3d DCA 2006); McGuire v. Ryland Group, Inc., 497 F. Supp. 2d 1347, 1355 (M.D. Fla. 2007).

c. Exception. If "the product is rendered valueless as a result of the defect[,] then the purchase price is the appropriate measure of actual damages." Heller, 454 So. 2d at 585, quoted in Beale, 492 F. Supp. 2d at 1374 n.12; accord Tri-county Plumbing Servs., Inc., 921 So. 2d at 22.

d. Actual damages under FDUTPA do not include consequential damages. Dorestin v. Hollywood Imps., Inc., 45 So. 3d 819 (Fla. 4th DCA 2010); Butland, 951 So. 2d at 869, quoted in Beale, 492 F. Supp. 2d at 1374 n.12 Thus, in a FDUTPA claim involving knee prosthetics, Plaintiffs were not "eligible for consequential damages including, ... pain and suffering, lost wages, or the cost of the subsequent total knee replacement." Beale, 492 F. Supp. 2d at 1374 n.12; See also Casa Dimitri Corp. v. Invicta Watch Company of America, Inc., No. 0:15–CV–21038, 2017 WL 4128050 (S.D. Fla. Sept. 15, 2017 ("Three of the thirteen FDUTPA claims fail as a matter of law because the alleged wrongful act causes only
consequential damage. Specifically, claims (ix), (x), and (xi), all essentially allege that Defendants have diverted sales and harmed goodwill. These types of damages are expressly not recoverable under the FDUTPA.


f. Within the context of prescription drugs, courts have explicitly rejected "price inflation" and "fraud on the market" theories of damages. *Prohias*, 485 F. Supp. 2d at 1336-37.

i. If the price of the product is strictly fixed by the manufacturer, theories derived from fluctuating securities markets are inapplicable. *Id.*

ii. Determining a hypothetical price that prescription drugs would sell for, absent the allegedly deceptive behavior, remains too speculative even with expert proof. *Id.* at 1337.

g. Examples of inadequately pled damages.

i. Plaintiff whose car financing transaction fell through could not prevail on a FDUTPA violation where she could not show damages. "Plaintiff was never charged a finance charge or any other fee by Defendant, her down payment was returned in full, and her insurance premiums did not change as a result of taking possession of, and later returning, the Mazda. . . . Subjective feelings of disappointment are insufficient to form a basis for actual damages under the statute. There can be no monetary recovery under the FDUTPA where the plaintiff has suffered no out-of-pocket losses." *Jones*, 2007 WL 2298020, at *7.

ii. A plaintiff's FDUTPA claim failed where plaintiff presented no evidence that a house coated with TCF rather than stucco differed in value from a house coated with stucco, and where her house actually increased in value since she purchased it. *McGuire*, 497 F. Supp. 2d at 1355.
G. **Reliance.** Intent to deceive or intent that the recipient of the representation rely on it are not elements of a FDUTPA cause of action. *Rollins v. Heller*, 454 So. 2d 580 ( Fla. 3d DCA 1984); *Urling v. Helms Exterminating, Inc.*, 468 So. 2d 451 (Fla. 5th DCA 1985); *W. S. Badcock Corp. v. Myers*, 696 So. 2d 776 (Fla. 1st DCA 1996). "A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, its different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue." *State of Florida, Office of Atty. Gen. Dept. of Legal Affairs v. Wyndham Intr'n'l, Inc.*, 869 So. 2d 592, 598 (Fla. 1st DCA 2004); see also *Turner Greenberg Assoc., Inc. v. Pathman*, 885 So. 2d 1004 (Fla. 4th DCA 2004).

Courts appear to differ on whether or not a plaintiff must prove actual reliance on the deceptive or unfair act or merely reliance by an objectively reasonable consumer. *See Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279 (11th Cir. 2011)(stating that actual reliance is not necessary); *Davis v. Powertel, Inc.*, 776 So. 2d 971 (Fla. 1st DCA 2000)(finding that actual reliance is not required); *Phillip Morris USA, Inc. v. Hines*, 883 So. 2d 292, 294 (Fla. 4th DCA 2003)(stating that causation requires actual reliance); *Black Diamond Prop., Inc. v. Haines*, 940 So. 2d 1176, 1179 n.1 (Fla. 5th DCA 2006)(stating that "[w]e disagree" with the proposition that plaintiffs are not required to prove actual reliance upon purported misrepresentations and criticizes the holding of *Davis v. Powertel, Inc.*, 776 So. 2d 971 (Fla. 1st DCA 2000), one of the earliest cases eliminating a reliance requirement on the grounds that it insufficiently takes into account the causation requirement).

H. **Pleading requirements.** The plaintiff must plead sufficient facts that establish the plaintiff was actually aggrieved by an unfair, unconscionable, or deceptive act committed by defendant in the course of trade or commerce. *Tuckish v. Pompano Motor Co.*, 337 F. Supp. 2d 1313, 1320 (S.D. Fla. 2004). Courts have described an unfair practice as "one that violates established public policy" and one that is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *PNR, Inc. v. Beacon Prop. Mngt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003); *Kelly v. Palmer, Reifler & Assocs., P.A.*, 681 F. Supp. 2d 1356 (S.D. Fla. 2010); but see *Porsche Cars North America, Inc. v. Diamond*, 140 So. 3d 1090 (Fla. 3d DCA 2014). A plaintiff must plead ultimate facts that establish deception is "probable," not just "possible," in order to be actionable. *Zlotnick v. Premier Sales Group, Inc.*, 480 F. 5d 1281, 1284 (11th Cir. 2007). A FDUTPA action exists when the plaintiff establishes that a reasonable person acting in the same circumstances would likely be deceived by the defendant's business practice. *Morris v. ADT Security Services*, 580 F. Supp. 2d 1305 (S.D. Fla. 2008). A FDUTPA complaint that fails to allege how the alleged deception or unfair practice caused damage to the plaintiff should be dismissed. *Kias v. Mansisana Ocean Residences, LLC*, No. 08-21492-civ, 2009 WL 825763 (S.D. Fla. March 26, 2009); *Macias v. HBC of Florida, Inc.*, 694 So. 2d 88, 90 (Fla. 3d DCA 1997). Although courts are still uncertain as to whether 9(b) heightened pleading
standards apply to FDUTPA claims, the recent trend seems to be that heightened standards do not apply. See e.g., Federal Trade Commission v. Student Aid Center, Inc., No., 16–21843, 2016 WL 10719950 (S.D. Fla. Dec. 29, 2016) (“Finally, courts in the Eleventh Circuit have held that Rule 9(b) does not apply to claims under Florida's Deceptive and Unfair Trade Practices Act (‘FDUTPA’”).

I. The nature of the representation.

1. Express Representations. Express representations need not be noncontractual to be actionable. Delgado v. J. W. Courtesy Pontiac GMC-Truck, 693 So. 2d 602 (Fla. 2d DCA 1997); Sarkis v. Pafford Oil, 697 So. 2d 524, 528 (Fla. 1st DCA 1997). A FDUTPA claim, however, cannot be premised on the same conduct and representations that are merely a derivative of an unsuccessful contract claim. As the Fifth District has observed, "to hold otherwise would allow every failed breach of contract claim to mark into a . . . FDUTPA claim. The well-established laws governing contracts should not be so casually dismissed." Bankers Trust Co. v. Basciano, 960 So. 2d 773, 778 (Fla. 5th DCA 2007). The Fourth DCA has similarly noted that the tactic of injecting deceptive trade practice claims into a contract dispute complicates a lawsuit, raises the stakes, and increases the litigation expenses. Further stated that "we have encountered few cases where such claims were successful." Mandel v. Decorator's Mart, Inc. of Deerfield Beach, 965 So. 2d 311, 313 n.1 (Fla. 4th DCA 2007). A FDUTPA claim will not lie where a written contract between the parties adequately dealt with, or expressly contradicted, the alleged misrepresentation. TRG Night Hawk, Ltd. v. Registry Development Corp., 17 So. 3d 782 (Fla. 2d DCA 2009). However, a FDUPTA claim may exist along with a contract claim if it challenges acts underlying the contract or giving rise to the breach and does not rely solely on the violation of the agreement. See Kenneth F. Hackett &Assocs. v. GE Capital Info. Tech. Solutions, Inc., 744 F. Supp. 2d 1305 (S.D. Fla 2010); It's a 10, Inc. v. Beauty Elite Grp., Inc., 13-60154-CIV, 2013 WL 4822270 (S.D. Fla. May 17, 2013).

2. Materiality. If reliance is not required for a valid claim, it can be argued that the alleged representation does not have to pass the "materiality test" that exists in a fraud claim. That notwithstanding, the requirement of causation may provide the requirement for a materiality element. At least one Florida court has held that materiality is still a required element of a FDUTPA claim. Mac-Gray Services, Inc. v. DeGeorge, 913 So. 2d 630 (Fla. 4th DCA 2005).

3. Unfair Acts and Practices. The substantive basis of a finding of unfairness must be based on a violation of (1) FTC rules; (2) the FTC standard of unfairness; (3) specific statutes that reference FDUTPA or describe unfair practice; or (4) Department of Legal Affairs rules.

4.9
a. Violation of Specific FTC Rules. Section 501.203(3)(a), Fla. Stat., creates a private right of action for violation of FTC rules even though none exists under the FTC act itself. Nieman v. Dryclean U.S.A. Franchise Co., Inc., 178 F. 3d 1126 (11th Cir. 1999) (construing Florida law). The FTC rules appear at 16 C.F.R. Ch.1, subch. D entitled "Trade Regulation Rules." Examples of these include: (1) consumer credit: making it unfair to take or receive a consumer credit contract not containing a specific notice that the holder is subject to claims and defenses the debtor could assert against the seller (16 C.F.R. 433); (2) franchising: prohibiting representations for prospective franchisees as to levels of sales, income or profit without making available substantiating material (16 C.F.R. 436); (3) funeral industry practices (16 C.F.R. 453); (4) home insulation sales: rules requiring home insulation manufacturers to calculate and disclose a standardized "R-value" (16 C.F.R. 460); (5) home location sales: rules requiring sellers making such sales to provide a "cooling off" period before the sale becomes final (16 C.F.R. 429); (6) ophthalmic practices: rules requiring ophthalmologists and optometrists to provide customers with copies of their prescriptions so they can price shop among different providers of eyeglasses (16 C.F.R. 456); and (7) used car sales: rules requiring used car dealers to post a buyer's guide on the side window (16 C.F.R. 455.2(a), 455.(3)).

b. FTC Standard of Unfairness. The FTC act defines an "unfair" practice to mean a practice that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by any availing benefits to consumers or to competition." 15 U.S.C. §45(n); see also Porsche Cars North America, Inc., 140 So. 3d 1090.

c. Violations of Florida Statutes as Per Se Violations of FDUTPA. Examples of these include the following: commercial weight loss practices (Section 501.1051, Fla. Stat.); home health agencies (Section 400.464(4)(b), Fla. Stat.); home medical equipment providers (Section 400.93(6)(b), Fla. Stat.); lemon law (Section 681.111, Fla. Stat.); service agreements (Section 624.125(2), Fla. Stat.); solicitation of funds by charities (Section 496.416, Fla. Stat.); and weight loss centers (Section 501.0579, Fla. Stat.).

d. Inter-State Land Sales Full Disclosure Act (ILSA). Florida federal courts have ruled that a violation of the Inter-State Land Sales Full Disclosure Act also constitutes a violation of FDUTPA. Trotta v. Lighthouse Point Land Co., LLC, 551 F. Supp. 2d 1359, 1367 (S.D. Fla. 2008) reversed on other grounds in Trotta v Lighthouse

J. **Individual Remedies.**

1. Section 501.211(1), Fla. Stat., allows declaratory and injunctive relief. "FDUTPA affords civil private causes of action for both declaratory and injunctive relief and for damages." Butland, 951 So. 2d at 869.

2. Section 501. 211(2), Fla. Stat., allows a person who has suffered a loss as a result of the violation of the act to recover “actual damages, plus attorney’s fees and court costs.” See also Zlotnick, 480 F. 3d at 1284 (citing §501.211, Fla. Stat.); Furmanite Am., Inc., 506 F. Supp. 2d at 1145.


4. If a party defending a FDUPTA action brings a motion alleging the action to be “frivolous, without legal merit, or brought for the purpose of harassment”, after evidentiary hearing, the Court may require the party asserting the FDUPTA claim to post a bond in the amount which the court finds reasonable to indemnify the defendant for damages incurred, including reasonable attorney’s fees. Section 501.211(3), Fla. Stat.

K. **Attorneys' fees under FDUTPA.**

a. The award of attorneys' fees under FDUTPA is not mandatory, and the entitlement to such an award is within the trial court's sound discretion. CrossPointe, LLC, 2007 WL 1192021, at *4.

b. The attorney's fees to the prevailing party provision under FDUTPA sections 501.2105(1)-(4) must be upheld absent an abuse of discretion. Humane Soc. of Broward County, Inc. v. Fla. Humane Soc., 951 So. 2d 966, 968 (Fla. 4th DCA 2007).

2. To be a prevailing party entitled to fees, the party must have been awarded a favorable judgment. CrossPointe, LLC, 2007 WL 1192021, at *4.

a. The movant must show it received a net judgment in the entire case. CrossPointe, LLC, 2007 WL 1192021, at *4.

b. For example, plaintiff was not entitled to an attorney's fees award where the court had granted summary judgment for defendants on substantial portion of plaintiff's FDUTPA claim, and defendants' damages award was more than eight times larger than plaintiff's award. CrossPointe, LLC, 2007 WL 1192021, at *5.

3. Factors the trial court may consider when awarding attorney's fees to the prevailing party include, but are not limited to:

a. "the scope and history of the litigation;"

b. "the ability of the opposing party to satisfy an award of fees;"

c. "whether an award of fees against the opposing party would deter others from acting in similar circumstances;"

d. "the merits of the respective positions-including the degree of the opposing party's culpability or bad faith;"

e. "whether the claim brought was not in subjective bad faith but frivolous, unreasonable, groundless;"

f. "whether the defense raised a defense mainly to frustrate or stall; [and]

g. "whether the claim brought was to resolve a significant legal question under FDUTPA law." Humane Soc. of Broward County, Inc., 951 So. 2d at 972-72; see also Procaps S.A. v. Patheon Inc., No. 12-24356, 2017 WL 3536917 (S.D. Fla. 2014) (appeal filed No. 17-14147).
4. Thus, a court may exercise its discretion to deny attorney's fees where each party "had contributed to the length and cost of the trial due to [its] lack of professionalism, gross overestimation of the value of [its] claims, and acrimonious behavior." CrossPointe, LLC, 2007 WL 1192021, at *5.

5. To recover attorney's fees, a prevailing defendant is not required to show that the action was "frivolous, unreasonable or without foundation." Humane Soc. of Broward County, Inc., 951 So. 2d 971-72 (citations omitted)(rejecting invitation to apply Christiansburg standard to FDUTPA).


N. Arbitration under FDUTPA. Florida courts have compelled arbitration of FDUTPA claims. See Eventys Marketing and Products, Inc. v. Comcast Spotlight, Inc., 28 So. 3d 959 (3d DCA 2010); Murphy v. Courtesy Ford, LLC, 944 So. 2d 1131 (Fla. 3d DCA 2006); Beazer Homes Corp. v. Bailey, 940 So. 2d 453 (Fla. 5th DCA 2006); Aztec Medical Servs. Inc. v. Burger, 792 So. 2d 617 (Fla. 4th DCA 2001); Bill Heard Chevrolet Corp. Orlando v. Wilson, 877 So. 2d 15 (Fla. 5th DCA 2004); Stewart Agency, Inc. v. Robinson, 855 So. 2d 726 (Fla. 4th DCA 2003); Mercedes Homes, Inc. v. Rosario, 920 So. 2d 1254 (Fla. 2d DCA 2006); and Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. 1st DCA 1999). The arbitration clause must actually cover the subject matter of the FDUTPA claim. JRG Enterprises, Inc. v. Evans, 941 So. 2d 1289 (Fla. 4th DCA 2006); United Vacation Network, Inc. v. Tahiri, 987 So. 2d 244 (Fla. 2d DCA 2008); and Contractor's Mangt. Syst. of NH, Inc. v. Acree Air Conditioning, Inc., 799 So. 2d 320 (Fla. 2d DCA 2001).

O. Possible defenses to a FDUTPA claim.

1. Statute of Limitations. An action cannot be brought more than four years after the occurrence of a violation or more than two years after the last payment in a transaction involved, whichever is later. Section 501.207(5), Fla. Stat. Damages do not occur, and a cause of action does not accrue until the deceptive payment is made. Sundance Apartments I, Inc. v. General Electric Capital Corp., 581 F. Supp. 2d 1215 (S.D. Fla. 2008). There is no tolling of the statute of limitations. See Yusuf Mohamad
Excavation, Inc. v. Ringhaver Equip. Co., 793 So. 2d 1127 (Fla. 5th DCA 2001); Davis v. Monahan, 832 So. 2d 708 (Fla. 2002); South Motor Co. of Dade County v. Doktorczyk, 957 So. 2d 1215 (Fla. 3d DCA 2007); and McKissic v. Country Coach, Inc., No. 8:07-cv-1488-T-17EAJ, 2008 WL 616093 (M.D. Fla. March 3, 2008).

2. Pre-emption. Federal law may pre-empt FDUTPA.
   c. FDA. Boca Burger, Inc. v. Forum, 912 So. 2d 561 (Fla. 2005).

3. Unenforceable Contract. A claim for FDUTPA cannot lie where it is based on a contract that the court has ruled unenforceable. See Bankers Trust Co. v. Basciano, 960 So. 2d 773, 778 (Fla. 5th DCA 2007).

P. Recent changes to FDUTPA. In 2013, the Florida legislature made three changes to FDUTPA. Section 501.203(3), Fla. Stat., was amended to provide that a violation of FDUTPA may be based upon any FTC rules or other laws governing unfair methods of competition or deceptive acts that exist as of July 1, 2013, as opposed to the former threshold date of July 1, 2006. Section 501.204, Fla. Stat., was amended to provide that due consideration shall be given to FTC and federal court interpretations that exist as of July 1, 2013, as opposed to the former threshold date of July 1, 2006. Section 501.2077, Fla. Stat., was amended to add protections for persons with a disability, military servicemembers, or the spouse or dependent child of a military servicemember.

II. ECONOMIC LOSS RULE

A. The Rule.
   1. “The economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses.” Indemnity Insurance Co. v. American Aviation, Inc., 891 So. 2d 532, at 536 n.1 (Fla. 2004).
2. “In this state, the economic loss rule has been applied in two different circumstances. The first is when parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract. The second is when there is a defect in a product that causes damage to the product, but causes no personal injury or damage to other property.” *Id.* at 536. The two applications are known as the “contractual privity economic loss rule” and the “products liability economic loss rule.”

3. Case law has developed numerous exceptions to the contractual privity economic loss rule, including for tort actions premised upon: 1) professional malpractice; 2) fraudulent inducement; 3) negligent misrepresentation; and 4) statute. *Id.* at 543.

B. *Tiara Condominium and a “Legacy of Unprincipled Expansion.”*

1. On March 7, 2013, in *Tiara Condominium Ass’n, Inc. v. Marsh & McLennon Companies, Inc.*, 110 So. 3d 399 (Fla. 2013), the Florida Supreme Court receded from its prior rulings and limited the economic loss rule to a products liability context. The contractual privity economic loss rule is no more.

2. The Court stated: “Our experience with the economic loss rule over time, which led to the creation of the exceptions to the rule, now demonstrates that expansion of the rule beyond its origins was unwise and unworkable in practice. Thus, today we return the economic loss rule to its origin in products liability.” *Id.* at 407.

C. *Tiara Condominium’s practical effect.*

1. As indicated by Justice Pariente’s concurring opinion and the dissenting opinions of Justice Polston and Justice Canady, the effect of *Tiara Condominium* is polemic and undecided. See also Judge Alice Blackwell, Judge Lisa T. Munyon, and Paul Sarlo, *Tort and Contract Actions: Strange Bedfellows no More in the Wake of Tiara Condominium*, 87 Fla. B. J. 10 (Dec. 2013)(concluding that “[t]he legal community will struggle to determine the line that remains, if any, between contract and tort”).

   a. According to Justice Pariente’s concurring opinion, the abolition of the contractual privity economic loss rule “is neither a monumental upsetting of Florida law nor an expansion of tort law at the expense of contract principles.” *Tiara Condominium*, 110 So. 3d at 408. Prior to the creation of the contractual privity economic loss rule, “fundamental contractual principles” already properly delineated the general boundary between contract law and tort law. “For example, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action
are satisfied, including that the tort is independent of any breach of contract claim.”

b. According to Justice Polston and Justice Canady, “Florida’s contract law is seriously undermined by [Tiara Condominium].” “Now there are tort claims and remedies available to contracting parties in addition to the contractual remedies which, because of the economic loss rule, were previously the only remedies available.” Justice Polston cites eight cases which illustrate the types of cases that are overruled by the abolition of the contractual privity economic loss rule. See Id. at 414 n.10.

2. It is difficult to reconcile the two disparate predictions of the future of tort and contract law. However, it is important to note that Justice Polston and Justice Canady fail to address the “fundamental contractual principles” referenced by Justice Pariente or why they would not ostensibly replace the contractual privity economic loss rule. Further, the origins of the rule itself make it appear more likely that the core of the economic loss rule will remain Florida law, but simply by a different name.

a. In the Florida Supreme Court case that originally adopted the economic loss rule in a contract for the sale of goods context, Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899 (Fla. 1987), the Court stated that the “economic loss rule approved in this opinion is not a new principle of law in Florida and has not changed or modified any decisions of this Court. In fact, the economic loss rule has a long, historic basis originating with the privity doctrine which precluded recovery of economic losses outside a contractual setting.” See also AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180 (Fla. 1987)(noting that applying the economic loss rule to bar a tort action when there was a contract for services was “consistent with district court of appeal decisions declining to allow a tort claim for economic losses against various service entities based on an underlying contract”).

3. Regardless of which is the winning argument, attorneys should familiarize themselves with the “fundamental contractual principle” case law cited by Justice Pariente. Attorneys should be prepared to argue that the core of the contractual privity economic loss rule – one cannot assert a tort action premised upon issues addressed in a contract – remains Florida law, but simply under a new name. See Alhassid v. Bank of Am., N.A., No. 14-CIV-20484, 2014 WL 6480656, at *12 (S.D. Fla. Nov. 17, 2014) (applying “fundamental contract principles” in place of economic loss rule); Lamm v. State St. Bank & Trust, 749 F.3d 938, 947 (11th Cir. 2014) (“While the exact contours of this possible separate limitation, as applied
post-Tiara, are still unclear, the standard appears to be that ‘where a breach of contract is combined with some other conduct amounting to an independent tort, the breach can be considered negligence.’”); Freeman v. Sharpe Resources Corp., 2013 WL 2151723 (M.D. Fla. May 16, 2013)(applying, after Tiara Condominium, “fundamental contractual principles” to bar tort actions); Joyeria Paris, SRL v. Gus & Eric Custom Services, Inc., 2013 WL 6633175 (S.D. Fla. Dec. 17, 2013); but see F.D.I.C. v. Floridian Title Group, Inc., 2013 WL 5237362 (S.D. Fla. Sept. 17, 2013)(refusing to apply “fundamental contractual principles” because defendant failed to cite any authority to support the “rebranding” of the economic loss rule); but see Bornstein v. Marcus, 169 So. 3d 1239, 1244 (Fla. 4th DCA 2015) (reversing trial court dismissal of tort claims based on Tiara).

4. Additionally, attorneys should still be aware of the extant case law explaining when a tort is deemed to be independent of a contract for purposes of the application of the economic loss rule. There is no reason that such cases cannot be controlling, or at least persuasive, in determining whether or not a tort is independent of a contract for purposes of the application of “fundamental contractual principles.” In Freeman, the court acknowledged the holding in Tiara Condominium, but still applied “fundamental contractual principles” to find that many of the tortious statements at issue were not independent of the contract and, therefore, could not support a tort action. To guide its determination of whether or not the statements were independent of the contract the court relied upon an economic loss rule case, HTP, LTD. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238 (Fla. 1996). See also Certain Underwriters at Lloyd’s of London, UK Subscribing to Policy No. B1230AP56189A14 v. Ocean Walk Resort, 16-cv-258-Orl-37, 2017 WL 3034069 at fn. 19 (M.D. Fla. July 18, 2017); Callaway Marine Technologies, Inc. v. Tetra Tech, No. 16-cv-20855, 2016 WL 7407769 (S.D. Fla. Dec. 22, 2016); Smith v. Jackson, No. 16-81454, 2017 WL 1047033, (S.D. Fla. Mar. 20, 2017). But see Abel & Buchheim, 2017 WL 3731002, Case No. 1:16-cv-24663 (S.D. Fla. Aug. 27, 2017) (applying distinct law rather than the economic loss rules to support the argument that there is no common-law duty of a defendant in negligence to protect a plaintiff from mere economic losses).

Because of the uncertain future of tort and contract law referenced above, the following economic loss rule cases may still be useful in answering questions on the independent nature of the alleged tort or the future applicability of an exception to the economic loss rule.

D. Negligent torts.
1. Negligence Claim. A negligence claim for economic loss based upon the same conduct as a breach of contract is barred by the economic loss rule.

a. In *Vesta Constr. and Design, LLC v. Lotspeich & Associates, Inc.*, 974 So. 2d 1176 (Fla. 5th DCA 2008), the Fifth District held that when an aggrieved party is barred by the contractual privity economic loss rule from suing a corporation in tort, it cannot avoid the rule by suing non-professional employees for their alleged negligence in performing the contract on behalf of the corporation. The court also held that claims for negligent misrepresentation pursuant to Section 552 of the Restatement (Second) of Torts do not apply as an economic loss rule exception in contractual privity cases. Rather, in contractual privity cases, the rule still stands that parties to a contract generally cannot sue one another in tort unless they establish a tort independent of the contract. E.g., *AFM Corp. v. South Central Bell & Tel. Co.*, 515 So. 2d 180, 181-82 (Fla. 1987).

b. In *Taylor v. Maness*, 941 So. 2d 559 (Fla. 3d DCA 2006), the court noted that plaintiffs were seeking to recover damages in tort for a matter which arose from a breach of contract claim and thus decided that "the trial court properly concluded that the economic loss rule barred recovery for the fraud in the inducement and negligent misrepresentation claims." See also *Mac-Gray Servs., Inc. v. DeGeorge*, 913 So. 2d 630, 634 (Fla. 4th DCA 2005) (considering statements claimed to have been relied on and observing "[e]ven if we considered these material statements, rather than mere puffing, the contract precludes reliance on them. A party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract.") *Giallo v. New Piper Aircraft, Inc.* 855 So. 2d 1273, 1275 (Fla. 4th DCA 2003) (stating "a party cannot recover for fraudulent oral representations which are covered in or contradicted by a later written agreement"); *Bates v. Rosique*, 777 So. 2d 980, 982 (Fla. 3d DCA 2001) (concluding "where the alleged fraudulent misrepresentations are inseparably embodied in the parties' subsequent agreement, the economic loss rule will apply"); *J Square Enters. v. Regner*, 734 So. 2d 565, 566-67 (Fla. 5th DCA 1999) (observing that fraudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract); *Clayton v. State Farm Mut. Auto. Ins. Co.*, 729 So. 2d 1012, 1014 (Fla. 3d DCA 1999) (holding "where the alleged fraudulent misrepresentation is inseparable from the essence of the parties' agreement, the economic loss rule still applies"); *Straub Capital Corp. v. L. Frank Chopin P.A.*, 724 So. 2d 577, 579 (Fla. 4th DCA 1998)
(concluding that the economic loss rule barred commercial tenants' claim against landlord for negligent misrepresentation, where alleged misrepresentations were directly related to landlord's performance under lease); Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So. 2d 74, 78 (Fla. 3d DCA 1997) (observing "where the alleged fraudulent misrepresentation is inseparable from the essence of the parties' agreement, the economic loss rule applies and the parties are limited to pursuing their rights in contract").

c. In Curd v. Mosaic Fertilizer, 993 So. 2d 1078 (Fla. 2d DCA 2008), the court held economic damages were not recoverable under negligence or strict liability theories absent personal injury or damage to property. In Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216 (Fla. 2010), the court held that economic damages were recoverable under statutory causes of action and under common law causes of action (negligence) absent personal injury or damage to property. But in Ramos v. Fla. Power & Light Co., No. 31008-1694, 2009 WL 336487221 So. 3d 91 (Fla. 3d DCA Oct. 21, 2009), the court reversed a dismissal of negligence claim for discontinuance of electrical services holding that the basis for the claims was independent of any contractual breach.

2. Exception for Certain Professionals. Courts have allowed negligence claims for economic loss against professionals (engineers, attorneys and abstractors).

a. Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999). Homeowners sought economic damages from engineering company and its employees for negligently performing a pre-purchase inspection of a house. The homeowner had a contract with the engineering company, but no privity with the individual employees. The Court held: (1) the homeowner could bring a professional negligence claim against the individual engineers notwithstanding the lack of privity with those individuals; and (2) the economic loss rule did not preclude negligence claims against professionals where there was no personal injury or property damage. The Court emphasized the existence of a duty on the part of professionals to practice in accordance with the standard of care used by similar professionals in communities under similar circumstances and the responsibility of individual professionals for breach of that applicable duty of care. The Court also noted that the economic loss rule was primarily intended to limit actions in the products liability area and that its application should generally be restricted to context where the policy considerations are substantially similar to those underlying the product liability context.
b. *Southland Construction, Inc. v. Richeson Corp.*, 642 So. 2d 5 (Fla. 5th DCA 1994). A general contractor filed negligence and breach of contract claims against an engineering company for faulty design of a retaining wall seeking recovery of economic losses. In holding that the contractor could pursue its negligence claim, the court noted that while there was no contractual relationship between the contractor and the engineer, it was clear that the contractor, as user of the plans, would be injured if the design was faulty. The court noted that as a result of the decision in *Moyer, supra*, this was not an extension of tort liability.

c. *Resolution Trust Corporation v. Holland & Knight*, 832 F. Supp. 1528 (S.D. Fla 1993). The court held that the economic loss rule and independent tort doctrine did not apply to a legal malpractice claim in which the complaint alleged breaches of the duty of care and breaches of fiduciary duties since these counts sounded both in tort and contract.

d. *First American Title Insurance Company, Inc. v. First Title Service Company of The Florida Keys, Inc.*, 457 So. 2d 467 (Fla. 1984). The Court held that when an abstractor knows his customer is ordering the abstract for the use of a purchaser of property, the third party user is owed the same duty and is entitled to the same remedy as the customer who ordered the abstract.

e. *Witt v. LaGorge Country Club, Inc.*, No. 3D08-1812, 3D08-1825, 2009 WL 1606437 (Fla. 3d DCA 2009). The economic loss rule did not bar professional negligence claims against a geologist notwithstanding a limitation of liability provision in the professional services agreement.

f. But in *Vesta Constr. and Design, LLC, supra*, the court held that a party could not avoid the economic loss rule by suing non-professional employees of an engineering company for negligence.

3. Negligent Misrepresentation: “Fraud in the Inducement” vs. “Fraud in the Performance.” The economic loss rule does not preclude claims for “fraud in the inducement,” but it may bar claims for “fraud in the performance.”

a. Fraud in the Inducement. To have fraud in the inducement (as distinguished from fraud in the performance) the alleged misrepresentation must induce the plaintiff to enter into a contract with the defendant. Fraud in the inducement relates to tortious conduct that occurred prior to and independent of the contract entered into by the parties. For purposes of applying the fraud in
the inducement exception to the economic loss rule, it is important
to distinguish that claim from other kinds of fraud.

i. *Swope v. Dimarco*, 886 So. 2d 270 (Fla. 4th DCA 2004); *Woodson v. Martin*, 685 So. 2d 1240 (Fla. 1996). A buyer of residential property is not prevented by the economic loss rule from recovering damages for fraud in the inducement against a real estate agency and its individual agent representing the sellers.

ii. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996). Noting that fraudulent inducement is an independent tort as it requires proof of facts separate and distinct from the breach of contract, the Supreme Court held that the economic loss rule did not bar claims for fraud in the inducement.

iii. *La Pesca Grande Charters, Inc. v. Michael H. Moran*, 704 So. 2d 710 (Fla. 5th DCA 1998). In holding that the economic loss rule did not bar a claim for fraud in the inducement, the court noted that if someone was induced to enter a contract by fraud, there is a cause of action for fraud. If there is no fraud inducing someone to enter into a contract, but the contract is breached, the cause of action sounds in contract. The fact that the measure of damages may be the same for both causes of action does not make the fraud claim disappear.

iv. *Output, Inc. v. Danka Bus. Systems, Inc.*, 991 So. 2d 941 (Fla. 4th DCA 2008). The court held that a party could state a cause of action for fraud in the inducement and not be barred by the economic loss rule where the alleged misrepresentation was set forth in a subsequent contract to which the plaintiff was not a party. Had the plaintiff been a party to that agreement, his claim would have been barred by the economic loss rule.

v. *Ladner v. AmSouth Bank*, 32 So. 3d 99 (Fla. 2d DCA 2009). In a mortgage foreclosure context, the economic loss rule did not bar the borrower's claims for fraud in the inducement in connection with a construction agreement.

b. Fraud in the Performance

i. *Output, Inc. v. Danka Bus. Systems, Inc.*, supra. When the fraud relates to the performance of the contract, the
economic loss doctrine will limit the parties to their contractual remedies.

ii. *Sarkis v. Pafford Oil Co., Inc.*, 697 So. 2d 524 (Fla. 1st DCA 1997). Lessee of gasoline station brought suit against the gasoline company and its sales representative for allegedly furnishing inferior grades of gasoline under multiple theories including fraud. The court found the fraud claim barred by the economic loss rule as the lease between the parties required the lessee to purchase certain quantities of motor fuel and the risk of obtaining inferior fuel could have been addressed when the parties negotiated the lease.

iii. *Straub Capital Corp. v. Frank Chopin, P.A.*, 724 So. 2d 577 (Fla. 4th DCA 1998). Office tenants sued the landlord for, *inter alia*, negligent misrepresentation arising from late delivery of tenant space. The court held the economic loss rule barred the tenants’ claims for negligent misrepresentation because, absent a tort independent of the breach of contract, the remedy for economic loss lies in contract law.

iv. *J. Allen, Inc. v. Humana of Florida, Inc.*, 571 So. 2d 565 (Fla. 2d DCA 1990). The hospital sued a contractor alleging that he negligently misrepresented amounts due to his company when he signed, in his role as president, several monthly applications for payment. The court held that the tort claim should have been dismissed where there was no allegation of conduct resulting in personal injury or property damage beyond the breach of contract and resulting economic loss.

v. *Concept Stores of Miami, Inc. v. Bakery Assoc. Ltd.*, 990 So. 2d 1118 (Fla. 3d DCA 2008). The court affirmed dismissal of a claim for fraud in the inducement and negligent misrepresentation on the basis of the economic loss rule where the alleged misrepresentations were inseparable from the parties contract. *See also Jacques v. Equitable Life Assurance Society*, 972 So. 2d 265 (Fla. 4th DCA 2008).

4. Section 552 of the Restatement (Second) of Torts as an Exception to the economic loss rule.
a. Section 552. Florida courts have adopted the rationale of Restatement (Second) of Torts, Section 552 which provides, “One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance on the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.”

b. Florida has adopted Section 552 as an exception to the economic loss rule.

i. First Florida, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990). The bank sued a certified public accountant and his accounting firm for negligence alleging the bank was induced to extend a loan to the accountant’s client though false financial statements prepared and presented by the accountant to the bank. The court adopted Section 552 as a limited exception to the economic loss rule reasoning that the bank could sue the accountant despite lack of privity because the accountant knew or should have known the bank would rely on the false financial statements. But see Vesta Constr. and Design LLC v. Lotspeich & Associates, Inc., 974 So. 2d 1176 (Fla. 5th DCA 2008).

ii. Angel, Cohen and Rogovin v. Oberon Investment, N.V., 512 So. 2d 192 (Fla. 1987). Although Florida courts had limited attorneys liability for negligence in the performance of their professional duties to clients with whom they had privity of contract, the Supreme Court recognized that the rule of privity has been relaxed where it was the apparent intent of the client to benefit a third party. The most obvious example of this appears to be the area of will drafting. [Note: The opinion does not cite §552].

iii. Comptech International, Inc. v. Milam Commerce Park, Ltd, 753 So. 2d 1219 (Fla. 1999), held that the economic loss rule could not bar statutory causes of action.

E. Intentional torts.

1. Fraud. Florida Courts consistently dismiss claims for fraud in the performance (intentional breaches of contract) where there is no separate and independent tort.
a. *Hoseline, Inc. v. U.S.A. Diversified Product, Inc.*, 40 F.3d 1198 (11th Cir. 1994). Plaintiff claimed that the defendant/manufacturer had short shipped certain hosing by 45% to 50%. The claim included a count for fraud arising from the under shipment. The Eleventh Circuit reversed the jury verdict in favor of plaintiff on the fraud claim reasoning that it was barred by the economic loss rule because the plaintiff did not allege any physical injury or property damage separate from that resulting from the breach of contract.

b. *Swaebe, Inc. v. Sears World Trade, Inc.*, 639 So. 2d 1120 (Fla. 3d DCA 1994). Plaintiff agreed to purchase certain quantities of aluminum from defendant at specified prices. Plaintiff provided letters of credit to issue in favor of defendant, but defendant refused to accept them claiming the letters did not conform to the contract specifications. Plaintiff subsequently sued defendant for breach of contract, tortious interference with an advantageous business relationship and fraud. The Third District Court of Appeal affirmed the trial court’s dismissal of the fraud claim under the economic loss rule.

c. *Williams Electric Co., Inc. v. Honeywell, Inc.*, 772 F. Supp. 1225 (N.D. Fla. 1991). Plaintiff brought a suit for fraud in the inducement and fraud in performance arising out of electrical contracts. The fraudulent conduct included charging the plaintiff for work that was performed at other jobs. The court struck the fraud in the performance claims, but allowed the fraud in the inducement claims to stand.

d. *J. Batten Corp. v. Oakridge Investments 85 Limited*, 546 So. 2d 68 (Fla. 5th DCA 1989). A construction company sued for money outstanding and alleged a fraud count in addition to a breach of contract count because of an alleged representation that the contractor would pay the balance it owed if the construction company would finish the work. The court held the fraud count was properly dismissed under the economic loss rule.

e. *Benedict Feeding Co., Inc. v. Priest*, No. 96-1836-civ-T-17, 1997 WL 75605 (M.D. Fla. Feb. 4, 1997). This case stands for the proposition that a fraud claim based upon a duty created by an agreement is barred by the economic loss rule.

f. See also, *Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So. 2d 74 (Fla. 3d DCA 1997); *Bankers Risk Management MGT Serv. Inc. v. Av-Med Managed Care, Inc.*, 697 So. 2d 158 (Fla. 2d DCA
2. Intentional interference with contractual or business relations.

The economic loss rule does not bar a tortious interference claim. The conduct that serves as the basis for the cause of action is independent from the contractual breach, notwithstanding the fact that the damages are typically identical to damages for breach of the contract.

a. 

_Abele v. Sawyer_, 750 So. 2d 70 (Fla. 4th DCA 1999). Tortious interference claim is sufficiently independent to withstand bar of the economic loss rule.

b. 

_Centro Nautico Representacoes Nauticas, LDA v. International Marine Co-Op, Ltd._, 719 So. 2d 967 (Fla. 4th DCA 1998). The economic loss rule did not bar boat distributor’s claim against retailer for tortious interference with contract with manufacturer because the tort claim was sufficiently independent from a claim for breach of contract. Note: quashed on other grounds.

c. In _Bankers Risk Management Services, Inc. v. Av-MedManaged Care, Inc._, 697 So. 2d 158 (Fla. 2d DCA 1997) the Court held that a tortious interference claim is a separate and independent tort not barred by the economic loss rule.

d. 

_Monoco Enterprises v. Ziebart Corp._, 673 So. 2d 491 (Fla. 1st DCA 1996). Economic loss rule did not bar claims for fraud in the inducement and intentional interference.

e. 


f. 

_Anthony Distributors v. Miller Brewing_, 882 F. Supp. 1024 (M.D. Fla. 1995). Tortious interference claim not barred because it was based on or conduct separate from the contract.

3. Breach of fiduciary duty. There is an apparent conflict amongst the Florida District Courts as to whether breach of fiduciary duty claims are barred by the economic loss rule where the fiduciary relationship arises out of a contract.

a. 


d. *Lindon v. Dalton Hotel Corporation*, 49 So. 3d 299 (Fla. 5th DCA 2010), *rev. denied*, *Dalton Hotel Corp. v. Lindon*, 69 So. 3d 277 (Fla. 2011). In affirming *Detwiler*, it establishes a broad rule barring claims for breach of fiduciary duties attendant to an underlying contract, even when the fiduciary relationship has a basis in common law apart from the contract.

e. *But see, First Equity Corp. of Florida, Inc. v. Watkins*, Nos. 98-851, 98-589., 1999 WL 542639 (Fla. 3d DCA July 28, 1999), holding that investor’s breach of fiduciary duty claim was not barred by economic loss rule.

f. *Invo Florida, Inc. v. Somerset Venturer, Inc.*, 751 So. 2d 1263 (Fla. 3d DCA 2000). Involved a fiduciary duty established through contract. *Invo* pointed to *Moransais, Supra*, as the catalyst for its decision: “We believe that *Moransais* makes it clear that the economic loss rule has not abolished the cause of action for breach of fiduciary duty, even if there is an underlying oral or written contract.”

g. *Indemnity Insurance Company of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004). Expressly limited the economic loss rule to two situations: 1) when the parties have negotiated remedies pursuant to a contract; and 2) when a defect in a product causes damage to the product, but causes no personal injury or damage to other property. Important for seemingly noting with approval “that some courts have extended the exception to the application of the economic loss rule created in *Moransais* to causes of action for breach of fiduciary duty, even if there was an underlying oral or written contract.”

F. **Statutory causes of action.** Since *Maronsais v. Heathman, supra*, it is clear that the economic loss rule does not bar statutory causes of action.

1. The economic loss rule does not bar a FDUTPA claim.
a. *Delgado v. J. W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602 (Fla. 2d DCA 1997). For additional cases, see I.L.5 supra.

2. The economic loss rule does not bar a claim for civil theft, Florida Statute Section 812.005 *et. seq.*

   a. In *Alex Hofrichter, P.A. v. Zuckerman and Venditti, P.A.*, 710 So. 2d 127 (Fla. 3d DCA 1998), the Third District Court of Appeal held that the economic loss rule did not bar a claim for conversion, civil theft, and constructive fraud where a defendant converted partnership funds to personal use. *See also Pershing Industries, Inc. v. The Estate of Victoria Savy*, 740 So. 2d 1246 (Fla. 3d DCA 1999).

3. The economic loss rule does not bar a claim under the Florida Rico Act. *Florida Statutes* Section 895.03.

4. The economic loss rule does not bar a claim under *Florida Statutes*. Section 818.01 and 818.03.


G. **Quantum meruit.** In *Aspsoft, Inc. v. Webclay*, 983 So. 2d 761 (Fla. 5th DCA 2008), the court held that a claim for quantum meruit was not barred by the economic loss rule, notwithstanding the plaintiff’s breach of contract claim because the quantum meruit claim was merely an alternative theory of the contract claim.

### III. MORTGAGE FORECLOSURE

A. **The right to foreclose.**

1. Mortgage must be valid and enforceable.

2. Mortgagor must default under terms of mortgage and note.

3. Absent a requirement in the loan documents, notice of default is not a condition precedent to a foreclosure action. *Millett v. Perez*, 418 So. 2d 1067 (Fla. 3d DCA 1982). If the loan documents require notice, failure to give notice may result in the dismissal of the lawsuit, causing delay in the prosecution of the foreclosure action.

B. **Foreclosure proceeding.**
1. On June 7, 2013, Governor Rick Scott signed House Bill 87 into law, known as “The Florida Fair Foreclosure Act,” which created many substantive changes to Florida foreclosure process.

2. One of the most substantial changes is the creation of Florida Statutes § 702.015, entitled “Elements of complaint; lost, destroyed, or stolen note affidavit.” A lender who fails to comply with this statute may be subject to sanctions. The statute applies to a plaintiff filing a complaint, on or after July 1, 2013, seeking to foreclose a mortgage or other lien on residential real property, including individual units of condominiums and cooperatives, designed principally for occupation by from one to four families which secures a promissory note.

The complaint must contain:

• Affirmative allegations that the plaintiff is the holder of the original note secured by the mortgage OR specific allegations of the factual basis by which the plaintiff is entitled to enforce the note.

• When a party, such as a loan servicer, has been delegated authority to file a mortgage foreclosure action on behalf of the note holder, the complaint must describe the authority and identify with specificity the document that grants the party to act on behalf of the note holder, such as a power of attorney.

• When the plaintiff possesses the original note, as a condition precedent to and contemporaneously with filing the complaint, the plaintiff must attach copies of the note and allonges, and certify, under penalty of perjury, that it possesses the original note and provide specific details regarding its physical location and plaintiff’s verification of same. It is not imperative that the verification be notarized. See RBS Citizens N.A. v. Reynolds, 42 Fla. L. Weekly D2583 (Fla. 2d DCA 2017) (finding the trial court erred because Section 702.015(4) “merely requires a certification of possession of an original promissory note to be filed ‘under penalty of perjury’ and does not require the certification to be notarized.”)

• When the plaintiff seeks to enforce a lost, destroyed or stolen note, it must execute an affidavit under penalty of perjury, and attach it to the complaint. The affidavit must include the following: (1) a chain of all endorsements, assignments or transfers of the note; (2) facts showing plaintiff is entitled to enforce the note; and (3) exhibits including copies of the note and allonges, audit reports showing physical receipt of the original note, or other evidence of acquisition, ownership and possession of the note. The plaintiff must also provide adequate protection as required under Florida Statutes § 673.3091(2) before final judgment.

4.28
3. Finality of mortgage foreclosure judgment. The new law also created Florida Statutes § 702.036, which provides for the finality of mortgage foreclosure judgments. The statute provides that an action to set aside, invalidate or challenge the validity of a final judgment of foreclosure, or to establish or reestablish a lien or encumbrance of property, is limited to monetary damages if all of the following apply: (1) the party seeking relief from the final judgment of foreclosure was properly served in the foreclosure action; (2) the final judgment of foreclosure was entered as to the property; (3) all applicable appeals periods have run and appeals are resolved; and (4) the property has been acquired for value, by a person not affiliated with the foreclosing lender or foreclosed owner, at a time in which no lis pendens regarding the suit to set aside, invalidate or challenge the foreclosure appears in the official records.

The law also provides that after a mortgage foreclosure based upon the enforcement of a lost, destroyed or stolen note, a person not a party to the foreclosure, but who claims to be the person entitled to enforce the note, has no claim against the property after it is conveyed for valuable consideration to a person not affiliated with the foreclosing lender or foreclosed owner. The rightful note enforcer may still recover adequate protection given pursuant to Florida Statutes § 673.3091.

4. Order to show cause; entry of final judgment of foreclosure; payment during foreclosure. The law also makes several revisions to the show cause process in Florida Statutes § 702.10, applicable to pending causes of action, including allowing a lienholder, including a condominium, homeowners’ or cooperative association with a lien on unpaid property assessments (or those associations that may file a lien against the property subject to the foreclosure), to request an order to show cause why the court should not enter an order requiring the borrower to make payments during the pendency of the foreclosure or enter an order to vacate the premises.

5. Adequate protections for lost, destroyed, or stolen notes in mortgage foreclosure. The law also created a new statute, Florida Statutes § 702.11, applicable to pending causes of action, and provides that a court may find the following as constituting adequate protection for lost, destroyed or stolen notes: (1) a written indemnification agreement by a person reasonably believed sufficiently solvent; (2) surety bond; (3) letter of credit issued by a financial institution; (4) deposit of cash collateral with the clerk of court; or (5) other security that the court deems appropriate under the circumstances. The law also outlines the liability of a person
who wrongly claims to be the holder of a note or entitled to enforce a lost stolen or destroyed note, and the remedies the actual note holder has against that person.

6. The general foreclosure procedure involves the filing of a two or three count complaint for foreclosure.

a. Complaint is required to be verified in residential foreclosures but not in commercial foreclosures.

i. Count I asserts a cause of action for foreclosure of the mortgage.

ii. Count II asserts a claim for damages under the instrument.

iii. Count III asserts a claim on any personal guaranty, if one exists.

b. Defendants have twenty days to file a responsive pleading to the Complaint.

i. Not required to be verified.

c. If no response is filed, a Clerk's Default will be entered upon motion filed by Plaintiff.

d. Plaintiff will usually file a motion for summary judgment when no issues of fact have been raised by responsive pleading, or if default has been entered.

i. Supporting affidavits are required including affidavits of indebtedness, costs and reasonable attorneys' fees.

ii. Section 702.065(2) provides that attorneys' fees that do not exceed 3% of the principal amount owed at the time the Complaint is filed are presumed reasonable in the case of a default judgment.

7. Show Cause Proceeding under Fla. Stat. § 702.10(1).

a. After a complaint in a foreclosure proceeding has been filed, a lienholder, including condominium, cooperative, or homeowners’ associations, may request an order to show cause for the entry of a final judgment. Fla. Stat. §702.10(1).

b. The court shall promptly issue an order directed to the other parties named in the action to show cause why a final judgment of
foreclosure should not be entered. *Id.* The order shall, among other things:

i. Set a time and date for hearing to show cause.

ii. State that the filing of defenses by a motion, a responsive pleading, an affidavit, or other papers, before the hearing, to show cause that raise a genuine issue of material fact which would preclude the entry of summary judgment or otherwise constitute a legal defense to foreclosure shall constitute cause for the court not to enter final judgment.

iii. State that if a defendant fails to appear at the show cause hearing or answer by motion or sworn answer, he may waive the right to a final hearing and the court may enter a default against such defendant and, if appropriate, a final judgment of foreclosure.

iv. Require the party seeking final judgment to serve a copy of the order to show cause on the other parties in the manner provided by the statute.

c. The filing of a motion to dismiss will constitute a showing of good cause. The "show cause" hearing will then be used to hear the motion to dismiss. The filing of a verified or sworn answer will also constitute good cause. However, an answer "to the best of knowledge or belief" is insufficient to prevent the entry of judgment. *Muss v. Lennar I, L.P.*, 673 So. 2d 84 (Fla. 4th DCA 1996). *But See, Trucap Grantor Trust 2010-1 v. Pelt*, 84 So. 3d 369 (Fla. 2d DCA 2012) (it is improper for a trial judge to require a verification beyond "information and belief" as established by Fla. R. Civ. P. 1.110(b) if the party is unable to meet the more stringent requirement.

Effective June 1, 2010, Rule 1.110(b) of the Florida Rules of Civil Procedure requires that a complaint for foreclosure of a mortgage on a residential property be verified. In this context, verification requires that the complaint include an oath, affirmation or the following statement, "Upon penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief." Failure to include the verification could be grounds for dismissal of the action under Rule 1.140(b)(6).

In this regard, note that at least one trial court, *Wells Fargo Bank, N.A. v. LeWarne*, 18 Fla. L. Weekly Supp. 874 (Fla. 6th Judicial
Cir., Pinellas County, June 15, 2011), has held that the verification required by Rule 1.110(b) must be "part of the complaint and not a free standing document behind exhibits and other attachments to the complaint." This ruling, implying that attachments to a complaint are not part of the complaint itself, would seem to be at odds with Rule 1.130(b) of the Florida Rules of Civil Procedure, which expressly provides that "Any exhibit attached to a pleading shall be considered a party thereof for all purposes." [Emphasis added.]

To the same effect is One West Bank, F.S.B. v. Laliocca, 18 Fla. L. Weekly Supp. 874 (Fla. 6th Judicial Cir., Pasco County, May 5, 2011), holding that the verification of residential foreclosure complaints is to be governed by both Rule 1.110(b) - with its "knowledge and belief" standard, and Section 92.525(2), Florida Statutes (2014) - with its requirement that a verification "shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration." In this case, the trial court found the verification of a residential mortgage foreclosure complaint to be deficient because "it was not printed at the end of the complaint." The opinion further clarifies that the verification was apparently in a separate document which was not attached to the complaint that was actually served on the defendant. The opinion then goes on to find the verification itself to be deficient because it contained the words, "to the best of my knowledge and belief." However, the inclusion of that language would seem to be required by the watered-down "verification" expressly required by Rule 1.110(b).

In contrast to the verification upon information and belief permitted by Rule 1.110(b) in the case of residential foreclosures, under Section 702.10, Florida Statutes (2014), a verified answer made on "information and belief" is insufficient to prevent the entry of judgment on an order to show cause. Muss v. Lennar Fla. Partners L L.P., 673 So. 2d 84 (Fla. 4th DCA 1996). While this decision may seem inconsistent with the verification upon information and belief allowed by Rule 1.110(b), it really is not. Section 92.525(2), Florida Statutes (2014), contemplates that the phrase "to the best of my knowledge and belief" may be added to a verification where "permitted by law." Thus, Rule 1.110(b) creates a specific exception to the general requirement of Section 92.525 that verifications cannot be on information and belief.

a. In an action for foreclosure, other than residential real estate, the mortgagee may also request that the court enter an order directing the mortgagor to make payments during the pendency of the foreclosure proceedings or vacate the premises. *Fla. Stat.* §702.10(2). The Florida Supreme Court reversed the Third DCA's decision declaring Section 702.10(2) unconstitutional. *Caple v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49 (Fla. 2000) (reversing 712 So. 2d 1213 (Fla. 3d DCA, 1998)).

b. If the court finds that the mortgagor has not waived the right to be heard on the order to show cause, the court shall consider the affidavits and other showings made by the parties appearing and make a determination of the probate validity of the underlying claim. *Fla. Stat.* §702.10(2)(d).

c. If the court determines that the mortgagee is likely to prevail in the foreclosure action, the court must order the mortgagor to make payments as provided in the mortgage instrument. The mortgagee shall be entitled to possession of the premises upon the failure of the mortgagor to make the required payments. *Fla. Stat.* §702.10(2)(d), (e) and (f).

C. **Assignment by mortgagee.**

1. Assignee “steps into the shoes” of the mortgagee and takes all rights under the mortgage, but takes no greater rights than the mortgagee. *Proctor v. Hearne*, 131 So. 173 (Fla. 1931); and *Alabama-Florida Co. v. Mays*, 149 So. 61 (Fla. 1933).

2. Assignee may not bring causes of action that arose prior to the assignment against the mortgagor absent an express assignment of those causes of action. *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490 (Fla. 3d DCA 1994). *But See, Siegel v. Whitaker*, 946 So.2d 1079, 1083 (Fla. 5th DCA 2006) (former wife was co-owner at time the cause of action accrued and thus had an ownership interest in the cause of action without the need for an assignment by the prior owner).

D. **Sale of property by mortgagor.**

1. Generally, mortgagor has free right to transfer the property to someone who assumes the mortgage, but mortgagor remains liable to mortgagee as principal debtor unless mortgagee agrees to release mortgagor. *Jacksonville Port Authority v. State*, 161 So. 2d 825 (Fla. 1964).

2. Grantee of property who assumes payment of the mortgage is estopped from asserting the invalidity of the mortgage.
E. **Necessary parties.**

1. Persons materially interested, either legally or beneficially, in the subject matter of a foreclosure suit, and who would be directly affected by adjudication therein.

2. Persons who have or claim an interest adverse to the plaintiff.

3. Owner of legal title of the land covered by the mortgage.

4. Mortgagor who has conveyed interest in mortgaged premises is only a necessary party if a deficiency judgment is sought.

5. A senior lienholder or mortgagee is not a necessary or even a proper party, but a subsequent lienholder must be a party in order for the proceedings to foreclose any rights it may have in the property by virtue of its lien.

F. **Notice of lis pendens.**

1. Contemporaneous with the filing of the foreclosure complaint, the plaintiff files the Notice of Lis Pendens.

2. Form 1.918 of the FRCP provides the Florida Supreme Court approved form for Lis Pendens.

3. The Notice of Lis Pendens must describe with specificity the property being foreclosed upon.

   See also, Fla. Stat. § 48.23, providing that the filing of a notice of lis pendens constitutes a bar to the enforcement against the property described in the notice of all interests, including federal tax liens. See also, FRCP 1.420(f) providing the automatic dissolution of a lis pendens on claims that are dismissed, even if the entire action may not have been dismissed.

4. The Fourth District Court of Appeal recently held that lis pendens protection ends upon the entry of a final judgment. *See Ober v. Town of Lauderdale-by-the-Sea*, 2016 WL 4468134 (Fla. 4th DCA 2016). This courts holding, however, was withdrawn and superseded on rehearing. *See Ober v. Town of Lauderdale-by-the-Sea*, 218 So. 3d 952, 953, 954 (Fla. 4th DCA 2017)( holding that “liens placed on property between a final judgment of foreclosure and a judicial sale . . . are discharged by section 48.23(1)(d)”).

G. **Appointment of a receiver pending resolution of foreclosure proceeding.**
1. Rests in the sound discretion of the court even if mortgage provides for appointment of a receiver. As a general rule, a receiver is typically only appointed when the property is undervalued and there are allegations of waste, mismanagement, or misappropriation. *Carolina Portland Cement Co. v. Baumgartner*, 128 So. 241 (Fla. 1930). Courts have rejected appointment of receivers, even when the loan documents provide for them, when there is an absence of waste or serious loss. *Alafaya Square Ass'n, Ltd. v. Great Western Bank*, 700 So. 2d 38 (Fla. 5th DCA 1997).

*See also*, FRCP 1.620 (rule applies to appointment of receivers).

2. Generally, receiver is appointed to conserve and maintain the status quo of the mortgaged property in order to protect the rights and interests of persons arising under the mortgage pending the resolution of the foreclosure suit. *Cone-Otwell-Wilson Corp. v. Commodore’s Point Terminal Co.*, 114 So. 232 (Fla. 1927); *Sazant v. Foremost Invest., N.V.*, 507 So. 2d 653 (Fla. 3d DCA 1987).


H. **Assignment of rents.**

1. A mortgage may provide for an assignment of rents of real property, and the rents may serve as security on the debt. *Fla. Stat.* §697.07(1).

2. In a foreclosure action, the court may require the mortgagor to deposit the collected rents in the court’s registry upon application by the mortgagee or mortgagor. *Fla. Stat.* §697.07(4).

3. Before enactment of the statute, a mortgagee’s only method of protecting rents subject to assignment on default was through the appointment of a receiver. The statute has removed any impediments to the enforcement of an assignment clause, and provides a simple procedure for enforcing the assignment. *Ormond Beach Assoc., Ltd. Partnership v. Citation Mortgage, Ltd.*, 634 So. 2d 1091 (Fla. 5th DCA 1994).

4. In order to properly perfect a security interest in a leasehold estate and in rents, the lien should be recorded in the public records pursuant to *Fla. Stat.* § 697.01 and 701.02.

I. **Defenses to foreclosure action.**

2. Unclean hands of mortgagee (i.e. usurious interest rate on loan).

3. Invalidity of the mortgage.

4. Payment or discharge of the principal obligation.

5. Inability of plaintiff to produce original note or otherwise re-establish instrument.

6. Generally, the statute of limitations for commencing a foreclosure suit is 5 years pursuant to Fla. Stat. 95.11(2)(c), Florida Statutes (2014). One case has held that the statute of limitations does not begin to run until the last payment is due unless the lender exercises its right to accelerate the mortgage debt sooner. Monte v. Tipton, 612 So. 2d 714 (Fla. 2d DCA 1993).

The Florida Supreme Court recently clarified the application of the statute of limitations to foreclosure actions in Bartram v. U.S. Bank, N.A., 2016 WL 6538647 (Fla. 2016). In Bartram, the Court affirmed the Fifth District Court of Appeal’s decision and held that a lender is not barred from filing a subsequent foreclosure action against a borrower based on a default after a first foreclosure action is involuntarily dismissed. The Court found that “the dismissal returned the parties back to ‘the same contractual relationship with the same continuing obligations,’” “Therefore, the Bank’s attempted prior acceleration in a foreclosure action that was involuntarily dismissed did not trigger the statute of limitations to bar future foreclosure actions based on separate defaults.”

The Court expressly limited its holding to circumstances in which the first foreclosure action was involuntarily dismissed and observed that the mortgage at issue had a clause allowing the borrower to reinstate the mortgage after acceleration but before a final judgment.

In Benfield v. Everest Venture Group, Inc., 801 So. 2d 1021 (Fla. 2d DCA 2001), the Court was faced with a situation in which a default on a promissory note had occurred in 1991, with acceleration being made at that time. Subsequently, after the default and acceleration, the holder of the note accepted payment of sum monies due under the note. Later, the payments stopped coming, and the holder of the note filed suit on the note in 1998. The borrowers moved to dismiss the suit on the ground that the statute of limitations had run. They argued that the five (5) year statute of limitations under Chapter 95 had run five (5) years after the acceleration of the note. The Second District ruled that the suit on the promissory note in 1998 was not barred because the tolling provision in Section 95.051 (1) (f), Florida Statutes applied. That tolling provision provided that the
running of the time under any statute of limitations would be tolled by the payment of any part of the principal or interest of any obligation or liability founded on a written instrument. The Second District found that the tolling provision applied even though the promissory note had already been accelerated.

In *Layton v. Bay Lake Ltd Partnership*, 818 So. 2d 552 (Fla. 2d DCA 2002), the mortgage contained no maturity date but incorporated the terms of the note by reference. The note was not recorded. The note matured in 1992. The suit was brought in 1999 on the note and to foreclose the mortgage. The defendant argued, and the trial court agreed, that the suit was barred by the five year statute of limitations under Section 95.281 because the maturity of the mortgage was ascertainable of record because the terms of the note were incorporated therein by reference. The Second DCA reversed, holding that the maturity date of the mortgage was NOT ascertainable of record because it was not noted on the face of the mortgage, and the note itself had not been recorded. Thus, the twenty (20) year statute of limitations under Section 95.281 would apply.

In *WRH Mortgage, Inc. v. Butler*, 684 So. 2d 325 (Fla. 5th DCA 1996), the Court reversed the trial court and found that the RTC's six year statute of limitations under 12 U.S.C. §1821 preempted Florida's five-year statute of limitations on mortgage foreclosures under Section 95.281, Florida Statutes (1995).

In general, a mortgage foreclosure action is a suit in equity. § 702.01, Fla. Stat. (2014). As such, the parties are generally not entitled to a trial by jury in a foreclosure action. *Bradberry v. Atl. Bank*, 336 So. 2d 1248 (Fla. 1st DCA 1976).


Creditors who are the subject of a counterclaim may well find some comfort in the provisions of Section 687.0304, Florida Statutes (2014). This statute, which was enacted in 1989, provides that a debtor cannot maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by both the creditor and the debtor. The statute further defines credit agreement to mean an agreement to lend or forbear the payment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodations.

The statute goes further to declare that, among other things, an agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements,
does not give rise to a claim that a new credit agreement has been created unless that new credit agreement satisfies the requirements that the agreement be in writing, express consideration, set forth relevant terms and conditions, and be signed by both the creditor and the debtor.

The Fifth District discussed the scope of Section 687.0304, in *Puff 'N Stuff* v. *Bell*, 683 So. 2d 1176 (Fla. 5th DCA 1996). There, the Court effectively held that Section 687.0304 bars claims for fraud in the inducement where those claims are actually grounded on a credit agreement, and the credit agreement fails to comply with the provisions specified in the statute that said agreement be in writing, express consideration, set forth relevant terms and conditions, and be signed by both the creditor and the debtor. This case has far-reaching implications for creditors who seek to use Section 687.0301 to bar counterclaims. In the case before the Fifth District, the plaintiff had brought a foreclosure action, and a defendant counterclaimed, claiming that the plaintiff had failed to honor verbal commitments to provide additional financing after a replacement loan had been obtained. The counterclaim also alleged that the lender's officer had verbally assured the defendant that the bank's lending limit would not be a problem, and that the bank would fully fund the project. The Fifth District affirmed Judge Gary L. Formet's lower court decision barring the counterclaim.

In *Brenowitz v. Cent. Nat'l Bank*, 597 So. 2d 340 (Fla. 2d DCA 1992), the court ruled that Section 687.0304 does not preclude a borrower from raising affirmative defenses based on discussions that occurred at a meeting between the borrower and the officers of the bank subsequent to the default and the bank's acceleration. However, Section 687.0304 still appears to bar counterclaims based on such discussions, if not affirmative defenses. *Griffiths v. Barnett Bank*, 603 So. 2d 690 (Fla. 2d DCA 1992).

In *Jay Square Enters. v. Regner*, 734 So. 2d 565 (Fla. 5th DCA 1999), the Court held that Section 687.0304 would not bar enforcement of an agreement between a bank and its customer where the customer had already fully performed on the agreement, and the bank had accepted that performance. The Court essentially held that the full performance exception to the traditional statute of frauds would apply to the Bank Statute of Frauds as well.

a. The statute does not, however, prevent the borrower from maintaining affirmative defenses based upon an alleged oral agreement. *See generally Griffiths v. Barnett Bank*, 603 So. 2d 690 (Fla. 2d DCA 1992), and *Brenowitz v. Central Nat. Bank*, 597 So. 2d 340 (Fla. 2d DCA 1992).

J. **The Protecting Tenants at Foreclosure Act.**
1. The Act protected tenants from eviction because of foreclosure on the properties they occupied. These provisions took effect on May 20, 2009 but expired on December 31, 2014. See, Title VII of the Helping Families Save Their Homes Act of 2009.

K. Foreclosure judgment.

1. May not award mortgagee greater rights than contained within the provisions of the contract.

2. Foreclosure judgment is not a personal judgment against the mortgagor but only declares a lien for the amounts due and directs a sale.


4. Attorneys’ fees may only be provided to the mortgagee if contractually agreed to by the parties. Penmont Enterprises, Inc. v. Dysart, 340 So. 2d 1285 (Fla. 3d DCA 1977), cert. denied. 352 So. 2d 173 (Fla. 1977).

L. Right of redemption from the sale.

1. Right of any person having an interest in the mortgaged premises who would be harmed by foreclosure, prior to being foreclosed from that right, to satisfy the mortgage indebtedness and thus clear property from the encumbrance of the mortgage. John Stepp, Inc. v. First Federal Savings and Loan Assoc. of Miami, 379 So. 2d 384 (Fla. 4th DCA 1980).

2. The right to redeem is an incident to every mortgage, which cannot be extinguished except by due process of law. Quinn Plumbing Co., Inc. v. New Miami Shores Corp., 129 So. 690 (Fla. 1930); John Stepp, Inv. v. First Federal Savings and Loan Assoc. of Miami, 379 So. 2d 384 (Fla. 4th DCA 1980).

3. A junior mortgagee may satisfy a prior mortgage by payment of the debt it secures and thereby become equitably subrogated to the rights of the prior mortgagee. Islamorada Bank v. Rodriguez, 452 So. 2d 61 (Fla. 3d DCA 1984); Shipp Corp., Inc. v. Charpilloz, 414 So. 2d 1122 (Fla. 2d DCA 1982). Note that the above-referenced cases were superseded by statute as stated in Abdoney v. York, 903 So. 2d 981 (Fla. 2d DCA 2005) (In 1993, the legislature enacted Fla. Stat. § 45.0315, which lengthened the time of redemption by a junior mortgagee to “any time before the latter of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order or decree.” This statute abrogated the common law
on the issue of the availability of redemption. See Emmanuel v. Bankers Trust Co., 655 So.2d 247, 249 ( Fla. 3d DCA 1995); see also AG Group Investments, LLC v. All Realty Alliance Corp., 106 So. 3d 950 (Fla. 3d DCA 2013) (holding that a junior lienholder’s interest cannot be extinguished before the issuance of a certificate of sale).

4. Time for exercising right of redemption.

   a. Fla. Stat. § 45.0315 - mortgagor and any junior mortgagee may redeem “at any time before the later of the filing of a Certificate of Sale by the clerk of the court or the time specified in the judgment, order, or decree of foreclosure…”

   b. United States Government Agencies are allowed greater periods of redemption. The Internal Revenue Service, for example, has 120 days from the date of sale to exercise its rights of redemption pursuant 26 U.S.C. § 6337(b). The Federal Deposit Insurance Company has a period of one year during which it can assert its redemption right.

5. Note the distinction between “redemption” and reinstatement” (reinstatement allows mortgagor to bring payments current).

6. The successful bidder at a judicial sale has a right to notice and to be heard at any hearings concerning the sale. Shlishey The Best, Inc. v. CitiFinancial Equity Services, Inc., 14 So. 3d 1271 (Fla. 2d DCA 2009).
M. **Preparing for the foreclosure sale, Fla. Stat. § 45.031.**

1. Clerk of the court must sell the property not less than 20 days and not more than 35 days after the final judgment.

2. Notice of the sale must be published in a newspaper of general circulation, published in the county where the sale is to be held once a week for two consecutive weeks, the second publication to be at least five days before the sale.

3. Publication must contain the following:
   a. a description of the property to be sold.
   b. time and place of sale.
   c. a statement that the sale will be made pursuant to the order or final judgment.
   d. the caption of the action.
   e. the name of the clerk making the sale.
   f. a statement that any person claiming an interest in the surplus from the sale, if any, other than the property owner as of the date of the lis pendens must file a claim within 60 days after the sale.

N. **Interest acquired by the purchaser at a judicial sale.**

1. Purchaser takes with notice that the interest sold is no greater than that which the mortgagor held.

2. Purchaser is subject to any prior lien or record affecting the land.

3. Purchaser takes the property free from the lien of junior encumbrances where the proceedings are regular and the junior lienholders are duly made parties to the action, and their rights decreed to be inferior to the lien of the mortgage.

O. **Right to a deficiency decree, Fla. Stat. § 702.06 and § 95.11.**

1. Creditor holding a note secured by a mortgage may, in addition to suing to foreclose the mortgage, bring an action at law on the indebtedness.

2. If suit for foreclosure results in a deficiency between the value of the mortgaged property and the amount of the indebtedness, the court may
enter a deficiency decree. *Federal Deposit Ins. Corp. v. Circle Bar Ranch, Inc.*, 450 So. 2d 921 (Fla. 5th DCA 1984).

3. Deficiency is entered not only against the original maker and mortgagor but also against the co-maker or indorser on the note secured by the mortgage. *Tendler v. Gottlieb*, 126 So. 2d 308 (Fla. 3d DCA 1961).

4. The jurisdiction conferred by the statute is permissive rather than mandatory. A party complaining of the court’s failure to enter a deficiency on appeal must make a clear showing of abuse of discretion. *Tendler v. Gottlieb*, 126 So. 2d 308 (Fla. 3d DCA 1961). The granting of a deficiency is the rule rather than the exception, however, unless there are facts creating equitable circumstances justifying the denial of a deficiency. *Fed. Dep. Ins. Corp. v. Hy Kom Dev. Co.*, 603 So. 2d 59 (Fla. 2d DCA 1992) review denied, 618 So. 2d 209 (Fla. 1993). See also Dyck-O’Neal, Inc. v. Meikle, 215 So. 3d 604, 606 (Fla. 4th DCA 2017) (finding that “section 702.06 . . . permits a separate suit to recover a deficiency where the foreclosure court did not grant or deny a claim for a deficiency judgment”).

5. Deficiency Judgments-Limitations Period and Amount Recoverable. Pursuant to The Florida Fair Foreclosure Act signed into law by Governor Scott on June 7, 2013, the statute of limitations period for a lender seeking a deficiency judgment on a note secured by a mortgage on residential property (one to four family dwellings), was reduced from five years to one year, for a deficiency action commencing on or after July 1, 2013, regardless of when the cause of action accrued. *Fla. Stat.* § 95.11(2)(b) and (5)(h). The law also limits the amount recoverable, in the case of owner-occupied residential property, to the difference between the judgment amount (or with a short sale, the outstanding debt) and the fair market value of the property on the date of the sale. *Fla. Stat.* § 702.06.

P. **Right to surplus funds.** If the judicial sale produces surplus funds, they are to be paid to the owner of record as of the date of filing the lis pendens. *Suarez v. Edgehill*, 20 So. 3d 410 (Fla. 3d DCA 2009).

Q. **Rule and Form Changes.** Please refer to section VIII of this outline for more detailed information. Note that effective December 11, 2014, the Florida Supreme Court amended the Florida Rules of Civil Procedure and forms as reflected in the appendix to Opinion No. SC13-2384.

Generally, the amendments relate to Florida Rule of Civil Procedure 1.110 and forms 1.944, 1.996(a), and 1.996(b). The amendments also involve new rule 1.115 and several new forms. The amended and new rules and forms are in response to legislation regarding mortgage foreclosure actions. Chapter 2013-173, Laws of Florida.
IV. ATTORNEY’S FEES

A. **Entitlement.** Under Florida law, a party is only entitled to recover attorney's fees if they are provided for by contract, a statute or, in certain instances, where a party has created a fund. *Estate of Hampton v Fairchild-Florida Construction Co.*, 341 So. 2d 759 (Fla. 1977)

B. **Pleading.** A party seeking to recover attorney's fees must plead entitlement to them. *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991). (superseded on other grounds; *AmerUs Life Ins. Co. v. Lait*, 2 So. 3d 203 (Fla. 2009)). It is not necessary, however, to plead the basis for recovery of attorney's fees. *Caufield v. Cantille*, 837 So. 2d 371 (Fla. 2002). Notwithstanding the foregoing, a party can be denied fees if it pleads the wrong basis for recovery. *Cavalry Portfolio Services, LLC v. Enningham*, 16 Fla. L. Weekly Supp. 141a (11th Cir. 2009). The failure of an opposing party to object to the request for attorney's fees may result in a waiver of the pleading requirement for fees. *Save On Cleaners of Pembroke II, Inc. v. Verde Pines City Center Plaza, LLC*, 14 So. 3d 295 (Fla. 4th DCA 2009).

C. **Motions under Fla. R. Civ. P. 1.525.** Motions seeking a judgment including attorney's fees may be served after verdict or an arbitration award and before entry of final judgment. *Barco v. School Board of Pinellas County*, 975 So. 2d 1116 (Fla. 2008). They must, however, be served no later than thirty (30) days after the filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal. Fla. R. Civ. P. 1.525. The motion must state the basis for entitlement to fees. *European Bank, Ltd. v. Online Credit Clearing Corp.*, 969 So. 2d 450 (Fla. 4th DCA 2008). The motion does not need to state the amount of the fees sought. *McDaniel v. Edmonds*, 990 So. 2d 9 (Fla. 2d DCA 2008).

D. **Prevailing party.** The determination of whether a party is the "prevailing party" is to be made using the "significant issues test." *Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807 (Fla. 1992). But see *Olson v. Pickett Downs Unit IV Homeowner's Association, Inc.*, 2016 WL 7176752 (finding that the significant issues test was not appropriate under the circumstances). If there are multiple issues that are intertwined, the prevailing party is entitled to recover fees for the entire case. “The party seeking fees has the burden to allocate them to the issues for which fees are awardable or to show that the issues were so intertwined that allocation is not feasible.” *Current Builders of Fla. Inc. v. First Sealord Surety, Inc.*, 984 So. 2d 526 (Fla. 4th DCA 2008); see also *Blanton v. Goodwin*, 98 So. 3d 609 (Fla. 2d DCA 2012).

E. **Requirements for determination of the amount of fees to be awarded.** Evidentiary hearing and findings. A court is required to conduct an evidentiary hearing and include findings as to the reasonable number of hours and the
reasonable hourly rate, which findings must be included in the final judgment. See Florida Patient’s Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985); Kiser v. Harrison, 985 So. 2d 1226 (Fla. 5th DCA 2008). The party seeking fees must present evidence based upon contemporaneous time records and the failure to maintain those records may result in a reversal of a fee award. Turnbull Trumbull Ins. Co. v. Wolentarski, 2 So. 3d 1050 (Fla. 3d DCA 2009).

F. Reciprocal right to attorney's fees – Section 57.105(7), Fla. Stat. If a contract contains a provision entitling one party to fees for enforcing the contract, the court may award the opposing party its fees if it prevails in the action. This applies to contracts entered into after October 1, 1988. Section 57.105(7), Fla. Stat. In Reisterer v. Cadle II, 981 So. 2d 644 (Fla. 2d DCA 2008), a lender sued a guarantor under a guaranty that did not contain an attorney's fee clause, but that was incorporated into a promissory note that contained a clause entitling the lender to recover its fees. The guarantor prevailed in the action and was entitled to recover fees against the lender notwithstanding the absence of a fee provision in the guaranty.

G. Sanction fees pursuant to Section 57.105, Fla. Stat.

1. The statute requires an evidentiary hearing and an express finding that the claim was frivolous and the attorney was not acting in good faith based on representation by the client in order to award fees against the attorney. Ferdie v. Issacson, 8 So. 3d 1246 (Fla. 4th DCA 2009).

2. It is error to award fees under the statute where the motion for them was not sent to the opposing attorney 21 days in advance of the hearing. Nathan v. Bates, 998 So. 2d 1178 (Fla. 3d DCA 2008).

3. A letter threatening to file a 57.105 motion is not the equivalent of service of the required motion and will not be deemed sufficient for an award of fees. Anchor Towing, Inc. v. Miguel DeGrandy, P.A., 34 Fla. L. Weekly D826 (Fla. 3d DCA April 4, 2008).

4. Fees awarded. Tobin v. Bursch, 977 So. 2d 745 (Fla. 3d DCA 2008). Legal malpractice action where client sued the attorney because property was landlocked, but evidence showed the client knew of this prior to closing. The attorney was entitled to recover fees for defending the action. Danzinger v. Alternative Ultimate Legal, Inc., 987 So. 2d 694 (Fla. 4th DCA 2008). Prospective purchaser sued on an oral agreement to purchase land. The trial court awarded fees to the defendant because of the clear application of the statute of frauds. The Fourth DCA reversed and held that the defendant was responsible for 50% of the attorney's fees.
5. Fees denied. *Alan v. Palm Beach Newspapers, Inc.*, 973 So. 2d 1177 (Fla. 4th DCA 2008). Obtaining a summary judgment alone was not a sufficient basis for recovery of fees under section 57.105, *Fla. Stat.*

6. No fees for fees. Attorney's fees incurred for seeking fees could not be recovered when the basis for fees was section 57.105, *Fla. Stat.* *Wood v. Haack*, 54 So. 3d 1082 (Fla. 4th DCA 2011); *Yakavonis v. Dolphin Petroleum, Inc.*, 934 So. 2d 615 (Fla. 4th DCA 2006).

7. Fees for fees. In *Condren v. Bell*, 853 So. 2d 609 (Fla. 4th DCA 2003), the Court approved an award of attorney's fees for litigating the amount of fees, reasoning that because fees were awarded as a sanction, "the award [did] not run afoul of *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993)." 853 So. 2d at 610. *Condren* does not identify any statutory or rule basis for the sanction; the award arose from a final judgment enforcing a settlement agreement.

8. Appellate court issues 57.105 fees on its own initiative. In *Waddington v. Baptist Medical Center of the Beaches, Inc.*, 78 So. 3d 114 (Fla. 1st DCA 2012), the court assessed attorney’s fees against the attorneys who filed the appeal “for filing a frivolous appeal counsel knew or should have known would not be supported by existing law, as proscribed by section 57.105(1)(b), *Fla. Stat.*

**H. Fees for fees.**

1. Generally, a party may only recover attorneys’ fees for litigating the issue of entitlement to attorneys’ fees and not for litigating the amount of attorneys’ fees (known as “fees for fees”). *See State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830 (Fla. 1993).

2. There are exceptions to the general rule such as in some wage claims or sanction contexts. *See Section G.7. supra; Diaz v. Santa Fe Healthcare, Inc.*, 642 So. 2d 765 (Fla. 1st DCA 1994); *see also* James C. Hauser, Attorney’s Fees in Florida §7.11[3] and [4] (2d ed. 2013)(providing a summary of cases permitting and not permitting the recovery of fees for fees); “The Wrongful Act Doctrine: A Common Law Exception to the American Rule on Entitlement to Attorneys’ Fees in Florida,” Jeremy M. Colvin, *Florida Bar Journal*, December 2015. But, until *Waverly at Las Olas Condominium Ass’n, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386 (Fla. 4th DCA 2012), the exceptions have been relatively narrow and rarely applicable to civil litigation at large.

3. In *Waverly*, the Fourth District Court of Appeal allowed the recovery of fees for fees where the substantive basis for the award was a contractual provision. The contractual provision broadly provided that attorneys’ fees
would be awarded to the prevailing party in “any litigation between the parties under [the] [a]greement.” The court distinguished Palma by noting that “[u]nlike Palma, which relied upon a statute and limited fees to those incurred in litigating entitlement, the contractual provision here authorizes attorney’s fees for ‘any litigation’ between the parties under the agreement. This language is broad enough to encompass fees incurred in litigating the amount of fees.” Further, although not expressed in the opinion, Waverly is also distinguishable from Palma because in Waverly the attorneys were paid on an ongoing basis and, therefore, the award of fees for fees was necessary to make the client whole. 


I. Fees in Excess of Agreement. If a party is awarded attorneys’ fees, it is possible to receive an award greater than the amount the client is obligated to pay the attorney. See First Baptist Church of Cape Coral, Florida, Inc. v. Compass Const., Inc., 115 So. 3d 978 (Fla. 2013). In First Baptist, there was an “alternative fee recovery clause” which provided that “should anyone other than the [insurance company] be required to pay attorneys’ fees . . . the hourly rate for attorneys’ fees would be $300 . . ., or such amount as is determined by the court, whichever is higher.” The attorney was being paid by the insurance company only $175.00 per hour. The Florida Supreme Court agreed with the Fourth District Court of Appeal and held that where the contract language so provided the attorney could recover a fee higher than he charged his client, although it still must be a reasonable fee under the lodestar method established by Florida Patient’s Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

V. Offers and Proposals for Judgment and Settlement

A. Proposals for settlement. Fla. R. Civ. P. 1.442 provides the requirements and procedure for proposals for settlement.

1. Applicability. This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule.

2 Rule 1.442 was amended by order of the Supreme Court on November 13, 2013, with the changes becoming effective January 1, 2014. In re Amendments to the Florida Rules of Civil Procedure, 131 So. 3d 643, (Nov. 14, 2013).
2. **Service of Proposal.** A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.

3. **Form and Content of Proposal for Settlement.**

   a. A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

   b. A proposal shall:

      i. name the party or parties making the proposal and the party or parties to whom the proposal is being made;

      ii. state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served subject to subdivision (F);

      iii. state with particularity any relevant conditions;

      iv. state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

      v. state with particularity the amount proposed to settle a claim for punitive damages, if any;

      vi. state whether the proposal includes attorneys’ fees and whether attorneys’ fees are part of the legal claim; and

      vii. include a certificate of service in the form required by rule 1.080(f).

   c. A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

   d. Notwithstanding subdivision (c)(3), when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment
or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

3. **Service and Filing.** A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

4. **Withdrawal.** A proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered. Once withdrawn, a proposal is void.

5. **Acceptance and Rejection.**

   a. A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of rule 1.090(e) do not apply to this subdivision. No oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

   b. In any case in which the existence of a class is alleged, the time for acceptance of a proposal for settlement is extended to 30 days after the date the order granting or denying certification is filed.

6. **Sanctions.** Any party seeking sanctions pursuant to applicable Florida law, based on the failure of the proposal’s recipient to accept a proposal, shall do so by serving a motion in accordance with rule 1.525.

7. **Costs and Fees.**

   a. If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and attorneys’ fees.

   b. When determining the reasonableness of the amount of an award of attorneys’ fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following factors:

      i. The then-apparent merit or lack of merit in the claim.

      ii. The number and nature of proposals made by the parties.

      iii. The closeness of questions of fact and law at issue.
iv. Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

v. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

vi. The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

8. Evidence of Proposal. Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions.

9. Effect of Mediation. Mediation shall have no effect on the dates during which parties are permitted to make or accept a proposal for settlement under the terms of the rule.

B. Offers of judgment and demand for judgment. The requirements on procedures for an offer of judgment or a demand for judgment are set forth in Section 768.79, Fla. Stat.

1. In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

2. The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

a. Be in writing and state that it is being made pursuant to this section.
b. Name the party making it and the party to whom it is being made.

c. State with particularity the amount offered to settle a claim for punitive damages, if any.

d. State its total amount. The offer shall be construed as including all damages which may be awarded in a final judgment.

3. The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

4. An offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

5. An offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

6. Upon motion made by the offer or within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

   a. If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

   b. If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or
due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced.

7. a. If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

b. When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

i. The then apparent merit or lack of merit in the claim.

ii. The number and nature of offers made by the parties.

iii. The closeness of questions of fact and law at issue.

iv. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

v. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

vi. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

vii. Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

C. The essence of the offers and proposals. The Statute and the Rule essentially provide that the defendant may obtain an award of costs and attorney’s fees if (a) the plaintiff does not timely accept the defendant's offer or proposal to settle the case; and (b) the result is a defense verdict or a judgment for plaintiff that is 25% less than the defendant's offer. Likewise, if a plaintiff makes a demand for judgment or a proposal for settlement and (a) defendant fails to timely accept the offer; and (b) plaintiff recovers a judgment in an amount at least 25% greater than the offer, then the plaintiff may be entitled to recover attorney's fees and costs. See Baptiste v. Fermenich, 977 So. 2d 658 (Fla. 4th DCA 2008).
D. **The good faith requirement.** The offer, demand or proposal must be made "in good faith," but it is the offeree's burden to prove that the offeror did not make the proposal in good faith. *Liggett Group, Inc. v. Davis*, 975 So. 2d 1281 (Fla. 4th DCA 2008). Absent a finding that the offer was not made in good faith, a court cannot disallow entitlement to fees if the offer complies with the Rule or Statute. *Downs v. Coastal Systems Intern. Inc.*, 972 So. 2d 258 (Fla. 4th DCA 2008). For an offer or proposal of settlement to be made in good faith, the offeror must have had a reasonable foundation for making it to settle the case. *Wagner v. Brandeberry*, 761 So. 2d 443 (Fla. 2d DCA 2000). Whether the offeror has a reasonable basis to support the offer is determined solely by the subjective motivations and beliefs of the offeror. In making this determination, the trial court is not restricted to the testimony of the offeror attesting to good faith; rather, the court may properly consider objective evidence of facts and circumstances that suggest whether the offeror made the offer with subjective good faith. Several types of objective evidence have been found relevant to a finding of good faith. *Arrowood Indem. Co. v. Acosta, Inc.*, 58 So. 3d 286 (Fla. 1st DCA 2011). In cases where only a nominal offer was made, a reasonable basis for the offer, so as to permit a subsequent award of attorney's fees, exists only where the undisputed record strongly indicates that the defendant had no exposure; a nominal offer should otherwise be stricken. *General Mechanical Corp. v. Williams*, 103 So. 3d 974 (1st DCA 2012)

E. **The January 1, 2014 Amendment – No Partial Offers.** Rule 1.442(c)(2)(B) was amended to clarify that a proposal for settlement must resolve all claims between the proponent of the proposal and the party to whom it is made, except attorney's fees. Attorney’s fees can, but do not have to be resolved in the proposal. The comments state that this amendment was made “to curtail partial proposals for settlement,” and to comport with Florida Statutes §768.79(2) which provide that the offer shall be construed to include all damages which could be awarded in a final judgment. *In re Amendments to the Florida Rules of Civil Procedure*, 131 So. 3d 643 (Nov. 14, 2013).

F. **Requirement for specificity.** To insure enforcement of an offer, proposal or demand it must comply with both the Rule and the Statute as the rule embodies the procedural requirements of the Statute. *Campbell v. Goldman*, 959 So. 2d 223 (Fla. 2007). Because both the Statute and the Rule are in derogation of the common law, courts must strictly construe the requirements, as to both the substantive and procedural portions of the rule. *Anhloan Tran v. Anvil Iron Works, Inc.*, 110 So. 3d 923 (2d DCA 2013); *Campbell, 959 So. 2d 223; Ledesma, Inc. v. Iglesias*, 975 So. 2d 1240 (Fla. 4th DCA 2008). To be enforceable the offer must state unambiguously all of the required elements. *State Farm Mutual Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006); *Sparklin v. Southern Indus. Associates, Inc.*, 960 So. 2d 895 (Fla. 5th DCA 2007)(finding offer contained ambiguous non-monetary terms, specifically the release); *but see Alamo Financing, L.P. v. Mazoff*, 112 So. 3d 626 (Fla. 4th DCA 2013); *Carey-All Transport, Inc. v. Newby*, 989 So. 2d 1201 (Fla. 2d DCA 2008) (indicating that
parties should not “nit pick” the validity of a proposal for settlement based on allegations of ambiguity unless such ambiguity could reasonably affect the offeree’s decision whether to accept the offer and finding the proposal to be sufficiently clear). The Fifth District has indicated that the proposal should be as specific as possible leaving no ambiguities so that the recipient can fully evaluate its terms and conditions and that it should be capable of execution without the need of further explanation or interpretation. *Nichols v. State Farm Mut.*, 851 So. 2d 742 (Fla. 5th DCA 2003), certification denied, review granted, 913 So. 2d 598, approved 932 So. 2d 1067; see also *Alamo financing v. Mazoff*, 112 So. 3d 626.

The First District recently held that an offer of judgment did not strictly comply with the statute or the rule because the offer, which stated a total amount to settle the claims, did not specifically state what portion of the total amount was attributable to settling the punitive damages claim. *R.J. Reynolds Tobacco v. Ward*, 141 So. 3d 236 (Fla. 1st DCA 2014).

The Florida Supreme Court has found an offer to be unenforceable because it failed to reference Florida Statutes §786.79 as required by the statute and the rule. *Campbell v. Goldman*, 959 So. 2d 223 (Fla. 2007); but see *Jefferson v. City of Lake City*, 965 So. 2d 174, 175 (Fla. 1st DCA 2007) (affirming enforcement where the proposal failed to refer to the correct statute but the notice did).

A release is a condition or non-monetary term that must be described with particularity in a proposal for settlement. A proposal for settlement must include either: (1) the language of the proposed release, or (2) a summary of the proposed release, as long as the summary eliminates any reasonable ambiguity about its scope. *Alamo Financing, L.P. v. Mazoff*, 112 So. 3d 626.

G. **Joint Proposals.** A joint proposal made by or as to two or more parties must state the amount and terms attributable to each party. A joint offer is not valid where it fails to specify the amount attributable to each party. See *Audiffred v. Arnold*, 161 So. 3d 1274 (Fla. 2015); *Cano v. Hyundai Motor of America, Inc.*, 8 So. 3d 408 (Fla. 4th DCA 2009); see also *Rossmore v. Smith*, 55 So. 3d 680 (Fla. 5th DCA 2011) (finding joint offer from two defendants to one plaintiff to be valid). However, a proposal that covers multiple defendants when only one party remains as a defendant is not a "joint proposal." *Carey-All Transport, Inc.*, 989 So. 2d 1201 (Fla. 2d DCA 2008). A joint proposal to two plaintiffs conditioned upon both plaintiffs accepting and specifying that neither plaintiff could accept independently was invalid. *Attorneys' Title Insur. Fund v. Gorka*, 989 So. 2d 1210 (Fla. 3d DCA 2008).

Proposal for settlement of injured motorist's negligence action against driver of other automobile involved in collision was a joint proposal on behalf of motorist and her husband, who asserted claim for loss of consortium in the action, and thus proposal's failure to apportion the settlement between the two offerors precluded recovery of attorney fees and costs pursuant to the offer of judgment statute and
rule, even though proposal stated that it was submitted only by motorist; proposal expressed a promise that motorist and husband would both dismiss their claims against driver, and proposal was submitted by attorney for both motorist and husband. *Audiffred*, 161 So. 3d 1274.

Vendor's proposals of settlement to broker and co-broker in their action for breach of brokerage commission contract were not ambiguous for failing explicitly to identify which party would make settlement payment, and proposals thus complied with offer of judgment statute and rule, where vendor identified itself as the party making the proposal, vendor identified the brokers as the parties to whom the proposal was being made, the only claims at issue in the case were brokers' claims against vendor, and vendor had raised no counterclaim. *Land & Sea Petroleum, Inc. v. Business Specialists, Inc.*, 53 So. 3d 348 (4th DCA 2011), on remand 2011 WL 10915654.

H. **Application to demands for non-monetary relief.** A party can serve an offer or demand for judgment directed to a claim for monetary damages, but cannot avail itself of the statute where a claim seeks non-monetary relief only. *Nat'l Indem. Co. of the South v. Consol. Ins. Servs.*, 778 So. 2d 404 (Fla. 4th DCA 2001) (finding declaratory judgment action was not a "civil action for damages" within the meaning of offer of judgment statute, so as to support award of attorney's fees, where real issue in case was insurance coverage for underlying tort action and no money damages or payment of money was directly requested in suit). Section 768.79 also does not authorize a party to serve an offer of judgment directed to a claim for which both monetary and injunctive remedies are requested. This is because § 768.79 makes no provision for a court to determine the value of any injunctive relief obtained in calculating the "judgment obtained." The statute speaks only in terms of "amount." *Winter Park Imps., Inc. v. JM Family Enters.*, 66 So. 3d 336 (Fla. 5th DCA 2011). The Fifth DCA has said, “While we are not willing to opine that an offer (or demand) for judgment can never be utilized when a party has included separate claims for monetary and non-monetary relief in the same pleading and the offer (or demand) is directed only to the monetary claim, we do agree with [*Palm Beach Polo Holdings, Inc. v. Equestrian Club Estates Property Owners Ass'n*, 22 So. 3d 140 (Fla. 4th DCA 2009)] to the extent that it holds that section 768.79 is inapplicable where a party's general offer of settlement is directed to a claim in which both damages and non-monetary relief is sought.” *Id.* at 341-42.

I. **Effect of Voluntary Dismissal.** A voluntary dismissal which does not act as an adjudication on the merits, does not trigger an entitlement to fees and costs under §768.69. *Smith v. Loews Miami Beach Hotel Operating Co., Inc.*, 35 So. 3d 101 (Fla. 3d DCA 2010) (finding that the Plaintiff’s voluntary dismissal of a negligence suit did not trigger entitlement to fees and costs under an offer of judgment where the voluntary dismissal was the first dismissal, was without prejudice and did not operate as an adjudication on the merits); *Commonwealth Prop. Assoc., Inc. v. SunTrust Bank*, 835 So. 2d 1175 (Fla. 2d DCA 2002)
(finding no entitlement to fees under an offer of judgment where the action was dismissed without prejudice and was the first voluntary dismissal of claims).

Voluntary dismissal of breach of contract action by decedent's daughter against decedent's son was not a “second voluntary dismissal” under rule that stated that second voluntary dismissal operated as an adjudication on the merits and, thus, son was not entitled to attorney fees under offer of judgment statute, although probate action was dismissed; daughter was not a plaintiff in probate action, since she simply opened the probate case as the personal representative, probate case was not voluntarily dismissed, but rather was administratively closed, and the court, rather than the daughter, dismissed it.  Bright v. Baltzell, 65 So. 3d 90 (4th DCA 2011).

J.  **Effect of settlement.**  Plaintiff sued manufacturer under the Magnuson Moss Warranty Act (“MMWA”).  Plaintiff accepted manufacturer’s offer of judgment, then sought attorneys’ fees under the MMWA.  The Florida Supreme Court found that the offer of judgment neither admitted nor conceded the plaintiff’s entitlement to attorney’s fees, but specifically acknowledge that the plaintiff could have sought attorney’s fees.  Litigation had commenced, an offer was produced pursuant § 768.79(4) and Fla. R. Civ. P. 1.442, and the result necessarily fell under the auspices of a court, which was exactly the design on the MMWA.  The resolution under § 768.79(4) and Rule 1.442 was the functional equivalent of a consent decree, and this the Plaintiff was a prevailing party under the MMWA.  Mady v. Daimler-Chrysler Corp., 59 So. 3d 1129 (Fla. 2011); Dufresne v. Daimler-Chrysler Corp., 975 So. 2d 555 (Fla. 2d DCA 2008); San Martin v. DaimlerChrysler Corp., 983 So. 2d 620, 625 (Fla. 3d DCA 2008); but see Sanchez-Knutson v. Ford Motor Co., No. 14-61344-CIV, 2014 WL 5139306, at *11 (S.D. Fla. Oct. 7, 2014).


L.  **Proposal can apply to fees on appeal.**  The right to fees pursuant to a proposal or offer of settlement can apply to the fees on appeal.  Frosti v. Creel, 979 So. 2d 912 (Fla. 2008).
M. **Appellate Review** – Whether a proposal for settlement complies with the requirements of §768.79 and Rule 1.442 is reviewed *de novo*. *Frosti v. Creel*, 969 So. 2d at 915.

VI. **FLORIDA’S ARBITRATION CODE**

A. Florida has a new Arbitration Code, chapter 682, Florida Statutes. It brings Florida in line with the states adopting the Uniform Revised Arbitration Code promulgated by the Uniform Law Commission.

B. The new Code was effective July 1, 2013, but only applies in the following cases:
   1. Agreements to arbitrate made on or after July 1, 2013, or
   2. If stipulated to apply to agreements to arbitrate made before July 1, 2013.
   3. As of July 1, 2016, the new Code applies regardless of the date of the agreement to arbitrate.

C. The Federal Arbitration Act preempts the new Code (and the former code) in matters of maritime transactions or interstate commerce. 9 U.S.C. section 1.

D. A significant change is that under the new Code an arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. *See* section 682.11(2).

E. Unless overruled by express provisions of the new Code, the following cases will be applicable to cases brought under the new Code.
   1. **Provisions found to be enforceable.** A single, self-contained italicized provision was found to be enforceable, but the trial court was reversed because it was found to be procedurally unconscionable. *National Fin. Serv., LLC v. Mahan*, 19 So. 3d 1134 (Fla. 3d DCA 2009); *but see Basulto v. Hialeah Automotive*, 131 So. 3d 1145 (Fla. 2014). A contention by a party that they were unable to understand the arbitration provision did not render it unenforceable. *Rocky Creek Retirement Prop. v. Estate of Fox*, 19 So. 3d 1105 (Fla. 2d DCA 2009). Where a mortgage did not contain an arbitration clause, but the note and guaranty did, it was error not to compel arbitration. *Swan Landing Dev., LLC v. Florida Capital Bank*, 19 So. 3d 1068 (Fla. 2d DCA 2009). If a power of attorney makes a specific grant of authority, or unambiguously makes a broad, general grant of authority to the attorney in fact to enter into an arbitration provision, arbitration is

2. **Arbitration not compelled.** Where there is no arbitration provision in writing between the parties, the fact that a catalog of the seller contained an arbitration provision was insufficient to compel arbitration. *General Impact Glass & Window Corp. v. Rollac Shutter of Texas, Inc.*, 8 So. 3d 1165 (Fla. 3d DCA 2009); *but see MV Insurance Consultants v. NAFH Nat. Bank*, 87 So. 3d 96 (Fla. 3d DCA 2012)(holding that a provision in another loan document, which was not collateral, could be used to compel arbitration. In General Impact Glass, the catalog was considered collateral). Arbitration was properly denied where the documents containing an arbitration provision were signed by a person with a power of attorney, but the power of attorney did not grant legal authority to enter into an arbitration provision. *Carrington Place of St. Pete, LLC v. Estate of Milo*, 19 So. 3d 340 (Fla. 2d DCA 2009).

3. **Dispute concerning the making of the arbitration provision.** Section 682.03(1) requires an evidentiary hearing if there is a substantial issue raised as to the making of the contract or the arbitration provision. *Curcio v. Sovereign Healthcare of Boynton Beach, L.L.C.*, 8 So. 3d 449 (Fla. 4th DCA 2009).

4. **Agreed method for selecting the arbitrator fails.** If the agreed method for selecting an arbitrator fails, the court must appoint another arbitrator. *New Port Richey Medical Investors, LLC v. Stern*, 14 So. 3d 1084 (Fla. 2d DCA 2009).

5. **Waiver of the right to arbitrate.**

   a. A waiver of the right to arbitrate was found where: (1) a default was entered; (2) the requirement for arbitration was not raised in the motion to set aside the default; (3) the arbitration requirement was not raised for seven months in litigation; and (4) the parties engaged in settlement discussions for years without raising the matter. *Bland v. Green Acres Group, L.L.C.*, 12 So. 3d 822 (Fla. 4th DCA 2009) [a dissenting opinion contended that Section 684.22(1), Fla. Stat. provided that waiver was an issue for determination by the arbitrators rather than the courts].

   b. Waiver requires actual knowledge of the arbitration provision and active participation in litigation notwithstanding that knowledge. All doubts should be resolved in favor of arbitration. A motion to
dismiss for lack of prosecution did not amount to a waiver of the requirement for arbitration. *DFC Homes of Fl. v. Lawrence*, 8 So. 3d 1281 (Fla. 4th DCA 2009). Multiple discovery requests made in litigation amounted to a waiver of arbitration. *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682 (Fla. 2d DCA 2009).

6. **Appealability of order confirming arbitration.** An order confirming an arbitration award is not an appealable order. In order for there to be an appeal a final judgment must have been entered. *Infolink Group, Inc. v. Kurzweg*, 10 So. 3d 201 (Fla. 3d DCA 2009).

7. **Applicability of statute of limitations to arbitration agreements.** In *Raymond James Financial Services, Inc. v. Phillips*, 110 So. 3d 908 (Fla. 2d DCA 2011), review granted, 81 So. 3d 415 (Fla. 2012), the Second DCA determined that the Florida statute of limitations does not apply to arbitrations because an arbitration is not a “civil action or proceeding” under section 95.011, Fla. Stat. The Second DCA held that unless the arbitration contract expressly states that the Florida statute of limitation applies to the arbitration, the statute of limitations will not bar arbitration of claims under the contract. However, the Florida Supreme Court reversed the Second DCA and expressly held that section 95.011 does apply to arbitration proceedings. *Raymond James Financial Services, Inc. v. Phillips*, 126 So. 3d 186 (Fla. 2013).

**VII. MISCELLANEOUS NOTEWORTHY DECISIONS AND LEGISLATION**

A. *Waverly at Las Olas Condominium Ass’n, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386 (Fla. 4th DCA 2012). The Fourth District Court of Appeal awarded recovery of fees for fees where the substantive basis for the award was a contractual provision. See Section IV, H, above.

B. *Joyce v. Federated National Ins. Co.*, 228 So. 3d 1122 (Fla. 2017) (reaffirming adherence to the use of contingency fee multipliers clarifying that there is not a “rare” and “exceptional” circumstances requirement before a contingency fee multiplier can be applied).


D. Computer Abuse and Data Recovery Act (§§ 668.801-668.805, Fla. Stat.) – Creates a civil cause of action for various prohibited practices such as obtaining information from a protected computer without authorization.

4.58
E.  *Billington v. Ginn-La Pine Island, LTD., LLLP*, 192 So. 3d 77 (Fla. 5th DCA 2016). The Court held that a “non-reliance” clause negated a claim for fraud in the inducement because the appellant “cannot recant his contractual promises that he did not rely upon extrinsic representations.”

VIII. **RECENT RULE CHANGES**

A. Pre-2013 Recent Changes.

1. Rule 1.201. Complex Litigation. This rule was approved by the Florida Supreme Court in 2009. It applies to complex actions, which the rule defines as one that is likely to involve complicated legal or case management issues and that may require extensive judicial management to expedite the action, keep costs reasonable, or promote judicial efficiency. You must become familiar with its provisions.

2. Rule 1.280(b)(3) and (d) were added in 2012 to address discovery of electronically stored information.

3. Rule 2.420. Public Access to Judicial Branch Records. This rule has been around for some time and was last amended in 2011. It deals with confidentiality of court records, and addresses how to file confidential information and provides a form for doing so. You must be familiar with this rule.

4. Rule 2.425. Minimization of the Filing of Sensitive Information. This rule became effective in 2012. It addresses what is sensitive personal information and what limits apply in filing certain sensitive information.

5. Rule 2.514. Computing and Extending Time. This rule was changed effective October 1, 2012. Note that it expressly states that a period of five days is added to the specified time after service where service is made by mail or by e-mail.

6. Rule 2.516. Service of Pleadings and Documents. This rule, which became effective September 1, 2012, requires service via e-mail on all attorneys in a case, unless otherwise ordered by the Court.

7. Rules 2.520 and 2.525. Electronic Filing. These rules make electronic filing mandatory in all Florida courts according to the schedule set forth in Florida Supreme Court Opinion No. SC11-399.

B. 2013 Changes.
1. Rule 1.380. Failure to Make Discovery; Sanctions. The rule was amended to add “substantially” before “justified” in subdivisions (a)(4), (b)(2), and (d), to make the rule internally consistent and to make it more consistent with Federal Rule of Civil Procedure 37.

2. Rule 1.431. Trial Jury. The rule was changed to add section (i). Section (i) governs all communication between the judge, the attorneys, and jurors.

3. Rule 1.442. Proposals for Settlement. Subdivision (c)(2)(B) was amended to clarify that a proposal for settlement must resolve all claims between the proponent and the party to whom the proposal is made except claims for attorneys’ fees, which may or may not be resolved in the proposal.

4. Rule 1.451. Taking Testimony. This is an entirely new rule which generally allows the parties to agree, or one or more parties to request, that the court authorize presentation of witness testimony by contemporaneous video or audio communications equipment.

5. Rule 1.480. Motion for a Directed Verdict. Subdivision (b) was amended to change the time for service of a motion from 10 to 15 days after the specified event.

6. Rule 1.490. Magistrates. Subdivision (f) was amended to provide that the notice must state whether or not the hearing will be recorded using electronic means or a court reporter. Subdivision (h) altered the exception notice language. Subdivision (i) allows any party 5 days to file cross-exceptions. Subdivision (j) governs the record that must be provided to the court.

7. Rule 1.530. Motions for New Trial and Rehearing; Amendments of Judgments. Subdivisions (b) and (g) were amended to change the deadlines for service of certain motions from 10 to 15 days after the specified event. Subdivision (d) is amended to change the deadline for a court to act of its own initiative.

8. Rule 1.560. Discovery in Aid of Execution. Subdivision (e) was deleted because the filing of a notice of compliance is unnecessary for the judgment creditor to seek relief from the court for noncompliance with this rule, and because the Fact Information Sheet itself should not be filed with the clerk of the court.

9. Rule 1.630. Extraordinary Remedies. Rule 1.630 was amended to remove any reference to certiorari proceedings, which instead are governed by the Florida Rules of Appellate Procedure. The Florida Rules of Appellate
Procedure apply when the circuit courts exercise their appellate jurisdiction.

10. Forms. Forms 1.910 (Subpoena for Trial); 1.911 (Subpoena Duces Tecum for Trial); 1.912 (Subpoena for Deposition); 1.913 (Subpoena Duces Tecum for Deposition); 1.922 (Subpoena Duces Tecum without Deposition); 1.977 (Fact Information Sheet); 1.981 (Satisfaction of Judgment); 1.982 (Contempt Notice); 1.997 (Civil Cover Sheet).

11. Administrative Order SC13-49. The order authorizes the use of the Florida Courts E-Filing Portal as a means of complying with Rule 2.516(a)’s service requirements.

C. 2014 Changes.

1. Rule 1.110(b). General Rules of Pleading / Claims for Relief. The rule was amended to delete the verification requirement for residential foreclosure actions. The last two paragraphs of rule 1.110(b) regarding pleading requirements for certain (residential) mortgage foreclosure actions were deleted and incorporated in new Rule 1.115.

2. New Rule 1.115. Pleading Mortgage Foreclosures. The new Rule states in its entirety as follows:

(a) Claim for Relief. A claim for relief that seeks to foreclose a mortgage or other lien on residential real property, including individual units of condominiums and cooperatives designed principally for occupation by one to four families which secures a promissory note, must: (1) contain affirmative allegations expressly made by the claimant at the time the proceeding is commenced that the claimant is the holder of the original note secured by the mortgage; or (2) allege with specificity the factual basis by which the claimant is a person entitled to enforce the note under section 673.3011, Florida Statutes.

(b) Delegated Claim for Relief. If a claimant has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note, the claim for relief shall describe the authority of the claimant and identify with specificity the document that grants the claimant the authority to act on behalf of the person entitled to enforce the note. The term “original note” or “original promissory note” means the signed or executed promissory note rather than a copy of it. The term includes any renewal, replacement, consolidation, or amended and restated note or instrument given in renewal, replacement, or substitution for a previous promissory note. The term also includes a transferrable record, as defined by the Uniform Electronic Transaction Act in section 668.50(16), Florida Statutes.
(c) Possession of Original Promissory Note. If the claimant is in possession of the original promissory note, the claimant must file under penalty of perjury a certification contemporaneously with the filing of the claim for relief for foreclosure that the claimant is in possession of the original promissory note. The certification must set forth the location of the note, the name and title of the individual giving the certification, the name of the person who personally verified such possession, and the time and date on which the possession was verified. Correct copies of the note and all allonges to the note must be attached to the certification. The original note and the allonges must be filed with the court before the entry of any judgment of foreclosure or judgment on the note.

(d) Lost, Destroyed, or Stolen Instrument. If the claimant seeks to enforce a lost, destroyed, or stolen instrument, an affidavit executed under penalty of perjury must be attached to the claim for relief. The affidavit must: (1) detail a clear chain of all endorsements, transfers, or assignments of the promissory note that is the subject of the action; (2) set forth facts showing that the claimant is entitled to enforce a lost, destroyed, or stolen instrument pursuant to section 673.3091, Florida Statutes; and (3) include as exhibits to the affidavit such copies of the note and the allonges to the note, audit reports showing receipt of the original note, or other evidence of the acquisition, ownership, and possession of the note as may be available to the claimant. Adequate protection as required under section 673.3091(2), Florida Statutes, shall be provided before the entry of final judgment.

(e) Verification. When filing an action for foreclosure on a mortgage for residential real property the claim for relief shall be verified by the claimant seeking to foreclose the mortgage. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement:

“Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.”

3. Note that Forms 1.944(a), (b), (c), and (d) dealing with foreclosures were also modified to comply with statutory changes.

4. Form 1.996(a) relating to Final Judgment of Foreclosure was also modified to add titles, update statutory references to time for right of redemption, and add a paragraph on attorneys’ fees.

5. Form 1.966 (b) was also created and is intended to be used when the foreclosure judgment re-establishes a lost note.
6. Form 1.966(c) deals with a motion to cancel and reschedule foreclosure sale. This Form used to be the old 1.966(b).

D. 2016 Changes.

1. Rule 1.115 and associated Forms were further slightly modified. See In re Amendments to Florida Rules of Civil Procedure, 190 So. 3d 999 (Fla. 2016).

IX. PLEADING FRAUD OR MISTAKE

A. Fla. R. Civ. P. 1.120(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit." Fed. R. Civ. P. 9(b) has slightly different language. It provides: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Despite the slightly different language in the rules, the case law is similar, requiring fraud to be pled with particularity.

B. Although the rule only refers to fraud, Florida requires that a negligent misrepresentation claim must also be pled with particularity. Morgan v. W.R Grace & Co-Conn, 779 So. 2d 503 (Fla. 2d DCA 2000).

C. The heightened standard for pleading claims of fraud, fraud in the inducement, misrepresentation, or negligent misrepresentation requires the plaintiff to "specifically identify the misrepresentations or omissions of fact, the time, place or manner in which they were made, and how the representations were false or misleading." Robertson v. PHF Life Ins. Co., 702 So. 2d 555 (Fla. 1st DCA 1997). Note also that Rule 1.120(f) states that "For the purposes of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter."

D. A proponent of a misrepresentation claim involving multiple defendants must specifically identify the misrepresentations made by each defendant. Simon v. Celebration Co., 883 So. 2d 826 (Fla. 5th DCA 2004) (In a case involving a fraud claim, holding that the "lack of specificity is particularly troublesome where nine separate defendants are lumped together . . . ."); Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F. 3d 1364 (11th Cir. 1997)(fraud claim was deficient because complaint was devoid of "specific allegations with respect to the specific Defendants"). Thus a complaint that simply "lumps together" the conduct of multiple defendants cannot withstand a motion to dismiss. Simon, 883 So. 2d 826.

E. Florida law does allow a plaintiff to plead fraud based upon an omission, but the facts not disclosed must be pled with particularity, and the plaintiff must also plead the basis for a duty to disclose by the defendant, such as allegations of a

F. Actual damages is an element of an action for fraud. National Equipment Rental, Inc. v. Little Italy Restaurant & Delicatessen, Inc., 362 So. 2d 338 (Fla. 4th DCA 1978). As such, the damages must be pled with particularity using specific ultimate facts. Held v. Trafford Realty Co., 414 So. 2d 631 (Fla. 5th DCA 1982).

G. Moreover, fraud cannot form the basis for recovery of damages unless the damages directly arise from the fraud and are causally connected to the fraud, and the pleading must include specific ultimate facts that show how the damages were causally related to the fraud. Rolls v. Bliss & Nyitray, Inc., 408 So. 2d 229 (Fla. 3d DCA 1981). This is commonly referred to as "loss causation."

H. In short, conclusory allegations of fraud are insufficient and will result in the pleading being dismissed for failure to plead fraud with sufficient particularity.
TRIAL SKILLS VOIR DIRE

By

William E. Hahn
Tampa
The purpose of voir dire is to “obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice.” *Pope v. State*, 94 So. 865, 869 (Fla. 1922)

I. GETTING THE PROCESS STARTED

In most Circuits, prospective jurors are placed under oath and examined in a preliminary manner by a Circuit Judge who makes an initial determination on the competency of those summoned for jury duty. When the panel comes to your courtroom attention must be paid to insure that court official that brings the prospective jurors to your courtroom announces on the record that they have been venire has been deemed competent to serve. In addition, before the lawyers start their voir dire, the trial Judge must swear the venire again. If the Judge fails to automatically swear the jurors then you have the right under Rule 1.431 to insist that they be sworn before the actual start of any questioning pertinent to your case. The failure to have the jury sworn probably acts as a waiver of any later irregularities that might occur during the jury selection process.

**When do you actually make your challenge for cause?**

Before the start of jury selection, it is appropriate to discuss the “timing” of challenges for cause with the trial judge. Some judges may expect the attorney conducting the questioning to approach the bench before the completion of voir dire in order to exercise a challenge for cause. This might very well be the case where a prospective juror makes outrageous statements which might have the effect of poisoning the entire venire. In this event in order to preserve the chance of selecting a jury, all counsel might agree to excuse the juror so that jury selection can continue.

What happened however if only plaintiff’s counsel has had a chance to ask questions? Does the defense have the right, even though the juror has said enough to be disqualified from jury service, to question the juror? This question has just been answered in Irimi vs. R.J. Reynolds, 2018 Fla. App. Lexis 322 (Jan. 10, 2018). In Irimi, several prospective jurors indicated they had strongly held beliefs about smoking cigarettes that they would not be able to set aside. Defense counsel agreed on the record that these prospective jurors could not be legally rehabilitated but insisted that they were still entitled to question them. The trial court dismissed the jurors for cause despite the objection from the defense. The 4th District Court of Appeal reversed, asserting that “the right of all parties to conduct a reasonable examination of each juror orally must be preserved…That right requires counsel for each side to orally examine the panel members during voir dire.” Further, the Court stated:” The better procedure would have been to allow the defense to question the thirty-one venire members outside the presence of the entire venire once it became apparent that some or all of them might possess a bias that could not be undone. In this way, the court could ensure that biased members were excused without tainting the entire venire with the bias of those members.”
What happens when you have exercised challenges for cause and have used several of your peremptory challenges? Can you, at this point, make another challenge for cause? This question was recently answered in *RJ Reynolds v. Grossman*, 209 So. 3rd 75 (Fla. 4th DCA 2017). The plaintiff sought to exercise two cause challenges after the defendant had already used two of its peremptory strikes. The trial court allowed it and the 4th District affirmed, recognizing that the trial court does not have the right to infringe on a party’s right to challenge any juror, citing the case of *Jackson v. State*, 464 So. 2nd 1181 (Fla. 1985). The 4th District also affirmed the trial court’s decision to proceed with jury selection, rather than starting all over as the defense urged.

II. CHALLENGES FOR CAUSE

*Rule 1.431(c) the Florida Rules of Civil Procedure*

1. On motion of any party the court shall examine any prospective juror on oath to determine whether that person is related to any party or to the attorney of any party within the third degree or is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called or has any interest in the action or has formed or expressed any opinion or is sensible of any bias or prejudice concerning it or is an employee or has been an employee of any party within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand indifferent to the action or any of the foregoing grounds of objection exists or that the juror is otherwise incompetent, another shall be called in that juror’s place (emphasis supplied).

2. The fact that any person selected for jury duty from bystanders or the body of the county and not from a jury list lawfully selected has served as a juror in the court in which that person is called at any other time within 1 year is a ground of challenge for cause.

3. When the nature of any civil action requires knowledge of reading, writing, and arithmetic, or any of them, to enable a juror to understand the evidence to be offered, the fact that any prospective juror does not possess the qualifications is a ground of challenge for cause.

III. THE TESTS FOR DETERMINING JUROR COMPETENCY

1. Trial courts have broad discretion in determining whether to grant or deny a challenge for cause based on juror incompetency and the decision in general will not be overturned on appeal, absent manifest error. *VanPoyck, v. Singletary*, 715 So. 2d 930,931 (Fla. 1998).

2. The test to determine a juror’s competency is whether that juror can set aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law
given by the court. *Kearse v. State*, 770 So. 2d 1119, 1128 (Fla. 2000). Further, prospective jurors must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995); see also, *e.g.*, *Nash v. General Motors Corp.*, 734 So. 2d 437, 439 (Fla. 3d DCA 1999) (applying reasonable doubt standard in civil case; stating, "When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the instructions on the law given to her by the court, she should be excused.").

3. In *Gore v. State of Florida*, 706 So. 2d 1328 (Fla. 1997), the Florida Supreme Court held “we conclude that the trial court did not abuse its discretion in declining to excuse the challenged venire members. We have carefully examined the voir dire of each of these jurors. Although they expressed certain biases and prejudices, each of them also stated that they could set aside their personal views and follow the law via the evidence presented. The trial court was in a better position to assess the credibility of these venire members. Consequently we will not substitute our judgment for that of the trial court.”

4. In *Ferrell v. State of Florida*, 697 So. 2d 198 (Fla. 2d DCA 1997), the 2d District Court of Appeal stated “the test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions of the law given by the court. The juror should be excused if there is any reasonable doubt about the juror’s ability to render an impartial verdict. See also *Vega v. State of Florida*, 781 So. 2d 1165 (Fla. 3d DCA 2001).

5. The 4th District Court of Appeal in *Longshore v. Fronrath Chevrolet, Inc.*, 527 So. 2d 922 (Fla. 4th DCA 1998), held “close cases involving challenge to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality.” In the *Longshore* case, the appellate court looked to the prospective jurors’ actual statements in response to the questioning. The court found that her initial response that “she would try to be impartial” was the primary reason for excusing her rather than looking to her subsequent statements that she could be fair. See also *Kochalka v. Burgeois*, 162 So. 3d 1122 (Fla. 2d DCA 2015); *Williams v. State*, 638 So. 2d 976 (Fla. 4th DCA 1994).

6. It is error to deny a challenge for cause to a juror who indicated that she had a preconceived opinion about the Defendant’s guilt even though the juror ultimately stated that she would base her verdict on the evidence and the law. *Hamilton v. State*, 547 So. 2d 630 (Fla. 1989).

7. In the case of *Imbimbo v. State*, 555 So. 2d 954 (Fla. 4th DCA 1990), the Fourth District Court of Appeal decided that where a juror who first stated that she “probably” would be prejudiced but later on further questioning stated that she “probably” could follow the judge’s instructions on the law, created enough reasonable doubt to warrant being excused for cause.

8. Where a prospective juror’s responses to questions were sufficiently equivocal to cast any doubt about their ability to be impartial and fair, it is error to deny a challenge for cause by
the *Bryant v. State*, 656 So. 2d 426 (Fla. 1995).

9. In the case of *Somerville v. Ahuja*, 902 So. 2d 930 (Fla. 5th DCA 2005), the Fifth District stated:

The right to have a case decided by an impartial jury has been equated to the constitutional right to a fair trial. Use of peremptory challenges and challenges for cause are two of the tools afforded parties and judges, in the context of a jury trial, to obtain a fair and impartial panel of jurors. The ultimate test is whether a juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions on the law given by the court. A juror should be able to set aside any bias or prejudice and assure the court and the parties that they can render an impartial verdict based on the evidence submitted and the law announced by the court.

10. A “reasonable doubt” standard should be applied in the attempt to resolve the question of a prospective juror’s ability to be fair and impartial. *Goldenberg v. Reg’l Import & Export Trucking Co.*, 674 So. 2d 761 (Fla. 4th DCA 1996).

11. Where the trial court denies a challenge for cause based on a potential jurors equivocal or conditional responses that are not rehabilitated and where a reasonable doubt exists as to whether the juror possessed the requisite state of mind necessary to render an impartial decision, a new trial is required. *Salgado v. State*, 829 So. 2d 342 (Fla. 3d DCA 2002).

12. A prospective juror is not impartial where one side must overcome a pre-conceived opinion in order to prevail. *Hill v. State*, 839 So. 2d 883 (Fla. 3d DCA 2003).

13. Where a potential juror responds that “I’d try not to” and “I would give it my best shot” referencing a previously announced bias, it is error not to excuse that potential juror on a challenge for cause. *Bell v. State*, 870 So. 2d 893 (Fla. 4th DCA 2004).

14. It is error to deny a challenge for cause where the potential juror stated that although he brought certain preconceived feelings to court about negligence claims in general, that he “would try to keep an open mind, but I am definitely of the opinion that [damage awards] need[s] to be capped and it has gone [sic] detrimental to the healthcare system”. He further declared that his beliefs would “probably” interfere with his obligations as a juror. In response to an attempt to rehabilitate him, he also stated that “I would do what I believe is the fair thing, yes...” and that his decision would be based on his “personal beliefs”. *Bell v Greissman*, 902 So. 2d (Fla. 4th DCA 2005).

15. “A juror who initially expresses bias may be rehabilitated during the course of questioning. Nevertheless, doubts raised by initial statements are not necessarily dispelled simply because a juror later acquiesces and states that he can be fair.” *Lewis v State*, 931 So. 2d (Fla. 4th DCA 2006), *Carratelli v State*, 832 So. 2d 850, 854 (Fla. 4th DCA 2002).

A review of the law on “rehabilitation” of a prospective juror is found in *Algie v Lennar*
Corporation, 969 So. 2d 1135 (Fla. 4th DCA 2007). Once again, the court emphasizes how doubts raised by initial expressions of bias are not necessarily dispelled simply because the prospective juror later states that he can be fair. Any ambiguity or uncertainty must be resolved in favor of excluding the juror. See also Kopsho v. State, 959 So. 2d 168 (Fla. 2007).

If you look hard enough you can find courts from all districts taking the opposite side of rehabilitation vs. failure to rehabilitate. Because there is so much support for each side of this question we need to ask ourselves whether it is really worth taking a chance on rehabilitation. The Second District in Rodriguez v. State, 42 FLW d1065 (Fla. 2nd DCA 2017) reviewed the law on rehabilitation recognizing that all parties have the right to try to rehabilitate prospective jurors. As a practical matter what then happens is that the appellate court reviews the questions that were asked; speculates on what could or should have been asked, and the result of the litigation is in jeopardy because equivocal responses were simply not left alone so that the juror could be excused.

16. In Reyes vs. State, 56 So. 3d 814 (Fla. 2d DCA 2011), the 2d District Court of Appeal stated that in order to avoid reasonable doubt about a prospective juror’s impartiality, they must state their opinions must have a “final, neutral, and detached determination to sit as a fair and impartial juror”.

17. Jurors are not required to be devoid of feelings, opinions or even preconceived notions about particular kinds of cases, as long as they can set aside those feelings, opinions or preconceived notions and render their verdict based on the evidence. Embleton v Senatus, 993 So. 2d 593 (4th DCA 2008).

18. Where the trial judge brought a single juror back into the courtroom by himself and proceeded to ask leading and compound questions about his ability to set aside his previously announced views, and where the juror finally relented and agreed with the judge that he could be fair, the trial court committed reversible error in denying the challenge for cause. The juror’s responses to the courts questing were insufficient to erase the reasonable doubt created by his earlier answers. Rimes v State, 993 So. 2d 1132 (5th DCA 2008.)

19. In a criminal case where a prospective juror repeatedly stated that he felt that there was a presumption that the defendant was guilty until proven innocent, even though he stated that he could be fair and make his decision based on the evidence, it was an abuse of discretion not to excuse that juror for cause. Joseph v. State, 983 So. 2d 781 (4th DCA 2008.)

20. The Florida Supreme Court in Matarranz v. State, 133 So. 3d 473 (Fla. 2013), reviewed the decisional law on challenges for cause. In that case, a prospective juror told the Court multiple times that she did not think that she could be fair in the case because of past personal experiences. Repeated “rehabilitation of the juror over two days resulted in the trial court allowing her to sit. The Supreme Court reversed.
21. The Third District, in Gonzalez v. State, 143 So. 3d 1171 (3d DCA 2014), rev. denied, 157 So.3d 1043 ( Fla. 2014), reviewed Matarranz and concluded that it did not establish a “bright line” test for juror competency regarding past experiences. Unlike in Matarranz, in Gonzalez, the prospective juror raised her hand and volunteered to the court that she had been a victim of child abuse (the case involved similar claims). On questioning, she made it clear that she could be fair and impartial. After his conviction, the defendant challenged it by arguing that the Supreme Court in Matarranz had established a clear test and those jurors who had had similar past experiences should have been excused for cause. The Gonzalez court reasoned: “Matarranz does not establish a bright line rule that a juror who has had a personal experience relating to the case must necessarily be stricken for cause…” Gonzalez v. State, 143 So. 3d 1171 (Fla. 3d DCA 2014) stands for the same proposition.

22. In Kochalka v. Bourgeois, 162 So. 3rd 1122 (2nd DCA 2015), the positive response to the question “who feels like one side or the other starts out ahead because of your life experiences” – even though the prospective juror did not identify which side she favored – should have been enough to cause disqualification. The Court cited Four Woods Consulting, LLC v. Fyne, 981 So. 2nd 2 (4th DCA 2007), holding that “the mere implication of bias should have led to dismissal.” Further, an expressed negative attitude towards the jury system, or an expression of “no faith” in the jury system should also lead to disqualification. Levy v. Hawk’s Cay, Inc. 543 So. 2nd 1299 (Fla. 3rd DCA 1989).

23. Where a prospective juror vacillates or equivocates about whether they can set aside bias, that is always grounds for a challenge for cause. Okufo v. State, 42 FLW S639 (Fla. 2017).

24. The real inquiry for the cause challenge is about bias. As pointed out recently in Jones v. State, 42 FLW D813 (Fla. 4th DCA 2017) “To obtain a fair and impartial jury, and for ‘voir dire examination of jurors…to have any meaning, counsel must be allowed to probe attitudes, beliefs and philosophies for the hidden biases and prejudices designed to be elicited by such examination’…As such, ‘a court may not preclude a party from inquiry into bias bearing on a matter that is at the heart of the defendant’s case.”

Most of the instructive Florida cases on jury selection arise from criminal cases, and it makes sense to consider Fla. Stat. 913.03 titled “Grounds for challenge to individual jurors for cause.” Among the “Grounds” listed in the statute:

1. The juror doesn’t have the necessary qualifications
2. The juror has an “unsound mind” or bodily defect (but not deafness).
3. The juror has conscientious beliefs (that would prevent him from finding guilt)
4. (The other 9 statutory provisions arguably only pertain to criminal cases).
IV. PRESERVING YOUR CAUSE OBJECTIONS

The manner in which you exercise challenges for cause is critical. Simply put, if you fail to adhere to the following rules, you will not preserve your cause objections for later appellate review.

1. The case which establishes the procedure for challenges for cause is Joiner v. State, 618 So. 2d 174 (Fla. 1993)*. The Florida Supreme Court in Joiner held that you must:

   a. Make your challenge for cause.
   b. The trial court refuses to strike the juror.
   c. You use a peremptory challenge against the juror.
   d. After exhausting all remaining peremptory challenges, you request an additional peremptory challenge to strike a specifically named juror.
   e. Your request for an additional peremptory challenge is refused.
   f. Prior to the actual swearing of the jury, you must again renew your objection so that the trial court will have one last clear opportunity to take the appropriate corrective action. See also Milstein v. Mutual Security Life Insurance Co., 705 So. 2d 639 (Fla. 3d DCA 1998).

2. In other words, “[t]o preserve for appellate review the denial of a for-cause challenge of a juror, [a party] must “object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible.” Gonzalez v. State, 143 So. 3d 1171, 1174 n.1 (Fla. 3d DCA 2014) (internal quotations omitted) (quoting Kearse v. State, 770 So.2d 1119, 1128 (Fla.2000)).

3. In addition, you must be able to demonstrate to the appellate court that the objectionable juror actually was seated on the jury, and not merely as an alternate. Frazier v. Welch, 913 So. 2d 1216 (Fla. 4th DCA 2005); Jenkins v. State, 824 So 2d 977 (Fla. 4th DCA 2002); Joseph v. State, 983 So. 2d 781 (Fla.4th DCA 2008).

4. Assuming the above procedure is followed, the appellate court then undertakes the task of determining whether or not the trial court made an error. in failing to excuse the challenged juror. Interestingly, there is no requirement that the objecting party demonstrate any prejudice in the failure to excuse the challenged juror. See Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5th DCA 2000) (dissenting opinion by Judge Harris). For additional cases supporting this same proposition, see Johnson v. State of Florida, 763 So. 2d 1214 (Fla. 2d DCA 2000); Kerestesy v. State, 760 So. 2d 989 (Fla. 2d DCA 2000); Geibel v. State, 795 So. 2d 285 (Fla. 3d DCA 2001); Shannon v. State, 770 So. 2d 714 (Fla. 4th DCA 2000).
5. After all challenges for cause and all peremptory challenges are used, and assuming the above process has been followed, when the additional requested challenge is once again refused, there is no requirement that a proffer be made of the reason for the additional peremptory challenge. In other words, there is no requirement that the objecting party state the basis for his desire to exercise an additional peremptory challenge. *Trotter v. State*, 576 So. 2d 691 (Fla.1990); *Shannon v. State of Florida*, 770 So. 2d 714 (Fla. 4th DCA 2000).

6. The case of *Coe v. State of Florida*, 100 So. 3d 1152, (Fla. 3d DCA 2012) emphasized just how hard it is to overturn the trial court’s decision to deny a challenge for cause:

   “There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause”
   “A trial judge has a unique vantage point from which to evaluate potential juror bias and make observations of the juror’s voir dire responses, which cannot be discerned by this court’s review of a cold record.”
   “It is within the trial court’s province to determine whether a challenge for cause should be granted…and such a determination will not be disturbed on appeal absent manifest error.”
   “A finding of manifest error is possible only when the record shows no basis for the decision”.

7. The Florida Supreme Court in *Cozzie vs. State*, 42 FLW S579 just re-stated the procedure that must be followed: “…the defendant must “object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible.”…”it is the objection/re-objection process…that is the decisive element in a juror-objection –preservation analysis”.

V. PEREMPTORY CHALLENGES

1. Rule 1.430(d) of the Florida Rules of Civil Procedure, provides “Each party is entitled to three peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties is entitled to the same aggregate number of peremptory challenges to be determined on the basis of three peremptory challenges to each party on the side with the greater number of parties. The additional peremptory challenges accruing to multiple parties on the opposite side shall be divided equally among them. Any additional peremptory challenges not capable of equal division shall be exercised separately or jointly as determined by the court.”

2. Although the above quoted provision is the only time in the civil procedure rules that peremptory challenges are mentioned, suffice it to say that use and misuse of peremptory challenges has recently have been examined by a number of appellate courts on race, gender and ethnicity issues. Most of the law on jury selection arises from
criminal cases but the same principles apply equally to civil and criminal jury trials.

3. Historically, use of peremptory challenges was something not controlled by the court. Reasons for the challenge were not required, and literally for any reason or for no reason, the challenge was just that, an unfettered challenge.

4. Happily, times changed and the evolution was such that “It is now...impermissible to exercise challenges on the basis of race, gender, or ethnicity.” Abshire v. State, 642 So. 2d. 542, 543-44 (Fla. 1994).*

The constitutional basis for the rule?

Federal:

In Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the defendant claimed that the state discriminated by systematically excluding blacks from trial juries. The Supreme Court stated that “purposeful discrimination may not be assumed or merely asserted,” but must be proved. 380 U.S. at 205, 85 S.Ct. at 827. The Court found

no reason ... why the defendant attacking the prosecutor's systematic use of challenges against Negroes should not be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor for many years is said to be responsible for this practice and is quite available for questioning on this matter.

Id. at 227-28, 85 S.Ct. at 839-40 (footnote omitted). In support of its holding the court reasoned that if peremptory challenges could be examined they would no longer be peremptory. The Court went on to say that

we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court.

Id. at 222, 85 S.Ct. at 836.

Batson v. Kentucky, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d 69 (1986), overturned Swain and held that systematic exclusion of venire members from jury on basis of race violates Equal Protection Clause of Fourteenth Amendment.

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), defendant in criminal case may raise argument even if not a member of the defined group (i.e., defendant has third party standing to raise equal protection argument).
Fludd v. Dykes, 863 F.2d 822, 829 (11th Cir. 1989) (Batson applies in civil rights cases through Equal Protection Clause of Fourteenth Amendment).

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616, 111 S. Ct. 2077, 2080, 114 L. Ed. 2d 660 (1991) (the equal protection component of the Fifth Amendment's Due Process Clause requires the same result as Batson in civil cases in federal court).

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 1420, 128 L. Ed. 2d 89 (1994) (The Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man).

Florida:

Before Batson was decided, Florida Supreme Court had to decide whether it would still be guided by Swain v. Alabama.

As did the New York, California, and Massachusetts courts, we find that adhering to the Swain test of evaluating peremptory challenges impedes, rather than furthers, [Florida Constitution’s] article I, section 16's guarantee. We therefore hold that the test set out in Swain is no longer to be used by this state's courts when confronted with the allegedly discriminatory use of peremptory challenges.

State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (based upon the constitutional guarantee in the state constitution of a speedy trial by an impartial jury to all criminal defendants).

The Third DCA extended Neil to civil cases, relying upon Article I, section 22 of the Florida Constitution:

We now turn to the question of whether Neil applies to civil cases. Neil focused on Article I, Section 16 of the Florida Constitution, which guarantees to an accused in a criminal case the right to a trial by an impartial jury. The civil analogue applicable to this case is Article I, Section 22 of the Florida Constitution, which provides that “[t]he right of trial by jury shall be secure to all and remain inviolate.” While Section 22 does not expressly grant civil litigants the right of trial by an impartial jury, we believe that anything less than an impartial jury is the functional equivalent of no jury at all.

City of Miami v. Cornett, 463 So. 2d 399, 402 (Fla. Dist. Ct. App.), dismissed, 469 So. 2d 748 (Fla. 1985)

Hall v. Daee, 602 So. 2d 512, 515 (Fla. 1992) ([i]n the third district, Neil was extended to civil cases in City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA), dismissed, 469 So.2d 748 (Fla.1985). Since then, the United States Supreme Court has settled the issue by holding that civil litigants may not use peremptory challenges in a racially discriminatory

Left unaddressed by the Court in *Hall* was the fact that *Edmonson* was based upon the equal protection component of the Due Process Clause of the Fifth Amendment to the federal constitution, while *Cornett* was based upon Article I, section 22 of the Florida constitution.

The rule has consistently been applied in Florida state courts, but without a great deal of discriminating analysis of the constitutional basis. *See, e.g., King v. Byrd*, 716 So.2d 831, 833 (Fla. 4th DCA 1999) (quoting citation to guarantee of speedy criminal trial in state constitution, then applying those principles to civil case).

For example, the rule has been summarized this broadly in a civil case (with respect to gender, but the same analysis will apply to all other protected classes):

Gender-based peremptory challenges are prohibited by both the federal and state constitutions. The prohibition applies in both criminal and civil trials.


The reason it matters? To the extent that the rule is based upon equal protection guarantees for civil litigants (and jurors) in the federal and state constitutions (and it is), then the parameters of equal protection law will define the groups of venire members who may not be peremptorily challenged for membership in those groups.

5. As the Florida Supreme Court stated in *State v. Neil*, 457 So. 2d 481 (Fla. 1984):

“The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury.”

6. In 1996, the Florida Supreme Court in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996)*, created what the Court would later describe as “a simple, precise, and easy-to-administer procedure for challenging a litigant’s suspected use of a peremptory challenge to discriminate based on race, or other impermissible factors.” *Hayes v. State*, 94 So. 3d 452 (Fla. 2012). The test is: [step 1] “A party objecting to the other side’s use of peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group, and c) request that the court ask the striking party’s reason for the strike.” [Step 2] “At this point the burden shifts to the proponent of the strike to come forward with a race neutral explanation.” [Step 3] “If the explanation is facially race-neutral and the court believes that given all the circumstances surrounding the strike, the explanation is
not a pretext, the strike will be sustained.”

**Step 1:** Even though the original language in *Melbourne* had to do with a challenge on the basis of race, it is fair to say that the appellate decisions since 1996 have vastly expanded the issue. Therefore, whenever a peremptory challenge is contested whether it is the basis of race, gender, ethnicity, or anything else, the Step 1, 2 and 3 analyses all come into play. See, e.g., *Guevara v. State*, 164 So. 3d 1254 (Fla. 2d DCA 2015) (reversing because prosecutor erroneously convinced trial court that the *Melbourne* steps did not apply to peremptories used to strike male jurors).

a) Timely and proper objection: The objection may be made at any point prior to the jury being sworn. If the objection is not sustained, it must be made again prior to the jury’s being impaneled. See *Watson v. Gulf Power*, 695 So. 2d 904 (Fla. 1st DCA 1997). Further, the Florida Supreme Court in *Mitchell v. State*, 620 So. 2d 1008 (Fla. 1993) stated “... in order to preserve a Neil issue for review it is necessary to call to the court’s attention before the jury is sworn, by renewed motion or by accepting the jury subject to the earlier objection, the desire to preserve the issue.”

By failing to renew the objection, trial courts have uniformly held that the objections were waived. *Joiner v. State*, 618 So. 2d 174 (Fla. 1993). See also *Couch v. Shell*, 803 So. 2d 803 (Fla. 1st DCA 2001).

The objection must be a specific objection and not a general objection in order to put the trial court on notice of the reason you are making the objection. In *Mobely v. State of Florida*, 37, FLW D384 (Fla. 1st DCA 2012) the court held that “The opponent of the strike cannot generally object to the trial court’s determination that the reason is race-neutral without an request or other notice to the court that it seeks a more specific determination of genuineness, and then appeal the trial court’s ruling for failure to further specify its ruling”.

There are no magic words that need to be used as long as the party making the objection timely communicates to the court and to opposing counsel an objection to the alleged improper use of a peremptory challenge. *Harrison v. Emanuel*, 694 So. 2d 759 (Fla. 4th DCA 1997).

b) The second part of Step 1 is the requirement that the record reflects that the venire person is a member of a distinct group under the federal or state Equal Protection Clause. Obviously no testimony
needs to be given on this issue, but the lawyer making the challenge or trial court must identify either by race, gender or ethnicity the prospective juror that is the subject of the inquiry.

Recognized classes for these purposes include:


**Gender.** See *Abshire v. State*, 642 So.2d 542 (Fla. 1994); *Murray v. Haley*, 833 So.2d 877 (Fla. 1st DCA 2003).

**Ethnicity.** *State v. Alen*, 616 So.2d 452 (Fla. 1993) (Hispanics are cognizable group for purposes of precluding peremptory challenges based solely on group membership). *Olibrices v State*, 929 So. 2d 1176 (Fla. 4th DCA 2006) (people who practice the Muslim religion and who are Pakistani are within the protection afforded by this line of decisional authority).


[Arguably/presumably] **Religion.** See, e.g., *Bush v. Holmes*, 886 So. 2d 340, 390 (1st DCA 2004), aff’d in part, 919 So. 2d 392 (Fla. 2006) (Equal Protection Clause of the Fourteenth Amendment prohibits unlawful intent to discriminate against individuals for an invalid reason, such as their religion). *But see Dorsey v. State*, 868 So. 2d 1192, 1202 n.8 (Fla. 2003) (“In response to the dissent’s suggestion that this holding applies to jurors of a ‘particular gender, occupation or profession or other economic, social, religious, political, or geographic group,’ dissenting op. at 1204 n. 11, we note that this Court has not extended Neil’s protections beyond peremptory challenges based on race, gender, and ethnicity.”)

Race and gender are easy to determine as protected. Ethnicity is more complex. The purported ethnic group must be “cognizable.” *See State v. Alen*, 616 So.2d at 454 (“First, the group’s population should be large enough that the general community recognizes it as an identifiable group in the community. Second, the group should be distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.”)
However, a juror’s surname, without more, is insufficient to trigger an inquiry into whether a peremptory strike was exercised in a discriminatory manner. *Smith v. State*, 59 So. 3d 1107, 1111 (Fla. 2011) (a venire member’s surname that “sounded like a German name” was not a sufficient basis upon which to initiate inquiry); *State v. Alen*, 616 So.2d 452 (Fla. 1993) (Hispanic or Latino surname, standing alone, not sufficient to require inquiry).

c) It is not necessary that the objecting party be a member of the class—in other words, e.g., white people can object to the discriminatory use of peremptory challenges against African Americans. *Powers v. Ohio*, 499 U.S. 400 (1991). See also *Abshire v. State*, 642 So.2d 542 (Fla. 1994) (upholding male defendant’s challenge to systematic exclusion of women from jury).

d) The last part of Step 1 is simply that the person challenging the strike must ask that the court make inquiry of the striking party about the basis for the strike. Note that objecting party must request the trial court to make two separate determinations of (a) facial neutrality and (b) genuineness. *Ivy v. State*, 196 So.3d 394 (Fla. 2d DCA 2016), *stayed pending disposition in related appeal*, No. SC16-988 (Fla. Sept. 23, 2016).

**Step 2:** Once the requirements outlined in Step 1 are met, the burden of stating either a race, gender or ethnically neutral reason now shifts to the party making the strike. It is reversible error for the trial court not to require a Step 2 inquiry once the requirements of Step 1 are met. *Streeter v. State*, 979 So. 2d 428 (Fla. 3d DCA 2008).

a) The party seeking to exercise the challenge must state on the record, a neutral reason for making the strike. The race, gender, or ethnically neutral explanation must be one where there is no predominant discriminatory intent which is apparent from the given explanation, taken at its face value. *State v. Slappy*, 522 So. 2d 18 (Fla. 1988)*.

b) “A facially race-neutral reason is one that is not based on race at all.” *Russell v State*, 879 So. 2d 1261 (Fla. 3d DCA 2004).

c) A stylistic note: “Objections to peremptory challenges of prospective jurors based on race, sex or ethnicity may actually involve more than one of these classifications. The term ‘race neutral’ is therefore under-inclusive by two-thirds and hence unsuitable. A better term would be *non-invidious.*” *Olibrices v. State*, 929 So. 2d 1176, 1177 (Fla. 4th DCA 2006) (emphasis by the Court).
d) For example, a prospective juror’s past involvement in car accidents has been determined to be a race neutral basis to exclude him in a car accident case. *Smellie v. Torres*, 570 So. 2d 314 (Fla. 3d DCA 1990). Similarly, a juror’s past involvement in “similar incidents” as the one which was being tried may constitute a neutral explanation. *Adams v. State*, 559 So. 2d 1293 (Fla. 3d DCA 1990). In the case of *State of Florida v. Mitchel*, 768 So. 2d 1223 (Fla. 3d DCA 2000), a Hispanic female was the subject of a peremptory challenge. It was apparent through the questioning that she was a paralegal who had just completed law school and who had sat for the Florida Bar examination. Citing the latter matters as a reason for being gender and ethnically neutral, the trial court agreed to the challenge. However, it has been held that a prospective juror’s occupation is not a valid reason for a challenge unless there is some connection between the occupation and the underlying facts of the case. *Johnson v. State*, 600 So. 2d 32 (Fla. 3d DCA 1992).

e) The issue before the trial court in the step two analysis is the facial neutrality of the proponent’s reason for the strike. Courts should presume the reason for a peremptory strike is facially neutral and nondiscriminatory, and the opponent of a peremptory strike always bears the burden of persuasion to show discriminatory intent by the party exercising the strike. *Hayes v. State*, 94 So. 3d 452, 461 (Fla. 2012); *Harris v. State*, 183 So.3d 1086, 1088 (Fla. 4th DCA 2015).

f) In *Soto v. State*, 786 So. 2d 1218 (Fla. 4th DCA 2001), a strike against a Hispanic juror was sustained where the State’s explanation for striking the juror was that the person did not appear to speak or understand English very well. *But see Despio v. State*, 895 So. 2d 1124, 1126 (Fla. 3d DCA 2005) (suggesting that an objection based solely on the fact that a jury speaks a certain language, without reference to why this fact matters, could be a proxy for a racial objection and thus not permissible). *Cf. Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859 (1991) (upholding strike of Spanish-speaking jurors because prosecutor expressed concern such jurors would not defer to the official translation).

g) The fact the prospective jurors have been victims of a crime has regularly been determined to be a valid, race neutral and gender neutral reason for a peremptory strike. *Porter v. State*, 708 So. 2d 338 (Fla. 3d DCA 1998) and *Symonette v. State*, 778 So. 2d 500 (Fla. 3d DCA 2001).

h) An equivocal response to a prosecutor’s questioning regarding views on the death penalty was determined to be a race neutral reason in
i) Further, when a black church pastor indicated to the prosecutor that he might have difficulty setting aside feelings of sympathy when he listened to the evidence, the court in *Rodriguez v. State*, 826 So. 2d 494 (Fla. 4th DCA 2002) found that that was a race neutral explanation for excusing the pastor.

j) Where a juror according to the attorney, was unwilling to look the attorney in the eye while answering questions; or while it seemed to the attorney that a particular juror was not paying attention to the proceedings; or where it seemed to the attorney that a prospective juror was unable to stay awake during the voir dire examination, or the prospective juror even seemed to have an unfriendly or hostile tone while answering questions, all of those reasons have been determined, at least facially, to be neutral reasons. *Dean v. State*, 703 So. 2d 1180 (Fla. 3d DCA 1997).

k) Concern for the young age of the potential juror, or concern that potential loss of income during jury service, might cause a lack of attention during the trial, were deemed to be race neutral reasons for using a peremptory challenge in *Saffold v. State*, 911 So. 2d 255 (Fla. 3d DCA 2005).

l) The assertion that a potential juror is “too young and inexperienced” in the right case, has been held to be a race-neutral justification for excusing the juror. See *Phelps v. State*, 42 FLWD 2384 (3rd DCA 2017).

m) A juror’s “non-verbal” actions which are disputed, and not observed by the Judge or otherwise supported in the record are an insufficient race-neutral reason for a peremptory challenge. *Dorssey v. State*, 868 So. 2d 1192 (Fla. 2003); *Brown v. State*, 995 So. 2d 1099 (3d DCA 2008); see also *Denis v. State*, 137 So. 3d 583 (Fla. DCA 2014) (reversing where trial court merely accepted the prosecutor’s word that juror had been falling asleep and had not observed such conduct).

n) In *Ivey v. State*, 42 FLWD 2004 (1st. DCA 2017) the prosecutor argued that a prospective juror gave him “the look” when at a break the prosecutor made a joke about the juror which was apparently overheard. Neither the Judge, defense counsel nor anyone else was able to corroborate “the look” but the trial judge struck the juror. The defense counsel was not able to dispute the prosecutors observation but did object to the use of the strike on the basis that it was not race-neutral. The 1st DCA reversed the conviction on the basis that the juror should
not have been excluded since there was nothing to corroborate the prosecutor.

o) It was error to allow the use of a peremptory strike against an African American juror where the only race-neutral explanation given applied equally to three non-African American jurors who were not challenged. Hunter v State, 42 FLWD 1792 (4th DCA 2017). In Hunter, the State asked whether any family member had ever been arrested. The African American juror and three non-African American jurors all answered in the affirmative. The State only challenged the African-American juror. In granting a new trial, the 4th District held: “Florida courts have repeatedly found that it can be “racially discriminatory to exercise a peremptory challenge against a prospective juror in the minority where the proffered reason applies equally to a prospective juror in the majority”.

p) For the most recent review of the case law on “race neutral” reasons, see: Guevara v. State, 164 So. 3rd 1254 (2nd DCA 2015), and Harris v. State, 40 FLWD 1235, (4th DCA 2015).

Step 3: Once the trial court has completed inquiry into Steps 1 and 2, the last portion of the process is to determine whether or not the circumstances given by the proponent of the strike are indeed “neutral” and are not “pretextual.” The trial judge “must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext.” State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988). Note that the burden rests on the objecting party to require the trial court to make the two separate determinations of (a) facial neutrality and (b) genuineness. Ivy v. State, 196 So.3d 394 (Fla. 2d DCA 2016), stayed pending disposition in related appeal, No. SC16-988 (Fla. Sept. 23, 2016) (“the word ‘genuineness’ with nothing more is not an adequate objection informing the trial court ath it must make two separate determinations…”)

a) In Hayes v. State, 94 So. 3d 452 (Fla. 2012) the Florida Supreme Court reviewed the Step 3 analysis from Melbourne. “The proper test under Melbourne requires the trial court’s decision on the ultimate issue of pretext to turn on a judicial assessment of the credibility of the proffered reasons and the attorney or party proffering them, both of which “must be weighed in light of the circumstances of the case and the total course of the voir dire in question as reflected in the record”… “Identifying the true nature of an attorney’s motive behind a peremptory strike turns primarily on an assessment of the attorney’s credibility.”
b) There have been a number of decisions on the Step 3 analysis: *Garcia v. State of Florida*, 75 So. 3d 871 (Fla. 3d DCA 2011); *Jones v. State of Florida*, 93 So. 3d 1189 (Fla. 1st DCA 2012); *Wimberly v. State of Florida*, 118 So. 3d 816 (Fla. 4th DCA 2012); *Victor v. State of Florida*, 126 So. 3d 1171 (Fla. 4th DCA 2012); *Wynn v. State of Florida*, 99 So. 3d 986 (Fla. 3d DCA 2012).

c) “A trial court’s genuineness inquiry involves consideration of factors which tend to show whether the proffered reason is pre-textual.” *Braggs v. State*, 13 So. 3d 505 (Fla. 3d DCA 2012).

d) The party opposing the explanation as pretextual MUST make a specific objection on that basis or it will be determined to be waived. *Hall v. State*, 768 So. 2d 1212 (Fla. 4th DCA 2000).

e) A pretextual and/or disingenuous reason for striking a prospective juror may be revealed where: there has been only a perfunctory examination of the juror; or the proffered explanation to strike a black juror is equally applicable to a white juror. *Overstreet v. State*, 712 So. 2d 1174 (Fla. 3d DCA 1998).

f) The analysis that must take place by the trial court under Step 3 is to determine whether the proffered explanation for the challenge is a pretext designed to conceal the attempt to discriminate on the basis of race, gender or ethnicity. In other words, the trial court is obligated to make an effort at identifying the true nature of the challenging attorney’s motive behind the peremptory strike and this of course means that the trial court must make a determination of the attorney’s credibility. *Young v. State of Florida*, 744 So. 2d 1077 (Fla. 4th DCA 1999). It is reversible error for the court to make a determination about the juror’s credibility as opposed to the credibility of the attorney exercising the strike. *Allstate v. Thornton*, 781 So. 2d 416 (Fla. 4th DCA 2001).

g) While there are no magic words that must be utilized, it must be clear on the record that step number three as to the actual genuineness of the challenge was actually considered. *Simmons v State*, 940 So. 2d. 580 (Fla. 1st DCA 2006).
h) The trial court must make its findings of genuineness in an explicit way or the findings must be implicit from the record. Burgess v. State, 117 So. 3d. 889 (Fla. 4th DCA 2013); Smith v State, 143 So. 3d 1194 (Fla. 1st DCA 2014). The Florida Supreme Court makes it clear in Poole v. State, 151 So. 3d 402 (Fla. 2014) by stating that “The trial court must make an indication on the record that it not only accepted the race-neutral explanation, but actually engaged in a 'genuineness' analysis.” This concept was just re-affirmed in the case of Ellis v. State, 152 So. 3d 683 (Fla. 3d DCA 2014). “Thus, the trial court in this case erred in stating that the genuineness of the proffered reason for the challenge is not part of the analysis, contrary to the dictates of Melbourne and its progeny.”

In the recent case of R.J. Reynolds v. Purdoenochs, 226 So. 3rd 872 (Fla. 4th DCA 20170, the 4th District emphasized that: “There is nothing in Melbourne which requires trial judges to articulate their thought process on the issue of pretext...Nor are trial judges required to “specifically use the word 'genuine'”....Nonetheless, ‘Melbourne does not relieve a trial court from weighing the genuineness of a reason just as it would any other disputed fact”. The appellate court was satisfied that the trial court, from reading the transcript had made the genuineness inquiry and emphasized that “…it is important for trial courts to make an on-the –record genuineness inquiry so as to permit meaningful appellate review”.

i) “Circumstances relevant to the ‘genuineness' inquiry include the gender or racial make-up of the venire, prior strikes exercised against the same gender or racial group, or singling the juror out for special treatment.” Norona v. State, 137 So. 3d 1096 (Fla. 3d DCA 2014).

j) Where the basis for the strike was the lawyers feeling that a prospective jurors “non-verbal indications” in response to some questions, “might” suggest that the juror would have certain expectations, during the trial, the lawyers explanation was appropriately determined to be disingenuous and the strike was not allowed. Dorsey v. State, 868 So. 2d 1192 (Fla. 2003).

k) In order to preserve the issue for appellate review, the objecting party must clearly state the basis for their objection—that the proffered reason is pretextual and is not race neutral. Failure to do so waives the courts error on appeal. Brown v. State, 994 So. 2d 1191 (4th DCA 2008).

l) Further, in order to preserve the matter for appellate review, the objection must be an appropriate objection. In Schummer v. State, 654 So. 2d 1215 (Fla. 1st DCA 1995), when counsel was asked to state a race neutral reason for striking a potential member of the jury, he responded by stating that the prospective jury person had not looked him in the eye; that he did not care for the person; and because the person was a retired military person, that they were typically more conservative than others. After listening to the response by the State,
the defense attorney replied “That’s ridiculous. I mean you’re following the law, but I think that is ridiculous.” The appellate court determined that saying “that’s ridiculous” did not constitute an objection to the judge’s ruling but merely amounted to an exclamation of the attorney’s opinion that the law on this particular subject was “ridiculous.” The court specifically found that such a response was not sufficient to put the trial judge on notice that defense counsel believed that reversible error had occurred in the denial of his use of a peremptory challenge and therefore the matter was waived on appeal.

m) In *Spencer v. State*, 196 So. 3rd 400 (Fla. 2nd DCA 2016) the 2nd District made it clear that there is no duty on the part of the trial court to initiate the “genuineness” finding. Rather, the burden is on the objecting party. The Court held that “If an opponent wants the trial court to determine whether a facially neutral reason is a pretext, the opponent must expressly make a claim of pretext and at least attempt to proffer the circumstances that support its claim.” The opinion also is a very good review of the above described “Melbourne” process.

7. Knowing that lawyers will try to constantly push the envelope to try and accomplish their goals, the Florida Supreme Court, in *State v. Slappy*, 522 So. 2d 18 (Fla. 1988), set forth a “non-exclusive” list of factors to guide trial judges in evaluating whether a proffered reason is nothing more than a pretext, and therefore inappropriate. The Court held: “…the presence of one or more of these factors will tend to show that the state’s reasons are not actually supported by the record or are an impermissible pretext:

a. Alleged group bias not shown to be shared by the juror in question,
b. Failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror,
c. Singling the juror out for special questioning designed to evoke a certain response,
d. The prosecutor’s reason is unrelated to the facts of the case, and a challenge based on reasons equally applicable to juror’s who were not challenged.”

The presence of one or more of these factors will tend to demonstrate that the proffered reason for the challenge is nothing more than an impermissible pretext. See *Welch v. State*, 992 So.2d 206 (Fla. 2008); *Harrison v. Emanuel*, 694 So.2d 759 (Fla. 4th DCA 1997).

8. In the decision by the Florida Supreme Court in *King v. State*, 89 So. 3d 209 (Fla. 2012), the Court re-emphasized that the race of the challenged juror must be clearly identified on the record. “…King failed to identify the race of the similarly situated jurors who were seated on King’s jury. Since the race of the seated juror’s is unclear, King cannot show that the strike of juror 111 was racially motivated.”

9. As the appellate court pointed out in the case of *King v. Bird*, 716 So. 2d 831 (Fla. 4th DCA 1998), it’s no longer the law where in the exercise of peremptory challenges you can strike anybody for any reason.

10. When the party striking a juror gives a factually erroneous reason for striking a juror, the appellate court will closely scrutinize the scope of the trial court’s genuineness inquiry.
See West v. State, 168 So. 3d 1282 (Fla. 4th DCA 2015). In West, the prosecutor initially stated he was striking a “Spanish” juror because she was unemployed. When defense counsel pointed out the juror was employed as a housekeeper and only her children were unemployed, the prosecutor then changed his reason for the strike, saying “we don’t want any housekeepers on the jury.” The trial court accepted both the original “unemployed” reason and the new “housekeeper” reason as being race-neutral without engaging in any genuineness inquiry. The appellate court reversed.

11. It should be noted however that not every exercise of a peremptory challenge requires an explanation. In Roberts v State, 937 So. 2d 781 (Fla. 2d 2006) the accused chose to represent himself at trial. The trial judge, seemingly frustrated with the process, considered that the courts time was being wasted, instructed the accused that he needed to have a “good reason” to challenge a prospective juror, and that it must be “supported by the record”. Since there had been no “challenge to the challenge”, the Second District disagreed with the trial court. The court stated, “[t]hus, the essence of the peremptory challenge is that it may be used for any reason, and ordinarily the trial court may not require a party to provide a reason for the use of a peremptory challenge. Rather, in order to effectuate the right to be tried by an impartial jury, the defendant may use his peremptory challenges against potential jurors “without giving his reason for not wishing them to pass upon his guilt or innocence.”

12. Comments made during Voir Dire that serve no purpose other than to ingratiate an attorney to the potential jurors and “focus their attention on irrelevant matters” (such as mentioning that the attorney has a child the same age as the decedent) are clearly improper. Bocher v. Glass, 874 So. 2d 701 (Fla. 1st DCA 2004).

13. For a nice, current review of the entire process, see Landis v. State, 143 So. 3d 974 (Fla. 4th DCA 2014).

VI. PRESERVING YOUR PEREMPTORY OBJECTIONS

1. As with challenges for cause, potential errors concerning improper use of peremptory challenges may be waived if not properly preserved. To preserve the point on appeal, the objecting party must not accept the jury without renewing the objection to the challenged juror. Disla v. Blanco, 129 So. 3d 398 (Fla. 4th DCA 2013); Boswell v. State of Florida, 92 So. 3d 883, (Fla. 4th DCA 2012); Joiner v. State, 618 So. 2d 174 (Fla. 1993). See also, Baccari v. State, 145 So. 3d 958 (Fla. 4th DCA 2014) holding: ”We find that appellants abandoned his earlier objection when he affirmatively accepted the jury at the time the jury was sworn and impaneled without reference to his prior objection”. Further one cannot later argue that to renew the objection before accepting the jury would have been “futile”. As the court pointed out in USAA Cas. Ins. Co. v. Allen, 17 So. 3d (Fla. 4th DCA 2009), “Without restating the objection to the trial court, the court cannot know that the party still maintains the previously voiced objection.” However, if the objection is made in close proximity to the end of jury selection, “it could” be considered preserved without renewing the objection. Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5th DCA 2000). But see Spencer v. State, 162 So. 3d 224 (Fla. 4th DCA 2015) (distinguishing Gootee and limiting its application).
2. In *McNeil v. State*, 158 So. 3d 626 (Fla. 5th DCA 2014), after the trial started, a juror informed the court that he recognized the defendant’s son. He had not disclosed this during jury selection despite the jury being asked if they were acquainted with any of the potential witnesses. The juror indicated that while he did not know the son personally, he did recognize him, and assured the court that he could still be fair and impartial. The State’s motion to strike the juror was denied, but the State was allowed to use a preemptory challenge on the juror. In deciding that the trial court had overstepped its bounds, the appellate court held: “Allowing the exercise of preemptory challenges to continue into a trial would encourage tactical gamesmanship, a result that we are unwilling to condone and one for which we feel compelled to provide a remedy.”

3. The timeliness of the objection is critical in a criminal case, and apparently it may be less critical in a civil case. In *Baccari v. State*, 145 So. 3d 958 (Fla. 4th DCA 2014) objections were made timely but not renewed before the jury was sworn. After the jury was sworn, they were discharged for the evening and the next morning, the objecting party renewed his objections before taking any testimony. Although the trial court did not find the objections untimely, the appellate court did emphasizing the jeopardy attaches in a criminal case at the time the jury is sworn. The defendant relied on a civil case to argue the timeliness of the objection to the jury. The case referenced was *Sparks v. Allstate Construction, Inc.*, 16 So. 3d 161 (Fla. 3d DCA 2009). In *Sparks*, the plaintiff did not renew his objection before the jury was sworn, but waited until the jury had returned from lunch and before there were any further proceedings. The appellate court allowed the late objection to stand because in that particular case, “there was no affirmative acceptance of the jury.” This is a thin line and the better practice is to make your objections again before the jury is sworn.

**VII. ALTERNATE JURORS**

1. Rule 1.431 (g) of the Florida Rules of Civil Procedure provide for the selection of one to two alternate jurors. By rule they are subject to the same selection process as the main panel of jurors and of course serve only in the event of the incapacity or disqualification of one of the main jurors.

2. The order in which they are selected dictates the order in which they come to the main jury. That is to say that alternate juror number one is the first alternate to replace a member of the main jury, etc.

3. Rule 1.431 (g) (2) provides that each party has one peremptory challenge per “alternate juror or jurors”. However if the number of the parties is unequal, then the plaintiff gets the same number of peremptory challenges as the aggregate number of defendant parties. Of note, the alternate challenges can only be used against prospective alternate jurors. Remaining peremptory challenges remaining from selection of the main jury cannot by rule, be used to challenge alternate jurors.

4. Alternate jurors should be dismissed before the jury retires for their deliberations. In *Boblit v. State*, 40 FLWD 2093, (1st DCA 2015), an alternate started deliberations after one of the
main jurors was wrongfully dismissed by mistake. When the error was noted the jury was instructed to stop deliberations and on questioning the alternate jury indicated that the jury had just started to discuss the case but had not gotten very far into it. Mistrial motions were denied and the case was reversed on appeal.

VIII. BACK STRIKING

1. Rule of Civil Procedure 1.431(f) provides, “No one shall be sworn as a juror until the jury has been accepted by the parties or until all challenges have been exhausted.”

2. Can there ever be a time, prior to a jury being sworn, that a litigant could not exercise a “back strike”? The answer is no.

3. The Florida Supreme Court in Gilliam v. State, 514 So. 2d 1098 (Fla.1987)*, determined that a trial judge cannot infringe upon a party’s right to challenge any juror, whether for cause or a peremptory challenge, before the time that the jury is sworn. The Supreme Court went on to say that the denial of this right to challenge a juror at any time is reversible error per se. Although the Gilliam case is a criminal case, it has been adopted in several civil cases. See Peacher v. Cohn, 786 So. 2d 1282 (Fla. 5th DCA 2001). In the Peacher case, the Fifth District Court of Appeal held “We conclude that the right to exercise peremptory challenges is a fundamental part of a right to a fair trial and that the denial of that right should be treated as reversible error and the cause remanded for a new trial.” In that case, the jury selection process took place without problem until the first six jurors were selected. The trial court asked if there were any more challenges and when none were voiced, then proceeded to select alternate jurors. At the time that the alternate jurors were being selected, the plaintiff attempted to exercise a strike against one of the original six. That was denied by the trial court and as mentioned, the appellate court reversed on that basis.

4. In Van Sickle v. Zimmer, 807 So. 2d 182 (Fla. 2d DCA 2002), the Second District Court of Appeal reiterated that while trial courts have discretion in determining the time and manner of challenging jurors and even the swearing of jurors, nonetheless, a party may exercise a peremptory challenge at any time until the juror is sworn.

5. The Fourth District Court of Appeal has reiterated the principle that back striking is permitted any time before the jury as a whole is sworn and the trial court may not circumvent this principle by swearing jurors in on an individual basis:

In Tedder v. Video Electronics, Inc., 491 So.2d 533 (Fla.1986), the supreme court clearly held that the right to the unfettered exercise of a peremptory challenge includes the right to view the panel as a whole before the jury was sworn. “[A] trial judge may not selectively swear individual jurors prior to the opportunity of counsel to view as a whole the entire panel from which challenges are to be made.” Id. at 535. See also Lottimer v. N. Broward Hosp. Dist., 889 So.2d 165, 167 (Fla. 4th DCA 2004) (a party may exercise an unused peremptory challenge at any time prior to the jury being sworn; this is so even if the main panel has been accepted, the parties are selecting alternates, and one party chooses to exercise an unused peremptory to a juror on the main panel).
6. If a trial court improperly denies a litigant her right to back strike, the litigant must identify a specific juror on the panel whom she would have struck had she been given the opportunity to back strike; otherwise her objection is not preserved for appeal. *Id.* at 926.

7. “UNSTRIKING”—a new term, “unstriking” has been adopted by the Florida Supreme Court in *McCray v State*, 42 FLW S618 (Fla.2017). In *McCray*, after going through cause challenges and after using all the defense peremptory challenges, the defense sought to “unstrike” one of the potential jurors against whom they had already used a peremptory challenge. The Court, reviewing past cases commented that the term “unstrike” had apparently never been used before. The Court stated: “…the term is best defined as the practice of withdrawing a peremptory challenge used on one juror and then using that same peremptory challenge to exclude another juror.” The Court held that there cannot be a blanket rule that never permits an “unstrike”. Worried that the practice of “unstriking” might lead to gamesmanship in the selection of a jury, the Court ruled that “…we emphasize that the rare instance when the withdrawal of a peremptory challenge is granted after a party has exhausted its peremptory challenges must not be the design of gamesmanship, as ‘established case law rejects the proposition that a defendant is entitled to have a particular composition of jury’”. The *McCray* decision relies heavily on the 3rd Districts decision in *McIntosh v State*, 743 So. 2nd 155 (Fla 3rd DCA 1999). In *McIntosh* the trial court was trying to empanel a 12 person jury but came up one short. The trial court permitted the State to “unstrike” one of the previously stricken jurors so that the case could proceed with a full 12 person jury. In that very limited circumstance allowing an “unstrike” was within the trial courts authority.

**IX. STRIKING THE ENTIRE VENIRE**

1. When voir dire is conducted of a group, as opposed to questioning individual jurors out of the presence of the others, there is always a chance that the entire venire hears an answer that taints the entire group. The case of *Reppert v. State of Florida*, 86 So. 3d 525 (Fla. 2d DCA 2012) is illustrative. During voir dire one prospective juror responding to the court’s questioning stated: “Most likely these individuals who go through the system have been doing some kind of criminal activity for a long time.” Further questioning by the trial judge made clear that the juror had no personal knowledge of the defendant, but rather was just expressing a personal opinion. The motion to disqualify the entire panel was denied and on appeal, the district court made clear that, “When a prospective juror comments on a defendant’s criminal history and expresses some knowledge of the defendant himself, it is an abuse of discretion not to strike the venire. However, when a prospective juror simply expresses a personal opinion of the criminal justice system, that opinion, without more, is usually insufficient to taint the remainder of the venire.”

2. In order to preserve your Motion to Strike the entire Venire Panel, you must make the objection twice. Initially when the issue comes up for the first time, and again before the jury is sworn. The failure to do so, waive your right to later complain about the court’s denial of your motion. See *Johnson v. State*, 141 So. 3d 698 (1st DCA Fla. 2014).
3. The Florida Supreme Court in *Morris v. State*, 42 FLW S502 (Fla.2017) restated its position on striking the entire panel. “In order for the statement of one venire member to taint the panel, the venire member must mention facts that would not otherwise be presented to the jury….Additionally, “a venire member’s expression of an opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel”.

**X. RESTRICTIONS ON VOIR DIRE**

1. Florida Rules of Civil Procedure 1.430(b) provides “The parties have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The court may ask such questions of the jurors as it deems necessary, but the right of the parties to conduct a reasonable examination of each juror orally shall be preserved.”

2. The obvious intent of Rule 1.430(b) is to afford the trial court some discretion in asking questions of perspective jury members. The trial court’s right to do so, however, is tempered by the right of each party to conduct a complete voir dire examination of each prospective juror and the failure of the trial court to permit such an examination is reversible error.

3. While a trial judge has the right to question prospective jurors, the judge’s role in jury selection must not impair a counsel’s right and duty to question prospective jurors. *Farrer v. State*, 718 So. 2d 822 (Fla. 4th DCA 1998). Even if the trial court questions prospective jurors on fundamental issues like burden of proof, presumption of interest, etc., it is error to prevent counsel from making similar inquiries on the basis that such an inquiry would be repetitive. *Sanders v. State*, 707 So. 2d 664 (Fla. 1998). The purpose of *voir dire* is to obtain a fair and impartial jury. *Hillsman v. State*, 159 So.3d 415, 420 (Fla. 4th DCA 2015).

Although a trial court “has considerable discretion in determining the extent of counsel’s examination of prospective jurors,” it “must allow counsel the opportunity to ascertain latent or concealed prejudgments by prospective jurors.” *Id.* at 419 (internal citations omitted). A trial court should also allow “questions on jurors’ attitudes about issues where those attitudes are ‘essential to a determination of whether challenges for cause or peremptory challenges are to be made....” *Id.* at 420.

It is “fundamental error” for a trial judge during voir dire to preview “hypothetical” facts to the venire that closely matches the evidence in the case and then to communicate the judge’s own view that defendant’s in that situation should not go free. *Grigg v. State*, 42 FLWD 2440 (1st DCA 2017).

4. Some courts have tried to impose arbitrary time limitations on voir dire examination and it has been widely held that such time limitations are inappropriate. *O’Hara v. State*, 642 So. 2d 592 (Fla. 4th DCA 1994); *Zimnick v. State*, 576 So. 2d 1381 (Fla. 3d DCA 1991). In the Second District case *Watson v. State*, 693 So. 2d (Fla. 2d DCA 1997) the trial court announced at the start of jury selection that each side would be limited to thirty minutes for jury selection. Importantly, neither side objected to the time limitation. The court held that there was no abuse of discretion. However the dissent by *Jd.* Schoonover, gives an exhaustive, and excellent review of the law on why the arbitrary time limit was an abuse of discretion. In *Rodriguez v State*, 675 So. 2d 189 (Fla. 3d DCA 1996) determined that the trial court had the discretion to set a time limitation on voir dire but reversed the trial court in this case since the time restriction was not announced before the
start of the questioning. In the same vein, in Roberts v State, 937 So. 2d 781 (Fla. 2d 2006), the trial judge before trial, set no time limit on voir dire. The State took about an hour for its questioning. After the defendant, who was representing himself took about an hour, the State objected. The court proceeded to allow the defendant an additional ten minutes to complete his questioning. Because there was no announcement by the court of any intention to limit questioning to a certain amount of time, the Second District reversed the conviction.

5. In a civil case, Carver v Niedermayer, 920 So. 2d 123 (4th DCA 2006), at the start of the trial, the judge announced for the first time that once he completed his preliminary questions of the prospective jurors, that each side would be limited to thirty minutes each for their questions. After objection, the Judge increased the time limit to 45 minutes. There was further objection and counsel pointed out that the court was limiting each party to approximately two to three minutes per juror. The trial judge was reversed for an abuse of discretion in that although a reasonable time limit for questions would be appropriate, such a limitation must be announced in advance of trial so that each party can be adequately prepared.

6. The trial court does have the right of course to prevent inquiry which is repetitive, improper, or argumentative. Stano v State, 473 So. 2d 1282 (Fla. 1985).

7. It is error to force trial counsel to start jury selection for the first time at 7:30 p.m. especially where the attorney represents that he got up early; has been in court all day; and that he is so exhausted, that his client will not be receiving competent representation, because of his fatigue. Ferrer v State, 718 So2d 822 (Fla. 4th DCA 1998).

8. The trial court has the power to prevent the use of hypothetical questions during voir dire that attempt to extract commitments from prospective jurors on conclusions they would reach on certain “facts” in the case. Jackson v State, 881 So. 2d 711 (Fla. 3d DCA 2004). However, it is perfectly appropriate for counsel to question the prospective jurors about their attitudes on particular legal theories which may be presented in the course of the trial. Morris v State, 951 So. 2d 1 (Fla. 3d DCA 2006) Moore v State, 939 So. 2d 1116 (Fla. 3d DCA 2006); Williams v State, 931 So. 2d 999 (Fla. 3d DCA 2006); Mosley v State, 842 So2d 279 (Fla. 3d DCA 2003).

In the recent decision of Boyles v. Dillard's, 199 So. 3rd 315 (Fla. 1st. DCA 2016) the court re-emphasized that all parties have the right to explore legal theories and attitudes about them with prospective jurors, stating: “...where a juror’s attitude about a particular legal doctrine...is essential to a determination of whether challenges for cause or peremptory challenges are made, it is well settled that the scope of the voir dire properly includes questions about and references to that legal doctrine.

It is clear that the trial court has the absolute right to restrict questions that seek to get agreement from jurors on issues that will be litigated during the trial. The Florida Supreme Court recently in Calloway v. State, 210 So. 3rd 1160 (Fla. 2017) extensively reviewed the law in this area of the law, once again emphasizing that there is no right to try to get jurors to “precommit” to a proposition where facts of the case would need to be discussed. It is simply not appropriate to try the case during jury selection.
9. It is error to deny a party the “right” to question prospective jurors individually, rather than as a group. *Francis v. State*, 579 So. 2d 286 (Fla. 3d DCA 1991).

10. To preserve your objection to a restriction on voir dire you must object to the panel before they are sworn or the objection is waived. See *Blanco v. State*, 89 So. 3d 933, (3rd DCA 2015), and *Wallace v. Holliday Isle Resort & Marina*, 706 So. 2d 346 (3rd DCA 1998).

**XI. YOU CAN AGREE TO A JURY IF YOU WANT TO DO SO!**

In *Hojan v. State*, 212 So. 3rd (Fla. 2017) the jury selection process was well under way and both sides had exercised challenges for cause. Trial was recessed before any peremptory challenges were made and the lawyers for both sides simply agreed, out of the presence of the judge and the defendant, to a jury panel. When the trial resumed, the judge permitted ample time for defense counsel so speak with the defendant and then the judge extensively questioned the defendant about the prospective jury. Having been satisfied with the process, the court allowed the trial to continue with the agreed upon jury. After conviction the defendant objected to the process since he was not physically present when the agreement between counsel was reached. The Supreme Court held that the parties can agree to a jury and were satisfied that even though not present for the actual selection process, that the defendants’ rights were not violated. Obviously the message here is that if you want to agree, that is fine, but have your clients involved in the process.

**XI. JUROR’S FAILURE TO DISCLOSE LITIGATION HISTORY**

1. On occasion, despite all genuine attempts to have potential juror’s honestly answer questions about their background, (especially their litigation background,) honesty sometimes eludes them for some reason. The Florida Supreme Court in *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995)*, and again in *Roberts ex rel. Estate of Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002)*; the Third District Court of Appeal in *Pereda v. Parajon*, 957 So. 2d 1194 (Fla. 3d DCA 2007); the Fourth District Court of Appeal in *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 417 (Fla. 4th DCA 2014) set the following test to set aside a jury verdict based on juror non-disclosure: “Entitlement to a new trial on the basis of a juror’s non-disclosure requires the complaining party to demonstrate that: (1) the information is relevant and material to jury service in the case; (2) the juror concealed the information during questioning; and (3) the failure to disclose the information was not attributable to the complaining party’s lack of diligence”. See also, *R.J. Reynolds Tobacco Company v. Allen* 42 FLW D491 (Fla. 1st DCA 2017).

2. A case from the Third District Court of Appeal demonstrates how the trial lawyer’s lack of diligence in asking questions, and doing a public records search on potential juror’s, may lead to trial lawyer liability to his client and certainly won’t lead to a new trial in the underlying case. In *Tricam Industries, Inc. v. Coba*, 100 So. 3d 105 (Fla. 3d DCA 2012), the trial court conducted part of the voir dire and questioned the venire and generally elicited responses about whether they had been sued. The responses to the questions were all in the personal injury context. There were no real follow-up questions by the plaintiff’s attorney about non-personal injury litigation, such as collections, foreclosures, divorces, etc. Additionally, before the jury was sent out to deliberate, the trial judge suggested that the lawyers conduct a public records search on the juror’s litigation history while the alternate juror was still available. After an unfavorable verdict, the plaintiff’s attorney conducted a search of the juror’s litigation
history and found that one juror had not disclosed information about his divorce, foreclosure, and collection history. The Third District Court of Appeal held that while, under the Roberts decision, trial attorneys are not categorically required to obtain litigation histories on the venire, trial lawyers are “permitted” to do so, and because in this case, the lawyer was given the opportunity to do so by the trial court, but refused, it was determined that the plaintiff’s attorney did not meet the “due diligence” component of Roberts. The court also found that the plaintiff’s attorney did not exercise due diligence in his questioning of the jurors as he made no effort to ask litigation questions relating to matters other than personal injury lawsuits.

3. Other decisions on the same topic are: Borroto v. Garcia 103 So. 3d 186 (Fla. 3d DCA 2012), holding that the trial court abused its discretion in not permitting a jury interview when a juror failed to disclose his car accident litigation history when asked a direct question by the judge. Also, Morgan v. Milton, 105 So. 3d 545 (Fla. 1st DCA 2012), holding that although there was non-disclosure by a juror in response to a direct question by the judge, a new trial was not appropriate since defense counsel did not strike other jurors who were involved in the same type of litigation.

4. In another juror non-disclosure case, Villalobos v. State, 143 So. 3d 1042 (Fla. 3d DCA 2014) the court reviews the law on the subject and finds that the issues that need to be addressed are: is the information that was not disclosed, relevant and material to the jury service; whether the juror concealed the information during questioning; and whether the failure to disclose was the result of the complaining parties lack of due diligence?

5. The court in a recent medical malpractice case, Weissman vs. Radiology Associates of Ocala, P.A., 152 So. 3d 754 (Fla. 5th DCA 2014) went out of its way to preserve a Plaintiff’s verdict on the non-disclosure issue. There, the defendant’s counsel asks the venire about lawsuits involving “credit issues.” The appellate court held this was not precise enough to alert jurors to disclose bankruptcy filings. Clearly, from this opinion, unless precise questions are asked on very precise topics, appellate courts are not going to take away a jury’s verdict pointing to the importance of discovering and reporting the data on non-disclosure prior to the completion of the trial.

6. The United States Supreme Court in a decision published in December, 2014 also weighed in on the non-disclosure issue. The Court in Warger v. Shauers, 135 S. Ct. 52 (2014) discussed Federal Rule of Evidence, 606 (b). In the Warger case, a juror had apparently lied during jury selection and ultimately was elected foreperson for the jury’s deliberations. After a verdict in the case, another juror contacted one of the attorneys and provided an affidavit detailing disclosures made by the foreperson during deliberations. The Supreme Court explained that since the disclosure of the foreperson’s misconduct occurred (and was therefore discovered) only during jury deliberations, that because this was “intrinsic” to the jury deliberations and not extrinsic to the deliberations, the verdict would not be disturbed.

7. In the recent case of Westgate v. Parr, 42 FLW D858 (Fla. 5th DCA 2017) where a juror failed to disclose twenty criminal cases, seven of which resulted in convictions and of which four resulted in the juror being incarcerated, together with the juror’s expressed enthusiasm to sit on the jury, the 5th DCA held that the trial court abused its discretion in failing to grant a request to interview the juror.

5.28
XII. EXTENSIVE PRE-TRIAL PUBLICITY

1. Extensive and prejudicial pre-trial publicity is most commonly a problem in criminal cases, but with some regularity now it seems in vogue to raise the specter of pre-trial publicity in civil cases as well. It is clear that where the venire has been exposed to prejudicial, inadmissible information in the press, that individual voir dire of the venire is the preferred way for the parties to discover if the publicity tainted the panel. The denial of a request for individual voir dire is likely to be reversed on appeal. The most important cases are: Boggs v. State 667 So. 2d 765 (Fla. 2d DCA 1996); Bolin v. State, 736 So. 2d 1160 (Fla. 1999); and Kessler v. State, 752 So. 2d 545, (Fla. 1999). For a review of the applicable law, see: Dippolito v. State, 143 So. 3d 1080(Fla. 4th DCA 2014). [A form for a motion for limited, individual sequestered voir dire is attached, courtesy of Rodney S. Margol, Esq.]

XIII. PREMATURE DELIBERATIONS

1. During a criminal trial an alternate juror reportedly spoke with a regular juror and told the juror how she would vote. The trial Judge made inquiry and the regular juror denied the conversation took place. The trial at that point had not been completed. The question for the trial court is whether there has been juror misconduct in the form of premature deliberations?

2. Where premature deliberations are shown, the burden shifts to the non-moving party to show that the moving party was not prejudiced. The first issue for the trial court is whether there has been enough of a showing to allow for an interview of the jury.

3. In Williams v. State, 793 So. 2d 1104 (Fla. 1st DCA 2001) and in Ramirez v. State, 992 So. 2d 386 (Fla. 1st DCA 2001) the court held that there must be a showing that multiple jurors were not only discussing the case, but discussing what would be a proper verdict, before the court should allow the jury to be interviewed. In Reaves v. State, 823 So. 2d 932 (Fla. 2002) and again in Gray v. State, 72 So. 3d 336 (Fla. 4th DCA 2011), it is clear that the efforts by one juror to discuss his opinions with other jurors is insufficient to require an interview of the jury.

4. The Florida Supreme Court in Sheppard v. State, 151 So. 3d 1154 (Fla. 2014) makes it clear that objections regarding premature deliberations are waived if not specifically raised with the trial court. Not all juror discussions amount to premature deliberations. In Shepard, the Supreme Court held, “Premature deliberations refers to discussions in which jurors have expressed opinions regarding a defendant’s guilt before the close of evidence.”

5. The 2nd DCA recently weighed in on this topic in Dowd v. State, 42 FLW D1192 (Fla. 2nd DCA 2017). In Dowd after an adverse verdict, an alternate juror approached the defense and reported that: before deliberations had begun, some members of the jury discussed the trial; and that the foreman was elected the first day of the trial”. The trial Court did not permit a jury interview. The 2nd District, agreed with the trial court since there was no report by the alternate juror that any opinions were discussed.

IN THE CIRCUIT COURT OF THE [____________________] JUDICIAL CIRCUIT
IN AND FOR [____________________] COUNTY. FLORIDA

5.29
Plaintiff,

V.

Defendant.

______________________________

MEMORANDUM OF LAW REGARDING VOIR DIRE

Plaintiff, __________________________, by and through his/her undersigned counsel, hereby files this Memorandum of Law regarding Voir Dire, and states as follows:

I. PARTIES ARE ENTITLED BY RIGHT, TO A FAIR AND IMPARTIAL JURY; IF THERE IS ANY REASONABLE DOUBT ABOUT A JUROR'S ABILITY TO BE FAIR. THE JUROR MUST BE STRUCK FOR CAUSE.

The fair and impartial jury, as guaranteed by the Sixth Amendment to the United States Constitution and Section 11 of the Florida Constitution, is crucial to the administration of justice under our legal system. Singer v. State, 109 So.2d 7 (Fla. 1959). Early Florida Supreme Court decisions heralded the necessity of a fair and impartial jury, as judges initiated an effort to safeguard the integrity of the jury trial. See O'Connor v. State, 9 Fla. 215, 222 (Fla. 1860) ("Jurors should, if possible, be not only impartial, but beyond even the suspicion of partiality.").
In Williams v. State, the court stated, "To render the right to an impartial jury meaningful, cause challenges must be granted if there is a basis for any reasonable doubt as to the juror's ability to be fair." 638 So.2d 976, 978 (Fla. 4th DCA 1994) (emphasis added) (citing Hill v. State, 477 So.2d 553 (Fla. 1985), cert. denied 485 U.S. 993 (1988); Singer v. State, 109 So.2d at 23). The Williams court went on to state:

Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality.

Williams, 638 So.2d at 978 see also, e.g., Nash v. General Motors Corp., 734 So.2d 437, 439 (Fla. 3rd DCA 1999) (applying reasonable doubt standard in civil case; stating, "When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the instructions on the law given to her by the court, she should be excused.").

To ensure the impartiality of each juror, Rule 1.431(c) of the Florida Rules of Civil Procedure¹ provides that an individual juror may be challenged for cause for bias or prejudice. The juror's voir dire responses are the fundamental source for grounds of impartiality. The testimony or opinion derived from the potential juror is relevant, competent, and primary evidence on the issue of impartiality. 33 Fla. Jur.2d Juries § 68.

A. A juror's assurance that he or she "could be fair" or would "try to be fair" does not control.

A juror's sincere belief that he is "a fair person" or the juror's assurance that he or she is able to be impartial does not control. The Court, not the individual juror, is the

¹Fla. Stat. §913.03 governs cause challenges in criminal actions.
judge of the juror's freedom from bias. See Gibbs v. State, 193 So.2d 460, 462 (Fla. 2d DCA 1967). In reversing a trial court's denial of a cause strike, the court in Williams v. State, 638 So.2d 976 (Fla. 4th DCA 43), acknowledged that, "Indeed, the juror in his own mind might even believe he could be 'fair and impartial.'" Id. at 979. Likewise and because "most everyone considers themselves to be a 'fair person,'" such statements, even if sincere, do not control the analysis of a reasonable doubt as to such. Nash v. General Motors Corp., 734 So.2d 437, 440 (Fla. 3rd DCA 1999) (reversing refusal to grant cause strike). See also Sikes v. Seaboard Coast Line R.R., 487 So.2d 1118 (Fla. 1st DCA 1986) (prospective juror who admitted that she didn't think she would be fair but who promised the trial judge that she would "try to be fair" should be dismissed for cause); Leon v. State, 396 So.2d 203, 205 (Fla. 3rd DCA 1981) (juror who did not know if she could be fair should have been excused for cause).

If there is a chance that, because of feelings or opinions that a juror carries, he or she may not be totally fair and impartial, that juror should be excused for cause. Club West v. Tropigas of Fla., Inc., 514 So.2d 426 (Fla. 3rd DCA 1987) (juror who had preconceived opinion about a defendant in a civil case should have been excused for cause), cert. denied, 523 So.2d 579 (Fla. 1988). Moreover, "[A] close case should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality." Sydleman v. Benson, 463 So.2d 533 (Fla. 4th DCA 1985).

B. Rehabilitation is often insufficient once a juror has expressed partiality.

Florida appellate courts have repeatedly held that "a juror is not impartial when one side must overcome preconceived opinions in order to prevail." Price v State, 538 So.2d 486, 489 (Fla. 3rd DCA 1989). A juror's statement that he can set aside his feelings or opinions and render a verdict based on the law and the evidence is not conclusive if it appears from other statements made by him that he is not possessed of a state of mind that will enable him to do so. Somerville v. Ahuia, 902 So. 2d 930 (Fla. 5th DCA 2005) "Potential jurors’ responses to questions by the court or counsel in an effort to rehabilitate him or her, after having admitted to harboring some bias or prejudice, that they can set aside those prior admitted feelings is not determinative."); Singer v. State, 109 So.2d 7 (Fla. 1959); Longshore v. Fronrath Chevrolet, Inc., 527 So.2d 922, 924 (Fla. 4th DCA 1988) ("[Juror's] connections with the appellee, coupled with her initial statement that she would ‘try’ to be impartial, were not overcome by her subsequent statements that she could be
fair.

Ortiz v. State, 543 So.2d 377 (Fla. 3rd DCA 1989) Club West, Inc. v. Tropigas of Fla., Inc., 514 So.2d 426 (Fla. 3rd DCA 1987), cert. denied, 523 So.2d 579 (Fla. 1988) In Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, (Fla. 1929) the Florida Supreme Court stated:

It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Id. at 796.

Thus, if a juror makes a statement sufficient to cause doubt as to his/her ability to render an impartial verdict, the fact that the trial judge or opposing counsel extracts a commitment that the juror will be fair or will try to be fair is insufficient. See Price v. State, 538 So.2d 486, 488-89 (Fla. 3rd DCA 1989) (it was error for trial court not to excuse a juror for cause because of uncertainty surrounding her impartiality). "A juror's later statement that she can be fair does not erase a doubt as to impartiality[.]." Peters v. State, 874 So.2d 677, 679 (Fla. 4th DCA 2004) (juror's rehabilitation was insufficient when, in response to court's leading question about whether she could set aside her prior experiences and be fair, juror said "I think I could"). See also Goldenberg v. Regional Import & Export Trucking Co., Inc., 674 So.2d 761, 764 (Fla. 4th DCA 1996) (juror's statement that she was a "fair person" was not an unequivocal statement that she could be fair and impartial; "[E]fforts at rehabilitating a prospective juror should always be considered in light of what the juror has freely said before the salvage efforts began."); Leon v. State, 396 So.2d 203, 205 (Fla. 3 DCA 1981) (statement that juror will return a verdict according to the evidence is not determinative); Plair v. State, 453 So.2d 917, 918 (Fla. 1st DCA 1985) (where the prospective juror vacillates between assertions of partiality and impartiality, a reasonable doubt has been created which would require that the juror be excused); Jaffe v. Applebaum, 830 So.2d 136 (Fla. 4th DCA 2002) (holding that, although no rehabilitation was actually done, any attempt to rehabilitate juror would have been futile in light of juror's responses to prior questions that demonstrated his bias). In Fazzalan v City of West Palm Beach, the court held:

The jurors' subsequent change in their answers, arrived at after further questioning by appellee's counsel, must be reviewed with some skepticism. The assurance of a prospective juror that the juror can decide the case on the facts and the law is not determinative of the issue of a challenge for cause[.]

5.33
Appellate courts have repeatedly reversed trial courts’ attempts to rehabilitate prospective jurors who initially expressed partiality, holding that such efforts were insufficient to remove reasonable doubt as to that prospective juror's impartiality. See Sikes v. Seaboard Coast Line R.R., 487 So.2d 1118 (Fla. 1st DCA 1986) (juror who said she would "try to be fair" was not sufficiently rehabilitated). There are no known cases reversing a trial judge's striking a venire person for cause, while there is abundant case law reversing a trial judge's refusal to strike.

Appellate courts are particularly concerned when the trial court attempts to rehabilitate the prospective juror, especially through the use of leading questions. A "juror who is being asked leading questions (by the court) is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions[,]” Price v. State, 538 So.2d 486, 489 (Fla. 3rd DCA 1989) Thus, "It becomes even more difficult for a juror to admit partiality when the court conducts the questioning.” Williams v. State, 638 So.2d at 978. In Hagerman v. State, 613 So.2d 552, 553 (Fla. 4th DCA 1993) the court held that the trial judge erred in not excusing a potential juror for cause when the sole rehabilitation was from leading questions by the trial judge.

Although the process of rehabilitation is fraught with uncertainty, successful rehabilitation requires that—in response to questioning from counsel or to non-leading questions from the court—the juror make an unequivocal statement that he or she will set aside any bias or prejudice, start from a clean slate, and render an impartial verdict based on the evidence and the law in the case. Compare Overton v. State, 801 So. 2d 877, 894 (Fla. 2001) (upholding trial court's denial of a cause challenge to a juror who said he would "start from a clean slate" and follow the law) with Williams v. State, 638 So.2d 976 (Fla. 4th DCA 1994) (holding that juror should have been dismissed for cause; stating, "Despite the juror's subsequent statement that I'll be impartial because that's my character,' he never expressed unequivocally that he could be fair and impartial in this case. He stated only that he hoped he could.” (emphasis added)). The court in Somerville v. Ahuja elaborated:

The ultimate test is whether a juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions on the law given by the court. A juror should be able to set aside any bias or prejudice and assure the court and the parties that they can render an impartial verdict based on the evidence submitted and the law announced by the court.
902 So.2d 930, 935 (Fla. 5th DCA 2005). As discussed above, a simple statement that the juror will be fair or try to be fair is not enough. Additionally, a juror's silence to a question asked of the entire panel is insufficient rehabilitation. See Bell v. State, 870 So.2d 893, 895 (Fla. 4th DCA 2004).

Thus, in summary, any appearance of partiality is usually sufficient to strike a prospective juror for cause. Rehabilitation efforts are fraught with difficulty. Carratelli v State, 832 So.2d 850 (Fla. 4th DCA 2002) ("The rehabilitation of prospective juror is a tricky business that often leads to reversal.").

II. **PARTIES HAVE WIDE LATITUDE TO EXAMINE JURORS, INCLUDING ASKING HYPOTHETICAL QUESTIONS ABOUT LEGAL DOCTRINE AND QUESTIONS RELATING TO PRECONCEIVED OPINIONS.**

It has long been held in this state that parties have wide latitude to examine jurors for the purpose of ascertaining the qualifications of persons drawn as jurors and whether they would be absolutely impartial in their judgment. See Fla. R. Civ. P. 1.431(b) (1999); Cross v. State, 89 Fla. 212, 216 (Fla. 1925) ("a very wide latitude of examination ... is allowable and indeed often necessary to bring to light the mental attitude of the proposed juror[]."). Therefore, the "length and extensiveness" of jury selection "should be controlled by the circumstances surrounding the jurors' attitudes in order to assure a fair and impartial trial by persons whose minds are free from all interest, bias or prejudice." Barker v. Randolph, 239 So.2d 110, 112 (Fla. 1st DCA 1970) see also Gibbs v. State, 193 So.2d 460, 462 (Fla. 2d DCA 1967) (stating that voir dire should be "so varied and elaborated as the circumstances surrounding" the potential jurors); Cross, 89 Fla. at 216 (stating that jurors should be "absolutely impartial in their judgment.").

In Lavado v. State, 492 So.2d 1322 (Fla. 1986), the Florida Supreme Court held that it was improper for the trial court to refuse the defendant's request to ask prospective jurors about their willingness to accept one of the defenses. The Court adopted the dissenting opinion of Judge Pearson of the Third District Court of Appeal in its entirety as its majority opinion. Judge Pearson had stated:

The scope of voir dire, therefore, "should be so varied and elaborated as the circumstances surrounding the juror..." Thus, where a juror's attitude about a particular legal doctrine (in the words of the trial court, "the law")(is) essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of voir dire properly includes questions
about and references to that legal doctrine even if stated in the form of hypothetical questions.

Lavado v. State, 469 So.2d 917, ( Fla. 3rd DCA 1985) (Pearson, J., dissenting) (internal citations omitted) (emphasis added). See also Moses v. State, 535 So.2d 350 ( Fla. 4th DCA 1988) (recognizing that the rationale of Lavado is not limited to legal defenses but encompasses inquiry into bias that goes to the heart of defendant's case). Compare Williams v. State, 744 So.2d 1103 (Fla. 3rd DCA 1999) (in a case in which eyewitness misidentification was the sole defense, the trial court's restriction of counsel's questioning jurors about their prior experiences in misidentifying people was upheld; the appeals court distinguished Lavado, because the Williams trial judge asked the panel about misidentification and because a juror's experience with misidentification was distinct from whether a juror could accept the defense).

Accordingly, hypothetical questions that correctly state the applicable law are proper. See e.g., Pait v. State, 112 So.2d 380, 383 ( Fla. 1959) ("A hypothetical question making a correct reference to the law of the case to aid in determining the qualifications or acceptability of a prospective juror may be permitted."). Hypothetical questions incorporating evidence at trial and asking how jurors would rule and questions regarding the types of verdicts under a given set of circumstances are not proper. Tampa Elec. Co. v. Bazemore, 85 Fla. 164, 96 So. 297 ( Fla 1932). Smith v. State, 253 So.2d 465, 470-71 ( Fla. 1st DCA 1971) (juror may not be asked about his attitude toward a witness, especially when it is the primary witness; however, it’s proper to ask whether a juror can follow the court’s instructions as to the credibility of witnesses); Hendrick v. State, 237 So.2d 555, 556 ( Fla. 2 DCA 1971) (voir dire questions asking what a verdict would be based on a hypothetical set of facts are improper).

A. **Areas of Inquiry on Voir Dire**

Rule 1.431(c) of the Florida Rules of Civil Procedure governs cause challenges. The rule states, in pertinent part:

On motion of any party the court shall examine any prospective juror on oath to determine whether that person is related to any party or to the attorney of any party within the third degree or is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called or has any interest in the action or has formed or expressed any opinion or is sensible of any bias or prejudice concerning it or is an employee of any party within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand indifferent to the action or any
of the foregoing grounds of objection exists or that the juror is otherwise incompetent, another shall be called in that juror's place.

Fla. R Civ. P. 1.431(c)(1).

In addition to the areas of questioning specifically enumerated in Rule 1.431, jurors can be questioned about the following areas and challenged for cause when appropriate:

1. Whether a juror has reservations about awarding money damages for the death of a loved one and disapproves of personal injury or malpractice lawsuits. Nash v. General Motors Corp., 34 So.2d 437 (Fla. 3rd DCA 1999) (reversing denial of cause strike for juror who had prejudices about personal injury lawsuits); Somerville v. Ahuja, 902 So.2d 930, 933 (Fla. 5th DCA 2005) (juror who had bad feelings about malpractice suits based on conversations with physician uncle and friend in medical school should have been excused for cause); Sisto v. Aetna Casualty & Surety Co., 689 So.2d 438 (Fla. 4th DCA 1997) (trial court abused its discretion by prohibiting counsel from asking questions about jurors' views on damages, including non-economic damages; court's general questions about whether jurors would follow the law did not cure prejudice).

2. Whether a juror can follow the law on pain and suffering. Pacot v. Wheeler, 458 So.2d 1141 (Fla. 4th DCA 2000) (reversing denial of cause strike for juror who said she would have "difficulty" following the law).

3. Whether a juror has negative attitudes toward lawyers or the legal system. Levy v. Hawk's Cay, Inc., 543 So.2d 1299 (Fla. 3rd DCA 1989) (jurors with negative attitudes toward the legal system resulting from unfavorable experiences due to lawsuits being filed against them or members of their family and that those predispositions would result in bias should have been excused for cause), rev. denied, 553 So.2d 1165 (Fla. 1989); Frazier v. Wescos, 913 So. 2d 1216 (Fla. 4th DCA 2005) (juror who stated, I don't care for lawyers much at all, who suggested that he would hold the plaintiff to a "clear and obvious" standard of proof, and who indicated that plaintiffs in general were "looking for easy money" and "trying to cheat the system" to "make an easy buck" should have been excused for cause).

4. Whether a juror has a friendship or economic relationship with a party or its counsel. Johnson v. Reynolds 97 Fla. 591, 121 So. 793, (Fla. 1929) holding that a friendly relationship with a party is grounds for a cause challenge; Canty v. State, 597 So.2d 927, 928 (Fla. 3 DCA 1992) ("Nothing can raise more doubts about a juror's impartiality than a previous contact with a party, or their attorney."); Sikes v. Seaboard Coast Line R.R., 487 So.2d 1118, 1119 (Fla. 1st DCA 1986) (refusal to excise juror whose son was best friend of counsel for defendant and who said this might lead her to give more weight to the defense was reversible error); Longshore v. Fronrath Chevrolet, 527 So.2d 922 (Fla. 4th DCA 1988) (juror whose daughter worked for defendant and who thought defendant's owner was a "good guy" should be excused for cause despite fact that she said he would "try" to be impartial); Mitchell v. CAC-Ramsey Health Plans, Inc., 719 So.2d 930 (Fla. 3rd DCA 1998) (juror who was member of defendant health care plan and who had been treated at two of its clinics could have been struck for cause).

5. Whether a juror is or was an employee of one of the parties or works for the same employer as one of the parties. Boca Tecca Corp. v.1 Palm Beach County, 291 So.2d 110
(Fla. 4th DCA 1974) (employee juror is subject to challenge for cause); Martin v. State Farm, 892 So.2d 11 (Fla. 5th DCA 1980) (juror employed by hospital where defendant doctor was president, and chief of staff should be dismissed for cause); Hagerman v. State, 613 So.2d 552 (Fla. 4th DCA 1993) (failure to exclude juror who worked in the state attorney's office and knew the assistant state attorney constituted an abuse of discretion).

6. Whether a juror believes that a rendition of a **verdict for one of the parties would have any influence on his/her personal life**, especially with regard to insurance and the premiums he/she has to pay. Purdy v. Gulf Breeze Enter., Inc., 403 So.2d 1325, 1330 (Fla. 1981) ("[T]he impact of monetary awards, in negligence cases upon automobile liability insurance rates may be proper subject for exploration upon voir dire examination of a jury panel." (internal citations omitted)).

7. Whether a juror **owned stock** in a defendant corporation. Club West, Inc. v. Tropigas, 514 So.2d 426 (Fla. 3rd DCA 1987) (said juror is subject to a cause challenge), cert. denied, 523 So.2d 579 (Fla. 1988).

8. Whether something about the juror's **employment "may" affect her decision** in the case. Ortiz v. State, 543 So.2d 377 (Fla. 3rd DCA 1989) (this is sufficient to disqualify a juror for cause).

9. Whether a juror has **life experiences that would influence her decision**. See Tizon v. Royal Caribbean Cruise Line, 645 So. 2d 504 (Fla. 3rd DCA 1994) (juror who stated she would be influenced by the fact that her husband and others she knew had successfully recovered from the same surgery the plaintiff had undergone and she would be influenced by the fact that her husband was a physician who had been sued should have been excused for cause, despite fact that she later said she would try to be fair).

10. Whether a juror could put a **dollar value on loss of companionship**. Gootee v. Clevinger, 778 So.2d 1005, 1008-09 (Fla. 5th DCA 2000) (holding that juror who could not put dollar value on loss of companionship without "a lot more education and many more convictions about the worth of a human life" should have been removed for cause because she could not perform her juror's responsibility).

11. Whether a juror has **already formed or expressed an opinion on issues** involved in a case based on newspaper articles, hearsay, or other previous experience or information. See Singer v. State, 109 So.2d 7, 19 (Fla. 1959) (juror who had **preconceived opinion**, and prejudice should have been excused for cause); see also Ortiz v. State, 543 So.2d 377, 378 (Fla. 3rd DCA 1989) (holding that trial court abused its discretion in denying cause challenge to venireperson who had **read newspaper accounts and made conclusions**)

Club West, Inc. v. Tropigas of Fla., Inc., 514 So.2d 426 (Fla. 3rd DCA 1987) (juror who had preconceived opinion about a defendant in a civil case should have been, excused for cause), cert. denied, 523 So.2d 579 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985) ("A juror is not impartial when one side must overcome a preconceived opinion in order to prevail"); Smith v. State, 463 So.2d 542, 543 (Fla. 5th DCA 1985) (juror who was "not sure" she could listen to the evidence and court instructions free from the influence of what she had previously seen or heard should have been excused); Somerville v. Ahuja, 902 So.2d 930, 933 (Fla. 5th DCA 2005) (juror who had had feelings about malpractice suits based on conversations with physician uncle and friend in medical school should have been excused for cause; juror could not unequivocally state she would set those feelings aside).

12. Whether a juror knows about claims concerning the "**insurance crisis**" or "**lawsuit crisis**". Bell v. Greissman, 902 So.2d 846 (Fla. 4th DCA 2005) (it was error to deny challenge for cause to juror who was skeptical about tort claims in general and who made comments reflecting strong bias arising out of previous personal experience); Sutherlin v. Fenenga, 810 P.2d 353, 361-62 (N.M. Ct. App. 1991) (party may inquire about juror's knowledge about the "insurance crisis" upon showing that members of jury may have been exposed to media accounts about effect of jury awards on insurance costs); Babcock v. Northwest Memorial Hosp, 767 S.W.2d 705 (Tex. 1989).
III. IT IS REVERSIBLE ERROR TO FORCE A PARTY TO USE A PEREMPTORY CHALLENGE ON A PERSON WHO SHOULD HAVE BEEN EXCUSED FOR CAUSE.

Florida and most other jurisdictions adhere to the general rule that "It is reversible error to force a party to use a peremptory challenge on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." Gootee v. Clevinge, 778 So.2d 1005, 1009 (Fla. 5th DCA 2000). In Hill v. State, 477 So.2d 553 (Fla. 1985). The Florida Supreme Court noted that failure to dismiss a juror for cause when appropriate abridges a party's right to peremptory challenges by reducing the number of those challenges available to him or her. See id. at 556. Thus, it is "exceedingly important" that trial courts ensure that jurors are unbiased. Id.

In order to preserve for appellate review the refusal to grant a challenge for cause, a party must do all of the following: (a) exhaust all remaining peremptory challenges; (b) make a request for additional peremptory challenges that is denied; and (c) identify to the trial court a particular juror who is ultimately empanelled whom the party would have also struck had peremptory challenges not been exhausted.²

IV. LANGUAGE SUGGESTING THE NEED FOR A CAUSE STRIKE.

The following cases illustrate statements by members of the venire which courts have held require they be excused for cause:

1. A venire person who admits a party would start out with a strike or half strike against him should be excused for cause. Club West, Inc. v

² See, e.g., Griefv. DePietro, 625 So.2d 1226, 1228 (Fla. 4th DCA 1993) is necessary not only to exhaust all the remaining challenges and for request additional peremptory challenges, but to identify to the trial court a particular objectionable juror whom the party would have' also struck had peremptory challenges not been exhausted.); Hill v. State, 477 So.2d 553 (Fla.1985) (stating that it is error to force a party to use peremptory challenges on a juror who should have been excused for cause where party exhausted all peremptory challenges and addition I challenges were sought and denied); Dardar v. Southard Distrib. of Tampa, 563 So.2d 1112 (Fla. 2d DCA1990) (stating that, if a party exhausts his peremptory challenges but does not request additional challenges, any error in the court's denial of that party's challenges for cause is not preserved); Metro, Dade County v. Sims Paving Corp., 576 So.2d 766, 767 (Fla. 3d DCA 1991) (holding that the trial court must empanel an objectionable juror in order to demonstrate. prejudice); Taylor v. Pub. Health Trust, 546 So.2d 733, 733 (Fla. 3rd DCA 1989) (holding there was no reversible error, because "counsel did not request an additional challenge nor indicate in any way that she was dissatisfied with any member of the jury which tried the case"). Compare Frazier v. Wesch, 913 So.2d 1216 (Fla. 4th DCA 2005) (no error where plaintiff requested peremptory strike to excuse juror who sat as alternate but who was excused before the jury retired to deliberate).
Tropigas of Fla., Inc.; 514 So.2d 426, 428 (Fla. 3d DCA 1987), cert. denied, 523 So.2d 579 (Fla. 1988) (holding that trial court abused its discretion in refusing to excuse for cause a juror who admitted that, because of her prior favorable and profitable experiences with a defendant, the plaintiff "may" be starting out with "one strike against him", despite her later statement she could be impartial); Jaffe v. Applebaum, 830 So.2d 136 (Fla. 4th DCA 2002) (in medical malpractice action involving allegedly negligent cosmetic procedure, juror who admitted he owed his life to his surgeon and plastic surgeon, and because of such experience, plaintiff/patient would have started out with a half strike against her she should have been struck for cause).

2. A venireman who admits a potential bias, or who admits he probably would be prejudiced or would probably give a bit more weight to what opposing counsel or certain witnesses say should be excused for cause. Bell v. State; 870 So.2d 893 (Fla. 4th DCA 2004) (reversing trial court's refusal to grant defendant's cause challenge to venireman who admitted a potential bias by stating "If I had a bias it would be against the defendant," and later responded by saying "I'd try not to" and "I would give it my best shot" when the judge attempted to rehabilitate him); Sikes v. Seaboard Coast Line R.R. 487 So.2d 1118 (Fla. 1st DCA 1986) (reversing trial court's refusal to strike for cause a venire person who admitted that he would "probably" "give a little bit more weight to what they [opposing counsel] say as opposed to what I say"); Imbimbo v. State 555 So.2d 954 (Fla. 4th DCA 1990) (juror who admitted she "probably" would be prejudiced, even though she then asserted she "probably" could follow the judge's instructions should be struck for cause); Somerville v. Ahuja 902 So.2d 930, 933-34 (Fla. 5th DCA 2005) (juror who admitted that he "probably" would bring back a verdict for the defense should have been excused for cause, despite the fact that the court stated that counsel could "probably get anybody on that jury to say that"); Slater v. State 910 So.2d 347 (Fla. 4th DCA Sept. 14, 2005) (juror who stated during voir dire that he believed the testimony of a police officer carried a little more weight than that of a lay person should have been stricken for cause).

3. A venire person who states she could not say she would be strictly impartial, is not a hundred percent sure she could be fair, or cannot affirmatively say she would follow the court's instructions should be excused for cause. Gooete v. Clevinger, 778 So.2d 1005 (Fla. 5th DCA 2000) (reversing a trial court's refusal to strike for cause a venire person who really could not say she would be strictly impartial despite her later statement that she "can be fair whether she likes it or not"); Williams v. State, 638 So.2d 976 (Fla. 4th DCA 1994) (reversing a trial court's refusal to excuse for cause a venire person who conceded by nodded head to counsel's question, "You're not a hundred percent sure that you could be fair and impartial, is that correct?" and who stated I hope that I can" in response to a question about whether could be fair, despite court's efforts at rehabilitation); Brown v. State 028 2d 758, 759 (Fla. 3d DCA 1999) (Prospective juror Mercado's responses, including "Yeah, I think so", when asked whether he would be able to follow the trial court's instructions, are equivocations, and thus raise a reasonable doubt as to whether he could serve as a fair and impartial juror."); Marquez v. State, 721 So.2d 1206, 1207 (Fla. 3d DCA 1998) (juror who said, "I don't know," when asked whether she could presume the defendant to be innocent and who was not directly rehabilitated should have been struck for cause); Blve v. State 566 So.2d 877, 878 (Fla. 3d DCA 1990) (juror who acknowledged in objectivity because of crimes against her friends should have been excused for cause; juror stated "I would have difficulty in being objective," "I cannot stay very objective," and "I think I would try to be objective.").
4. A venire person who states he/she would have "difficulty" or a problem," or "trouble" in following the law regarding compensation for pain and suffering should be dismissed for cause. Pacot v. Wheeler 758 So.2d 1141, 1142 (Fla. 4th DCA 2000) See also Howard v. State, 698 So.2d 923 (Fla. 4th DCA 1997) (juror from Finland who expressed difficulty with the concept that accused defendants were presumed innocent and who stated, "Well if they can prove they're innocent, its okay," should have been excused for cause).

5. A venire person who admitted a bias against some personal injury claimants by admitting that the Plaintiff would "have to overcome a burden and not be starting off even with the defense", that she would "have a little difficulty in being impartial in this case," and that she felt that personal injury plaintiffs are "dishonest" should be excused for cause. Goldenburg v. Regional Import and Export Trucking Co., Inc. 674 So.2d 761 (Fla. 4th DCA 1996) (reversing trial court's failure to excuse said venire person for cause).

6. A venire person who has prior experiences that could cloud his judgment or influence his verdict should be excused for cause. Hall v. State, 682 So.2d 208, 209 (Fla. 3d DCA 1996) (juror's voir dire statement that his wife's victimization in armed home invasion "could cloud my judgment" raised reasonable doubt about his ability to render impartial verdict); Wilkins v. State 607 So.2d 500 (Fla. 3d DCA 1992) (juror who "couldn't definitely say" whether the fact that his five-year-old, niece was sexually attacked a year prior and the perpetrator was never prosecuted would influence his verdict should have been excused for cause); Gill v. State, 683 So.2d. 158 (Fla. 3d DCA 1996) (jurors who had been victims of burglaries could not unequivocally state they would be fair and should have been excused for cause; one juror could only state she would "try" to be fair and another stated he felt "very negative about people who do what this man is accused of doing."); Ferguson v. State, 693 So.2d 596 (Fla. 2d DCA 1997) (juror who had lost two friends because of alcohol and driving and whose beliefs about driving with alcohol in your system might "possibly" prejudice him should have been excused for cause).

Moreover, while a juror's individual comments may not give individual bases for a case challenge, the cumulative effect of the juror's comments may raise reasonable doubt sufficient to justify a cause challenge. See James v. State 731 So.2d 781 (Fla. 3d DCA 1999) (reversing denial of cause challenge); Jaffe v. Applebaum, 830 So.2d 136 (Fla. 4th DCA 2002) (reversing a trial court's denial of a cause strike).

A. Counsel should directly question jurors suspected of prejudice.

Counsel need to directly and thoroughly question jurors who may be suspected of prejudice; a recent case held that basing a cause challenge solely on a juror raising his hand in response to questions or on a series of "do you agree with what another juror said" questions is not enough. In Somerville v. Ahuja, 902 So.2d 930 (Fla. 5th DCA 2005) a prospective juror raised his hand in response to general questions concerning prejudice; this juror was not questioned beyond eliciting
the fact that he shared a co-juror's feelings about bias against smokers and that he understood the questions posed to her. See id. at 934. The court held that the questioning of this juror was "so limited" that the plaintiff "failed to demonstrate that any bias or prejudice against smokers he admitted to, could not be set aside, and that he could not render an impartial verdict." Id. at 937. Accordingly, the court refused to reverse the case based on the trial court's failure to excuse this juror for cause.

V. PROCEDURAL MATTERS

A. Counsel must be given adequate time to conduct voir dire.

To be afforded the right "to conduct a reasonable examination of each juror," as prescribed by Florida Rule of Civil Procedure 1.431(b), counsel must be given adequate time to conduct voir dire. The general rule as to length of questioning was succinctly stated in Williams v. State 424 So.2d 148 (Fla. 5th DCA 1982) as follows:

The purpose of voir dire is to obtain a "fair and impartial jury to try the issues in the cause." Time restriction or limits on number of questions can result in the loss of this fundamental right. They do not flex with the circumstances, such as when a response to one question evokes follow-up questions.

Id. at 149 (internal citations omitted). See also Barker v. Randolph, 239 So.2d 110, 112 (Fla. 1st DCA 1970) (the "length and extensiveness [of voir dire] should be controlled by the circumstances surrounding the juror's attitude in order to assure a fair and impartial trial by persons whose minds are free from all interest, bias or prejudice."); Cohn v. Julien 574 So.2d 1202 (Fla. 3d DCA 1991) (reversing verdict in medical malpractice wrongful death case, because the trial judge unreasonably restricted plaintiffs counsel to fifteen minutes for voir dire examination; citing Williams)3

3 But see Anderson v. State, 739 So.2d 642 (Fla. 4th DCA 1999) (holding that the trial judge did not abuse his discretion in trial for grand theft by limiting voir dire to 30 minutes for each party, where counsel were informed of limitation before commencement of voir dire, no objections were made at the time, trial judge asked background questions of each prospective juror and posed general questions to panel, defense counsel's line of questioning during allotted time was somewhat repetitious, and the charged offenses were not severe).
Recently, in Somerville v. Ahuja, 902 So.2d 930 (Fla. 5th DCA 2005) the court chastised the trial judge for rushing to pick a jury. The court noted that, because the trial judge was frustrated with having to bring in a second panel of jurors and insisted on completing voir dire that day, the trial judge "did not accurately recall what [two jurors who should have been dismissed for cause] said on voir dire, nor did the court allow the court reporter to read back their testimony." Id. at 936. The court stated that, because the trial court improperly refused to grant the cause challenges, plaintiff was improperly deprived of a "needed peremptory challenge[,]" Id. at 937. Accordingly, the court reversed the verdict and remanded the case for a new trial.

B. **Courts cannot limit or prohibit backstriking.**

The trial court cannot limit or prohibit the use of backstriking and a party can use its peremptory challenges until the jury has been sworn. This process cannot be circumvented by the trial court's swearing of individual jurors. Tedder v. Video Elec. Inc 491 So.2d 533 (Fla. 1986) Van Sickle v. Zimmer 807 So.2d 182 (Fla. 2nd DCA 2002) ("the trial court's failure to allow a party to exercise a remaining peremptory challenge before the jury is sworn constitutes reversible error").

C. **Errors in allotting the number of peremptory challenges is grounds for reversal.**

Rule 1.431(d) of the Florida Rules of Civil Procedure allocates three peremptory challenges to each party. The rule states, in pertinent part:

Peremptory Challenges. Each party is entitled to three peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of three peremptory challenges to each party on the side with the greater number of parties[.]

Id. In St. Paul Fire and Marine Ins. Co. v. Welsh 501 So.2d 54 (Fla. 4th DCA 1987) the Court of Appeals held that the trial court committed reversible error when it allotted six peremptory challenges to the plaintiffs and three peremptory challenges to the intervenors, while only allowing three peremptory challenges to the defendant. See id. at 55-56. The Court of Appeals noted that the plaintiffs and defendant "should have had at least an equal number of challenges." Id. at 56.
D. Peremptory challenges based on race, ethnicity, or gender are prohibited.

In civil and criminal cases, the use of peremptory challenges based on the juror's race, ethnicity, or gender is prohibited. Dorsey v. State, 868 So.2d 1192, 1202 n.8 (Fla. 2003) J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994) (holding that the Equal Protection Clause prohibits gender-based peremptory challenges); Abshire v. State, 642 So.2d 542, 544 (Fla. 1994) (following J.E.B.; holding that attorney's comment that women were more emotional was not a gender-neutral reason for striking women); Joseph v. State, 636 So.2d 777 (Fla. 3rd DCA 1994) (striking Jewish person in community where Jews made up ten percent of the population was impermissible discrimination based on ethnicity in violation of Florida constitution). However, it is presumed that peremptory challenges will be exercised in a nondiscriminatory manner. Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996) Melbourne, the Florida Supreme Court set forth the procedure for objecting to a peremptory strike based on race as follows:

A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent the strike to explain the reason for the strike.

At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court’s focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

Id. At 764 (internal citations omitted) (following Batson v. Kentucky 476 U.S. 79 (1986), and its progeny); Johnson v. California, 125 S.Ct. 2410, 2417 (2005) (Ex. 82) (a defendant satisfies the requirements of Batson’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred); Portu v. State, 651 So.2d 791 (Fla. 3rd DCA 1995) (merely “noting” that a juror being challenged is from a particular cognizable group does not suffice to trigger and inquiry). The Melbourne court emphasized that the trial court must evaluated the “genuineness” of an explanation for striking a juror” and determine whether the proffered explanation for a challenge is a pretext (i.e., whether it conceals an intent to discriminate based on race”). Young v. State, 744 So.2d 1077, 1082 (Fla. 4th DCA 1999) see also Henry v. State, 724 So.2d 657, 658 (Fla 3rd DCA 1991) (“A pretextual reason for a strike may exist when a juror is struck from the jury panel based on a reason equally applicable to an unchallenged juror.”). The Melbourne analysis also applies in gender-based challenges.
“Florida law does not require the explanation for a strike to be objectively reasonable, only that it be truly nonracial.” Young, 744 So.2d at 1084 (holding that the following were facially race-neutral reasons for striking three jurors: a heavy accent, being quiet, and having a sister-in-law whom the juror felt was treated unfairly when arrested for robbery). See also American Security v. Hettel, 572 So.2d 1020 (Fla. 2d DCA 1991) that the following reasoning was not a racially neutral explanation: "I don't like the way that he responded to my questions, Your Honor ... And he doesn't appear to be interested in this case or sitting on this jury."); Mitchell v. CAC-Ramsey Health Plans, Inc., 719 So.2d 930 (Fla. 3rd DCA 1998) (in medical malpractice action against physician and health plan, the trial court erred in denying the plaintiffs' peremptory challenges of three jurors, because the reasons given for the challenges—that one juror was a hospital employee and her relative was a physician and another juror had been married to a neurologist—were race neutral); Baber v. State, 776 So.2d 309 (Fla. 4th DCA 2000) (allowing the prosecutor's strike of a black juror because the prosecutor did not want an African American to evaluate a black-on-black crime was ineffective assistance of counsel); Haile v. State, 672 So.2d 555 (Fla. 2nd DCA 1996) (trial court erred when it accepted state's explanation that it was peremptorily striking the sole remaining African-American member of venire because she read the Bible; this juror was never questioned about her religious beliefs and their effect on her ability to serve as a juror).

The trial court's ruling "turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." King v. Byrd, 716 So.2d 831 (Fla. 4th DC 1999) review denied, 779 So.2d 271 (Fla. 2000). See also Dorsey v. State, 868 So.2d 1192 (Fla. 2003) (holding that peremptory strike of African-American prospective juror because she appeared "disinterested" was not supported by the record; the proponent of a peremptory strike based on nonverbal behavior may satisfy its burden of production of a race-neutral reason for the strike only if the behavior is observed by the trial court or otherwise has record support).

To preserve the issue for appeal, counsel should renew her objection to a race or gender-based challenge before the jury is sworn. See Melbourne, 679 So.2d at 765 (holding that counsel did not preserve the race-based use of a peremptory challenge for review, because counsel did not renew her objection before the jury was sworn; noting that counsel never requested that the court ask the State for its reason for the strike); Mazzouccolo v. Gardner, McLain & Perlman, M.D., PA, 714 So.2d 534 (Fla. 4th DCA 1998) (where plaintiffs' counsel makes a timely, gender-based objection to the defendant having stricken three female jurors and the defendant refuses to supply a gender-neutral reason for the strikes, to preserve error, plaintiffs' counsel must not accept the jury and must renew their gender-based objection or condition acceptance of the jury on their previous objection).
WHEREFORE, Plaintiffs respectfully requests that this Honorable Court apply the above and foregoing law at the time of jury selection in the instant case, and grant such other and further relief as is just and proper.

[CERTIFICATE OF SERVICE]

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE No.: 16-2008-CA-000130-XXX
DIVISION: CV-8

MARTHA GARDNER,

Plaintiff,

vs.

ANTHONY NIOSO, M.D.; BAPTIST PRIMARY CARE, INC.; and JACKSONVILLE NEUROLOGICAL CLINIC, P.A.,

Defendants.

PLAINTIFF’S MOTION FOR LIMITED INDIVIDUAL SEQUESTERED VOIR DIRE AND QUESTIONNAIRE

Pursuant to Rule 1.431, Florida Rules of Civil Procedure, the plaintiff respectfully moves this Court to permit a limited individual sequestered voir dire examination of the prospective jurors in this case. In support thereof, plaintiff shows:

1. This is a medical negligence action involving an alleged failure to timely diagnose the plaintiff’s thyroid cancer.

2. The case is set for two weeks on the trial calendar, and as discussed below there is a reasonable probability that some jurors will be challenged for cause due to their personal opinions about medical malpractice cases in general and this case in particular because of the nature of the plaintiff’s medical condition; and plaintiff
respectfully observes that, unless the Court utilizes the limited individual sequestered
voir dire, there is a substantial likelihood that the entire venire could be prejudiced by
one biased juror's comments made in front of the entire pool of prospective jurors. Such
comments by a biased prospective juror would probably increase the number of
challenges for cause (and potentially lead to a mistrial), and, in any event, would
substantially increase the time required to select and impanel a jury.

3. Additionally, some jurors with a history of cancer may be reluctant or
embarrassed to respond to questions about this subject and their own condition in front
of the full venire.

4. In February, 1988, the Legislature adopted Ch. 88-1, Laws of Florida, in
Special Session. In adopting this legislation, the Legislature's findings were indicative
of the views held by some members of the public about medical malpractice litigation:

WHEREAS, the people of Florida are concerned
with the increased cost of litigation and the need for "
review of the tort and insurance laws . . . .

Ch.88-1, Laws of Florida, Preamble. (Emphasis added.)

5. Following the adoption of Ch.88-1, Laws of Florida, a statewide campaign
was waged by the medical profession to adopt Amendment J0, a proposed constitutional
amendment related to the subject of medical malpractice and limitations on jury awards
in cases such as the instant case. Millions of dollars were spent on media advertising
directed to this issue, thereby heightening the public's preoccupation with this subject.
In 2004 the issue of medical malpractice litigation arose again and was the subject of a
ballot initiative. An extensive media campaign was waged resulting in additional statewide attention to U1is issue. As a result, many members of the public have developed strongly held views on the subject of medical malpractice litigation.

6. The plaintiff respectfully shows that Ule foregoing concerns are not speculative, because the problem has occurred in trials where individual sequestered questioning was not employed.

7. As a direct result of the problems which have arisen in the past in selecting a jury in a case of this type, other divisions of this Circuit Court and other Circuit Courts of this State have granted this same motion as it relates to questions about potential jurors’ personal views toward medical malpractice litigation. See, e.g., Dalgleish v. Walgreens. Case No. 16-2010-CA-000176 (4'h Jud. Cir., Duval County, Fla.); Thomas v. Baptist Medical Center, Case No. 87-1734-CA (4th Jud. Cir., Duval County, Fla.); Barbree v. Baptist Medical Center, Case No. 87-649-CA and Case No. 87-11120-CA (4th Jud. Cir., Duval County, Fla.); Weiss v. Mei11, Joest & Hayes. M.D., P.A., Case No. 84-12821-CA (4th Jud. Cir., Duval County, Fla.); Bums v. University Medical Center, inc., Case No. 85-12974-CA (4th Jud. Cir., Duval County, Fla.); Beal v. Smith, Case No. 88-18178-CA (4th Jud. Cir., Duval County, Fla.); Jossey v. Si. Vil1cent's Medical Center, inc., Case No. 89-15834-CA (4th Jud. Cir., Duval County, Fla.); Robinson vs. University Medical Center. Inc, etc., et al., Case No. 89-5290-CA (4th Jud. Cir., Duval County, Fla.); Smith vs. Murray, et al., Case No. 89-12178-CA (4th Jud. Cir., Duval County, Fla.); Morrell, etc., vs. Lakeland Regional Medical Cen1er, Inc., et al., Case No. GC-G-

8. Specifically, the plaintiff requests that a questionnaire be filled in by each member of the panel in accordance with Exhibit "A" attached. If a potential juror responds "yes" to any of the questions on the questionnaire, then he or she would be questioned about the answer(s) outside the presence of the other potential jurors in the jury room during a recess in the voir dire.

9. If this procedure were to be employed, the time necessary to impanel a jury should be reduced because the potential for one biased member of the venire to prejudice other prospective jurors would be virtually eliminated; and the risk of a mistrial would be greatly reduced.

WHEREFORE, the plaintiff respectfully moves the Court to order that a questionnaire of the type attached as Exhibit "A" be utilized and that a limited individual
sequestered voir dire examination be conducted under appropriate conditions as determined by the Court.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on the 21st day of November, 2014, a copy hereof was electronically filed with the Clerk of Ule Court by using the ECF system with copies being furnished via Email to Clemente Inclan, Esquire, Clemente.inclan@saalfielddlaw.com and James Smith, Esquire, jsmith@smithschoder.com.

[Signature]
ATTORNEY
QUESTIONNAIRE

Juror number ____

1. Have you, or any member of your immediate family, or a close friend ever been diagnosed with cancer?

   Yes_______ No ___

2. Do you have any strong views or strong feelings about medical malpractice cases?

   Yes_______ No ___

3. Do you have any strong views or strong feelings on the subject of personal injury lawsuits that involve a claim for compensation for pain and suffering?

   Yes_______No ___

________________________
Juror
ETHICS

By

Edward K. Cheffy
Naples
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>INTRODUCTION</td>
</tr>
<tr>
<td>A.</td>
<td>ORGANIZATION</td>
</tr>
<tr>
<td>B.</td>
<td>SOURCES</td>
</tr>
<tr>
<td>C.</td>
<td>FEDERAL COURTS</td>
</tr>
<tr>
<td>D.</td>
<td>IMPORTANCE OF KNOWING THE RULES.</td>
</tr>
<tr>
<td>E.</td>
<td>ETHICS AND PROFESSIONALISM</td>
</tr>
<tr>
<td>F.</td>
<td>THEMES</td>
</tr>
<tr>
<td>2.</td>
<td>ADVERTISING AND SOLICITATION</td>
</tr>
<tr>
<td>A.</td>
<td>HISTORY AND CONSTITUTIONAL ISSUES</td>
</tr>
<tr>
<td>B.</td>
<td>OVERHAUL OF RULES IN 2013</td>
</tr>
<tr>
<td>C.</td>
<td>APPLICATION OF ADVERTISING RULES</td>
</tr>
<tr>
<td>D.</td>
<td>REQUIRED CONTENT</td>
</tr>
<tr>
<td>E.</td>
<td>PERMITTED CONTENT</td>
</tr>
<tr>
<td>F.</td>
<td>PROHIBITED CONTENT</td>
</tr>
<tr>
<td>G.</td>
<td>FILING WITH THE BAR</td>
</tr>
<tr>
<td>H.</td>
<td>EXCEPTIONS TO FILING REQUIREMENT</td>
</tr>
<tr>
<td>I.</td>
<td>PAYMENT FOR ADVERTISING BY OTHERS</td>
</tr>
<tr>
<td>J.</td>
<td>PAYMENT FOR REFERRALS</td>
</tr>
<tr>
<td>K.</td>
<td>LAWYER REFERRAL SERVICES</td>
</tr>
<tr>
<td>L.</td>
<td>SOLICITATION GENERALLY</td>
</tr>
<tr>
<td>M.</td>
<td>WRITTEN SOLICITATIONS</td>
</tr>
<tr>
<td>N.</td>
<td>TEXT V. EMAIL</td>
</tr>
<tr>
<td>O.</td>
<td>CONSEQUENCES OF IMPROPER SOLICITATION</td>
</tr>
<tr>
<td>P.</td>
<td>COMMUNICATIONS BETWEEN LAWYERS</td>
</tr>
<tr>
<td>Q.</td>
<td>CHAT ROOMS</td>
</tr>
<tr>
<td>R.</td>
<td>VIDEO SHARING AND NETWORKING SITES</td>
</tr>
<tr>
<td>S.</td>
<td>FIRM NAMES</td>
</tr>
<tr>
<td>3.</td>
<td>CONFLICTS OF INTEREST</td>
</tr>
<tr>
<td>A.</td>
<td>EXISTING CLIENTS</td>
</tr>
<tr>
<td>B.</td>
<td>REPRESENTING AN ORGANIZATION</td>
</tr>
<tr>
<td>C.</td>
<td>REPRESENTING MULTIPLE PARTIES</td>
</tr>
<tr>
<td>D.</td>
<td>MULTIPLE INSUREDGS</td>
</tr>
</tbody>
</table>
E. INSURER AND INSURED .................................................................................. 17
F. POSITIONAL CONFLICTS ................................................................................. 18
G. FORMER CLIENTS .......................................................................................... 18
H. HOT POTATO DOCTRINE ................................................................................. 19
I. PROSPECTIVE CLIENTS .................................................................................. 19
J. IMPUTED CONFLICTS .................................................................................. 21
K. RELATED LAWYERS ...................................................................................... 21
L. NEWLY AFFILIATED LAWYER ....................................................................... 22
M. NONLAWYER EMPLOYEES ........................................................................... 23
N. CONFLICT ALLEGED BY ADVERSARY .......................................................... 25
O. DISQUALIFICATION FOR CONFLICT ............................................................. 25
P. DISQUALIFICATION – FEDERAL CASES .......................................................... 25
Q. APPEARANCE OF IMPROPRIETY ................................................................... 26
R. DISQUALIFICATION BASED ON INFORMATIONAL ADVANTAGE ..................... 26
S. FORFEITURE OF FEES ................................................................................... 26
T. SETTING ASIDE JUDGMENT ........................................................................... 27

IV. ATTORNEY FEES AND RELATED MATTERS ................................................. 27
A. GENERAL ..................................................................................................... 27
B. VOID AGREEMENTS ....................................................................................... 29
C. DUTY TO COMMUNICATE ............................................................................. 30
D. SECURITY FOR FEES .................................................................................... 30
E. ACQUIRING INTEREST IN CAUSE OF ACTION .............................................. 31
F. CHARGING LIENS ........................................................................................ 31
G. RETAINING LIENS ....................................................................................... 31
H. SUING CLIENTS FOR FEES .......................................................................... 32
I. CONTINGENT FEES - GENERALLY ................................................................. 32
J. CONTINGENT FEES - INJURY CASES ............................................................ 33
K. CONTINGENT FEES – MEDICAL LIENS ....................................................... 33
L. CONTINGENT FEES – MEDICAL MALPRACTICE ......................................... 33
M. CONTINGENT FEES - COMMERCIAL CASES ............................................. 33
N. CONTINGENT FEES - CALCULATION .......................................................... 34
O. STRUCTURED SETTLEMENTS ..................................................................... 34
P. DIVISION OF FEES - GENERALLY ................................................................. 34
Q. DIVISION OF FEES - WRITTEN AGREEMENT ............................................. 34
R. DIVISION OF FEES - INJURY CASES ........................................................... 35
S. FEE DIVISION WITH OF COUNSEL ............................................................ 35
T. FEE DIVISION WITH DEPARTING LAWYER ............................................... 36
U. FEE DIVISION WITH NONLAWYERS ......................................................... 36
V. FEE DIVISION WITH OUT-OF-STATE LAWYERS ........................................ 36
W. PAYMENT WITH MEDIA RIGHTS ................................................................. 37
X. ADVANCING EXPENSES ............................................................................... 37
Y. GIFTS TO CLIENTS ........................................................................................ 37
Z. LOANS TO CLIENTS ..................................................................................... 38
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>AA</td>
<td>Non-Recourse Advance Funding</td>
<td>38</td>
</tr>
<tr>
<td>BB</td>
<td>Offers of Judgment</td>
<td>39</td>
</tr>
<tr>
<td>CC</td>
<td>Payment by Third Party</td>
<td>39</td>
</tr>
<tr>
<td>DD</td>
<td>Limiting Scope</td>
<td>39</td>
</tr>
<tr>
<td>EE</td>
<td>Limiting Liability</td>
<td>39</td>
</tr>
<tr>
<td>FF</td>
<td>Limiting Fee Disputes</td>
<td>40</td>
</tr>
<tr>
<td>GG</td>
<td>Arbitration</td>
<td>40</td>
</tr>
<tr>
<td>HH</td>
<td>Interest on Fees</td>
<td>41</td>
</tr>
<tr>
<td>II</td>
<td>Attorney Discharged Without Cause</td>
<td>41</td>
</tr>
<tr>
<td>JJ</td>
<td>Attorney Discharged With Cause</td>
<td>42</td>
</tr>
<tr>
<td>KK</td>
<td>Voluntary Withdrawal</td>
<td>42</td>
</tr>
<tr>
<td>LL</td>
<td>Withdrawal Because of Suspension</td>
<td>42</td>
</tr>
<tr>
<td>MM</td>
<td>Successor Counsel’s Fees</td>
<td>43</td>
</tr>
<tr>
<td>V</td>
<td>The Attorney/Client Relationship</td>
<td>43</td>
</tr>
<tr>
<td>A</td>
<td>Basics</td>
<td>43</td>
</tr>
<tr>
<td>B</td>
<td>Fiduciary Duty</td>
<td>43</td>
</tr>
<tr>
<td>D</td>
<td>Confidentiality</td>
<td>44</td>
</tr>
<tr>
<td>E</td>
<td>Confidentiality - Joint Representation</td>
<td>45</td>
</tr>
<tr>
<td>F</td>
<td>Confidentiality - Documents Filed with Court</td>
<td>45</td>
</tr>
<tr>
<td>G</td>
<td>Confidentiality - Mediation</td>
<td>46</td>
</tr>
<tr>
<td>H</td>
<td>Confidentiality - HIPPA</td>
<td>47</td>
</tr>
<tr>
<td>I</td>
<td>Confidentiality - Information Stored on Hard Drives</td>
<td>47</td>
</tr>
<tr>
<td>J</td>
<td>Confidentiality - Cloud Computing</td>
<td>48</td>
</tr>
<tr>
<td>K</td>
<td>Confidentiality - Deceased Clients</td>
<td>48</td>
</tr>
<tr>
<td>L</td>
<td>Scope of Representation</td>
<td>48</td>
</tr>
<tr>
<td>M</td>
<td>Who Makes Decisions</td>
<td>48</td>
</tr>
<tr>
<td>N</td>
<td>Terminating Representation</td>
<td>49</td>
</tr>
<tr>
<td>O</td>
<td>Client Files Upon Termination</td>
<td>50</td>
</tr>
<tr>
<td>P</td>
<td>Accepting Gifts From Client</td>
<td>50</td>
</tr>
<tr>
<td>Q</td>
<td>Business Transactions With Client</td>
<td>51</td>
</tr>
<tr>
<td>VI</td>
<td>Filing Suit and Pleadings</td>
<td>51</td>
</tr>
<tr>
<td>A</td>
<td>Standard in Rule 4-3.1</td>
<td>51</td>
</tr>
<tr>
<td>B</td>
<td>Related Rules</td>
<td>51</td>
</tr>
<tr>
<td>C</td>
<td>Section 57.105, Florida Statutes</td>
<td>52</td>
</tr>
<tr>
<td>D</td>
<td>Electronic Filing</td>
<td>54</td>
</tr>
<tr>
<td>E</td>
<td>Signing Court Papers</td>
<td>55</td>
</tr>
<tr>
<td>F</td>
<td>Default</td>
<td>56</td>
</tr>
<tr>
<td>VII</td>
<td>Communications with Adversaries, Parties and Witnesses</td>
<td>56</td>
</tr>
<tr>
<td>A</td>
<td>Civility</td>
<td>56</td>
</tr>
<tr>
<td>B</td>
<td>Advocacy and Courtesy</td>
<td>56</td>
</tr>
<tr>
<td>C</td>
<td>Truthfulness</td>
<td>56</td>
</tr>
<tr>
<td>D</td>
<td>Settlement Negotiations</td>
<td>56</td>
</tr>
</tbody>
</table>
E. DISCLOSURE OF INTEREST ...................................................................................... 57
F. UNPROFESSIONAL BEHAVIOR .............................................................................. 57
G. THREATS ............................................................................................................... 57
H. PAYMENT TO WITNESS ....................................................................................... 57
I. ASKING WITNESS NOT TO VOLUNTEER INFORMATION ........................................ 58
J. SURREPTITIOUS RECORDINGS ............................................................................. 58
K. NONLAWYER ASSISTANTS INCLUDING PRIVATE INVESTIGATORS ....................... 59
L. REPRESENTED PERSONS ...................................................................................... 59
M. CURRENT EMPLOYEES ...................................................................................... 61
N. FORMER EMPLOYEES ......................................................................................... 61
O. EXPERT WITNESSES .......................................................................................... 62
P. HIRING ADVERSARY’S FORMER EMPLOYEE OR EXPERT ...................................... 63
Q. UNREPRESENTED PARTY AS ADVERSARY .......................................................... 63

VIII. DISCOVERY AND EVIDENCE ......................................................................... 64
A. DISCOVERY .......................................................................................................... 64
B. CONCEALING OR ALTERING EVIDENCE .............................................................. 64
C. “CLEANING UP” SOCIAL MEDIA PAGES ............................................................... 64
D. DEPOSITIONS ........................................................................................................ 64
E. INADVERTENT DISCLOSURE .................................................................................. 65
F. DOCUMENTS WRONGFULLY OBTAINED BY CLIENT .............................................. 67
G. METADATA ............................................................................................................ 68

IX. TRIAL ..................................................................................................................... 68
A. COMMUNICATION WITH THE COURT .................................................................... 68
B. CONDUCT IN COURT ............................................................................................ 69
C. CANDOR - LAW ..................................................................................................... 69
D. CANDOR - FACTS .................................................................................................. 69
E. EVIDENCE BELIEVED TO BE FALSE ..................................................................... 69
F. EVIDENCE KNOWN TO BE FALSE ....................................................................... 69
G. FALSE EVIDENCE – REMEDIAL MEASURES ....................................................... 69
H. ATTORNEY AS WITNESS ...................................................................................... 70
I. MARY CARTER AGREEMENTS ............................................................................. 72
J. DISPARAGE OR DISCRIMINATE ............................................................................ 72
K. FAIRNESS ............................................................................................................ 73
L. TRIAL PUBLICITY .................................................................................................. 73
M. INVESTIGATION OF PROSPECTIVE JUROR’S INTERNET PRESENCE ....................... 73
N. VOIR DIRE ............................................................................................................ 74
O. OPENING STATEMENTS ....................................................................................... 74
P. COACHING WITNESSES ....................................................................................... 74
Q. VIOLATING ORDERS GRANTING MOTIONS IN LIMINE ........................................ 74
R. CLOSING ARGUMENTS ....................................................................................... 74

X. POST-TRIAL ........................................................................................................... 79
A. COMMUNICATION WITH JURORS ......................................................................... 79
B. Appeals

XI. Rules Having General Applicability

A. Misconduct Generally
B. Competence — Technology
C. Supervising Attorneys
D. Nonlawyer Assistants
E. Outsourcing
F. Trust Account Procedures and Records
G. Trust Accounts — Written Plan for Compliance
H. Trust Property — Generally
I. Proceeds from Settlement or Judgment
J. File Retention
K. Electronic File Retention
L. Settlement Agreements
M. Agreements to Prevent Reporting or Withdraw Grievance
N. Reporting Violations
O. Rule Violations and Malpractice
P. Restricting Right to Practice
Q. Leaving a Firm
R. Selling a Firm
S. Inventory Attorneys
T. Multijurisdictional Practice of Law
U. Criticizing Judges
I. INTRODUCTION

A. Organization. This outline presents ethical issues in the order in which a lawyer might encounter them in handling a case (as opposed to the order in which they are presented in the Rules of Professional Conduct).

B. Sources. Ethical rules applicable to Florida lawyers come from three main sources: (1) Rules Regulating The Florida Bar, including Rules of Professional Conduct, as adopted by the Florida Supreme Court; (2) court decisions; and (3) Opinions from The Florida Bar’s staff, Professional Ethics Committee or Board of Governors. According to Chastain v. Cunningham Law Group, P.A., 16 So.3d 203 (Fla. 2d DCA 2009), “[E]thics opinions of The Florida Bar are not controlling; nevertheless, they are persuasive authority and, if well reasoned, are entitled to great weight.”

C. Federal Courts. All three federal district courts in Florida have adopted Florida’s Rules of Professional Conduct. For example, Rule 2.04(d) of the Middle District’s Rules, provides that “[T]he professional conduct of all members of the bar of this Court ... shall be governed by the Model Rules of Professional Conduct of the American Bar Association as modified and adopted by the Supreme Court of Florida to govern the professional behavior of the members of The Florida Bar.” However, in In re Disciplinary Proceedings Regarding John Doe, 876 F. Supp. 265 (M.D. Fla. 1993), the court explained:

> We do not regard the provisions of our Rule 2.04(c), M.D. Fla. Rules, borrowing and adopting the Florida Rules of Professional Conduct, as an adoption also of the opinions of the Ethics Committee of The Florida Bar or even the decisions of the Supreme Court of Florida interpreting those rules. While the opinions of the Committee and of the Supreme Court of the state are highly persuasive, this court must retain the right to interpret and apply the rules in the federal setting. That responsibility and authority may not be abdicated to the state system.

D. Importance of knowing the rules. “As the number of lawyers increases to an unprecedented level, the responsibility of ensuring that all lawyers conduct
themselves within the ethical bounds required by the Rules Regulating the Florida Bar continues to be a top priority for this Court. ... members of The Florida Bar are responsible for knowing the Rules Regulating the Florida Bar ... it is well established that ignorance of the law, especially by lawyers in disciplinary proceedings, is no excuse.” The Florida Bar v. Adorno, 60 So.3d 1016, 1018 (Fla. 2011). “In recent years this Court has moved towards stronger sanctions for attorney misconduct.” The Florida Bar v. Rotstein, 835 So.2d 241, 246 (Fla. 2002).

E. Ethics and professionalism. According to “Professionalism Expectations,” which was adopted by The Florida Bar’s Board of Governors in 2015, professionalism “embraces far more than simply complying with the minimal standards of professional conduct. The essential ingredients of professionalism are character, competence, commitment, and civility.” On September 10, 2015, The Florida Supreme Court amended the Code for Resolving Professionalism Complaints to say: “Members of The Florida Bar shall not engage in unprofessional conduct. ‘Unprofessional conduct’ means substantial or repeated violations of the Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Professionalism Expectations, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court.”

F. Themes. Ethics rules applicable to lawyers are dynamic, as they frequently change and evolve through amendments to the Rules Regulating The Florida Bar, Ethics Opinions and court decisions. Accordingly, relying solely on one’s instincts, experience, and sense of “right and wrong” can be risky and problematic. We need to keep up-to-date with developments relating to rules of ethics just as we do with substantive laws in our practice areas. In the words of the Florida Supreme Court, the rules of ethics “should be read by every lawyer as often as his preacher reads the Bible.” The Florida Bar v. Murrell, 74 So.2d 221 (1954).

II. ADVERTISING AND SOLICITATION

A. History and constitutional issues. During most of the twentieth century, lawyers were prohibited from advertising by Canon 27 of the ABA’s Canons of Professional Ethics. However, in Bates v. Bar of Arizona, 433 U.S. 350 (1977), the United States Supreme Court held that lawyer advertising constitutes commercial speech that is protected by the First Amendment; therefore, lawyer advertising may be subjected to reasonable regulations but may not be banned altogether. The following year, in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), the Court held that states may constitutionally prohibit all direct, in-person solicitation of prospective clients, but it subsequently confirmed that states could not categorically prohibit lawyers from soliciting legal business by sending written communications to potential clients. Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988).
1. **Florida example.** The Florida Bar’s ongoing efforts to regulate lawyer advertising remain subject to First Amendment challenges, as demonstrated by *The Florida Bar v. Pape*, 918 So.2d 240 (Fla. 2005). In that case, a referee had held that a lawyer’s television advertisements featuring the depiction of the head of a pit bull wearing a spiked collar and a 1-800-PIT-BULL telephone number were permissible as “constitutionally-protected commercial free speech.” The Florida Supreme Court disagreed and concluded that “the First Amendment does not prevent ... sanctioning the attorneys.” The Comment to Rule 4-7.13 explains that the advertisements in *Pape* were “false, misleading, and manipulative, because use of that animal implied that the advertising lawyers would engage in ‘combative and vicious tactics’ that would violate the Rules of Professional Conduct.” See also, *Rubenstein v. The Florida Bar*, 72 F. Supp. 3d 1298 (S.D.Fla. 2014), which is discussed below.

B. **Overhaul of rules in 2013.** The Florida Supreme Court approved significant changes to the advertising rules, effective May 1, 2013. *In re: Amendments to the Rules Regulating The Florida Bar – Subchapter 4-7, Lawyer Advertising Rules*, 108 So.3d 609 (Fla. 2013). Websites, which were previously “considered to be information provided upon request” and therefore not subject to most of the advertising rules, are now subject to the amended rules. However, testimonials and descriptions of past results, which were previously prohibited, are now permitted, subject to certain conditions, as explained below.

C. **Application of advertising rules.** The rules apply to “all forms of communication in any print or electronic forum,” including television, radio, electronic mail, websites, social networking, and video sharing media. (4-7.11)

D. **Required content.** All advertisements for legal employment must include, among other things, a “bona fide” office location of the lawyer who will perform the services. If the matter will be referred to another lawyer or firm, that must be stated. (4-7.12)

E. **Permitted content.** Rule 4-7.16 lists types of information that are “presumed not to violate” the advertising rules such as foreign language ability, military service, and positions held with The Florida Bar.

F. **Prohibited content.** A lawyer may not engage in: “deceptive or inherently misleading advertising” (4-7.13); “potentially misleading advertising” (4-7.14); or “unduly manipulative or intrusive” advertising (4-7.15).

1. **Past results.** References to past results are permitted only if “objectively verifiable” and are not “potentially misleading.” 4-7.13(b)(2). The Comment notes that a lawyer who refers to past
results “must have the affected client’s consent.” The Board of Governors issued “Guidelines for Advertising Past Results” on January 17, 2014, which explain that “unacceptable” media for soliciting “past results” include billboards, radio and TV, while “acceptable” media include websites, print advertisements and direct mailings. The Guidelines were declared unconstitutional on December 8, 2014, in Rubenstein v. The Florida Bar, 72 F. Supp. 3d 1298 (S.D.Fla. 2014), and they were withdrawn by the Board of Governors on December 12, 2014.

2. **Skills, etc.** Statements characterizing a lawyer’s “skills, experience, reputation or record” are permitted only if “objectively verifiable.” (4-7.13(b)(3))

3. **Testimonials.** Testimonials are permitted subject to conditions, such as: they may not be written by the lawyer; the lawyer may not give anything of value for the testimonials, and a disclaimer must be included. (4-7.13(b)(8))

4. **Specialist or expert.** Statements that a lawyer is a specialist or expert are not permitted unless the lawyer is certified by The Florida Bar or a program accredited by the ABA or The Florida Bar or by another state bar program with standards “reasonably comparable” to those in Florida. A lawyer who is not certified may, however, communicate that he or she “limits his or her practice to 1 or more fields of law.” (4-7.14(a)(4)) However, on September 30, 2015, the United States District Court for the Northern District of Florida determined that this rule is unconstitutional, explaining that "the state cannot prevent a person from advertising a lawful specialty, even if the state's own definition of the specialty is different." Searcy v. The Florida Bar, 140 F.Supp.3d 1290 (N.D. Fla. 2015). On November 9, 2017, the Florida Supreme Court declined to adopt the Bar's proposed amendments to Rule 4-7.14. In Re: Amendments to the Rules Regulating The Florida Bar (Biennial Petition), 229 So.3d 1154 (Fla. 2017).

G. **Filing with the Bar.** Each advertisement must be filed with The Florida Bar for evaluation 20 days prior to its “first dissemination,” subject to the exemptions in 4-7.20, as noted below. (4-7.19(a))

H. **Exceptions to filing requirement.** There are many exceptions to the filing requirement, including “information contained on the lawyer’s Internet website(s).” (4-7.20)

I. **Payment for advertising by others.** “No lawyer may, directly or indirectly, pay all or any part of the cost of an advertisement by a lawyer not in the same
firm.” (4-7.17(a)) Similarly, “a lawyer may not permit a nonlawyer to pay all or a part of the cost of an advertisement by that lawyer.” (4-7.17(c))

J. Payment for referrals. “A lawyer may not give anything of value to a person for recommending the lawyer’s services,” subject to the limited exceptions. (4-7.17(b))

1. Bonuses to nonlawyers. Rule 4-5.4(a) states that “a lawyer or law firm shall not share legal fees with a nonlawyer” subject to certain exceptions, one of which is that “bonuses may be paid to nonlawyer employees for work performed, and may be based on their extraordinary efforts....” However, bonuses to nonlawyers may not be “calculated as a percentage of legal fees received by the lawyer or law firm.” An amendment to this rule, effective January 1, 2006, clarified that “bonus payments shall not be based on cases or clients brought to the lawyer or law firm by the actions of the nonlawyer.”

   a. However, in Patterson v. Law Office of Lauri J. Goldstein, P.A., 980 So.2d 1234 (Fla. 4th DCA 2008), a paralegal was permitted to enforce an agreement against an attorney who promised her a bonus of 10% of the attorney’s fees from cases on which the paralegal worked, even though the agreement violated Rule 4-5.4.

2. Referral fees to lawyers. Referral fees to lawyers are discussed in Section IV of this outline.

K. Lawyer referral services. Lawyer Referral Services are governed by Rule 4-7.22. On September 24, 2015, the Florida Supreme Court directed The Florida Bar to propose amendments “that preclude Florida lawyers from accepting referrals from any lawyer referral service that is not owned or operated by a member of the Bar.” In re: Amendments to Rule Regulating The Florida Bar 4-7.22 – Lawyer Referral Services, 175 So.3d 779 (Fla. May 3, 2015). Amendments were proposed and rejected in 2017. In Re: Amendments to the Rules Regulating The Florida Bar, 2017 WL 1718860 (Fla. 2017). On December 8, 2017, the Board of Governors determined that “Avvo Advisor” is a referral service, and as of January 18, 2018, that program was not in compliance with Rule 4-7.22.

L. Solicitation generally. What is the difference between advertising and solicitation? The word “advertisement” is defined to include “all forms of communication seeking legal employment, both written and spoken.” (4-7.11(a)), and that broad definition includes solicitations. The term “solicit” is more narrowly defined as “communication directed to a specific recipient.” (4-7.18(a)) The general rule is that a “lawyer may not solicit in person ...
professional employment from a prospective client.” (4-7.18(a)) However, this general rule is subject to the following exceptions:

1. **Prior relationship.** The prohibition against solicitations does not apply to prospective clients with whom the lawyer has a “family or prior professional relationship.” (4-7.18(a)(1))

2. **No pecuniary gain.** The prohibition does not apply when “the lawyer’s pecuniary gain” is not a “significant motive” of the solicitation. (4-7.18(a)(1))

3. **Written solicitations.** While “in person” solicitations are generally prohibited, many written solicitations are permitted, as explained below.

M. **Written solicitations.** A lawyer may solicit professional employment through a written communication directed to a specific recipient if the conditions set forth in Rule 7.18(b) are satisfied. These conditions include, among many others:

1. In personal injury or wrongful death cases, the accident must have occurred more than 30 days prior to the mailing of the communication. (4-7.18(b)(1)(A)) This 30-day ban on targeted direct-mail solicitation was upheld by the United States Supreme Court in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). Previously, the Court had held that a state could not categorically prohibit lawyers from soliciting legal business by sending letters to potential clients. *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988).

2. The lawyer sending the communication must not have reason to believe that the person is already represented by a lawyer in the matter. (4-7.18(b)(1)(B))

3. Each separate enclosure of the written communication and the face of the envelope must be “reasonably prominently marked ‘advertisement.’” If the written communication is sent via electronic mail, the subject line must begin with the word “Advertisement.” (4-7.18(b)(2)(B))

4. “Every written communication must be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm.” (4-7.18(b)(2)(C))

5. The first sentence of the communication must be: “If you have already retained a lawyer for this matter, please disregard this letter.” (4-7.18(b)(2)(E))
6. Written communications prompted by a specific occurrence must disclose “how the lawyer obtained the information prompting the communication.” (4-7.18(b)(2)(H))

N. Text v. email. An email is considered to be a written communication, so solicitation by email is permitted if all requirements for written solicitations have been satisfied. What about a text message? In May 2015, The Florida Bar’s Standing Committee on Advertising voted 6-1 against a law firm’s request to use text messaging to solicit potential clients, reasoning that a text is more like a phone call than an email and, therefore, constitutes an improper direct solicitation. In July, the Board of Governors overruled the Committee’s decision, determining that a text is more like mail or an email than a phone call, so texts to potential clients are permitted so long as all requirements for written solicitations have been satisfied.

O. Consequences of improper solicitation. In addition to any sanction imposed through the disciplinary process, the Rules provide that a lawyer may not collect any fee as a result of professional employment obtained in violation of the solicitation rule (4-7.18(a)(2) and 4-1.5(a)), and solicitation of legal work could even be a crime, pursuant to the statutes cited below.

1. **No fee.** An attorney who contacted a client at the suggestion of a mutual friend was determined to have improperly solicited the employment. The resulting fee agreement was void, and the attorney was prohibited from recovering in quantum meruit. *Spence, Payne, Masington & Grossman, P.A. v. Gerson, P.A.*, 483 So.2d 775 (Fla. 3d DCA), rev. denied, 492 So.2d 1334 (Fla. 1986).

2. **Discipline.** In *The Florida Bar v. Barrett*, 897 So.2d 1269 (Fla. 2005), the Florida Supreme Court disbarred an attorney who violated the solicitation and fee sharing rules (by hiring a minister as a “paralegal” to solicit clients in emergency rooms), explaining: “[T]his Court will strictly enforce the rules that prohibit these improper solicitations and impose severe sanctions on those who commit violations of them.”

3. **Crime.** Section 877.02, Florida Statutes, provides that soliciting legal business is a first degree misdemeanor. Pursuant to Section 817.234(9), Florida Statutes, improper solicitation may be a third degree felony. (However, in *State v. Bradford*, 787 So.2d 811 (Fla. 2001), the Florida Supreme Court held that subsection 8 of 817.234, which is very similar to subsection 9, is an unconstitutional infringement on commercial speech since fraud is not an element of the offense).
P. Communications between lawyers. Written communications “between lawyers” are not subject to the requirements of Rule 4-7.18(b)(2), such as marking each page with the word “advertisement.” (4-7.18(b)(3)) Communications with clients and family members are also excepted by this rule, but that seems unnecessary because such communications are not included in the prohibition against solicitation in 4-7.18(a)(1).)

Q. Chat rooms. “[A]n attorney’s participation in a chat room in order to solicit professional employment is prohibited,” according to Opinion A-00-1. However, on October 15, 2015, the Professional Ethics Committee voted to revise the Opinion to state that lawyers "may solicit" clients through chat rooms but “only if the lawyer complies with the rules on direct written communications and files any unsolicited communications with The Florida Bar for review.”

R. Video sharing and networking sites. Videos appearing on video sharing sites, such as YouTube, “that are used to promote the lawyer or law firm’s practice are subject to the lawyer advertising rules.” Furthermore, “[i]nvitations to view or link to the lawyer’s video sent on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business are direct solicitations in violation of Rule 4-1.18(a), unless the recipient is the lawyer’s current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer.” Therefore, “[a]ny invitations to view the video sent via email” to other recipients who have not requested information from the lawyer must comply with the rules applicable to direct e-mail, which include the general advertising regulations in Rules 4-7.11 through 4-7.18 and 4-7.21 as well as the additional requirements in Rule 4-7.18(b). (See The Florida Bar's Standing Committee on Advertising’s “Guidelines for Video Sharing Sites,” as revised April 16, 2013. Revised guidelines were also issued by the Committee on the same date for lawyers using “networking sites,” such as Facebook, MySpace, Twitter and LinkedIn.)

S. Firm names. Lawyers may practice under trade names subject to certain restrictions. The name cannot imply a connection with a government agency or that the firm is something other than a private law firm by use of such names as “academy,” “institute” or “center.” (4-7.21(b) and Comment) The name may include the phrase “legal clinic” if the firm provides routine legal services at lower than prevailing rates. (4-7.21(b) and Comment) Lawyers may not imply that they practice in a partnership if they in fact do not. (4-7.21(f))

III. CONFLICTS OF INTEREST

A. Existing clients. Generally, “a lawyer shall not represent a client” if “the representation of 1 client will be directly adverse to another client ...” or if “there is a substantial risk that the representation of 1 or more clients will be
materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” (4-1.7) Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter “even if the other matter is wholly unrelated.” (4-1.7 Comments)

1. Waiver of conflict. “Notwithstanding the existence of a conflict ... a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.” However, it could be deemed improper to ask for consent “when a disinterested attorney would conclude that the client should not agree to the representation under the circumstances.” (4-1.7 Comment) See also The Florida Bar v. Scott, 39 So.3d 309 (Fla. 2010) (“Some kinds of conflicts of interest cannot be waived by a client.”)

2. Written consent. When an existing client consents to representation of an adverse party, must the consent be in writing? In 2006, Rule 4-1.7 was amended to require the consent to be “informed” and “confirmed in writing” or “clearly stated on the record at a hearing.” The phrase “informed consent” is defined in the Preamble to the Rules of Professional Conduct.

3. Materiality irrelevant. “Rule 4-1.7 leaves no room for a ‘materiality’ analysis,” according to Lincoln Associates & Construction, Inc. v. Wentworth Construction Co., Inc., 26 So.3d 638 (Fla. 1st DCA 2010), which held that disqualification was required when a law firm “failed to prove it had the written consent from each client, and failed to prove that the representation of both clients would not inadvertently affect the responsibilities to each client.”

B. Representing an organization. A lawyer employed by an organization represents the organization. (4-1.13(a)) If it is apparent that the organization’s interests are “adverse to those of the constituents with whom the lawyer is dealing” the lawyer “shall explain the identity of the client” to the constituents. (4-1.13(d)) If a lawyer for an organization knows that a person associated with the organization may violate a legal obligation that is “likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.” The steps the lawyer should take may include asking the representative to reconsider the
matter, referring the matter to a higher authority in the organization, and resigning as counsel for the organization. (4-1.13(b) and (c))

1. **Constituents.** The lawyer may also represent the organization’s directors, officers, employees, members, shareholders or other constituents, subject to the conflict of interest rules. (4-1.13(e))

2. **Affiliates.** Subject to certain exceptions, a lawyer is “not ethically precluded from undertaking representations adverse to affiliates [such as parent or subsidiary corporations] of an existing or former client.” (4-1.13 Comment) See also ABA Formal Opinion 95-390. *But see Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio 1990) (Representation of subsidiary when suing parent corporation in separate case presents a conflict even if the matters are unrelated.)

3. **Derivative Suits.** “Most derivative actions” may be “defended by the organization’s lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise....” (4-1.13 Comment) See Kapnick, Richard B., and Rosen, Courtney A. “Representing Multiple Parties in Derivative Litigation.” *Bloomberg Law Reports – Corporate Law*, vol. 4, no. 4.

   a. An attorney may concurrently represent the same plaintiff in derivative claims and individual claims against a corporation. *Gonzalez v. Chillura*, 892 So.2d 1075 (Fla. 2d DCA 2004).

   b. In *Campellone v. Cragan*, 910 So.2d 363 (Fla. 5th DCA 2005), the court disqualified a lawyer from representing the defendant corporation in a derivative suit but allowed the lawyer to continue representing the individual defendant.

4. **Partnerships.** By representing a partnership, a lawyer does not become counsel for each partner. *Chaiken v. Lewis*, 754 So.2d 118 (Fla. 3d DCA 2000). See also ABA Formal Opinion 91-361.

C. **Representing multiple parties.** A lawyer may represent multiple parties in a case if their interests are not directly adverse to one another; however, in that event, the lawyer’s “consultation shall include explanation of the implications of the common representation and the advantages and risks involved.” (4-1.7(c)) “One of the risks that should be discussed before undertaking representation” is the possibility that the multiple parties may have “differences in willingness to make or accept an offer of settlement.” (4-1.8 Comment)
1. **Negotiations.** “[A] lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.” (4-1.7 Comment)

2. **Aggregate settlements.** A lawyer who represents two or more parties is prohibited from participating in making an aggregate settlement unless each client “gives informed consent, in a writing signed by the client.” The lawyer’s disclosure “must include” the “nature of all of the claims” and “the participation of each person in the settlement.” (4-1.8(g)) See *The Florida Bar v. Kane*, 202 So.3d 11 (Fla. 2016). (Three attorneys disbarred for making aggregate settlement for 441 clients without disclosing material facts to clients.)

3. **Confidentiality and secrets.** “[I]n a joint representation it is ordinarily assumed that the joint clients and the lawyer are sharing information and have no secrets from each other.” Hazard, *The Law of Lawyering*, section 1.9:104, p. 295. However, Opinion 95-4 states: “We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband’s consent.” The Opinion also concludes that “Lawyer must withdraw from the joint representation under the facts presented.”

4. **Subsequent conflict.** If a conflict later arises and the lawyer withdraws from representing one of the clients, the lawyer’s ability to continue representing any of the clients is determined by Rule 4-1.9, relating to former clients. (4-1.7 Comment)

5. **Medical malpractice cases.** In a medical malpractice case, it is “extremely unlikely” that one attorney could ethically represent three defendants when each could be responsible to the others for contribution. (Opinion 87-1)

6. **Auto cases.** In an automobile accident case, may one attorney represent both the driver and the passenger in a suit against a third party? “Each case must be dealt with on its own facts,” according to Opinion 02-3, which sets forth an excellent analysis of various scenarios.

7. **Trial.** In *Pitcher v. Zappitell*, 160 So.3d 145 (Fla. 4th DCA 2015), a lawyer was sued for malpractice because the lawyer, who represented the Mother and Father in a wrongful death case involving the death of their child, was allegedly reluctant to “impeach the negative trial
testimony of the Mother," and the Mother was awarded $4,000,000 compared to only $200,000 for the Father. Summary judgment in favor of the attorney was reversed by the appellate court.

D. Multiple insureds. May one lawyer hired by an insurance company represent the insured party and a second party who was named as an “additional insured” when the complaint alleges that both “were directly negligent” and when each defendant alleges that it was relieved of responsibility due to the negligence of the other? No, the insurance company must provide separate counsel for each defendant. *University of Miami v. Great American Assurance Company*, 112 So.3d 504 (Fla. 3d DCA 2013).

E. Insurer and insured. “[T]he same attorney may often ethically represent both the insured and the insurer” provided their interests are not adverse. *Progressive Express Ins. Co. v. Scoma*, 975 So.2d 461, 466 (Fla. 2d DCA 2007). See also Rule 4-1.7(e) and Comment.

1. **Scope of Representation.** An amendment to Rule 4-1.7 states that “a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured” and to inform both of them “regarding the scope of representation.” (4-1.7(e))

2. **Primary duty to insured.** If a lawyer is hired by an insurance company to defend an insured in a suit alleging breach of contract and negligence, should the lawyer move for summary judgment on the negligence count if the motion could eliminate the basis for insurance coverage and leave the insured without representation? According to Opinion 97-1:

   An attorney who has been hired by an insurance company to represent an insured owes his primary duty to the insured. An attorney may not ethically continue the representation of the insured under instructions from the insurance carrier that the lawyer file for summary judgment where the attorney has determined that such a motion would be against the insured’s interest.

3. **Statement of Insured Client’s Rights.** According to Rule 4-1.8(j), a lawyer hired by an insurance company to represent an insured in a personal injury, wrongful death, or property damage case must provide the insured with a Statement of Insured Client’s Rights.

4. **Insurance Staff Attorneys.** Rule 4-7.10(g) requires lawyers “who practice law as employees within a separate unit of a liability insurer representing others pursuant to policies of liability insurance” to make various disclosures.
F. Positional conflicts. “A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.” (4-1.7 Comment)

G. Former clients. Generally, a lawyer does not have a conflict of interest in representing one client against a former client unless the subject of the representation is “substantially related” to the matter in which the lawyer represented the former client. However, a lawyer is not permitted to “use information relating to the representation to the disadvantage of the former client” unless the information has become “generally known.” Furthermore, a lawyer may not “reveal information” relating to a prior representation except as otherwise permitted or required by the rules. (4-1.9) See State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So.2d 630 (Fla. 1991).

1. “Substantially related.” “Matters are ‘substantially related’ for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client.” (4-1.9 Comment)

2. Similar cases. “[G]eneral knowledge of the client’s policies and practices generally will not preclude a subsequent representation” that is adverse to the client. Moreover, a lawyer “who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the former client.” (4-1.9 Comment)

   a. Notwithstanding this Comment, a federal court in Florida disqualified an attorney from representing a plaintiff in a products liability case against Kawasaki because the attorney had represented Kawasaki seven years previously in product liability cases. Contant v. Kwasaki Motors Corp., U.S.A., Inc., 826 F. Supp. 427 (M.D. Fla. 1993) See also Pastor v. Transworld Airlines, Inc., 951 F. Supp. 27 (E.D. N.Y. 1996) (former in-house counsel disqualified from representing plaintiff against counsel’s former employer). However, in Health Care and Retirement Corporation of America, Inc. v. Bradley, 961 So.2d 1071 (Fla. 4th DCA 2007), the court refused to disqualify a lawyer who had previously represented the opposing party in similar cases, explaining that: “Unlike two products liability cases involving the identical product, each negligence case turns on its own facts.”
3. “Generally known.” The Comment to Rule 4-1.9 explains that the phrase “generally known” refers to information “that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonably prudent lawyer who had never represented the former client.”

4. Waiver. In some circumstances, the former client may waive a conflict by giving “informed consent.” (4-1.9 and 4-1.6) In contrast to waivers by current clients pursuant to Rule 4-1.7, waivers by former clients pursuant to Rule 4-1.9 are not required to be confirmed in writing or stated on the record at a hearing.

5. Passage of time/remoteness. In *ASI Holding Company, Inc. v. Royal Beach & Golf Resorts, LLC.*, 163 So.3d 668 (Fla 1st DCA 2015), the trial court had denied a motion to disqualify based, in part, on “[t]he time that separates the [prior] representation and the [current] representation.” The appellate court reversed, explaining: “Notably, nothing in the rule or caselaw suggests that questions regarding conflicting representations turn on the passage of time.”

H. Hot potato doctrine. At the same time a lawyer is representing client A, client B contacts the lawyer about suing A on a matter that is totally unrelated to the matter in which the lawyer is representing A. May the lawyer withdraw from representing A - thereby making A a former client - and accept B’s case against A? No. A lawyer may not “drop one client like a hot potato in order to treat it as though it were a former client for the purpose of resolving a conflict of interest dispute.” *Value Part, Inc. v. Clements*, 2006 WL 2252541 (N.D. Ill. Aug. 2, 2006), cited with approval by *Young v. Achenbauch*, 136 So.3d 575 (Fla. 2014) (“Attorneys may not avoid this rule [i.e., the rule requiring attorneys to decline representation if a conflict exists] by taking on representation in which a conflict of interest already exists and then convert a current client into a former client by withdrawing from the client’s case.”) See *also Harrison v. Fisons Corp.*, 819 F. Supp. 1039 (M.D. Fla. 1993) (“A lawyer may not evade ethical responsibilities by choosing to jettison a client whose continuing representation becomes awkward. Allowing lawyers to pick the more attractive representation would denigrate the fundamental concept of client loyalty.”)

I. Prospective clients. An attorney-client relationship may arise “if the client merely consulted the attorney ... with the view to employing the attorney professionally ... although the attorney is not subsequently employed.” *Garner v. Somberg*, 672 So.2d 852 (Fla. 3d DCA 1996) (attorney disqualified by opposing party who consulted him even though attorney had no recollection of consultation and movant did not prove that any specific confidential information was disclosed). *See also Metcalf v. Metcalf*, 785
So.2d 747 (Fla. 5th DCA 2001). “[T]he test for an attorney-client relationship is a subjective one and hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention is to seek professional legal advice. However, this subjective belief must ... be a reasonable one.” *Mansur v. Podhurst Orseck, P.A.*, 994 So.2d 435, 438 (Fla. 3d DCA 2008) (quoting *The Florida Bar v. Beach*, 675 So.2d 106, 109 (Fla. 1996)).

1. **Irrefutable presumption.** If a relationship is shown to have existed, there is “an irrefutable presumption that confidences were disclosed during that relationship.” *State Farm Mutual Automobile Insurance Co. v. K.A.W.*, 575 So.2d 630 (Fla. 1991). However, this “irrefutable presumption only applies in the case of a direct attorney-client relationship as governed by rule 4-1.9, not in the case of an imputed disqualification as governed by rule 4-1.10(b).” *Scott v. Higginbottom*, 834 So.2d 221 (Fla. 2d DCA 2002) (no disqualification of law firm based on its hiring a “newly affiliated lawyer” who had worked at firm representing opposing party but claimed he did not acquire any confidential information about the case).

2. **Rule 4-1.18.** In 2006, the Florida Supreme Court adopted a new rule, 4-1.18, titled “Duties to Prospective Clients,” which permits a law firm to avoid disqualification as a result of consultation with a prospective client if: (i) the lawyer who consulted with the prospective client “took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client”; (ii) that attorney is “timely screened” from participating in the matter; (iii) the attorney is apportioned no part of the fee, and (iv) written notice of the subject matter of the consultation and the screening procedures is promptly given to the prospective client.

3. **Exceptions.** Furthermore, according to the Comment, even the lawyer who had the consultation should not be disqualified if the lawyer received no “information that could be used to the disadvantage of the prospective client” or if the prospective client consulted the lawyer “with the intent of disqualifying the lawyer from the matter, with no intent of possibly hiring the lawyer.”

4. **Unsolicited information.** What if a person sends information to a lawyer on a “totally unsolicited basis” with no prior communication? According to Opinion 07-3, the lawyer “will not have a conflict of interest in representing the adversary of the person and "may disclose or use that unsolicited information" in representing the adversary. The Opinion suggests that lawyers include a disclosure statement on their websites explaining these issues.
J. **Imputed conflicts.** When a lawyer has a conflict of interest the conflict is generally imputed to all lawyers who are “associated” with that lawyer's firm “unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” (4-1.10(a))

1. **Associated lawyers.** “The meaning of ‘associated’ is not completely clear. But one thing is clear: not every lawyer who is paid by a law firm to do work of a legal nature is ‘associated’ with the firm. Thus, for example, a firm can outsource research or other support services so long as the firm complies with any applicable requirements on billing and on disclosures to the client. [Citations omitted.] An attorney to whom work is outsourced – for example, an attorney who contracts to do research or draft pleadings from the attorney’s own premises on the attorney’s own schedule – ordinarily is not an associate.” *Brown v. Florida Dept. of Highway Safety and Motor Vehicles*, 2012 WL 4758150 (N.D. Fla.) (motion to disqualify “denied because the firm and the attorney entered only an outsourcing relationship that did not rise to the level of an association”).

2. **Co-counsel.** The imputation rules may, under certain circumstances, be extended to co-counsel in a separate firm. *Zarco Supply Co. v. Bonnell*, 658 So.2d 151 (Fla. 1st DCA 1995) (“To the extent the two firms worked together to draft the complaint ... it appears illogical to assume the two firms have not exchanged confidential information. Thus, ... the two firms may be viewed as one ‘law firm.’”). *But see Estate of Jones v. Beverly Health and Rehab. Servs., Inc.*, 68 F. Supp. 2d 1304 (N.D. Fla. 1999) (“In general the law does not impute disqualification between firms, even where members of the two firms are working together, so long as there is ‘only a small actual risk of confidential information spreading from the primarily conflicted lawyer to the second firm.’”); *Baybrook Homes, Inc. v. Banyan Constr. Dev., Inc.*, 991 F. Supp. 1440 (M.D. Fla. 1997)

3. **Exception – lawyer as witness.** Disqualification of a lawyer from acting as an advocate at trial because the lawyer will be a witness does not disqualify other lawyers in the firm from acting as advocates at the trial so long as there is no conflict of interest under Rules 4-1.7 or 4-1.9. (4-3.7(b)) *See City of Lauderdale Lakes v. Enterprise Leasing Co.*, 654 So.2d 645 (Fla. 4th DCA 1995) (error to disqualify attorney because another lawyer in the firm is a witness when the testimony is not adverse to the client).

K. **Related lawyers.** Lawyers who are closely related by either blood or marriage may not represent adverse parties in a matter except with consultation and consent. (4-1.7(d))
1. No imputation. This disqualification is “personal and is not imputed to members of firms with whom the lawyers are associated.” (4-1.7 Comment)

L. Newly affiliated lawyer. When a lawyer moves between firms, the lawyer’s new firm may be disqualified, under certain circumstances, from representing clients on matters that are substantially related to matters worked on by the lawyer’s former firm if the lawyer acquired “actual knowledge” of confidential information. (4-1.10(b) and Comment) See Akrey v. Kindred Nursing Centers East, LLC, 837 So.2d 1142 (Fla. 2d DCA 2003); Nissan Motor Corp. in U.S.A. v. Orozco, 595 So.2d 240 (Fla. 4th DCA 1992); Philip Morris USA Inc. v. Caro, 207 So.3d 944 (Fla. 4th DCA 2016). Similarly, the lawyer’s former firm may be prohibited, under certain circumstances, from representing a person “with interests materially adverse” to those of a client represented by the formerly associated lawyer while at the firm if any lawyer remaining in the firm has confidential information. (4-1.10(b) and (c) and Comment)

1. Test. “Thus, under Rule 4-1.10(b), in order to establish a prima facie case for disqualification, the moving party must show that the newly associated attorney acquired confidential information in the course of the attorney’s prior representation.... After the moving party meets this burden, the burden shifts to the firm whose disqualification is sought to show that the newly associated attorney has no knowledge of any material confidential information.” Scott v. Higginbottom, 834 So.2d 221 (Fla. 2d DCA 2002).

2. Presumption inapplicable. The “irrefutable presumption that confidences were disclosed” (as discussed in Garner v. Somberg, 672 So.2d 852 (Fla. 3d DCA 1996)) “does not apply” in the case of an imputed disqualification governed by Rule 4-1.10(b). Solomon v. Dickison, 916 So.2d 943 (Fla. 1st DCA 2005).

3. Competing affidavits require hearing. When the parties submit competing affidavits “the trial court needs to resolve by an evidentiary hearing” whether the newly associated attorney “received confidential information material to the issues in the underlying litigation” before deciding whether to disqualify the attorney’s new firm. AGIC, Inc. v. North American Risk Services, Inc., 120 So.3d 189 (Fla. 5th DCA 2013).

4. Chinese walls. If a firm has a conflict as a result of a newly affiliated attorney’s prior involvement on the other side of a case, may the firm avoid disqualification by creating a Chinese wall, which screens the particular attorney from any participation in the matter? This procedure is effective if the newly affiliated attorney’s conflict arises
from prior employment as a public officer or employee. (4-1.11) However, “the Chinese wall or screening process is not a defense when a private attorney joins another private firm.” Edward J. DeBartolo Corp. v. Petrin, 516 So.2d 6 (Fla. 5th DCA 1987). (In 2009, the ABA amended Model Rule of Professional Conduct 1.10 to allow screening to avoid disqualification in this situation; The Florida Bar’s Board of Governors endorsed the amendment, but it has not been adopted by the Supreme Court of Florida.)

5. **Firing the lawyer.** May the firm avoid disqualification by firing the newly affiliated lawyer? Maybe, according to Rule 4-1.10(c) and School Board of Broward County v. Polera Building Corp., 722 So.2d 971 (Fla. 4th DCA 1999) (After termination of employment of newly affiliated lawyer who had a conflict, matter was remanded for an evidentiary hearing to determine whether any lawyer remaining at the firm acquired any protected information). In Nissan, supra, 595 So.2d 240, the appellate court noted that the employment of the newly affiliated lawyer had been terminated in approving the trial court’s denial of a motion to disqualify, and in a subsequent case, the court explained that Rule 4-1.9, rather than Rule 4-1.10, “would have applied had the conflicted attorney still been associated with the firm.” Health Care and Retirement Corporation of America, Inc. v. Bradley, 944 So.2d 508 (Fla. 4th DCA 2006). But see Harpley v. Ducane Industries, 183 B.R. 645 (M.D. Fla. 1995) (“There does not appear to be any authority to cure a conflict that has arisen under Rule 4-1.10(b), by terminating association with a tainted lawyer.”).

M. **Nonlawyer employees.** If a secretary or paralegal working on a particular case leaves his or her firm and goes to work for the firm representing an opposing party in the case, will the hiring firm be disqualified?

1. **Ethics opinion.** According to Opinion 86-5, the answer is “no” but the hiring firm has a duty not to “seek or permit a disclosure of confidences ... and not to use such information” (and the former firm has a duty to admonish the departing employee not to reveal confidences). The Opinion states that in the case of a paralegal or legal assistant, the former firm must advise the client of the employee’s departure and new employment if the employee had a close relationship with the client.

2. **Conflicting appellate decisions.** In Lackow v. Walter E. Heller & Co., Southeast, Inc., 466 So.2d 1120 (Fla. 3d DCA 1985), the Third DCA held that a firm could be disqualified if the firm’s new secretary was “privity to confidences” of the opposing party while employed by the opposing party’s firm. Subsequently, in Esquire Care, Inc. v. McGuire, 532 So.2d 740 (Fla. 2d DCA 1988), the Second DCA criticized Lackow
stating that before the “drastic action of disqualification is considered,”
the trial court “should conduct an evidentiary hearing, the purpose of
which is to determine, not just whether a potential ethical violation has
occurred, but whether as a result one party has obtained an unfair
advantage over the other which can only be alleviated by removal of
the attorney.” The Fifth DCA followed Esquire Care, noting that
disqualification of a party’s chosen counsel is “an extraordinary
remedy which should be resorted to sparingly.” Apopka v. All Corners,
Inc., 701 So.2d 641 (Fla. 5th DCA 1997).

In Kouliasis v. Rivers, 730 So.2d 289 (Fla. 4th DCA 1999), the Fourth
DCA certified conflict with Esquire Care and Apopka in disqualifying a
law firm, explaining that “it makes no difference that Holmes was a
secretary and not an attorney.”

The First DCA, in Stewart v. Bee-Dee Neon & Signs, Inc., 751 So.2d
196 (Fla. 1st DCA 2000), held that disqualification is not required if the
employee was not “exposed to confidential information” that is material
to the case. Even with such exposure, disqualification is not required
if: the employee has not disclosed confidential information to the new
firm; the employee has not and will not work on the case at the new
firm; and adequate screening measures have been implemented.
(The court also noted that the former firm has “an independent duty
under Rule 4-5.3 to instruct the departing nonlawyer ... not to reveal
... any confidential information....”)

In First Miami Securities, Inc. v. Sylvia, 780 So.2d 250 (Fla. 3d DCA
2001), the Third DCA disagreed with Stewart, explaining that “actual
knowledge is the focus of the inquiry and screening is not a valid
defense to disqualification.” The court adopted the “burden shifting
test from the Fourth District’s Kouliasis opinion,” noting that while the
record established that the secretary had been “exposed” to
confidential information at the former firm (giving rise to a “rebuttable
presumption” that she had “actual knowledge”), the case must be
remanded for an evidentiary hearing to determine whether the current
employer could overcome the presumption by proving that she did not
have “actual knowledge” of any confidential information.

In 2004, the Fourth DCA rejected “the view allowing for the screening
of nonlawyer employees” and adhered to its prior opinion in Kouliasis,
supra, but held that “brief and now-completed employment in opposing
counsel’s firm, in a non-legal capacity, represent an exception to the
rule in Kouliasis.” Eastrich No. 157 Corp. v. Gatto, 868 So.2d 1266
(Fla. 4th DCA 2004).
3. **2006 Amendment.** In 2006, the Florida Supreme Court adopted an amendment to the Comment to Rule 4-1.10 stating that the imputation rule “does not prohibit representation by others in the firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or secretary. Such persons, however, ordinarily must be screened from any personal participation in the matter....” As of 2006, the word “screened” is a defined term in the “Terminology” section at the beginning of the Rules of Professional Conduct.

N. **Conflict alleged by adversary.** “As a general proposition, ‘a party ... does not have standing to seek disqualification where, as here, there is no privity of contract between the attorney and the party claiming a conflict of interest.’” *THI Holdings, LLC v. Shattuck*, 93 So. 3d 419 (Fla. 2d DCA 2012). While “opposing counsel may properly raise the question” of conflict of interest in a proper case, such an objection “should be viewed with caution” because “it can be misused as a technique of harassment.” (4-1.7 Comment). See *Anderson Trucking Service, Inc. v. Gibson*, 884 So. 2d 1046 (Fla. 5th DCA 2004); *Singer Island Ltd., Inc. v. Budget Constr. Co., Inc.*, 714 So. 2d 651 (Fla. 4th DCA 1998); *Yang Enterprises, Inc. v. Georganis*, 988 So. 2d 1180 (Fla. 1st DCA 2008) (“Such motions are ‘generally viewed with skepticism because ... [they] are often interposed for tactical purposes.’”).

O. **Disqualification for conflict.** While lawyers were disqualified in a number of the cases cited above, including *Young v. Achenbauch*, 136 So. 3d 575 (Fla. 2014), disqualification of a party’s lawyer is nevertheless “an extraordinary remedy that should be used most sparingly.” *Akrey v. Kindred Nursing Centers East, LLC*, 837 So. 2d 1142 (Fla. 2d DCA 2003). “Since the remedy of disqualification strikes at the heart of one of the most important associational rights, it must be employed only in extremely limited circumstances.” *Coral Reef of Key Biscayne Developers, Inc. v. Lloyd’s Underwriters at London*, 911 So. 2d 155 (Fla. 3d DCA 2005). Disqualification “is a drastic measure which courts should hesitate to impose except when absolutely necessary.” *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721-22 (7th Cir. 1982). Moreover, a party can waive its right to seek disqualification of the opposing party’s counsel by failing to move for disqualification promptly upon learning of the facts leading to the alleged conflict. *Information Systems Associates, Inc. v. Phuture World, Inc.*, 106 So.3d 982, 985 (Fla. 4th DCA 2013) (waiver of right to seek disqualification after delay of nine months).

P. **Disqualification – federal cases.** Federal cases apply a “balancing test” and state that “[d]isqualification is not mandatory, even if a court finds a lawyer is violating a conflict-of-interest rule,” explaining that “[i]nstead, a ‘court should be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant’s right to freely chosen
counsel.” Lanard Toys Limited v. Dolgencorp LLC, 2016 WL 7326855 (M.D. Florida 2016). In applying the “balancing test,” the Court in Lanard Toys stated that the “pertinent factors may include the nature of the ethical violation, the age of the case, the prejudice to the parties, the effectiveness of counsel in light of the violation, the public’s perception of the profession, whether the attempt to disqualify is a tactical device or a means of harassment, and whether any screening measures have been implemented.” Id. While this balancing test has been applied by federal courts in Florida, the Florida Supreme Court has held that it “is not the proper test for motions to disqualify counsel as set forth by this Court.” Young v. Achenbauch, 136 So.3d 575, 581 (Fla. 2014).

1. While several opinions from federal courts in Florida state that “any doubt must be resolved in favor of disqualification” [e.g., McPartland v. ISI Investment Services, 890 F. Supp. 1029 (M.D. Fla. 1995)], the authority cited for that proposition in the opinions does not support the quoted language.

Q. Appearance of impropriety. Canon 9 of the Code of Professional Responsibility stated that “a lawyer should avoid even the appearance of impropriety.” While the Code was superseded in 1987 with the adoption of the Rules Regulating The Florida Bar, the Florida Supreme Court, in disqualifying a lawyer for a conflict, explained that “we do not believe that a different standard now applies because the specific admonition to avoid the appearance of impropriety does not appear in the Rules of Professional Conduct.” State Farm Mut. Auto Ins. Co. v. K.A.W., 575 So.2d 630 (Fla. 1991). But see Armor Screen Corp. v. Storm Catcher, Inc., 709 F. Supp. 2d 1309 (S.D. Fla. 2010) (“This Court does not read the decision as retaining the appearance of impropriety standard and respectfully disagrees with those courts that do.”)

R. Disqualification based on informational advantage. A law firm may be disqualified based on an improper “informational advantage”, even though the adverse party was never a client or a prospective client. Frye v. Ironstone Bank, 69 So.3d 1046 (Fla. 2d DCA 2011). In that case, a law firm was disqualified from representing a bank in a suit on a guaranty because the law firm was also representing the guarantor’s former lawyer (who had represented the guarantor in connection with the guaranty and asset planning) in a separate malpractice suit and, therefore, had access to confidential information. According to Gutierrez v. Rubio, 126 So.3d 320 (Fla. 3d DCA 2013), “Disqualification cases require the court to make a factual determination that 1) there is proof that confidential information was actually disclosed and 2) that this information gave the non-moving party an unfair tactical advantage.”

S. Forfeiture of fees. An attorney is entitled to a reasonable fee for services rendered before he knows or should have known of a conflict. Hill v.
Douglass, 271 So.2d 1 (Fla. 1972). However, this entitlement “terminates when the attorney realizes or should realize” that a conflict exists. Adams v. Montgomery, Searcy & Denney, P.A., 555 So.2d 957 (4th DCA 1990). Accordingly, fees collected for services after a conflict should have been recognized may be subject to forfeiture. See also Rule 3-5.1(i) and The Florida Bar v. St. Louis, 967 So.2d 108 (Fla. 2007).

T. Setting aside judgment. In order to have a judgment set aside based on a conflict of interest, “actual prejudice” must be established. Henry v. Entertainment Design, Inc., 711 So.2d 179 (Fla. 4th DCA 1998); Junger Utility & Paving Co., Inc. v. Myers, 578 So.2d 1117 (Fla. 1st DCA 1989).

IV. ATTORNEY FEES AND RELATED MATTERS

A. General. Lawyers may not charge fees that are “illegal, prohibited, or clearly excessive” or obtained through “advertising or solicitation not in compliance with the Rules Regulating the Florida Bar or are otherwise illegal or prohibited.” (4-1.5(a))

1. Excessive fees. A fee is “clearly excessive” when “a lawyer of ordinary prudence” would have “a definite and firm conviction” that the fee “[e]xceeds a reasonable fee ... to such a degree as to constitute clear overreaching or an unconscionable demand...” (4-1.5(a)(1)). Factors to be considered in determining whether a fee is “reasonable” are set forth in Rule 4-1.5(b).

2. Unit billing. “Unit billing” has been disapproved by Florida courts. See The Florida Bar v. Richardson, 574 So.2d 60 (Fla. 1990), cert. denied, 502 U.S. 811 (1991) (“[A]bsolutely no justification exists to bill for twenty minutes for every telephone call...”); Browne v. Costales, 579 So.2d 161 (Fla. 3d DCA), rev. denied, 593 So.2d 1051 (Fla. 1991) (“We cannot condone the practice of unreasonable ‘unit billing’ for an attorney’s time without regard for the actual time spent on true legal work.”).

3. Block billing. “[B]lock billing makes judicial review unnecessarily difficult and warrants reduction of the number of hours claimed in the attorneys’ fee motion. However, the mere fact that an attorney includes more than one task in a single billing entry is not, in itself, evidence of block billing.” Franklin v. Hartford Life Ins. Co., 2010 WL 916682 (M.D. Fla.)

4. Nonrefundable fees. Nonrefundable retainers are permissible, but they are subject to Rule 4-1.5 regarding clearly excessive fees. (Opinion 93-2) As of 2010, they must be “confirmed in writing.” (4-1.5) Circumstances such as the death of the client or the early termination
of the attorney-client relationship can cause an otherwise permissible fee to become “clearly excessive.” *Florida Bar v. Grusmark*, 544 So.2d 188 (Fla. 1989).

5. **Bonuses.** “Fees that provide for a bonus ... can be effective tools for structuring fees.” However, “the bonus ... must be stated clearly in [the] amount or formula for calculation of the fee” and bonuses are impermissible in some types of cases, such as domestic relations. (4-1.5 Comment)

6. **Costs.** Rule 4-1.5 was amended in 2004 to specifically state that costs, as well as fees, are subject to the prohibitions in the Rule, as set forth above. Factors to be considered in determining whether costs are reasonable are set forth in Rule 4-1.5(b). Subsection (b)(2)(E) provides a “safe harbor” by stating: “When the parties have a written contract in which the method is established for charging costs, the costs charged thereunder shall be presumed reasonable.”

7. **Surcharge on Costs.** “[I]n the absence of disclosure to the contrary, it would be improper if the lawyer assessed a surcharge on ... disbursements [such as for court reporters and travel] over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item.” (ABA Formal Opinion 93-379) A new Comment to Rule 4-1.5, adopted in 2004, states that “[f]iling fees, transcription, and the like should be charged to the client at the actual amount paid by the lawyer.” However, the lawyer and client may agree to a reasonable charge for “in-house” costs, such as copying, faxing, long distance telephone and computerized research and for “in-house” services, such as paralegal, investigative accounting and courier services.

8. **Percentage of fees.** Instead of tracking and itemizing all actual costs, is it proper to charge a client 4% of all fees billed to cover costs, assuming the client has agreed to such an arrangement in the retainer agreement? No, according to Staff Opinion 30989, dated January 4, 2012, which was affirmed by the Professional Ethics Committee on June 22, 2012.

9. **Administrative fee for opening file.** In *The Florida Bar v. Carlon*, 820 So.2d 891 (Fla. 2002), the Florida Supreme Court upheld a referee’s finding that a fee “including a $500 administrative fee for opening Woodburn’s file” was unreasonable.

10. **Overhead.** “It is unprofessional and undignified for an attorney to separately charge a client for costs of secretarial work unless such work is extraordinary or unusual.” (Opinion 75-29 and see 4-1.5)
Comment) A new Comment to Rule 4-1.5, adopted in 2004, states that “[g]eneral overhead should be accounted for in a lawyer’s fee, whether the lawyer charges hourly, flat, or contingent fees.”

11. Credit Cards. Rule 4-1.5(h) states that lawyers may accept payment under a “credit plan,” and the Comment states that “[c]redit plans include credit cards.” The Rule provides that “[n]o higher fee shall be charged and no additional charge shall be imposed,” and the Comment explains that when a credit card is used to pay a refundable retainer or other advance the lawyer must not only place the funds received in trust but add “the lawyer’s own money ... in an amount equal to the amount charged” by the credit card company.

B. Void agreements. Generally, fee agreements “which do not comply with the regulations [i.e., the Rules of Professional Conduct] are ... void as against the public interest.” Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995). “A fee obtained by unethical means is a prohibited fee.” The Florida Bar v. Adorno, 60 So.3d 1016 (Fla. 2011). For example, fee agreements procured through improper solicitation are void, and “an attorney’s fee agreement that includes an unenforceable contingency provision is void in its entirety.” King v. Young, Berkman, Berman, & Karph, P.A., 709 So.2d 572 (Fla. 4th DCA 1998). However, in Lackey v. Bridgestone/Firestone, Inc., 855 So.2d 1186 (Fla. 3d DCA 2003), the court held that so long as the “contingent fee clauses ... do not violate the rules,” non-complying clauses on other matters may be severed and “do not render the agreement void.” See also, State Contracting & Eng’g Corp. v. Condotte America, Inc., 368 F. Supp. 2d 1296 (S.D. Fla. 2005), affirmed, 197 Fed. Appx. 915 (2006), in which the court enforced a contingent fee agreement despite several “minor” violations of the rules.

1. Third-party challenges. However, in Corvette Shop & Supplies, Inc. v. Coggins, 779 So.2d 529 (Fla. 2d DCA 2001), the court upheld an award of contingent fees in a challenge by the opposing party, even though the contingent fee contract was not reduced to writing until after the trial. The court explained that Rule 4-1.5(f) was intended to protect clients rather than to allow opposing parties to avoid payment of fees after losing a case. Rule 4-1.5(e), as amended effective January 1, 2006, states: “The fact that a contract may not be in accord with these rules is an issue between the attorney and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved.”

2. Quantum meruit. “Even though a member of The Florida Bar cannot claim fees based upon a non-complying agreement, the attorney would still be entitled to the reasonable value of his or her services on the basis of quantum meruit.” Chandris, supra, 668 So.2d 180, 186.
Similarly, in *King, supra*, the court explained: “[w]hen a fee agreement ... fails to comply with the Rules Regulating The Florida Bar, the attorney is entitled to recover on the basis of quantum meruit.” However, when a fee agreement is procured through improper solicitation, the attorney “is entitled to no fruit from the forbidden tree on any theory of recovery recognized in law or equity.” *Spence, Payne, Masington & Grossman, P.A. v. Gerson*, 483 So.2d 775 (Fla. 3d DCA), rev. denied, 492 So.2d 1334 (Fla. 1986). *See also, Morrison v. West*, 30 So.3d 561 (Fla. 4th DCA 2010) (“We hold that it violates public policy for a court to award a fee, even in quantum meruit, for the unlicensed practice of law.”)

C. **Duty to communicate.** “When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.” (4-1.5(e)) (emphasis added) Certain types of fees must be confirmed in writing, such as contingent fees (as discussed below) and any nonrefundable retainer (as provided in an amendment to 4-1.5(e), effective February 1, 2010).

D. **Security for fees.** Rule 4-1.8(a) prohibits a lawyer from acquiring a security interest adverse to the client (except “a lien granted by law”) unless: the terms are fair and fully disclosed in writing, the client is given an opportunity to seek independent counsel and the client gives informed consent in writing. *See Lee v. Gadasa Corp.*, 714 So.2d 610, 612 (Fla. 1st DCA 1998).

1. **Liens on client’s homestead.** May a lawyer enforce a charging lien against a client’s homestead? In *Trontz v. Winig*, 905 So.2d 1026 (Fla. 4th DCA 2005), the court affirmed a judgment foreclosing a lawyer’s charging lien on a client’s homestead where the client had “specifically waived his homestead protection” and agreed to an order that applied the charging lien to his homestead. Similarly, in *Demayo v. Chames*, 30 Fla. L. Weekly D2692 (Fla. 3d DCA Nov. 30, 2005), the court allowed an attorney to enforce a charging lien against a client’s homestead where the fee agreement specifically provided that “the client hereby knowingly, voluntarily and intelligently waives his rights to assert his homestead exemption in the event a charging lien is obtained to secure the balance of attorney’s fees and costs.” A strong dissent in *DeMayo* noted that the Florida Supreme Court had previously refused to enforce contractual waivers of homestead protection on public policy grounds in *Sherbhill v. Miller Mfg. Co.*, 89 So.2d 28 (Fla. 1956). On March 15, 2006, the Third DCA withdrew its opinion dated November 30, 2005, and held that the attempted waiver was invalid. *DeMayo v. Chames*, 934 So.2d 548 (Fla. 3d DCA 2006), rev. granted, 948 So.2d 758 (2007), aff’d *Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007).
E. Acquiring interest in cause of action. Rule 4-1.8(i) specifically prohibits a lawyer from acquiring “a proprietary interest in the cause of action or subject matter of the litigation” (except that a lawyer may “acquire a lien granted by law” and may contract for a “reasonable contingent fee”). See The Florida Bar v. Perry, 377 So.2d 712 (Fla. 1979) (Attorney disciplined for making arrangements to sell van to pay for fees when ownership of van was issue in litigation.)

F. Charging liens. Under certain circumstances, an attorney may assert a charging lien for fees and costs on a judgment or property recovered for the client. JLA Inv. Corp. v. Colony Ins. Co., 922 So.2d 249 (Fla. 2d DCA 2006).

1. Requirements. In Baker & Hostetler, LLP v. Swearingen, 998 So.2d 1158 (Fla. 5th DCA 2008), the court explained that attorneys wishing to impose a charging lien “must show: (1) an express or implied contract between attorney and client; (2) an express or implied understanding for payment of attorney’s fees, either dependent upon or out of recovery; (3) either avoidance of payment or a dispute as to amount of fees; and (4) timely notice.” As to the timeliness of notice, the court explained that “unless jurisdiction is properly reserved by the trial court, a notice of an attorney’s charging lien must generally be filed before the lawsuit has been reduced to judgment or dismissed pursuant to settlement in order to be timely.”

2. Liability for ignoring charging lien. In Hall, Lamb & Hall, P.A. v. Sherlon Investments Corp., 7 So.3d 639 (Fla. 3d DCA 2009), the former client, the former client’s new counsel, and the opposing party were all jointly and severally liable to a law firm that had filed a charging lien and did not receive timely notice of a settlement. Arguably, opposing counsel could also be liable.

G. Retaining liens. An attorney may assert a possessory retaining lien for outstanding costs or fees on the client’s papers, money, securities, and other property in his or her possession. Dowda and Fields, P.A. v. Cobb, 452 So.2d 1140 (Fla. 5th DCA 1984), and Opinion 88-11 (Reconsideration).

1. Refusal to provide copies. An attorney who properly asserts a retaining lien on a case file for unpaid fees or costs is not required to provide copies to the client. Opinion 88-11 (Reconsideration). According to Rutherford, Mulhall & Wargo, P.A. v. Antidormi, 695 So.2d 1300 (Fla. 4th DCA 1997), “[a]bsent exceptional circumstances ... it is a departure from the essential requirements of the law for a court to disregard a retaining lien and release a client’s file before the fee dispute has been resolved.” See also Foreman v. Behr, 866 So.2d 705 (Fla. 2d DCA 2003) (where attorney has valid lien court should not
order attorney to turn over file to client even when client has sued attorney for malpractice) and Fox v. Widjaya, 2013 WL 5927583 (Fla. 3d DCA 2013) (“It matters not that the order compelled the production of the documents to successor counsel, rather than to the client himself.”).

2. **Avoiding prejudice.** However, the attorney’s right to assert a retaining lien is limited by the ethical obligation that the attorney must avoid foreseeable prejudice to the client. Opinion 88-11 (Reconsideration).

3. **Trust property.** Another limitation on the right to assert a retaining lien is set forth in the Comment to Rule 5-1.2, which states that “property entrusted to a lawyer for a specific purpose, including advances for fees, costs and expenses ... must be applied only to that purpose” and is “not subject to ... set-off for attorney’s fees.” The Comment goes on to state that “a refusal to account for and deliver over such property upon demand shall be a conversion.” See also The Florida Bar v. Bratton, 413 So.2d 754 (Fla. 1982), and Opinion 87-12.

H. **Suing clients for fees.** Attorneys cannot sue current clients for fees under any circumstances. Suits may be filed against former clients but only after other reasonable means of collection have been exhausted. See Rule 4-1.7(b) and Opinion 88-1. Under certain conditions, attorneys may report a delinquent former client to a credit reporting service and refer past due accounts to a reputable collection agency or assign them to a corporation which is wholly owned by the attorney or the attorney’s firm. Opinions 81-3, 90-2 and 95-3.

I. **Contingent fees - generally.** A fee may be contingent on the outcome of the matter for which the service is rendered, except in domestic relations and criminal matters. (4-1.5(f))

1. **Degree of risk.** However, there must be a “degree of risk” in a case to justify a contingent fee. The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975). Furthermore, a lawyer may not charge a contingent fee for recovering PIP benefits. The Florida Bar v. Gentry, 475 So.2d 678 (Fla. 1985).

2. **Requirements.** Contingent fee agreements must be in writing, state the terms in detail, and be signed by all parties, including all lawyers or firms that may participate in the fee. (4-1.5(f)(1) and (2)) Upon conclusion of the contingent fee matter, the lawyer shall advise the client of the outcome in writing. If there is a recovery, the lawyer shall prepare an itemized closing statement which shall be signed by all parties to the agreement and retained by the lawyer for six years. (4-1.5(f)(2) and (5))
J. Contingent fees - injury cases. Additional requirements apply to contingent fee agreements in claims involving personal injury and death. (4-1.5(f)(4)) The additional requirements include the following:

1. The contract must contain specific language referring to a “statement of client’s rights” and describing the three day rescission period. The separate “statement of client’s rights” must be provided, signed, and retained.

2. The amount of the contingent fee is subject to specific limitations which may not be exceeded absent a court order. (The Comments state that these limitations “should not be construed to apply to ... the non-contingent portion of the fee agreement.”)

K. Contingent fees – medical liens. May a lawyer who is representing a client in a personal injury or wrongful death matter with a contingent fee refer the client to another lawyer to resolve medical lien and subrogation claims? “[W]e wish to emphasize that lawyers representing clients in personal injury, wrongful death, or other cases where there is a contingent fee should, as part of the representation, also represent those clients in resolving medical liens and subrogation claims related to the underlying case. This should be done at no additional charge to the client beyond the maximum contingency fee, even if the attorney outsources this work to another attorney or non-attorney.” In re: Amendments to Rule Regulating Florida Bar 4-1.5 – Fees and Costs for Legal Services, 202 So.3d 37 (Fla. 2016).

L. Contingent fees - medical malpractice. Contingent fees in “medical liability cases” are subject to additional limitations set forth in Rule 4-1.5(f)(4)(B), which are consistent with an amendment to the Florida Constitution, but the Rule also provides that those limitations may be waived by the client. In re Amendment to the Rules Regulating The Florida Bar, 939 So.2d 1032 (Fla. 2006).

M. Contingent fees - commercial cases. Do the limitations in injury cases discussed above apply to commercial cases? While Rule 4-1.5(f)(4) refers to “property damages” the Comment specifically states that the Rule “should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context.” However, footnote 6 in a concurring opinion in Arabia v. Siedlecki, 789 So.2d 380 (Fla. 4th DCA 2001), states the view that the rule applies to all contingent fee cases, including those involving claims for fraud. Also, in The Florida Bar v. Kavanaugh, 915 So.2d 89 (Fla. 2005), the court held that an attorney who charged a fee of 53% of the recovery in a commercial case (despite an agreement limiting the fee to 50%) violated Rule 4-1.5(a), which prohibits a “clearly excessive fee.”
N. Contingent fees - calculation. If a client is awarded $10,000 plus statutory fees of $5,000, should the lawyer’s contingent fee be calculated as a percentage of $10,000 or $15,000?

1. Fees on fee award. According to World Service Life Ins. Co. v. Bodiford, 537 So.2d 1381 (Fla. 1989), a lawyer “is not entitled to add statutory attorney’s fees to the principal and claim a percentage of the total.” See also Royal Belge v. New Miami Wholesale, Inc., 858 So.2d 336 (Fla. 3d DCA 2003). However, in Olmsted v. Emmanuel, 783 So.2d 1122 (Fla. 1st DCA 2001), a contingent fee agreement specifically defined the “recovery” on which the fee was to be based as including “court-awarded attorney’s fees,” and the court affirmed the trial court’s ruling that the contract was enforceable and permitted by the Rules Regulating the Florida Bar.

O. Structured settlements. “[T]he contingent fee percentage shall be calculated only on the cost of the structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less.” However, this rule does not apply if “the damages and the fee are to be paid out over the long term future schedule.” (Rule 4-1.5(f)(6))

P. Division of fees - generally. Rule 4-1.5(g) states that a division of fees between lawyers who are not in the same firm may be made only if the total fee is reasonable and either of the following two conditions is satisfied:

- The division is in proportion to the services performed by each lawyer; or

- By written agreement with the client, each lawyer assumes joint responsibility and agrees to be available, and the agreement fully discloses the basis for the division of fees.

Q. Division of fees - written agreement. Is an oral agreement to split fees ever appropriate? Yes, since the conditions referenced above in Rule 4-1.5(g) are in the alternative, an oral agreement to divide fees in proportion to the services performed by each lawyer may be appropriate in non-contingent fee cases. However, in contingent fee cases, Rule 4-1.5(f)(2) states that “No lawyer or firm may participate in the fee without the consent of the client in writing” and “[e]ach participating lawyer or law firm shall sign the contract…."

1. Absence of written agreement. If there is no written agreement to divide fees in a contingent fee case, the referring attorney is not entitled to a fee. In The Florida Bar v. Rubin, 709 So.2d 1361 (Fla. 1998), an attorney who sued another attorney for a referral fee, when no written agreement existed, was publicly reprimanded for attempting “to achieve a civil remedy ... when such remedy was ethically prohibited.” See also Florida Bar v. Carson, 737 So.2d 1069 (Fla.
1999) (Rule 4-1.5(f)(2) “clearly prohibits not only the actual receipt of a contingent fee without a written contract, but also prohibits entering into an oral agreement for such a fee.”). But see Lackey v. Bridgestone/Firestone, Inc., 855 So.2d 1186 (Fla. 3d DCA 2003), in which the court permitted two attorneys who had no written agreement to recover in quantum meruit for assisting a third attorney, who had a valid written agreement, with a contingent case. (The decision in Lackey is arguably inconsistent with Rule 4-1.5(f)(2) which prohibits a lawyer from participating in a contingent fee “without the consent of the client in writing.”)

2. Liability for malpractice. “Where there is an express or implied agreement for the payment of a referral fee, but the attorneys have not executed the written agreement required by Rule Regulating The Florida Bar 4-1.5(g), is the referring attorney civilly liable in the event of legal malpractice by the working attorney?” Yes. Even though the oral or implied agreement is not enforceable by the referring attorney, the referring attorney is liable, according to the Third DCA, which certified the question quoted above to the Florida Supreme Court. Noris v. Silver, 701 So.2d 1238 (Fla. 3d DCA 1997).

R. Division of fees - injury cases. In injury or death cases in which any part of the fee is contingent the division of fees between lawyers in different firms is subject to the rules discussed above and to the special rules in 4-1.5(f)(4), which provide that the lawyer assuming primary responsibility for the legal services must receive a minimum of 75% of the total fee, and the lawyer assuming secondary responsibility may receive a maximum of 25% of the total fee. However, these limitations may be varied if the lawyers “accept substantially equal active participation in the providing of legal services” and seek court approval (with notice to The Florida Bar and the client) when (or before) suit is filed or “within 10 days of execution of a contract for division of fees when new counsel is engaged.”

1. Conflict of interest. If the referral was made because of a conflict of interest, the referring attorney is not permitted to receive any part of the fee for services performed, or to be performed, after the emergence of the conflict. (Opinion 89-1)

S. Fee division with of counsel. May the restrictions on fee divisions between lawyers in different firms be avoided by forming an “Of Counsel” relationship? According to Opinion 94-7: “for the purposes of the fee division rules, an attorney is in the ‘same firm’ to which the attorney is ‘of counsel’ only if the attorney is ‘of counsel’ in the traditional sense - that is, only if the attorney is affiliated with and practices through that one firm exclusively.” (emphasis added)
T. Fee division with departing lawyer. According to Opinion 94-1, a fee splitting arrangement between a departing associate and a law firm is a “matter of contract to be decided by the parties, in accordance with applicable law.” The Comment to Rule 4-5.6 (Restrictions on Right to Practice) provides that “[t]he percentage limitations found in Rule 4-1.5(f)(4)(D) do not apply to fees divided pursuant to a severance agreement” but also notes that severance agreements containing “punitive clauses” which “restrict competition or encroach upon a client’s inherent right to select counsel” are prohibited.

1. Example. In *Miller v. Jacobs & Goodman, P.A.*, 699 So.2d 729 (5th DCA 1997), *rev. denied*, 717 So.2d 533 (Fla. 1998), the court upheld a provision in an employment agreement requiring an associate to pay a law firm 75% of any fees earned from firm clients who followed the associate to a new firm. (Note: Subsequent to this decision, the Board of Governors ratified Opinion 93-4 which disapproves employment contracts restricting a lawyer’s right to represent clients of a law firm after leaving the firm.)

2. Restrictions on right to practice. Employment agreements which restrict a lawyer’s right to practice after leaving a firm are discussed below in section XI.

U. Fee division with nonlawyers. Lawyers “shall not share legal fees with a non-lawyer” except in very limited circumstances set forth in Rule 4-5.4(a). The rule specifically prohibits paying bonuses to nonlawyer employees for bringing in cases or clients. Further, nonlawyers may not own any interest in a business entity that practices law. (4-5.4)

V. Fee division with out-of-state lawyers. A Florida lawyer may pay a referral fee to an out-of-state attorney who is consulted by a resident of his or her state about an accident in Florida. (Opinion 90-8) However, an out-of-state lawyer who resides in Florida and is no longer actively practicing law is treated as any other “nonlawyer” for purposes of the fee division rules. (Opinion 60-18) In *Chandris, S.A. v. Yanakakis*, 668 So.2d 180 (Fla. 1995), the Florida Supreme Court held that “Florida contingent fee agreements entered by attorneys not subject to our professional regulations are unauthorized legal services and are void as against public policy.” However, the court explained that “a non-Florida attorney can join with a Florida attorney in a joint representation of a client in Florida on the basis of a contingent fee agreement that complies with the rules.” Opinion 17-1 states: “Florida Bar members may divide fees with an out-of-state lawyer whose firm includes non-lawyer ownership,” subject to certain conditions. In *Lackey v. Bridgestone/Firestone, Inc.*, 855 So.2d 1186 (Fla. 3d DCA 2003), the court held that a non-Florida attorney who had no written agreement (but who worked on the case with Florida counsel who did have a valid agreement) was entitled to a quantum meruit recovery.
W. Payment with media rights. A lawyer may not negotiate an agreement giving the lawyer literary or media rights relating to the representation “prior to the conclusion of representation” of the client. (4-1.8(d))

X. Advancing expenses. A fee agreement may provide that the lawyer will advance all court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. (4-1.8(e)) Except for advancing “court costs and expenses of litigation,” a lawyer “is prohibited from providing financial assistance to a client in connection with pending or contemplated litigation.” (4-1.8(e))

1. May a lawyer agree at the outset of a case to be responsible for all costs and expenses (and not seek repayment from the client) even if a recovery is obtained? No, according to Advisory Opinion 96-1, explaining that Rule 4-1.8(e) “contemplates repayment ... in the event of a recovery.” However, the rule may be different when “representing an indigent client.” Rule 4-1.8(e)(2).

2. While a lawyer may not agree at the outset to waive the repayment of costs from a recovery, there are circumstances in which waiver is permissible after a recovery has been obtained. Specifically, Opinion 16-1 states that it is permissible to waive costs: “where there has been no agreement for the [lawyer] to be unconditionally responsible at the outset of representation, the cost ‘forgiveness’ occurs after settlement, and the [lawyer] will receive no fees for the representation.”

3. May an attorney advance the cost of a “diagnostic medical examination used for litigation purposes?” Yes, according to an amendment to the Comment to Rule 4-1.8(e), effective February 1, 2010. However, advances for medical treatment are not permitted.

4. May one attorney pay fees to another attorney, who is assisting with the representation, as an “expense of litigation”? No, according to The Florida Bar v. Patrick, 67 So.3d 1009 (Fla. 2011), which says: “the comment explains the phrase ‘litigation expenses’ by providing an example of permissible litigation costs: the reasonable costs involved in obtaining and presenting evidence. The payment of another attorney’s fees is not listed as a permissible litigation expense.”

Y. Gifts to clients. The prohibition in Rule A 4-1.8(e) against providing “financial assistance” to clients applies to gifts. In The Florida Bar v. Roberto, 59 So.3d 1101 (Fla. 2011), an attorney gave his client “$250 to buy clothes, groceries, and other personal goods,” among other gifts; the Court imposed significant discipline for this and other breaches of ethics, noting that “[t]he ethical prohibition on this type of activity could not be more clear.” However, in an
earlier case, the Court appears to have reached a conclusion that is inconsistent with *Roberto*. In *The Florida Bar v. Taylor*, 648 So.2d 1190 (Fla. 1994), a client was given used clothing and a check for $200 “for basic necessities.” Explaining that the rule “does not bar all financial assistance given during the attorney/client relationship,” the Court held that “the giving of used clothing to a client is not regarded as unethical where there is no agreement for repayment and the clothing is not given in an effort to maintain employment.”

**Z. Loans to clients.** Lawyers are prohibited from loaning money to clients in connection with pending litigation. (Opinion 65-39) This rule applies even if the loan is made through a non-profit corporation funded by attorney contributions. (Opinion 68-15) While a lawyer “may suggest to a client where the client may try to obtain financial help for individual needs ... the lawyer should not become part of the loan process.” (Opinion 75-24) A lawyer who “routinely refers clients to a loan company and actively participates in the loan transaction would be providing financial assistance to those clients.” (Opinion 92-6)

**AA. Non-recourse advance funding.** May an attorney provide information to a client regarding sources of non-recourse loans secured by the anticipated recovery in the client’s lawsuit? According to Opinion 00-3 (as modified on March 15, 2002), “The Florida Bar discourages the use of non-recourse advance funding companies.” A lawyer may advise a client about the existence of such companies “only if the attorney also discusses with the client whether the costs of the transaction outweigh the benefits.” In addition, a lawyer must determine whether the potential transaction is legal by checking, for example, whether the company has all necessary licenses and whether the transaction complies with usury laws. Moreover, “the attorney shall not co-sign or otherwise guarantee the financial transaction.... The attorney also shall not allow the funding company to ... influence the attorney’s independent professional judgment. The attorney shall not have any ownership interest in the funding company or receive any compensation or other value from the funding company in exchange for referring clients.... Additionally, the attorney shall not provide the funding company with an opinion regarding the worth of the client’s claim or the likelihood of success .... Finally, the attorney may, at the client’s request, honor a client’s valid, written assignment of a portion of the recovery to the funding company. The attorney may not, however, provide a letter of protection to the funding company signed by the attorney....”

1. In *Rancman v. Interim Settlement Funding Corporation*, 789 N.E.2d 217 (Oh. 2003), the Ohio Supreme Court held that advance funding transactions “are void as champerty and maintenance.” Lower courts
had held the transactions to be void for violating usury and licensing laws.

2. In *Fausone v. U.S. Claims, Inc.*, 915 So.2d 626 (Fla. 2d DCA 2005), the court upheld and enforced a “litigation loan” agreement pursuant to which a personal injury plaintiff had sold an interest in her claim. In the opinion, Judge Altenbernd observed that “[i]t cannot be denied that people like Ms. Fausone may need a credit source during litigation” but also noted that “[s]uch agreements create confusion concerning the party who actually owns and controls the lawsuit, and create risks that the attorney-client privilege will be waived unintentionally.” The opinion concludes by stating that “[t]he legislature may wish to examine this industry to determine whether Florida citizens are in need of any statutory protection.”

3. According to Advisory Opinion 16-2, a criminal defense lawyer may, under certain circumstances, provide information to a client about a financing company that advances money for the payment of the lawyer’s fees. The retention by the financing company of a percentage of the amount of the loan as a fee does not constitute an impermissible division of fees with a nonlawyer.

BB. **Offers of Judgment.** “An attorney may not ethically agree to pay fees and costs assessed to a client pursuant to the offer of judgment statute.” Opinion 96-3. While an attorney may not agree to pay such fees, may the attorney agree to purchase an insurance policy that would cover fees and costs awarded pursuant to an offer of judgment? According to *The Florida Bar News*, October 1, 2009, the Professional Ethics Committee will be issuing an opinion stating that an attorney “can advance the cost of the premium and make the repayment of that cost contingent on the outcome of the matter, but that the Bar offers no opinion on whether the policies themselves are legal or comply with the Rules Regulating The Florida Bar.”

CC. **Payment by third party.** A lawyer is prohibited from accepting compensation from a third party for representing a client unless the client “gives informed consent,” there is no interference, and confidentiality is protected. (4-1.8(f))

DD. **Limiting scope.** A lawyer and client may limit the objectives or scope of representation if the limitation is reasonable and the client consents in writing after consultation. (4-1.2)

EE. **Limiting liability.** In a fee agreement (or any other agreement), a lawyer is prohibited from prospectively limiting liability for malpractice “unless permitted by law and the client is independently represented in making the agreement.” (4-1.8(h)). Are attorneys “permitted by law” to limit their liability? See *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999) (“Indeed, it is
questionable whether a professional, such as a lawyer, could legally or ethically limit a client’s remedies by contract in the same way that a manufacturer could do with a purchaser in a purely commercial setting.

Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility, Section 9-9.1.2 (ABA Center for Professional Responsibility, 2002); Little v. Middleton, 401 S.E.2d 751 (Ga. 1991) (“An attorney may not relieve himself by contract of the duty to exercise reasonable care and an attempt to do so is void as against public policy.”). In 2009, the 3rd DCA, citing Moransais, supra, held that clauses limiting liability in professional service contracts (in a case involving a geologist) are invalid and unenforceable. Witt v. La Gorce Country Club, Inc., 35 So.3d 1033 (Fla. 3d DCA 2010). While Section 558.0035, Florida Statutes, adopted in 2013, arguably limits the applicability of Witt with regard to claims against “design professionals,” the rationale of the case remains applicable to claims against lawyers.

1. In The Florida Bar v. Head, 84 So.3d 292 (Fla. 2012), the Court disciplined an attorney who sent a letter to a former client stating that a claim for fees would not be pursued if the former client would sign a mutual release because the letter did not advise the former client that independent representation would be appropriate, as required by Rule 4-1.8(h).

FF. Limiting fee disputes. A clause in a fee agreement providing that all objections to a bill are waived unless made within 10 days is unconscionable and unenforceable. Elser v. Law Offices of James M. Russ, P.A., 679 So.2d 309 (Fla. 5th DCA 1996). However, in Franklin & Marbin, P.A. v. Mascola, 711 So.2d 46 (Fla. 4th DCA 1998), a fee agreement stated that the client must object to monthly bills in writing within 15 days; the court held that the client’s failure to object, under the circumstances, waived any objections to the number of hours billed and “would operate as a tacit admission of the reasonability thereof in a later suit for a money judgment under the contract.”

GG. Arbitration. May lawyers include a clause in fee agreements requiring all fee disputes to be resolved by arbitration? Yes, if the client is advised in writing to consider obtaining independent legal advice and if the agreement contains a specific “notice” in bold print, pursuant to an amendment creating Rule 4-1.5(i), effective March 1, 2008.

1. Malpractice claims. In Vargas v. Schweitzer-Ramras, 878 So.2d 415 (Fla. 3d DCA 2004), the court held that an arbitration clause was not broad enough to include claims for malpractice, explaining that agreements are construed against the attorney and in favor of the client. Would it be ethical to require arbitration of malpractice claims? See Brian F. Spector, Predispute Agreements to Arbitrate Legal Malpractice Claims: Skating on Thin Ice in Florida’s Ethical Twilight Zone? Fla. B.J., Apr. 2008 at 50. More recently, the 4th DCA
reversed an order denying a motion to compel arbitration, explaining that the language in the clause “is broad enough to encompass the malpractice and breach of fiduciary duty claims.” Mintz & Fraade, P.C. v. Beta Drywall Acquisition, LLC, 59 So.3d 1173 (Fla. 4th DCA 2011).

Even more recently, the 2d DCA enforced an arbitration clause in a fee agreement in a malpractice action. Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier, 67 So.3d 315 (Fla. 2d DCA 2011). And in Lash & Goldberg, LLP v. Clarke, 88 So.3d 426 (Fla. 4th DCA 2012), the appellate court ruled that a law firm’s motion to compel arbitration should have been granted, along with co-defendants’ motion, even though the law firm did not sign the arbitration agreement, because the complaint alleged “concerted misconduct” by all defendants.

HH. Interest on fees. Lawyers may charge a lawful rate of interest on fees and cost advances not paid when due either as provided in advance by written agreement or, in the absence of a written agreement, upon reasonable notice “of 60 days.” (Opinion 86-2) In The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986), an attorney was found to have committed an ethical violation for “charging a finance/interest charge without any authorization from the client and/or proper disclosure.”

II. Attorney discharged without cause. An attorney who is discharged from a contingency fee contract without cause before the contingency has occurred is entitled to recover for the reasonable value of his or her services after the contingency occurs, but the recovery is limited by the maximum fee set forth in the contingent fee contract. Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982).

1. Test. In such cases, the amount of fees should be determined by the “totality of circumstances” rather than by the lodestar method. Searcy, Denney, Scarola, Barnhart & Shipley v. Poletz, 652 So.2d 366 (Fla. 1995). While the lodestar method set forth in Florida Patient’s Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), focuses on the number of hours, hourly rates, and contingency risk factor, the “totality of circumstances” approach requires consideration of additional factors such as the benefit conferred on the client and the behavior of the parties after the discharge. Poletz, supra. Thus, under the “totality of circumstances” approach, the failure of an attorney to comply with a successor attorney’s request to turn over the file should be considered in determining a reasonable fee. Riesgo v. Weinstein, 523 So.2d 752 (Fla. 2d DCA 1988). See also Rule 4-1.16, Declining or Terminating Representation.

2. Disputes between co-counsel. However, in Jay v. Trazenfeld, 952 So.2d 635 (Fla. 4th DCA 2007), the court held that while Levin v. Rosenberg, supra, applies to fees due from the client, it does not
control a dispute between co-counsel when one has been discharged without cause and the other has collected a fee; in such a case, the terms of the contract, rather than quantum meruit, determine the division of the fee.

JJ. Attorney discharged with cause. An attorney who is discharged “with cause” for violating a duty to a client may be entitled to some fee or may be deemed to have forfeited any fee, depending on the circumstances. “In determining whether and to what extent forfeiture is appropriate, relevant considerations include the extent of the violation, its willfulness, any threatened or actual harm to the client, and the adequacy of other remedies.... [F]orfeiture is not an automatic remedy even for serious violations.” Searcy, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So.2d 947 (Fla. 4th DCA 1993), rev. denied, (Fla. 1994). In that case, the court suggested that the trial judge should calculate a quantum meruit fee, reduce it by any damages caused to the client, and then consider whether all or part of the reduced fee should be forfeited.

KK. Voluntary withdrawal. “[W]hen an attorney withdraws from representation upon his own volition, and the contingency has not occurred, the attorney forfeits all right to compensation.” Faro v. Romani, 641 So.2d 69 (Fla. 1994). However, if the client’s conduct makes the attorney’s continued performance either legally impossible or would cause a violation of an ethical rule, the attorney may be entitled to a fee when the contingency occurs. Smith & Burnetti, P.A. v. Falk, 677 So.2d 404 (Fla. 2d DCA 1996). In DePena v. Cruz, 884 So.2d 1062 (Fla. 2d DCA 2004), the court refused to recognize an exception when the “conduct of the client has caused a break-down in the attorney-client relationship.”

1. Unethical agreements. “Any contingent fee contract which permits the attorney to withdraw from representation without fault on the part of the client or other just reason and purports to allow the attorney to collect a fee for services already rendered would be unenforceable and unethical.” The Florida Bar v. Hollander, 607 So.2d 412 (Fla. 1992).

2. Outlier. However, according to Franklin & Marbin, P.A. v. Mascola, 711 So.2d 46 (Fla. 4th DCA 1998), “where the lawyer withdraws before a result, but without fault by the client, under Scheller the client may be liable for quantum meruit.” (In the author’s opinion, Mascola is based upon a faulty reading of Scheller, supra, and is inconsistent with the Supreme Court’s decision in Faro, supra.)

LL. Withdrawal because of suspension. In Frank J. Pepper, Inc. v. Vining, 783 So.2d 1160 (Fla. 3d DCA 2001), the court held that fees claimed by an attorney, who withdrew from a case because his license to practice had been
suspended, should be determined by the “totality of the circumstances,” as explained in Poletz, supra, and that expert testimony based on the lodestar method should not be considered. See also Opinion 90-3 (“Payment of referral fee to attorney who, subsequent to execution of fee-division agreement, has become suspended, disbarred, or resigned from The Florida Bar, is to be made on a quantum meruit basis.”)

MM. Successor counsel’s fees. “The proper basis for awarding attorney’s fees to discharged attorneys and their successors is as follows: Discharged attorneys hired under a contingent fee contract are entitled to recover quantum meruit for their services, limited by the maximum fee allowable under the fee agreement.... A substituted attorney, however, is entitled to the full contingent fee provided for in the contract.” Lubell v. Martinez, 901 So.2d 951 (Fla. 3d DCA 2005).

V. THE ATTORNEY/CLIENT RELATIONSHIP

A. Basics. A lawyer shall provide competent representation, shall act with reasonable diligence and promptness, and shall keep clients reasonably informed. (4-1.1, 4-1.3 and 4-1.4)

B. Fiduciary duty. “The relationship between an attorney and his or her client is a fiduciary relationship of the very highest character.” Elkind v. Bennett, 958 So.2d 1088 (Fla. 4th DCA 2007). “There is no relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client.... The attorney is under a duty at all times to represent his client ... with the utmost degree of honesty, forthrightness, loyalty and fidelity.” Gerlach v. Donnelly, 98 So.2d 493 (Fla. 1957)

1. Class actions. “At the very least” there is an “implied fiduciary relationship” between attorneys who file a class action lawsuit and potential members of the class even before a class is certified. Masztal v. City of Miami, 971 So.2d 803 (Fla. 3d DCA 2008). See also The Florida Bar v. Adorno, 60 So.3d 1016 (Fla. 2011)

2. Higher calling. While an attorney’s fiduciary duty to a client is “of the very highest character,” every attorney’s “duty to his calling and to the administration of justice far outweighs – and must outweigh – even his obligation to his client.” Boca Burger, Inc. v. Forum, 912 So.2d 561 (Fla. 2005)

C. Privilege. The “lawyer-client privilege” is an evidentiary rule that is codified in Section 90.502, Florida Statutes. In a case of importance to lawyers who handle personal injury cases, the Florida Supreme Court ruled, in 2017, that “the question of whether a plaintiff’s attorney referred him or her to a doctor for treatment is protected by the attorney-client privilege.” Worley v. Central Florida Young Men’s Christian Ass’n, Inc., 228 So.3d 18 (Fla. 2017)
D. **Confidentiality.** A lawyer shall not reveal information relating to representation of a client except as specifically provided in Rule 4-1.6.

1. **Broader than privilege.** The confidentiality rule applies not merely to matters communicated in confidence by the client but also “to all information relating to representation, whatever its source.” (4-1.6 Comment) The protection afforded by Rule 4-1.6 “is broader than the evidentiary attorney-client privilege and applies even though the same information is discoverable from other sources.” *Buntrock v. Buntrock*, 419 So.2d 402, 403 (Fla. 4th DCA 1982).

2. **Duty to prevent disclosure.** Rule 4-1.6 was amended, effective October 1, 2015, to state that a lawyer “must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

3. **Public records.** “The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it.” *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 851 (W.Va. 1995). *See also Akron Bar Association v. Holder*, 810 N.E.2d 426, 435 (Ohio 2004) (“An attorney is not free to disclose embarrassing or harmful features of a client’s life just because they are documented in public records.”) *See also Sealed Party v. Sealed Party*, 2006 WL 1207732 (S.D.Tex. 2006) (“A lawyer breaches the duty of confidentiality under Model Rule 1.6(a) by revealing information that is available from sources other than the client, including information filed in the public record.”)

4. **After relationship ends.** “After withdrawal the lawyer is required to refrain from making disclosure of the client’s confidences, except as otherwise provided in rule 4-1.16.” (4-1.5 Comment) In *The Florida Bar v. Knowles*, 99 So.3d 918 (Fla. 2012), the Court suspended an attorney for one year for violating Rule 1.6, among other rules, explaining: “A lawyer who is upset with her client is not permitted to turn on her client and begin disparaging and betraying her. Rather, the lawyer must maintain confidences even after withdrawing from representation.”

5. **Obtaining advice.** An amendment to the Comment to Rule 4-1.6, adopted in 2006, provides that “[a] lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these rules.”

6. **Checking for conflicts.** An amendment to Rule 4-1.6(c), effective October 1, 2015, states that a lawyer “may reveal confidential information to the extent the lawyer reasonably believes necessary” in
order to “detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.”

7. **Appellate remedies.** When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies. (4-1.6(d))

8. **Defense of malpractice suit or grievance.** “A lawyer may reveal [information relating to representation of a client] to the extent the lawyer reasonably believes necessary: … (2) to establish a claim or a defense … in a controversy between the lawyer and client; … (4) to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” (4-1.6(c))

9. **Responding to criticism.** In *In re: Skinner*, 758 S.E.2d 788 (Georgia 2014), a lawyer received a public reprimand for responding to a negative review on the Internet by disclosing, among other facts, the identity of the client and the amount of fees paid. Similarly, New York Ethics Opinion 1032 (2014) states as follows: “A lawyer may not disclose client confidential information solely to respond to a former client’s criticism of the lawyer posted on a website that includes client reviews of lawyers.” But there may be a remedy. In *Blake v. Giustibelli*, 182 So.3d 881 (Fla. 4th DCA 2016), an attorney sued former clients for defamation based on an on-line review. The trial court awarded $350,000 in punitive damages, and the appellate court affirmed.

**E. Confidentiality - joint representation.** “[I]n joint representation it is ordinarily assumed that the joint clients and the lawyer are sharing information and have no secrets from each other.” Hazard, *The Law of Lawyering*, section 1.9:104, p. 295. However, Opinion 95-4 states: “We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband’s consent.” The Opinion also concludes that “Lawyer must withdraw from the joint representation under the facts presented.”

**F. Confidentiality – documents filed with court.** Rule 2.420 of the Florida Rules of Judicial Administration requires lawyers to determine whether any document they are filing with the court contains confidential information.
1. **Itemized information.** If a document contains confidential information itemized in 2.420(d)(1)(B), a “Notice of Confidential Information within Court Filing” must be filed pursuant to Rule 2.420(d)(2).

2. **Non-itemized information.** Rule 2.420(d)(3) states that a filer “shall ascertain” whether a document contains confidential information that is not itemized in Rule 2.420(d)(1), and a lawyer who “believes in good faith” that a document contains such information must file a “Motion to Determine Confidentiality of Court Records” pursuant to Rule 2.420(d)(3) or (e) or, alternatively, make an “oral motion” pursuant to Rule 2.420(h).

3. **Interplay with discovery rules.** Rule 1.280(f) prohibits filing documents obtained in discovery without good cause, and it provides for sanctions if a filing violates Rule 2.425.

G. **Confidentiality - mediation.** Statements made during mediation are confidential pursuant to section 44.405, Florida Statutes, and Rule 10.420 requires mediators to inform parties about confidentiality. According to *Enterprise Leasing Company v. Jones*, 789 So.2d 964 (Fla. 2001), the mediation privilege “does not differ substantially from ... the attorney-client privilege.” In *Paranzino v. Barnett Bank*, 690 So.2d 725 (Fla. 4th DCA 1997), a party’s pleadings were struck as a sanction for disclosing to the media a settlement offer made during mediation.

1. **Mediation agreements.** “[T]here is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise.” §44.405(4), Fla. Stat. However, if a mediation agreement does contain a confidentiality clause, a breach can lead to severe consequences. In *Gulliver Schools, Inc. v. Snay*, 137 So.3d 1045 (Fla. 3d DCA 2014), the appellate court reversed the trial court’s order enforcing a settlement agreement which contained a confidentiality clause prohibiting disclosure, directly or indirectly, of the existence or terms of the settlement agreement based on the plaintiff’s statement to his daughter that the case settled “and we were happy with the results” and the daughter’s subsequent posting on Facebook stating that “Gulliver is now officially paying for my vacation to Europe this summer.”

2. **Exceptions.** Other exceptions to the privilege and confidentiality rules include statements made at a mediation that are:

   - “willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;”
• “offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;”

• “offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation;” or

• “offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.” §44.405, Fla. Stat.

3. **Example.** In *Cooper v. Austin*, 750 So.2d 711 (5th DCA 2000), a wife in a divorce case sent a note to her husband during a mediation stating that if he did not agree to a certain settlement, “the kids will take what information they have [about the husband allegedly taking nude pictures of an underage female] to whomever to have you arrested.” The appellate court, finding that the wife’s note constituted extortion, set aside the mediated settlement agreement.

H. **Confidentiality – HIPPA.** When dealing with “personal health information,” such as medical records, attorneys may be subject to confidentiality requirements in the Health Information Portability and Accountability Act, which provides for civil penalties of up to $1,500,000 and criminal penalties. Attorneys may also be responsible for ensuring that their experts, consultants and other agents comply with confidentiality requirements. See 45 CFR Part 164.

I. **Confidentiality – information stored on hard drives.** Opinion 10-2 states that any lawyer who uses devices with hard drives “has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to confidentiality.”

1. **Policies.** In addition to identifying potential threats to confidentiality, a lawyer must develop and implement policies to address the threats.

2. **Inventory.** A lawyer must maintain an inventory of devices with hard drives.

3. **Supervision.** A lawyer must supervise nonlawyers to maintain confidentiality.

4. **Disposal.** Before disposing of a device with a hard drive, “a lawyer has a duty to obtain adequate assurances that the Device has been
stripped of all confidential information,” which includes “an affirmative obligation to ascertain that the sanitization has been accomplished.”

J. **Confidentiality – cloud computing.** According to Ethics Opinion 12-3, lawyers may use “cloud computing” (in which files are stored at and accessed from a service provider’s remote server) “if they take reasonable precautions to ensure that confidentiality of client information is maintained.” The Opinion explains that the “lawyer should research the service provider” and “consider backing up the data elsewhere as a precaution.”

K. **Confidentiality – deceased clients.** While the duty of confidentiality continues after a client dies, “[a] lawyer may disclose confidential information to serve the deceased client’s interests, unless the deceased client previously instructed the lawyer not to disclose the information. Whether and what information may be disclosed will depend on who is making the request, the information sought, and other factors. Doubt should be resolved in favor of nondisclosure.” (Opinion 10-3)

L. **Scope of representation.** Rule 4-1.2 states that “a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable … and the client consents in writing after consultation.” If a lawyer assists a pro se litigant with drafting a document to be submitted to a court, the lawyer “must indicate ‘prepared with the assistance of counsel’ on the document to avoid misleading the court.…” (4-1.2 Comment)

M. **Who makes decisions?** “A lawyer must abide by a client’s decision concerning the objectives of representation” (subject to the limitations in Rule 4-1.2(c) and (d).) (Rule 4-1.2)

1. **Settlements.** A lawyer “must abide by a client’s decision whether to make or accept an offer of settlement of a matter.” (4-1.2(a))
   a. “[P]rovision in the contingency fee agreement whereby client agrees ‘not to settle this matter without the prior written approval of the law firm’ is void.” *Ellis Rubin, P.A., v. Alarcon*, 892 So.2d 501 (Fla. 3d DCA 2004)

2. **Assisting with improper conduct.** “A lawyer must not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.” (4-1.2(d)) An amendment to the Comment to this Rule, adopted in 2006, specifically provides that a lawyer is “required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent....”
a. In *The Florida Bar v. Rood*, 622 So.2d 974 (Fla. 1993), an attorney was suspended for one year for knowingly assisting in the fraudulent conveyance of real property. (However, an article in The Florida Bar Journal suggests, based on *Freeman v. First Union National Bank*, 865 So.2d 1272 (Fla. 2004), that it is not unethical for an attorney to assist with a property transfer that is subsequently found to be a fraudulent conveyance. Denis A. Kleinfeld and Jonathan Alper, *The Florida Supreme Court Finds No Liability for Aiding or Abetting a Fraudulent Transfer*, Fla. B.J., June 2004 at 26. For a contrary view, see *Will the Lawyers Pay? Counsel’s Ethical, Civil and Criminal Exposure for Creating Offshore Asset Protection Trusts* by Thomas Mayer (2003), which can be found by Googling the title.)

b. Could an attorney have civil liability for assisting with a fraudulent conveyance? “[T]here is no cause of action under the fraudulent conveyance statute against one who allegedly assists a debtor in a fraudulent conversion or transfer of property, where the person does not come into possession of the property.” *Danzas Taiwan, Ltd. v. Freeman*, 868 So.2d 537 (Fla. 3d DCA 2003). In *Freeman v. First Union National Bank*, 865 So.2d 1272 (Fla. 2004), the Florida Supreme Court held that there is no cause of action “against an aider or abettor to a fraudulent transaction,” but a footnote left open the possibility of a claim for civil conspiracy. Other courts have recognized claims for conspiracy to defraud creditors. See *Elie v. TFB Properties, Inc.*, 652 So.2d 1194 (Fla. 4th DCA 1995) and *Huntsman Packaging Corp. v. Kerry Packaging Corp.*, 992 F.Supp. 1439 (M.D. Fla. 1998), affirmed in *Huntsman Packaging v. Kerry*, 172 F. 3d 882 (11th Cir. 1999).

3. Calling a particular witness at trial. In *Puglisi v. State*, 110 So.3d 1196 (Fla. 2013), the Florida Supreme Court held that defense counsel, rather than a criminal defendant, “has the final authority as to whether or not the defense will call a particular witness to testify at the criminal trial.” (An exception to this rule is that in a criminal case, Rule 4-1.2 specifically provides that “the lawyer shall abide by the client’s decision” with regard to “whether the client will testify.”)

N. Termination representation. Rule 4-1.16 provides that a lawyer may withdraw from representing a client at any time that it can be accomplished “without material adverse effect on the interests of the client.” Furthermore, even if there is a material adverse effect, the lawyer may nevertheless withdraw for “good cause,” examples of which are set forth in Rule 4-1.16(b). Under certain circumstances described in the Rule, a lawyer is required to
terminate the representation. Upon termination of representation, a lawyer “shall take steps to the extent reasonably practicable to protect a client’s interest.” See The Florida Bar v. King, 664 So.2d 925 (Fla. 1995) (holding that attorney “could not simply stop representing his clients without following the procedures for withdrawal described in Rule 4-1.16(a”).

1. **Order required.** Rule 2.505(f) of the Rules of Judicial Administration provides that an attorney shall not be permitted to withdraw from an action unless the withdrawal is approved “by order of court.” Similarly, any substitution of counsel must be “by order of court.”

2. **Right to withdraw.** According to the leading Florida case on this subject, an attorney has “the right to terminate the attorney-client relationship and to withdraw as an attorney of record upon due notice to his client and approval of the court.” Such approval “should be rarely withheld” and “only upon a determination” that withdrawal would “interfere with the efficient and proper functioning of the court.” However, approval of the court “will not relieve the attorney of any civil liability ... nor from appropriate disciplinary procedures ... if it [i.e. the withdrawal] is wrongfully done.” Fisher v. State, 248 So.2d 479 (Fla. 1971). See also ABA Formal Ethics Opinion 471 (2015).

O. **Client files upon termination.** Upon termination of representation, the attorney is required to surrender papers and property “to which the client is entitled,” but “the lawyer may retain papers and other property ... to the extent permitted by law.” (4-1.16(d)) See also ABA Formal Ethics Opinion 471 (2015).

1. **Copies to client.** Case files belong to the attorney, not the client. Dowda and Fields, P.A. v. Cobb, 452 So.2d 1140, 1142 (Fla. 5th DCA 1984). Except for documents provided by the client, an attorney is not required to give materials from the client’s file to the client or “make copies free of charge.” Donahue v. Vaughan, 721 So.2d 356 (Fla. 5th DCA 1998). However, “under normal circumstances, an attorney should make available to the client, at the client’s expense, copies of information in the file where such information would serve a useful purpose to the client.” Opinion 88-11 (Reconsideration) Notwithstanding this Opinion, an attorney who properly asserts a retaining lien is arguably not required to provide copies to the client, even if the client offers to pay for the copies or has filed suit against the attorney for malpractice. Rutherford, Mulhall & Wargo, P.A. v. Antidormi, 695 So.2d 1300 (Fla. 4th DCA 1997) and Foreman v. Behr, 866 So.2d 705 (Fla. 2d DCA 2003).

P. **Accepting gifts from client.** Rule 4-1.8(c) states that a lawyer is prohibited from “preparing on behalf of a client an instrument giving the lawyer” (or a
member of the lawyer’s family) “any gift” (unless the client is a family member). However, the Comment to the Rule explains that a “lawyer may accept a gift from a client, if the transaction meets general standards of fairness and if the lawyer does not prepare the instrument bestowing the gift.” Rule 4-1.8 prohibits lawyers from “soliciting” any gift from a client, and a statute added to the Florida Probate Code in 2013, Section 732.806, provides: “Any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient is related to the person making the gift.”

Q. Business transactions with client. Rule 4-1.8(a) provides that a lawyer “is prohibited from entering into a business transaction with a client” or “knowingly acquiring” a “pecuniary interest adverse to a client” unless: the terms are fair; the terms are fully and reasonably disclosed in writing; “the client is advised in writing of the desirability of seeking and is given an opportunity to seek the advice of independent legal counsel,” and the client “gives informed consent, in a writing signed by the client....” See also Opinion 02-8.

VI. FILING SUIT AND PLEADINGS

A. Standard in Rule 4-3.1. “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” The Comment to the Rule explains that an action is considered frivolous “if the lawyer is unable either to make a good faith argument on the merits ... or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.” See also DeVaux v. Westwood Baptist Church, 953 So.2d 677 (Fla. 1st DCA 2007).

1. Sanctions. In The Florida Bar v. Richardson, 591 So.2d 908 (Fla. 1991), an attorney was suspended for sixty days for filing a “frivolous and malicious” lawsuit in federal court. In Florida Bar v. Kelly, 813 So.2d 85 (Fla. 2002), an attorney who sued a client for filing a grievance against him was suspended for 91 days.

B. Related rules. Federal Rule 11 authorizes severe sanctions for filing frivolous pleadings, and 28 U.S.C. §1927 authorizes the court to award fees and costs against an attorney who “multiplies the proceedings in any case unreasonably and vexatiously.” See Glenn J. Waldman, Federal Court Sanctions Against Attorneys Under 28 U.S.C. §1927, Fla. B.J., Jan. 2007. Similarly, Rule 2.515(a) of Florida’s Rules of Judicial Administration provides that an attorney’s signature constitutes a certificate that there is “good ground to support” the pleading and that it is “not interposed for delay.” If a pleading is not signed or if it is signed “with intent to defeat the purpose of this rule,” it may be stricken, pursuant to Rule 2.515(a). Trial courts also have “the
inherent authority to impose attorneys' fees against an attorney for bad faith conduct." *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002).

C. **Section 57.105, Florida Statutes.** Subsection 1 of this statute states that the court "shall award" reasonable fees to the prevailing party if the losing party or attorney “knew or should have known” that "any claim or defense" was not "supported by the material facts" or the “then-existing law.” Subsection 2 authorizes an award of fees if “any action” is taken “primarily for the purpose of unreasonable delay.”

1. **Purpose.** “The purpose of 57.105 is to discourage baseless claims" and "not to cast a chilling effect on use of the courts" or "discourage a party from pursuing a colorable claim.” Therefore, section 57.105 “should be applied with restraint.” *Swan Landing Development, LLC v. First Tennessee Bank N.A.*, 97 So.3d 326 (Fla. 2d DCA 2012).

2. **Safe Harbor.** The award may be made “at any time” during a civil proceeding. However, subsection 4 of the statute provides that a motion pursuant to this statute may not be filed until 21 days after it has been served on the opposing party and then only if the matter has not been corrected. This 21 day “safe harbor” applies only when a party moves for fees and does not apply when the court awards fees on its own initiative. *Schmigel v. Cumbie Concrete Company*, 915 So.2d 776 (Fla. 1st DCA 2005), rev. denied, 930 So.2d 622 (Fla. 2006). However, in *Davidson v. Ramirez*, 970 So.2d 855 (Fla. 3d DCA 2007), the court reversed an award of fees, explaining that “[i]t would frustrate the legislative intent to avoid the twenty-one-day notice by allowing the court to adopt the party-filed motion as the court’s own.” In *Koch v. Koch*, 47 So.3d 320 (Fla. 2d DCA 2010), the court distinguished *Davidson* (by noting that the trial court in that case had “effectively adopted the defendant’s motion” as the court’s own motion), and held that the 21-day notice requirement is not applicable when a court imposes sanctions on its own initiative. In *Albelo v. Southern Oak Ins. Co.*, 2013 WL 440199 (Fla. 3d DCA 2014), the Third District Court of Appeal followed, *Koch, supra*.

3. **Liability of attorney and client.** Section 57.105(1) provides that the award is to be paid "in equal amounts by the losing party and the losing party's attorney." But there is no authorization in 57.105 for the imposition of “joint and several liability” on the attorney and client. *Austin & Laurato, P.A. v. State Farm Florida Ins. Co.*, 229 So.3d 911 (Fla. 5th DCA 2017).

4. **Attorney's good faith.** Section 57.105(3) provides that "monetary sanctions may not be awarded" against an attorney if the attorney acted in good faith. *See Ferdie v. Isaacson*, 8 So.3d 1246 (Fla. 4th
DCA 2009) ("the losing party’s attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client,” and “a full evidentiary hearing on the good faith issue is necessary."). However, the court may order the attorney to pay 100% of the fees based on the “inequitable conduct doctrine.” \textit{Korte v. US Bank National Association}, 64 So.3d 134 (Fla. 4th DCA 2011). Notwithstanding the language of 57.105(3) and \textit{Ferdie, supra}, one court has determined that: "Nothing in the plain language of the statute suggests that the court is required to find that there was not good faith before granting an award." \textit{Pronman v. Styles}, 163 So.3d 535 (Fla. 4th DCA 2015) (emphasis in original)

5. \textbf{Duty to verify.} Does a law firm have “a duty to independently verify what it was told by its client”? No, according to a concurring opinion in \textit{Wolfe v. Foreman}, 128 So.3d 67 (Fla. 3d DCA 2013). (“The plaintiff alleges the ... law firm had a duty to independently verify what it was told by its client and lead counsel. That is not so.”) See also \textit{Endacott v. International Hospitality, Inc.}, 910 So.2d 915 (Fla. 3d DCA 2005) (attorneys “are entitled to rely on their client’s representations of fact”).

6. \textbf{Continuing duty to evaluate.} Even if a defense “initially appeared” to be “meritorious,” an attorney may be liable under section 57.105 for failing to withdraw the defense promptly after facts disclosed during discovery made the defense “completely untenable.” \textit{Gahn v. Holiday Property Bond, Ltd.}, 826 So.2d 423 (Fla. 2d DCA 2002). See also \textit{Infiniti Employment Solutions, Inc. v. MS Liquidators of Arizona, LLC}, 204 So.3d 550 (Fla. 5th DCA 2016) (“Here, the trial court should have separately evaluated each of the three affirmative defenses and determined at what point ‘defense activities became unsupported.’")

7. \textbf{Additional damages.} The court may award additional damages under Section 57.105, such as delay damages. \textit{Korte v. US Bank National Association}, 64 So.3d 134 (Fla. 4th DCA 2011).

8. \textbf{Informing client.} When a motion under section 57.105 has been filed, “an ethical duty may arise on the part of the attorney to bring this matter to the client’s attention and perhaps go as far as to recommend getting independent counsel.” \textit{Kerzner v. Lerman}, 849 So.2d 1185 (Fla. 4th DCA 2003). See also \textit{Khoury v. Estate of Kashey}, 553 So.2d 908 (Fla. 3d DCA 1988) (“It is therefore incumbent upon the attorney facing a 57.105 proceeding to apprise the client of the conflict... ”) and \textit{Geiger v. Spurlock}, 30 So.3d 704 (Fla. 5th DCA 2010).

9. \textbf{Liability of others.} “For the purpose of assessing fees pursuant to section 57.105, the term ‘party’ is subject to an expanded definition. ‘Parties include[ ] not only those whose names appear upon the
record, but all others who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of [the] proceedings.... The record here shows that Zwiebach was in “control” of the proceedings on behalf of LZD and was thus a party subject to the attorney’s fee award even though he was not a named plaintiff.” *Zwiebach v. Gordimer*, 884 So.2d 244 (Fla. 2d DCA 2004)

10. **Defending order on appeal.** Could a lawyer ever be sanctioned pursuant to 57.105 for defending a trial court’s order on appeal? In *State Dept. of Highway Safety and Motor Vehicles v. Salter*, 710 So.2d 1039, 1041 (Fla. 2d DCA 1998), the Second District Court of Appeal concluded that since the judgment of a trial court carries a presumption of correctness, the defense of a judgment “necessarily involves the advancement of justiciable issues,” and quashed the lower court’s award of fees and costs pursuant to section 57.105. However, in *Boca Burger, Inc. v. Forum*, 912 So.2d 561 (Fla. 2005), the Supreme Court disagreed, explaining that “allowing sanctions against appellees or their counsel for defending indefensible orders requires the quintessentially professional act of admitting defeat when there is no chance of victory, or when victory will have been obtained at the price of integrity and truth.” (emphasis by the Court) The Court concluded that “the rules ... require counsel to concede error on appeal when appropriate,” explaining that “[t]oo many members of the Bar practice with complete ignorance of or disdain for the basic principle that a lawyer’s duty to his calling and to the administration of justice far outweighs – and must outweigh – even his obligation to his client.” See also, Florida Rule of Appellate Procedure 9.410 and *United Automobile Insurance Co. v. Doctor Rehab Center, Inc.*, 121 So.3d 66 (Fla. 3d DCA 2013) (award of sanctions pursuant to 57.105 reversed because of failure to comply with 10-day notice provision in Appellate Rule 9.410).

11. **Adding a Fabre defendant.** After defendants specifically identify certain individuals who may be liable to plaintiff in a *Fabre* affirmative defense, the Plaintiff adds those individuals as defendants. Could the Plaintiff be sanctioned pursuant to 57.105 for this? Yes, Plaintiff “cannot avoid responsibility for attorneys fees” simply because Defendant claimed someone else was liable. *Yakavonis v. Dolphin Petroleum, Inc.*, 934 So.2d 615 (Fla. 4th DCA 2006).

D. **Electronic filing.** All court documents in civil courts must be filed electronically as of April 1, 2013 via a single website serving all courts known as E-Portal. Only lawyers may obtain a user name and password for filing via E-Portal. May lawyers permit their staff members to use the lawyer’s access
credentials? According to Opinion 12-2, the Professional Ethics Committee “is of the opinion that a properly supervised nonlawyer may use the credentials of a lawyer to file documents via the E-Portal at the lawyer’s discretion.”

E. Signing court papers. All papers filed with the court are to be signed “by an attorney of record.” The signature “shall constitute a certificate” that the attorney “has read” the paper, that there is “good ground to support it,” and that “it is not interposed for delay.” Rule 2.515(a), Judicial Administration Rules.

1. Original signature. The signature may be an “original” or an original that has been “reproduced by electronic means,” including “photocopied documents.” Rule 2.515(c). See also Wemett v. State, 536 So.2d 349 (Fla. 1st DCA 1988) (“In the absence of a statute prescribing the method of affixing a signature ... it may be printed, stamped, typewritten, engraved, photographed or cut from one instrument and attached to another.”).

2. Other formats. “Any other signature format authorized by general law” is allowed in state courts in which the clerk has obtained approval from the Supreme Court of Florida, but if the electronic filing does not contain an original signature, an identical paper with an original signature must be filed immediately thereafter. Rule 2.515, Judicial Administration Rules.

3. Signing by nonlawyer. “[A]n attorney should not under any circumstances permit nonlawyer employees to sign notices of hearing.” Opinion 87-11. But see Hanklin v. Blissett, 475 So.2d 1303 (Fla. 3d DCA 1985) (“a pleading signed in the name of the attorney by the attorney’s authorized agent [which was a secretary in that case] is, in effect, a pleading signed by the attorney.”) In Standard Guaranty Insurance Co. v. Fidelity & Deposit Co. of Maryland, 140 F.R.D. 5 (M.D. Fla. 1991), rev’d, 980 F.2d 1447 (11th Cir. 1992), a motion to dismiss was stricken and a default was entered because the motion was signed by the attorney of record’s partner. While the trial court’s decision was “reversed in part, vacated in part” in an unpublished opinion, it was subsequently cited with approval in Ware v. U.S., 154 F.R.D. 291 (M.D. Fla. 1994).

4. Electronic signing. If a court paper is to be signed electronically, must the lawyer (as opposed to a staff member) actually touch the computer keys to accomplish the signing? Arguably, the answer is “yes” pursuant to Opinion 87-11. Opinion 12-2 specifically notes that it does not address the issue. However, on January 24, 2014, the Professional Ethics Committee voted to reconsider Florida Ethics...
Opinion 87-11 in light of Rule of Judicial Administration 2.515 regarding electronic signatures, and on June 27, 2014, the PEC issued Advisory Opinion 87-11 (Reconsideration), which would permit “electronic signatures using the ‘/s/’, ‘s/’, or ‘/s’ formats by or at the direction of the person signing.”

F. Default. Assume that a defendant has not filed any paper or requested an extension by the deadline for responding to a complaint, but you know that the defendant is represented by counsel and intends to defend the lawsuit. Should you take a clerk’s default? In *Makes & Models Magazine, Inc. v. Web Offset Printing*, 13 So.3d 178 (Fla. 2d DCA 2009), the court, referencing “civility and professionalism,” held that a clerk’s default must be vacated under these circumstances, explaining that the plaintiff “is required to serve the defendant with notice of the application for default and to present the matter to the court for entry of the default.”

VII. COMMUNICATIONS WITH ADVERSARIES, PARTIES AND WITNESSES

A. Civility. As amended in 2011, the Oath of Admission provides that Florida attorneys “pledge fairness, integrity, and civility” to “opposing parties and their counsel” in “all written and oral communications.” *In re Oath of Admission to The Florida Bar*, 73 So.3d 149 (Fla. 2011).

B. Advocacy and courtesy. “An attorney has a responsibility to represent his client zealously within the bounds of the law…. He cannot, however, take action on behalf of his client that he knows will merely serve to harass his opponent…. Moreover, a lawyer should be courteous to and accede to the reasonable requests of his opposing counsel regarding matters which will not prejudice the rights of his client.” *Sanchez v. Sanchez*, 435 So.2d 347 (Fla. 3d DCA 1983)

C. Truthfulness. A lawyer is required to be truthful when dealing with others on a client’s behalf. (4-4.1 Comment) A lawyer shall not knowingly “make a false statement of material fact or law” or “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6 [confidentiality of information].” (4-4.1) Misrepresentations can occur by “partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” (4-4.1 Comment)

D. Settlement negotiations. Rule 4-4.1 states that a lawyer shall not knowingly “make a false statement of material fact or law.” However, “[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category....” (Rule 4-4.1
Comment) See also ABA Opinion 06-439 ("It is not unusual in a negotiation ... to make a statement ... that is less than entirely forthcoming.").

E. Disclosures of interest. In dealing on behalf of a client with a witness or other person who is not represented by counsel, a lawyer "shall not state or imply that the lawyer is disinterested." (4-4.3)

F. Unprofessional behavior. Rule 4-4.4 provides that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person." In The Florida Bar v. Sayler, 721 So.2d 1152 (Fla. 1998), cert. denied, 528 U.S. 890 (1999), the Florida Supreme Court reprimanded an attorney who, in a workers' compensation case, sent the opposing attorney a letter referencing the recent murder of an attorney who represented employees in workers' compensation cases, explaining that "[t]he First Amendment does not protect those who make harassing or threatening remarks about the judiciary or opposing counsel." See also The Florida Bar v. Adams, 641 So.2d 399 (Fla. 1994) (attorney suspended for 90 days for falsely accusing another attorney of suborning perjury).

G. Threats. An attorney may not "present, participate in presenting, or threaten to present" criminal charges "solely to obtain an advantage in a civil matter." (Rule 4-3.4(g)). See also Opinion 89-3. (It is "improper for an attorney to bring, participate in bringing, or threaten to bring criminal charges against someone solely to obtain an advantage in a civil matter, or if the primary purpose of such action is harassment.") Similarly, filing or threatening to file a disciplinary complaint against opposing counsel "solely to obtain an advantage in a civil matter" is prohibited. (Rule 4-3.4(h) and Opinion 94-5) In contrast, the ABA Model Rules of Professional Conduct do not include a specific prohibition against threatening criminal charges, in recognition that raising the possibility of criminal charges is appropriate in some circumstances, as explained in ABA Formal Opinion 92-363. See The Florida Bar v. Committee, 136 So.3d 1111 (Fla. 2014) (attorney suspended for three years for requesting criminal prosecution for extortion of a person who sent two letters to the attorney "seeking payment of the attorney's fees and costs awarded to her" in a prior court order).

H. Payment to witness. A lawyer shall not "offer an inducement to a witness." However, a lawyer may: (a) pay reasonable expenses incurred by a witness "in attending or testifying at proceedings"; (b) pay reasonable non-contingent fees of an expert witness, and (c) pay reasonable compensation "to a witness for time spent preparing for, attending, or testifying at proceedings." (4-3.4(b))
1. **Medical-legal consulting service.** “It is impermissible for an attorney to enter into an arrangement with a medical-legal consulting service on a contingency fee basis to provide services to the attorney’s client, including provision of an expert witness.” Opinion 98-1

2. **Non-testifying witnesses.** “Offering financial inducements to a fact witness is extremely serious misconduct,” and the prohibition against paying witnesses “is not limited to testifying witnesses.” *The Florida Bar v. Wohl*, 842 So.2d 811 (Fla. 2003). In that case, a party to a dispute over a large estate hired a former employee of the family business to provide “assistance” with the litigation for $500 per hour plus a large bonus depending on “the usefulness of the information provided.” The Florida Supreme Court suspended an attorney who participated in developing the agreement, rejecting the attorney’s contention that the former employee was a “consultant” rather than a “fact witness.”

3. **“Assistance with case and discovery preparation.”** “[T]he rule does not expressly state that witnesses may be paid for ‘assistance with case and discovery preparation.’ But … we hold that the rule’s language is broad enough to encompass such payments.” *Trial Practices, Inc. v. Hahn Loeser & Parks, LLP*, 228 So.3d 1184 (Fla. 2d DCA 2017).

**I. Asking witness not to volunteer information.** While lawyers may instruct their clients not to volunteer information, they are prohibited from requesting that a witness refrain from voluntarily giving relevant information to an opposing party (unless the witness is a relative, employee, or agent of the client and “the person’s interests will not be adversely affected by refraining from giving such information”). (4-3.4(f))

**J. Surreptitious recordings.** May you secretly record a conversation with a witness? ABA Formal Opinion 337, which stated that it is unethical for a lawyer to engage in secret tape recordings, has been withdrawn pursuant to Formal Opinion 01-422, and the Restatement of the Law Governing Lawyers states that lawyers may make a secret recording if it does not violate the law of the relevant jurisdiction. While Florida’s Rules of Professional Responsibility do not address the issue, Chapter 934, Florida Statutes, prohibits the recording of conversations without the consent of all participants, at least when the speaker has a reasonable expectation of privacy. *State v. Tsavaris*, 394 So.2d 418 (Fla. 1981), rev. denied, 424 So.2d 763 (1983); *State v. Sells*, 582 So.2d 1244 (Fla. 4th DCA 1991). “A significant factor used in determining the reasonableness of the defendant’s expectation of privacy in a conversation is the location in which the conversation or communication occurs.” *Stevenson v. State*, 667 So.2d 410 (Fla. 1st DCA 1996).
K. Nonlawyer assistants including private investigators. The Comment to Rule 4-8.4 states that lawyers may not “knowingly assist or induce” someone else to violate the Rules of Professional Conduct or “request or instruct an agent to do so.” Moreover, the Comment to Rule 4-5.3 states that: “A lawyer must give” assistants, including secretaries, paralegals and investigators, “appropriate instruction and supervision concerning the ethical aspects of their employment.”

May a lawyer ethically hire a private investigator to pose as a consumer to investigate issues at an opposing party’s place of business? According to Gidatex, S.R.L v. Campenielo Imports, Ltd., 82 F.Supp.2d 119 (S.D.N.Y. 1999), “[t]he use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation,” does “not represent the type of conduct prohibited by the rules.” Similarly, the court in Apple Corps Ltd., MPL v. International Collectors Soc., 15 F.Supp.2d 456 (D.N.J. 1998) noted that “[t]he prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.” See also “Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentations under the Rules of Professional Conduct,” by David B. Isbell, 8 Geo. J. Legal Ethics 791, 829 (1995) (“[I]f the misrepresentations are only as to the investigator/tester’s identity and purpose, and are made only for fact-gathering purposes, they do not entail the violation of any provision of the Model Rules.”) In contrast, the court in Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003), concluded that one party’s “undercover ruse to elicit damaging admissions” from an opposing party’s employees and its president “to secure an advantage” at trial “fall(s) squarely” within the prohibition of “conduct involving dishonesty, fraud, deceit or misrepresentation.”

In 2008, a prominent attorney in Los Angeles was convicted of “aiding and abetting” and conspiracy to commit wiretapping after it was discovered that a private investigator he hired had wiretapped telephone conversations of an opposing party. U.S. v. Christensen, 828 F.3d 763 (9th Cir.), petition for certiorari denied January 9, 2017. He began serving a three year sentence in a federal prison in 2017.

L. Represented persons. If a lawyer knows that a person is represented by another lawyer in the matter, the lawyer shall not communicate "about the subject of the representation with the person unless the other lawyer consents.” (4-4.2) “The rule applies even though the represented person initiates or consents to the communication.” (4-4.2 Comment)
1. **General counsel.** “If an individual or a corporation has general counsel representing that party in all matters, communications must be with the attorney” even if the particular matter which is the subject of the communication has not yet been referred to the general counsel. (Opinion 78-4)

2. **In-house counsel.** According to an opinion from the ABA, a lawyer is not prohibited from communicating directly with an opposing party’s in-house counsel about a matter even if outside counsel represents the opposing party in the matter. (ABA Formal Opinion 06-443)

3. **Attorney as party.** Since represented parties are not prohibited from communicating directly with one another, may an attorney who is a party to a lawsuit communicate directly with adverse represented parties? While there is no authority on this issue in Florida, other states say that attorneys may not do this. (E.g., Massachusetts Opinion 97-1 and Virginia Legal Ethics Opinion 1527).

4. **Indirect communication.** “A lawyer may not make a communication prohibited by this rule through the acts of another,” according to the Comment to Rule 4-4.2, as amended in 2006, but “parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct.” (4-4.2 Comment) See *The Florida Bar v. Nicnick*, 963 So.2d 219 (Fla. 2007) (when attorney gave his client a settlement agreement with the understanding that it would be delivered to the opposing party, the attorney “had an obligation to share the document with opposing counsel.”).

5. **Copies to opposing party.** If you suspect that your adversary is not relaying settlement offers, may you copy the opposing party with correspondence sent to opposing counsel? No. (Opinion 76-28) However, you could advise your client to ask the opposing party if the offer had been received. (ABA Formal Opinion 92-362)

6. **Exception for required notices.** The rule prohibiting attorneys from communicating directly with represented parties does not prohibit giving statutory or contractual notices directly to a represented party, but such communication “shall be strictly limited to that required by statute or contract, and a copy shall be provided to the adverse party’s attorney.” (4-4.2 and Opinion 89-6)

7. **Post-judgment.** When does the representation end for purposes of this rule? Even after entry of judgment and expiration of the appeal period, a plaintiff's attorney may not communicate directly with the
defendant “until he has determined that the defendant is no longer represented by counsel.” (Opinion 65-3)

8. Second opinions. Are lawyers restricted from giving second opinions by the statement in Rule 4-4.2 that “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer...”? No, according to Advisory Opinion 02-5.

M. Current employees. The Comment to Rule 4-4.2 states: “In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”

1. Permitted communications. There is no prohibition against direct communication with a corporation’s employee so long as the employee is not an officer, director, managing agent, or “directly involved in the incident or matter giving rise to the investigation or litigation.” However, “the attorney or the attorney’s agent must specifically identify the capacity in which they are conducting the investigation.” (Opinion 78-4) But see Lang v. Reedy Creek Improvement District, 888 F. Supp. 1143 (M.D. Fla. 1995) (“Plaintiff shall not initiate ex parte communications with current employees of the Defendants absent prior consent of Defense counsel or this Court.”).

2. Governmental employees. Rule 4-4.2 also applies to employees of governmental agencies. However, the rule does not prohibit an attorney from communicating with such employees “on subjects unrelated to those controversies in which the agency attorney is actually known to be providing representation.” (Opinion 09-1)

N. Former employees. May an attorney representing one party in a lawsuit have ex parte communications with former employees of the opposing party, when the opposing party is represented by counsel? Yes, at least in Florida’s state courts. In 2006, the Comment to Rule 4-4.2 was amended to specify that: “Consent of the organization’s lawyer is not required for communication with a former constituent.”

1. Bar Opinions. According to Florida Bar Ethics Opinion 88-14, “a plaintiff’s attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of the corporation’s attorney.” However, “the attorney should
not inquire into matters that are within the corporation’s attorney/client privilege (e.g., asking former manager to relate what he told the corporation’s attorney concerning the subject matter of the representation).” ABA Formal Opinion 91-359 reaches a similar conclusion.

2. **Supreme Court Decision.** In *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So.2d 541 ( Fla. 1997), the Florida Supreme Court held that Rule 4-4.2 “neither contemplates nor prohibits an attorney’s *ex parte* communications with former employees of a defendant employer.” The Court further explained that “there is no valid reason to distinguish between former employees who witnessed an event and those whose act or omission caused the event.”

3. **Federal Cases.** While the Florida Supreme Court has clarified the law relating to *ex parte* communications with former employees in state court cases, “practice in federal district courts in Florida is still unsettled.” Bernard H. Dempsey, Jr., *Ex Parte Communications with Current and Former Employees of a Corporate Defendant*, Fla. B.J., December 1997 at 10; see also *Lang v. Reedy Creek Improvement District*, 888 F. Supp. 1143 (M.D. Fla. 1995), for a list of guidelines to be followed when contacting former employees. More recently, in *Pepperwood of Naples Condominium Ass’s, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2011 WL 4382104 (M.D. Fla. 2011), the court held that plaintiff’s counsel could contact former managers and other former high level employees of defendant “but must do so through defense counsel.” See also, *NAACP v. Florida Dept. of Corrections*, 122 F. Supp. 2d 1335 (M.D. Fla. 2000).

O. **Expert witnesses.** May an attorney representing one party in a case have *ex parte* communication with the other party’s expert witnesses?

1. **Section 456.057(5), Florida Statutes.** This Statute prohibits a health care provider from disclosing information about a patient without written authorization from the patient or pursuant to subpoena. See *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996); *Bradley v. Brotman*, 836 So.2d 1129 (Fla. 4th DCA 2003) (attorney improperly subpoenaed medical records without giving notice to patient, as required by statute).

2. **Rule 1.280 (b)(4).** Furthermore, by providing that “[d]iscovery of facts known and opinions held by experts ... may be obtained only as follows ...” (emphasis added), the Rules of Civil Procedure arguably prohibit a party from having *ex parte* communication with an opposing party’s expert.
3. Federal cases. However, some federal courts have permitted *ex parte* communication with experts, reasoning that the federal equivalent of Florida’s Rule 1.280(b)(4) only establishes a “formal method of acquiring evidence” and does not “preclude the use of such venerable, if informal, discovery techniques as the *ex parte* interview of a witness who is willing to speak.” Doe v. Eli Lilly & Co., 99 F.R.D. 126 (D.D.C. 1983). Other federal cases have disagreed with this analysis. See Horner v. Rowan Companies, Inc., 153 F.R.D. 597 (S.D. Texas 1994). In Franklin v. Nationwide Mut. Fire Ins. Co. 566 So.2d 529 (Fla. 1st DCA), rev. dismissed, 574 So.2d 142 (Fla. 1990), the court criticized Doe v. Eli Lilly & Co., supra, and reversed a trial court’s order which compelled an insured to execute a medical authorization permitting *ex parte* communications between the insurer’s attorney and the insured’s physicians.

P. Hiring adversary’s former employee or expert. May an attorney hire a former employee or former expert of an opposing party to testify as an expert?

1. Former employee. An attorney was disqualified for doing this in Rentclub, Inc. v. Transamerica Rental Finance Corp., 811 F. Supp. 651 (M.D. Fla. 1992), affirmed, 43 F.3d 1439 (11th Cir. 1995), but that case was distinguished and a motion to disqualify was denied in Carnival Corporation v. Romero, 710 So.2d 690 (Fla. 5th DCA 1998).

2. Former expert. There is no “automatic” disqualification of an expert who was previously retained by an opposing party. However, the expert will be disqualified if his or her opinion discloses or is based on any confidential communication from the opposing lawyer or party. Sultan v. Earing-Doud, 852 So.2d 313 (Fla. 4th DCA 2003). The opinion also states that whether an attorney should be disqualified for contacting an opponent’s non-testifying expert depends upon whether the attorney obtained confidential information. See Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 Fla. L. Rev. 195 (Jan. 2004).

Q. Unrepresented party as adversary. Assume that your client negotiates a settlement with the opposing party, who is unrepresented, and asks you to put the agreement in writing. If you believe that the settlement is so favorable to your client that it may be unconscionable, you may have an affirmative duty to explain the material terms of the settlement documents to the opposing party so that he “fully understands their actual effect.” See The Florida Bar v. Belleville, 591 So.2d 170 (Fla. 1991); William J. Hazzard, *Professional Responsibility: Duties Owed to an Unrepresented Party*, 44 Fla. L. Rev. 489 (1992). While an amendment to Rule 4-4.3, adopted in 2006, states that a lawyer “shall not give legal advice to an unrepresented person, other than the advice to seek counsel,” the Comment to the Rule, as amended in 2006,
explains that a lawyer “may explain ... the meaning” of a transaction or settlement document to an unrepresented opposing party.

VIII. DISCOVERY AND EVIDENCE

A. Discovery. A lawyer shall not “make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party.” (4-3.4(d)) See Pecorelli v. Vantage Real Property Holding Corp., 685 So.2d 1309 (Fla. 2d DCA 1995) (order striking pleadings upheld for repeatedly failing to appear for depositions).

B. Concealing or altering evidence. A lawyer shall not “unlawfully obstruct another party’s access to evidence” or unlawfully alter or conceal material that the lawyer knows, or should know, is relevant to a pending or reasonably foreseeable proceeding. (4-3.4(a))

1. “Drastic sanctions, including default, are appropriate when a defendant alters or destroys physical evidence, and when the plaintiff has demonstrated an inability to proceed without such evidence.” Sponco Manufacturing, Inc. v. Alcover, 656 So.2d 629 (Fla. 3d DCA), rev. granted, 666 So.2d 144 (Fla. 1995), rev. denied, 679 So.2d 771 (Fla. 1996). “Alternatively, when a party fails to produce evidence within his control, an adverse inference may be drawn that the withheld evidence would be unfavorable to the party failing to produce it.” New Hampshire Ins. Co., Inc. v. Royal Ins. Co., 559 So.2d 102 (Fla. 4th DCA 1990). In Federal Ins. Co. v. Allister Manufacturing Co., 622 So.2d 1348 (Fla. 4th DCA 1993), the court concluded that a sanction which was the equivalent of a dismissal, was not warranted where the loss of evidence was “inadvertent and not for improper purpose.” See Bard D. Rockenbach, Spoliation of Evidence/A Double Edged Sword, Fla. B.J., Nov. 2001 at 34.

C. “Cleaning up” social media pages. May a lawyer advise a client to change privacy settings on social media sites and remove photos and information that relate to potential litigation? Advisory Opinion 14-1, approved by the Board of Governors on October 16, 2015, states: “A personal injury lawyer may advise a client pre-litigation to change privacy settings on the client’s social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved.”

D. Depositions. Rule 4-4.4 prohibits unduly “embarrassing” or “burdening” a witness and Rule 4-3.4 prohibits unlawfully obstructing access to evidence.
In addition, special related guidelines and rules have been developed for depositions, including the following:

1. **Examination.** According to the “Guidelines for Professional Conduct” of The Florida Bar Trial Lawyers’ Section, “[c]ounsel should not inquire into a deponent’s personal affairs or question a deponent’s integrity where such inquiry is irrelevant to the subject matter of the deposition.”

2. **Objections.** Rule 1.310(c), Florida Rules of Civil Procedure, provides that “[a]ny objection during a deposition shall be stated concisely and in a nonargumentative and non-suggestive manner.” According to the “Guidelines for Professional Conduct” of The Florida Bar Trial Lawyers’ Section, “[w]hen objecting to the form of a question, counsel should simply state ‘I object to the form of the question.’ The grounds should not be stated unless asked for by the examining attorney. When the grounds are then stated they should be stated succinctly and only what is necessary to state the grounds should be stated.”

3. **Instructions.** “A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d) [to terminate or limit a deposition].” Fla. R. Civ. P. 1.310(c).

E. **Inadvertent disclosure.** “An attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney’s receipt of the documents. It is up to the sender to take any further action.” (Opinion 93-3)

1. **Rule 4-4.4(b).** In 2006, the Florida Supreme Court codified the concept in Opinion 93-3 by amending Rule 4-4.4(b) to state that a lawyer “who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” The Comment, also amended in 2006, explains: “Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived.”

2. **No waiver or disqualification.** In *Kusch v. Ballard*, 645 So.2d 1035 (Fla. 4th DCA 1994), the court concluded that an inadvertent disclosure of a document did not waive the attorney/client privilege and would not require disqualification of either attorney. See also *Cunningham v. Appel*, 831 So.2d 214 (Fla. 5th DCA 2002); Dorothea Beane and Heath Nailos, *Inadvertent Disclosure of Attorney-Client Privilege Material: Putting the Horse Back in the Barn*, Fla. B. J., Oct. 1995 at 67; John T. Hundley, Annotation, *Waiver of Evidentiary

3. **Disqualification.** However, in *Abamar Housing and Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So.2d 572 (Fla. 3d DCA 1998), rev. denied, 729 So.2d 918 (Fla. 1999), the court held that the inadvertent receipt of privileged documents was grounds for disqualification regardless of whether prejudice resulted from the disclosure. In a footnote, the court explained that “an attorney who follows the dictates of the Ethics Opinion [i.e., Opinion 93-3, *supra*], and complies with the obligation to *promptly notify* and to *return immediately* the inadvertently produced documents without exercising any *unfair* advantage (such as photocopying the ‘confidential documents’ prior to returning them), will not be subject to disqualification.” (emphasis by the court). See also *General Accident Insur. Co. v. Borg-Warner Acceptance Corp.*, 483 So.2d 505 (Fla. 4th DCA 1986) (firm disqualified after receiving privileged file as a result of judge’s error).

4. **Unfair informational advantage.** In *Moriber v. Dreiling*, 95 So.3d 449 (Fla. 3d DCA 2012), the court explained that there must be an “inadvertent disclosure” and the “possibility” of a resulting “unfair informational advantage” to warrant disqualification. To determine whether there was an unfair advantage the court must look at “the actions taken by the receiving lawyers,” citing *Abamar, supra*.

5. **Actions of receiving lawyer.** In *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So.2d 1117 (Fla. 3d DCA 2008), the court, noting that a law firm “fell far short of satisfying the requirements” of *Abamar Housing, supra*, and gained an unfair informational advantage, held that not only the individual lawyer who reviewed the inadvertently produced documents – but the entire law firm – must be disqualified. A concurring judge explained that “[b]ecause there is no requirement that prejudice be shown ... and it is so difficult to measure how much of an advantage, if any, was obtained due to the inadvertent disclosure of privileged documents, the court must look to the actions taken by the receiving lawyer or law firm in determining whether the drastic remedy of disqualification is warranted.” See also Etan Mark, *Inadvertent Document Productions and the Threat of Attorney Disqualification*, Fla. B.J., Nov. 2009 at 9.

6. **Vacated order.** In *Coral Reef of Key Biscayne Developers, Inc. v. Lloyds’ Underwriters at London*, 911 So.2d 155 (Fla. 3d DCA 2005), a trial court ordered disclosure of documents, rejecting an argument that they were privileged. However, after the documents had been produced, the trial court’s order was vacated by the appellate court, which concluded that the documents were privileged. The party who
produced the documents then moved to disqualify opposing counsel based on Abamar, supra. The appellate court denied the motion, stating: “[w]e hold that a higher standard must apply for disqualifying counsel when the privileged documents are received pursuant to a court order that is subsequently vacated.” The court said it was persuaded by a Texas court which had concluded in a similar case that “the party moving to disqualify counsel must show that (1) the opposing counsel’s review of the privileged documents caused actual harm to the moving party, and (2) disqualification is necessary because the trial court lacks means to remedy the moving party’s harm.”

7. Test for waiver. In Nova Southeastern University, Inc. v. Jacobson, 25 So.3d 82 (Fla. 4th DCA 2009), the court confirmed that “the relevant circumstances test” should be applied in determining whether an inadvertent disclosure of documents results in the waiver of the attorney-client privilege. That test includes the following five factors: “1) the reasonableness of the precautions taken to prevent inadvertent disclosure ...; 2) the number of inadvertent disclosures; 3) the extent of the disclosure; 4) any delay and measures taken to rectify the disclosures; and 5) whether the overriding interests of justice would be served by relieving a party of its error.”

8. Federal Court. Rule 502, Federal Rules of Evidence (adopted in 2008), provides that the “inadvertent” disclosure of privileged material does not result in a waiver of attorney-client and work product privileges so long as the holder of the privileges “took reasonable steps to prevent disclosure” and “promptly took” reasonable steps to rectify the error.

9. New Florida Rule of Civil Procedure. Rule 1.285, Florida Rules of Civil Procedure, effective January 1, 2011, provides that a party asserting that inadvertently disclosed documents are privileged must do so by serving a written notice within 10 days of discovering the disclosure. A party receiving such a notice “shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the materials.” If the receiving party wishes to challenge the claim of privilege, a “notice of challenge” must be served within 20 days.

F. Documents wrongfully obtained by client. If your client has wrongfully obtained documents from the opposing party, you “must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party” that you and the client have the documents. “If the client refuses to consent to disclosure,” you must withdraw but you remain bound by confidentiality obligations to the client. (Opinion 07-1)
1. Disqualification. In Minakan v. Husted, 27 So.3d 695 (Fla. 4th DCA 2010), a dissolution of marriage case, the wife obtained and provided to her counsel an email between her husband and his counsel. The appellate court instructed the trial court to “determine whether the husband treated the e-mail as confidential and, if so, whether the wife gained an unfair advantage in discovering it and having it forwarded to her attorney. If the court determines that the wife gained an unfair advantage, then disqualification of the wife’s attorneys may be appropriate. Regardless of whether the wife gained an unfair advantage, however, disqualification and other sanctions still may be appropriate under the ‘inequitable conduct doctrine’ if the court finds that the wife, in bad faith, discovered the e-mail and had it forwarded to her attorney. If disqualification is not appropriate, the court can consider lesser remedies, such as precluding any discovery based on the email’s contents, precluding the use of the email at trial, or both.”

2. Sanctions. In Castellano v. Winthrop, 27 So.3d 134 (Fla. 5th DCA 2010), a party illegally obtained a USB drive containing privileged and confidential information, which was reviewed by the party’s law firm (“Firm”). The Firm was not only disqualified but ordered to delete from its computers all information obtained from the USB drive and “to make their computers available for third-party inspection to confirm deletion of this information – all at the Firm’s expense.” The Firm and the client were also ordered to indemnify the opposing party “for any damages he might suffer from the improper use” of the information, and the trial court reserved jurisdiction to award attorneys’ fees to the opposing party. The appellate court, referencing Opinion 07-1, denied a petition for certiorari.

G. Metadata. Metadata is “information describing the history, tracking, or management of an electronic document,” which may be inadvertently transmitted. Opinion 06-2 requires lawyers to “take reasonable steps to safeguard the confidentiality of all communications sent by electronic means ... and to protect ... all confidential information, including ... metadata.” The Opinion also prohibits a receiving lawyer from trying to obtain metadata that is not intended for the lawyer. Issues relating to metadata can usually be avoided by sending electronic documents in PDF.

IX. TRIAL

A. Communication with the court. “A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.” (4-3.5(a)) A lawyer shall only communicate with a judge “as to the merits or the cause” as provided in 4-3.5(b).
B. **Conduct in court.** “A lawyer shall not engage in conduct intended to disrupt a tribunal.” (4-3.5(c))

C. **Candor - law.** A lawyer shall not make a false statement of law to a tribunal “or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” (4-3.3(a)(1)) Furthermore, a lawyer shall not knowingly “fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” (4-3.3(a)(3))

D. **Candor - facts.** A lawyer shall not knowingly “make a false statement of fact” to a tribunal or “fail to correct a false statement of material fact ... previously made to the tribunal by the lawyer.” (4-3.3(a)(1)) Furthermore, a lawyer shall not knowingly “fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.” (4-3.3(a)(2)) In *The Florida Bar v. Corbin*, 701 So.2d 334 (Fla. 1997), an attorney was suspended for 90 days for deliberately misrepresenting facts in a motion for summary judgment.

E. **Evidence believed to be false.** “A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.” (4-3.3(c)) However, “[a] lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact.” (4-3.3 Comment)

F. **Evidence known to be false.** A lawyer shall not knowingly “offer evidence that the lawyer knows to be false.” (4-3.3(a)(4))

1. **Obligation to prevent perjury.** “If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence.” (4-3.3 Comment) “A lawyer whose client has repeatedly stated that the client will commit perjury must withdraw from the representation and inform the court of the client’s intent to lie under oath.” (Opinion 04-1)


G. **False evidence – remedial measures.** “If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer
comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.” (4-3.3(a)(4))

1. **Disclosure.** “If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially if circumstances permit. In any case, the advocate should ensure disclosure is made to the court. It is for the court then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.” (4-3.3 Comment)

2. **Withdrawal.** If a client offers false testimony, “then the lawyer must convince the client to agree to disclosure and remediation of the false testimony; failing that, the lawyer must disclose to the court anyway. Absent client consent, the lawyer’s disclosure of the client’s false testimony or intent to offer false testimony will create a conflict between the lawyer and the client requiring the lawyer to move to withdraw from representation.” (Opinion 04-1)

3. **Privilege.** The duties in Rule 4-3.3 apply “even if compliance requires disclosure of information otherwise protected by rule 4-1.6.” (4-3.3(d))

4. **Conclusion of Proceeding.** The duties in Rule 4-3.3 “continue beyond the conclusion of the proceeding.” (4-3.3(d))

5. **False name.** One situation in which it has been determined that withdrawal from representation, without disclosure, is a sufficient remedial measure is when a criminal defendant is proceeding under a false name. According to Opinion 90-6, “[a] lawyer who learns that a criminal defendant who is an existing client is proceeding under a false name must withdraw from representation and must admonish the client not to commit perjury, but cannot disclose the client's use of the false name to the court unless the client makes an affirmative misrepresentation to the court regarding the name.”

6. **Depositions.** An attorney who learns that a client has lied in a deposition is obligated to utilize the remedial measures described above, even if the deposition has not been filed with the court. (Opinion 75-19, as affirmed and clarified in 1998, and 4-3.3 Comment)

   See *The Florida Bar v. Dupee*, 160 So.3d 838 (Fla. 2015)

H. **Attorney as witness.** Rule 4-3.7 provides that “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client....” (emphasis added).
1. **Exceptions.** This rule does not apply if “disqualification of the lawyer would work substantial hardship on the client” or if the attorney’s testimony relates to: an uncontested issue; a matter of formality; or the nature and value of legal services rendered in the case. (4-3.7)

2. **Called by adversary.** “An attorney need not withdraw from representation of a client simply because he expects to be called to testify by his adversary; rather, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.” (Opinion 72-2) In *Ray v. Stuckey*, 491 So.2d 1211 (Fla. 1st DCA 1986), the court stated that such testimony is prejudicial “only when sufficiently adverse to the factual assertions or account of events offered on behalf of the client.” See also *Allstate v. English*, 588 So.2d 294 (Fla. 2d DCA 1991) (disqualification order quashed where there was no evidence that attorney’s testimony would be prejudicial to client or that attorney was the only witness who could provide contemplated testimony) and *Alto Const. Co., Inc. v. Flagler Const. Equipment, LLC*, 22 So.3d 726 (Fla. 2d DCA 2009) (“an attorney that will be called as a witness by an opposing party may be disqualified if the attorney’s testimony will be ‘sufficiently adverse to the factual assertions or account of events offered on behalf of the client.’”).

3. **Pre-trial matters.** Disqualification as counsel at trial because an attorney may be called as a witness does not necessarily extend to pretrial or appellate matters. See *Cerillo v. Highley*, 797 So.2d 1288 (Fla. 4th DCA 2001) (holding that attorney may participate in pre-trial proceedings but cannot try the case if he will be a witness at trial); *Columbo v. Puig*, 745 So.2d 1106 (Fla. 3d DCA 1999) (attorney not disqualified from representing client at deposition even though likely to be necessary fact witness at trial); *Fleitman v. McPherson*, 691 So.2d 37 (Fla. 1st DCA 1997) (holding that attorney who is an indispensable witness in a client’s case may not represent the client at trial but “may participate in the representation up until trial and after the trial.”); *KMS Restaurant Corp. v. Searcy, Denney, Scarola, Barnhart & Shipley, P.A.*, 107 So.3d 552 (Fla. 4th DCA 2013) (“The fact that counsel will be a material witness does not preclude him from participating in proceedings before and after trial.”) This rule also applies in Florida’s federal courts. *In re: Thompson*, 2006 WL 1598112 (11th Cir.)

4. **No imputation.** This disqualification is personal and other attorneys in the same firm may represent the client at trial unless precluded from doing so because of a conflict of interest. (4-3.7(b)) See *City of Lauderdale Lakes v. Enterprise Leasing Co.*, 654 So.2d 645 (Fla. 4th DCA 1995).
I. Mary Carter agreements. In *Dosdourian v. Carsten*, 624 So.2d 241 (Fla. 1993), the Florida Supreme Court stated that Mary Carter agreements “by their very nature, promote unethical practices by Florida attorneys” and concluded that “the only effective way to eliminate” their “sinister influence” was “to outlaw their use.” The Court defined the typical Mary Carter agreement as “a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants,” and the Court further explained that: “[w]e include within our prohibition any agreement which requires the settling defendant to remain in the litigation....” See also, *La Costa Beach Club Resort Condominium Association v. Carioti*, 37 So.3d 303 (Fla. 4th DCA 2010).

1. **High-low agreements.** “It is unclear whether the Supreme Court in *Dosdourian* intended to outlaw high-low agreements in addition to ‘Mary Carter agreements’... If the trial court concludes that the ‘high-low agreement’ is not a settlement and the co-defendant still has a genuine incentive to defend, then in our view the agreement would not be prohibited by *Dosdourian.*” *Garrett v. Mohammed*, 686 So.2d 629 (Fla. 5th DCA 1996), rev. denied, 697 So.2d 510 (Fla. 1997). Similarly, in *Gulf Industries, Inc. v. Nair*, 953 So.2d 590 (Fla. 4th DCA 2007), the court held that a high-low agreement was not prohibited; the court also held that the agreement did not need to be disclosed to the jury. However, in *State Farm Mutual Automobile Insurance Co. v. Thorne*, 110 So.3d 66 (Fla. 2d DCA 2013), the Court held that a high-low agreement, based upon its particular terms, should have been disclosed to the jury. See Michael L. Forte, *Admissibility of High-low Agreements in Multi-defendant Litigation*, Fla. B. J., December 2013 at 26.

2. **Charades.** In *Dosdourian*, “we took a strong stand against charades in trials. To have the U.M. insurer, which by statute is a necessary party, not be so named to the jury is a pure fiction in violation of this policy.” *Government Employees Insurance Co. v. Krawzak*, 675 So.2d 115 (Fla. 1996).

J. **Disparage or discriminate.** A lawyer shall not “engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic....” (4-8.4(d))
K. Fairness. In trial, a lawyer shall not “allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant....” (4-3.4(e))

1. Appellate courts have overturned jury verdicts due to arguments that violated this rule. *Sacred Heart Hospital of Pensacola v. Stone*, 650 So.2d 676 (Fla. 1st DCA), *rev. denied*, 659 So.2d 1089 (Fla. 1995); *Dutcher v. Allstate Ins. Co.*, 655 So.2d 1217 (Fla. 4th DCA 1995).

L. Trial Publicity. A lawyer shall not make an extra judicial statement to be disseminated by means of public communication if the lawyer knows or should know that the statement “will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.” A lawyer must also “exercise reasonable care” to prevent others, who are associated with the lawyer, from doing so. (4-3.6)

1. Rule 4-3.6 was amended in 1994 to conform with *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), which held that a publicity rule similar to Florida's prior rule was unconstitutionally vague.

M. Investigation of prospective juror's internet presence. Rule 4-3.5(d) prohibits communication with any member of the venire prior to trial and any member of the jury during trial. Does this prohibit a lawyer from reviewing a juror’s (or a prospective juror’s) internet presence, such as Facebook pages?

1. No, according to ABA Formal Opinion 466, issued on April 24, 2014, which says:

   - “[A] lawyer may passively review a juror’s public presence on the Internet, but may not communicate with a juror.”
   - “Requesting access to a private area on a juror’s ESM (electronic social media) is communication” and therefore prohibited.
   - “The fact that a juror or potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication” that would violate Model Rule 3.5 (upon which Rule 4-3.5 is based).
   - “If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable
remedial measures including, if necessary, disclosure to the tribunal."

2. “There is no prohibition in Florida law against an attorney researching jurors before, during, and throughout a trial so long as the research does not lead to contact with a juror. An attorney is not obligated to inform the court of such research unless it affects the fairness of the trial and the administration of justice.” Tenev v. Thurston, 198 So.3d 798, 802 (Fla. 2d DCA 2016) (reversing award of sanctions against an attorney who had moved to strike juror after client’s wife discovered that juror was a Facebook friend of a party’s employee).

N. Voir dire. Comments designed only “to ingratiate” an attorney to potential jurors and “focus their attention on irrelevant matters” (such as mentioning that an attorney has a son the same age as the decedent) should not be made during voir dire. Bocher v. Glass, 874 So.2d 701 (Fla. 1st DCA 2004).

1. A comment during voir dire by defense counsel, who was hired by an insurer, that “I’m a consumer justice attorney” representing an individual, rather than a company, was deemed to be a misleading suggestion that the individual would pay any adverse judgment and an improper “appeal to the jury to protect that individual from a harmful verdict.” Hollenbeck v. Hooks, 993 So.2d 50 (Fla. 1st DCA 2008).

O. Opening statements. In an opening statement, counsel is prohibited “both legally and ethically” from “telling the jury he will prove something he cannot prove or that is doubtful.” Chin v. Caiaffa, 42 So.3d 300 (Fla. 3d DCA 2010).

P. Coaching witnesses. While the CFO of the plaintiff was on the witness stand, being questioned about whether a key document had been received, the sole shareholder of the company sent him two text messages concerning the document. The trial court declared a mistrial and dismissed the case with prejudice. The appellate court affirmed, explaining that plaintiff’s conduct constituted a “blatant showing of fraud, pretense, collusion or other similar wrongdoing.” Sky Development, Inc. v. Vistaview Development, Inc., 41 So.3d 918 (Fla. 3d DCA 2010).

Q. Violating orders granting motions in limine. In a personal injury action, the appellate court affirmed a trial court’s decision to strike the defendant’s pleadings because of defense counsel’s “conscious, intentional acts” violating orders that granted motions in limine. Adams v. Barkman, 114 So.3d 1021 (Fla. 5th DCA 2012).

R. Closing arguments. Florida courts have ruled upon the propriety of the following types of arguments:
1. General. “[C]losing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response rather than the logical analysis of evidence in light of the applicable law.” *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010 (Fla. 2000).

2. Golden rule. “An argument that jurors place themselves in the plaintiff’s shoes, commonly referred to as a ‘golden rule’ argument, is impermissible ... because it encourages the jury to ... decide the case on the basis of personal interest and bias rather than on the evidence.” *Schreidell v. Shoter*, 500 So.2d 228 (Fla. 3d DCA 1986), *rev. denied*, 511 So.2d 299 (Fla. 1987). Arguing that clients would “walk past” $6 million to press a “magic button” to bring their son back was deemed an improper golden rule argument because its only purpose was to suggest that the jurors imagine themselves in the place of the parents. *Bocher v. Glass*, 874 So.2d 701 (Fla. 1st DCA 2004).

3. Conscience of community. “Appeals to ‘community conscience’ and ‘civic responsibility’ are inappropriate.” *Superior Industries International, Inc. v. Faulk*, 695 So.2d 376 (Fla. 5th DCA 1997). For example, it is improper to argue: “I want to send a message to the community” so others “won’t think they can get away with stealing some elderly folks’ monies.” *Murphy v. Murphy*, 622 So.2d 99 (Fla. 2d DCA 1993). However, such arguments are appropriate when there is a claim for punitive damages. *Ocwen Financial Corp. v. Kidder*, 950 So.2d 480 (Fla. 4th DCA 2007).

4. Overcrowded courtrooms and insurance crisis. References to “overcrowded courtrooms” and the “insurance crisis” are deemed to be improper appeals to the conscience of the community. *Davidoff v. Segert*, 551 So.2d 1274 (Fla. 4th DCA 1989); *Stokes v. Wet ‘N Wild, Inc.*, 523 So.2d 181 (Fla. 5th DCA 1988).

5. Nationalistic appeals. Repeated references to how business is conducted “in America” (when the opposing party was a company owned by foreigners) were strongly criticized by two judges in *Telemundo Network, Inc. v. Spanish Television Services, Inc.*, 812 So.2d 461 (Fla. 3d DCA 2002). The following question was certified to the Supreme Court: “are unobjected to comments made during closing argument which appeal to a jury’s racial, ethnic, religious or xenophobic prejudices, sufficient to justify an appellate court’s finding of fundamental error....?”

7. **Appeals to jurors’ self-interest.** It is improper to ask jurors to consider the effect that a verdict might have on them as taxpayers. *Davis v. South Florida Water Mgmt. District*, 715 So.2d 996 (Fla. 4th DCA 1998). Similarly, suggesting a relationship between verdicts in automobile cases and rising insurance premiums is “clearly” an “improper tactic.” *Russell v. Guider*, 362 So.2d 55 (Fla. 4th DCA 1978), *cert. denied*, 368 So.2d 1373 (Fla. 1979).

8. **Currying favor with jury.** Counsel’s comment in closing that he “liked the jury when he picked them and he likes them now” was “inappropriate ... unprofessional and should be met by rebuke.” *Kelley v. Mutnich*, 481 So.2d 999 (Fla. 4th DCA 1986).

9. **Referring to jurors by name.** Two Florida cases suggest that it is not proper to refer to jurors by name during closing argument. See *Bocher v. Glass*, 874 So.2d 701 (Fla. 1st DCA 2004); *Cummins Alabama, Inc. v. Allbritten*, 548 So.2d 258 (Fla. 1st DCA 1989).

10. **Familial rhetoric.** “Irrelevant familial rhetoric” (such as an attorney telling a story about walking in the woods with his grandfather or an attorney mentioning that he has a child the same age as the decedent) “must not be condoned.” *Bocher v. Glass*, 874 So.2d 701 (Fla. 1st DCA 2004).

11. **Attacks on counsel.** “[I]t is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury.” *Owens-Corning Fiberglass Corp. v. Crane*, 683 So.2d 552, 554-55 (Fla. 3d DCA 1996). Accordingly, asking the jurors if “they would buy a used car” from opposing counsel is “utterly and grossly improper.” *Jackson v. State*, 421 So.2d 15 (Fla. 3d DCA 1982). “[T]he repeated use of the term ‘B.S.’ [in describing the opposing party’s argument] was not only clearly improper, but also highly unprofessional.” *Lingle v. Dion*, 776 So.2d 1073 (Fla. 4th DCA 2001). See also *Sanchez v. Nerys*, 954 So.2d 630, 632 (Fla. 3d DCA 2007) (argument that defense counsel was “‘pulling a fast one,’ ‘hiding something,’ and ‘trying to pull something,’ was tantamount to calling defense counsel liars and accusing them of perpetrating a fraud upon the court and jury,” requiring a new trial).

12. **“Whatever it takes.”** A statement in a closing argument that “the City would ‘do whatever it takes to try to win this case’ suggests that the City is engaging in improper or less than honest tactics.” *Orlando v. Pineiro*, 66 So.3d 1064 (Fla. 5th DCA 2011).
13. **Criticism for defending case.** Arguments by plaintiff’s counsel suggesting that defendant should not have contested liability and should not have presented a particular defense were deemed improper in *Carnival Corporation v. Pajares*, 972 So.2d 973 (Fla. 3d DCA 2007).

14. **“Shameful” and failure to take responsibility.** Describing a defense as “shameful” or arguing that a defendant has “never taken responsibility” is improper. *State Farm Mutual Automobile Ins. Co. v. Thorne*, 110 So.3d 66 (Fla. 2d DCA 2013).

15. **Lack of remorse or apology.** Arguments that the jury “did not see one bit of remorse of any of the officers who testified in trial” and that not one of the officers “looked over at mom during the trial and said sorry for your loss” were “improper” because they suggested that “the City is doing something wrong by either vigorously defending itself or not showing proper sympathy or empathy.” *Orlando v. Pineiro*, 66 So.3d 1064 (Fla. 5th DCA 2011).

16. **Failure to conduct “honest, fair” investigation.** A reference to “the City’s alleged failure to conduct an ‘honest, fair’ investigation into Alvarado’s death was also improper.” *Orlando v. Pineiro*, 66 So.3d 1064 (Fla. 5th DCA 2011).

17. **Attacks on experts.** Describing an opposing expert as “nothing more than an unqualified doctor who prostitutes himself for the benefit of lawyers” warranted a new trial in *Venning v. Roe*, 616 So.2d 604 (Fla. 2d DCA 1993). *See also, King v. Byrd*, 716 So.2d 831 (Fla. 4th DCA 1998) (“We specifically condemn counsel’s use of the term ‘hired gun’ to refer to a defense expert.”)

18. **Vouching.** Counsel’s comment that he “had heard nothing but wonderful things” about his client was deemed improper (as were his references to opposing witnesses as “a good soldier” and “this joker”). *Walt Disney World Company v. Blalock*, 640 So.2d 1156 (Fla. 5th DCA 1994).

19. **Statements unsupported by record.** Defense counsel’s argument that “any Plaintiff’s attorney always asks for at least ten or fifteen times what they want” was deemed to be “improper rhetoric” that “does considerable harm to the already impaired reputation of the legal profession,” in *Hartford Accident & Indemnity Co. v. Ocha*, 472 So.2d 1338 (Fla. 4th DCA 1985).

20. **Nullification.** “Nullification arguments [i.e., asking the jury to disregard the law] have absolutely no place in a trial....” *Ligget Group, Inc. v.*
Engle, 853 So.2d 434 (Fla. 3d DCA 2003), approved in part, reversed in part, Engle v. Liggett Group, Inc., 945 So.2d 1246 (Fla. 2006).

21. **Wealth or poverty.** “In Florida, the general rule is that during trial no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other’s.” Sossa v. Newman, 647 So.2d 1018 (Fla. 4th DCA 1994).

22. **Personal opinions.** While Rule 4-3.4(e) specifically prohibits a lawyer from stating a personal opinion, the “use of the personal pronoun ‘I’ is not, in and of itself, improper...use of the phrases ‘I think’ and ‘I believe’ did not impermissibly express a personal opinion, but was instead merely a figure of speech.” Murphy v. International Robotic Systems, Inc., 766 So.2d 1010 (Fla. 2000).

23. **Calling party a liar.** “[I]t is not improper for counsel to state during closing argument that a witness ‘lied’ or is a ‘liar,’ provided such characterizations are supported by the record.” Murphy v. International Robotic Systems, Inc., 766 So.2d 1010 (Fla. 2000). Rule 4-3.4(e) was amended, effective January 1, 2006, to say that an attorney may not “state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law.” An amendment to the Comment to the rule discusses Murphy, supra.

24. **“Value of human life” argument.** Arguments that “place a monetary value on the life of the decedent” (such as by comparing the value of a life to the value of a painting or a jet) are not proper. Wilbur v. Hightower, 778 So.2d 381 (Fla. 4th DCA 2001). See also Chin v. Caiaffe, 42 So.3d 300 (Fla. 3d DCA 2010) (asking jury to consider value of a Picasso painting in determining damages in a personal injury case “was highly improper and grounds for reversal”).

25. **Failure to call witness.** When non-party witnesses are “equally available” to both parties “no inference should be drawn or comments made on the failure of either party to call the witness.” State v. Michaels, 454 So.2d 560 (Fla. 1984). However, in that case the uncalled witness was the defendant’s daughter, and the court held that a comment on the defendant’s failure to call her was permissible, even though she was “equally available,” because of “the parent-child relationship which would normally bias her toward supporting her father’s defenses.” In Wall v. Costco Wholesale Corp., 857 So.2d 975, 976 (Fla. 3d DCA 2003), the Court held that defense counsel’s comments regarding the plaintiff’s failure to call her daughter to testify were improper when defense counsel knew that the daughter was estranged from her parents and had disappeared. See also Lowder v.
Economic Opportunity Family Health Center, Inc., 680 So.2d 1133 (Fla. 3d DCA 1996) (indicating that “current employees” of one party may not be “equally available” to the other party). With regard to expert witnesses, the court held in Gianos v. Baum, 941 So.2d 581 (Fla. 4th DCA 2006), that it was reversible error to prevent a party from commenting on another party’s failure to call an expert witness. Also, a party may comment on the fact that an opposing party failed to testify regardless of the party’s availability. Fino v. Nodine, 646 So.2d 746 (Fla. 1st DCA 1994).

26. Failure to present excluded evidence. If you are successful in excluding certain evidence or a witness from a trial, may you comment in closing on your adversary’s failure to present that evidence? No, according to Carnival Corporation v. Pajares, 972 So.2d 973 (Fla. 3d DCA 2007). “Case law indicates it is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented.” JVA Enters., I, LLC v. Prentice, 48 So.3d 109, 115 (Fla. 4th DCA 2010).

X. POST-TRIAL

A. Communication with jurors. Before and during the trial, as noted above, a lawyer shall not “communicate or cause another to communicate” with anyone known to be a member of the venire from which the jury will be selected or, subsequently, with any member of the jury. Furthermore, after dismissal of the jury, a lawyer shall not “initiate communication” (or cause another to initiate communication) with any juror regarding the trial except “to determine whether the verdict may be subject to legal challenge.” (4-3.5(d))

1. Notice. Even when trying “to determine whether the verdict may be subject to legal challenge,” a lawyer may not interview a juror unless the lawyer has a reason to believe that grounds for such challenge may exist, and, before conducting any such interview, the lawyer must file and serve a notice. (4-3.5(d))

2. Motion. The Florida Rules of Civil Procedure set forth a procedure for interviewing jurors that varies from the procedure in the Rules of Professional Conduct: “A party who believes that grounds for legal challenge to a verdict exist may move for an order permitting an interview.... The motion shall be served within fifteen days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time.” (1.431(h))

3. Violation of rules. When the facts supporting allegations of juror misconduct were obtained in violation of the rules, a motion to
interview jurors should be denied. *Walgreens, Inc. v. Newcomb*, 603 So.2d 5 (Fla. 4th DCA 1992), *rev. denied*, 613 So.2d 7 (Fla. 1993).

4. **Contempt.** In *Alan v. State*, 39 So.3d 343 (Fla. 1st DCA 2010), an attorney who telephoned a juror without obtaining permission from the court (and after the court had denied an oral request for permission to obtain the juror’s medical records) was found guilty of indirect criminal contempt and sentenced to 5 months and 29 days in jail. (While this decision is based in part on a criminal rule of procedure, that rule is very similar to Rule 1.431(h), as quoted above, so the result could be the same in a civil case.)

B. **Appeals.** After an adverse result, “the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.” (4-1.3)

1. **Duty to appeal?** If you send a letter advising your client of appellate rights and receive no response, should you file a notice of appeal just in case your client might decide to pursue an appeal? No, according to *W.J.E. v. Department of Children and Family Services*, 731 So.2d 850 (Fla. 3d DCA 1989) ("[C]ounsel, having fulfilled all his ethical obligations and duties, should not have filed the appeal.")

2. **Settlement pending appeal.** If you settle a case while an appeal is pending, do you have a duty to inform the court? “When a pending appeal becomes moot by reason of a settlement, rule 9.350(a) requires counsel to notify the appellate court immediately by filing a signed stipulation for dismissal of the appeal.” *Merkle v. Guardianship of Jacoby*, 912 So.2d 595 (Fla. 2d DCA 2005).

XI. **RULES HAVING GENERAL APPLICABILITY**

A. **Misconduct generally.** Rule 4-8.4, titled “Misconduct,” enumerates many categories of prohibited misconduct, and Rule 3-4.3 explains that “any act that is unlawful or contrary to honesty and justice... may constitute cause for discipline,” regardless of whether the act is committed outside the state or in the course of practicing law.

1. **Examples.** Specific prohibitions in Rule 4-8.4 include: dishonesty; stating or implying “an ability to influence improperly a government agency or official”; conduct that is “prejudicial to the administration of justice”; willfully refusing to “timely pay a child support obligation”; and engaging “in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.”
2. **Sex with clients.** Rule 4-8.4 provides that when sexual conduct begins after the formation of the attorney-client relationship, there is a rebuttable presumption of a violation of the rules. (4-8.4) In *The Florida Bar v. Bryant*, 813 So.2d 38 (Fla. 2002), the Florida Supreme Court suspended an attorney for one year noting that “[t]his court will strictly enforce the rule against lawyers engaging in sexual conduct with a client that exploits the lawyer-client relationship.” In *The Florida Bar v. Senton*, 882 So.2d 997 (Fla. 2004), the court disbarred an attorney who had sex with a client and lied about it under oath. In *The Florida Bar v. Roberto*, 59 So.3d 1101 (Fla. 2011), the Court held that an attorney’s sexual relationship with a client “created a conflict of interest between” the attorney’s “own interests and those of his client.”

3. **Fraudulent transfers.** In *The Florida Bar v. Draughon*, 94 So.3d 566 (2012), a lawyer who engaged in a fraudulent transfer was suspended for one year. Even though the lawyer was not representing a client, “the Court expects members of The Bar to conduct their personal business affairs with honesty and in accordance with the law.”

4. **Misrepresentations about personal finances.** In connection with purchasing a cooperative apartment in New York City, a Florida lawyer made misrepresentations to the cooperative apartment board about his ownership interest in his law firm and failed to disclose that 100% of his purchase price was borrowed. The Florida Supreme Court rejected the referee’s recommendations of a 30 day suspension, and suspended the lawyer for 91 days. *The Florida Bar v. Adler*, 126 So.3d 244 (Fla. 2013).

5. **Forum and judge shopping.** Rule 4-8.4(d) prohibits conduct that is “prejudicial to the administration of justice,” and forum shopping has been deemed to violate this rule. *The Florida Bar v. Klein*, 774 So.2d 685 (Fla. 2000). According to *In re: Bellsouth Corp.*, 334 F.3d 941 (11th Cir. 2003), “every court considering attempts to manipulate the random assignment of judges has considered it to constitute a disruption of the orderly administration of justice.” See also *McCuin v. Texas Power and Light Co.*, 714 F. Supp. 1255 (5th Cir. 1983) (“The general rule of law is clear: a lawyer may not enter a case for the primary purpose of forcing the presiding judge’s recusal”). *In Grievance Administrator v. Fried*, 570 N.W.2d 262, 267 (Mich. 1997), the Supreme Court of Michigan held that “[A] lawyer who joins a case as co-counsel, and whose principal activity on the case is to provide recusal, is certainly subject to discipline.” The consequences of judge shopping can be severe; according to *Alvarado v. Bank of America, N.A.*, 2009 WL 720875 (E.D. Cal. 2009), “a district court has inherent power to dismiss a case due to judge shopping as part of its power to sanction conduct that abuses the judicial process.”
B. Competence – technology. Rule 4-1.1 requires lawyers to provide “competent representation,” which is defined to include “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Effective January 1, 2017, the Comment to the Rule was amended to add the following:

Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications. (emphasis added)

1. CLE and technology. At the same time, Rule 6-10.3 was amended to provide:

   (b) Minimum Hourly Continuing Legal Education Requirements. Each member must complete a minimum of 33 credit hours of approved continuing legal education activity every 3 years.... 3 of the 33 credit hours must be in approved technology programs. (emphasis added)

2. Sufficient procedures. In Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC, 227 So.3d 752 (Fla. 1st DCA 2017), a party moved for relief from an order on the basis that a copy of it had not been received in time to file an appeal. The trial court denied the motion, and the appellate court affirmed, explaining: “[c]ounsel has a duty to have sufficient procedures and protocols in place to ensure timely notice of appealable orders. This includes use of an email spam filter with adequate safeguards and independent monitoring of the court’s electronic docket.”

C. Supervising attorneys. According to Rule 4-5.1, lawyers with managerial authority must “make reasonable efforts to ensure” that the firm “has in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct.” Further, a supervising lawyer must “make reasonable efforts to ensure” that lawyers being supervised conform to the Rules of Professional Conduct.

   1. Responsibility. A lawyer may be responsible for another's violation of the Rules of Professional Conduct if the lawyer “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.” (Rule 4-5.1(c)(2)) “Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the
supervisor as well as the subordinate has a duty to correct the resulting misapprehension.” (4-5.1 Comment)

D. Nonlawyer assistants. “Although paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of the lawyer, the lawyer shall review and be responsible for the work product....” (4-5.3(c)) The Comment to this Rule was amended in 2006 to explain that the Rule “requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct.”

E. Outsourcing. A lawyer may “engage the services of an overseas provider, as long as the lawyer adequately addresses” relevant ethical obligations relating to supervision, confidentiality, consent to disclose information, and billing. (Opinion 07-2)

F. Trust account procedures and records. All lawyers are required to maintain minimum trust accounting records as described in Rule 5-1.2(b), and those records must be maintained “for 6 years subsequent to the final conclusion of each representation in which the trust funds or property were received.” (5-1.2(d)) Moreover, all lawyers are required to follow minimum trust accounting procedures, as set forth in Rule 5-1.2(c), such as monthly reconciliations.

1. Disbarment. In The Florida Bar v. Rousso, 117 So.3d 756 (2013), a nonlawyer bookkeeper embezzled millions of dollars over an extended period of time. Even though the two lawyers in the firm did not profit from the theft and they went to extraordinary lengths to deal with the problem after it was discovered, they were disbarred because, among other reasons, they failed to follow the “minimum trust accounting procedures,” which would have revealed the problem quickly and limited the extent of the theft.

G. Trust accounts – written plan for compliance. Effective June 1, 2014, Rule 5-1.2(c)(1) was amended to provide that: “Every law firm with more than 1 lawyer must have a written plan in place for supervision and compliance with this rule for each of the firm’s trust accounts.” The written plan must include the names of specific lawyers in the firm who will be responsible for signing checks, reconciling accounts and answering questions. The written plan must be circulated to all lawyers in the firm.

H. Trust property - generally. “Money or other property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose.” (5-1.1(b))
1. **Standard of care.** “A lawyer must hold property of others with the care required of a professional fiduciary.” (Rule 5-1.1 Comment)

2. **Commingling.** “A lawyer must hold in trust, separate from the lawyer’s own property, funds and property of clients or third persons that are in a lawyer’s possession in connection with a representation.” (5-1.1(a)(1)) (emphasis added)
   
a. “Earned fees” must **not** be placed in a trust account, but deposits or retainers for unearned fees and future costs must be placed in a trust account. (Opinion 93-2; see also Rule 5-1.2 Comment)

b. Rule 5-1.1(a)(1)(A) allows lawyers to “maintain funds belonging to the lawyer in the lawyer’s trust account in an amount no more than is reasonably sufficient to pay bank charges relating to the trust account.”

c. Rule 5-1.1(a)(1)(B) states that: “A lawyer may deposit the lawyer’s own funds into a trust to replenish a shortage in the lawyer’s trust account. Any deposits by the lawyer to cover trust account shortages must be no more than the amount of the trust account shortage, but may be less than the amount of the shortage. The lawyer must notify the bar’s lawyer regulation department immediately of the shortage in the lawyer's trust account, the cause of the shortage, and the amount of the replenishment of the trust account by the lawyer.”

3. **No set-off.** “Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or set-off for attorney’s fees, and a refusal to account for and deliver over the property on demand is conversion.” (5-1.1(b)) However, this rule does not “preclude the retention of money or other property upon which a lawyer has a valid lien for services” or “the payment of agreed fees from the proceeds of transactions or collection.” (5-1.1 Comment)
   
a. In *The Florida Bar v. Bratton*, 413 So.2d 754 (Fla. 1982), the Court disciplined an attorney for refusing to return $10,000 that had previously been posted as a bond in a foreclosure proceeding and applying it against unpaid fees, explaining that property delivered for a specific purpose is not subject to a lien.

4. **Safe deposit boxes.** If a lawyer uses a safe deposit box to store trust property, the lawyer “shall advise the institution” that the box “may include property of clients or third persons.” (5-1.1(a)(3))
5. **IOTA.** “All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing from an office or other business location within the state of Florida must be deposited into one or more IOTA accounts” (subject to certain exceptions). (5-1.1(g)(2)) While a lawyer must exercise good faith judgment in determining whether funds are “nominal or short-term,” the rule specifically provides that “no lawyer will be charged with ethical impropriety or other breach of professional conduct based on the exercise of the lawyer’s good faith judgment.” (5-1.1(g)(3))

6. **Cleared funds.** May a lawyer disburse funds from a trust account in reliance upon a deposited check which has not yet “been finally settled and credited to the account?” Generally, the answer is “no” but there are exceptions for certain types of checks, including certified or cashiers checks and checks from an insurance company authorized to do business in Florida or checks drawn on a trust account from a member of The Florida Bar (so long as there is a “reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer’s trust account within a reasonable period of time”). (5-1.1(j))

7. **Garnishment.** Funds held by a lawyer in a trust account are subject to garnishment. If checks have been drawn on a trust account but have not cleared at the time a lawyer is served with a writ of garnishment, does the attorney have an obligation to stop payment on the checks? Yes. *Arnold, Matheney & Eagan, P.A. v. First American Holdings, Inc.*, 982 So.2d 628 (Fla. 2008). See also Comment to Rule 5-1.1.

8. **Indemnity agreements.** May a lawyer require a client to sign an indemnity agreement before releasing trust funds? No, at least under the circumstances set forth in Advisory Opinion 02-6, which involves a deposit in a real estate transaction.

9. **Overdraft protection.** “An attorney shall not authorize overdraft protection for any account that contains trust funds.” (5-1.1(k))

10. **Separate trust account.** Effective July 1, 2012, a separate trust account is required for “all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent.” Section 626.8473, Florida Statutes. An attorney is not permitted to allow a title insurance company to audit the separate trust account if it holds funds for transactions unrelated to the particular insurer requesting the audit, unless the affected clients give informed consent; however, “Consistent with Florida Ethics Opinion 93-5, a lawyer would not be required to obtain clients’ informed
consent to permit one title insurer to audit a separate trust account that is devoted exclusively to funds for clients’ transactions that are insured by the one title insurer requesting the audit, because the audit would serve the clients’ interests under Rule 4-1.6(c)(1).” Advisory Opinion 12-4 (August 21, 2013; revised March 12, 2014).

I. Proceeds from settlement or judgment. “A lawyer shall hold in trust, separate from the lawyer’s own property, funds and property of clients or third persons that are in a lawyer’s possession in connection with the representation.” (5-1.1(a)(1))

1. Client’s account. An attorney should not agree to a settlement requiring proceeds to be placed in an account with the client as the sole signatory because the attorney cannot fulfill responsibilities to third parties, such as medical providers, and participate in the IOTA program. (Opinion 00-2) However, according to Opinion 00-2 (Reconsideration), adopted January 21, 2005, “a lawyer may participate in an arrangement where an insurance company pays only that portion of the settlement proceeds owed directly to the client into a client’s financial account or to another recipient designated by the client ... however, a lawyer should not participate in a settlement if the funds deposited into the client’s account include the attorney’s fees, costs and funds to which a third party may have a claim.”

2. Notification of receipt. On receiving funds in which a client or a third person has an interest, “a lawyer must promptly notify” the client or third person. (5-1.1(e)) In The Florida Bar v. Silver, 788 So.2d 958 (Fla. 2001), an attorney was publicly reprimanded for failing to timely notify a doctor that settlement proceeds had been received.

3. Delivery of funds. A lawyer is required to deliver promptly any funds or other property that the client or a third person is entitled to receive and to provide an accounting upon request. (5-1.1(e))

   a. However, if there is a risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. (5-1.1 Comment; See also Rule 5-1.1(f))

4. Instructions not to pay. What if your client instructs you not to pay a creditor who has demanded payment from settlement proceeds you are holding?

   a. According to the Comment to Rule 5-1.1, a lawyer “may have a duty under applicable law” to protect a third-party claim, and “[w]hen the lawyer has a duty under applicable law to protect
the third-party claim and the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved.” The lawyer should not “unilaterally assume to arbitrate” a dispute between a client and a third party and “should consider the possibility of depositing the funds into the registry of the court.”

b. The Comment to Rule 5-1.1 also states: “[h]owever, where a lawyer is an escrow agent and represents a party to a transaction involving the escrowed funds, the Supreme Court of Florida has held that lawyers acting as escrow agents have a fiduciary duty to **protect the interests of all parties having an interest** in escrowed funds whether the funds are in a lawyer’s trust account or a separate escrow account.” (emphasis added)

c. In *The Florida Bar v. Silver*, 788 So.2d 958 (Fla. 2001), the Court stated that, “[q]uite apart from any legal duty on his part, the attorney has a professional duty to accomplish the disbursement of such funds in a matter (sic) which accords a proper regard and respect for the rights and legitimate expectations of his own creditors, as well as those of his client.” (emphasis added)

d. Opinion 02-4 states that “the lawyer may act as a negotiator for his client, but not as an arbitrator…. The lawyer should take no action which would be against his client’s interests unless fully confident that under the law such action must be taken … If possible, the client should be given an opportunity to seek independent legal counsel before any action is taken against the client’s interests, such as depositing the funds or property into the court registry…. In any event, the lawyer at all times must act as an advocate for the client in resolving the dispute.” The Opinion further states that “it is impossible for the Committee to announce any bright line rule that applies in all situations.”

e. Opinion 60-34 states: “It is improper for an attorney to advise his client’s creditors that he holds funds due to the client so that such creditor may proceed against them, nor is it proper for the lawyer to interplead such funds. It is the lawyer’s duty to represent his client with undivided fidelity and to preserve his confidences.”

f. In *Koenig v. Charles S. Theofilos, M.D., P.A.*, 933 So.2d 1293 (Fla. 4th DCA 2006), the court affirmed a summary judgment against a lawyer who failed to honor a letter of protection.
J. File retention. How long must an attorney retain client files before they may be discarded? According to Opinion 06-1, “There are very few Rules Regulating the Florida Bar that address records retention,” but various rules do require certain records (such as contingent fee agreements and closing statements, Statements of Insured Client’s Rights, advertising records and trust accounting records) to be retained for six (6) years. Before files are discarded, efforts must be made to contact clients, according to Opinion 81-8, and when files are discarded, reasonable efforts should be made to prevent unauthorized access to sensitive information. See FTC’s “Disposal Rule,” 69 Fed. Reg. 68,690. See also Opinions 63-3, 71-62 and 81-8, as well as ABA Informal Opinion 1384.

K. Electronic file retention. The Rules also say little about the method of file retention (except for certain specific documents such as trust account checks). Opinion 06-1 “encourages ... electronic file storage,” unless “a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client’s interests.” The Opinion goes on to emphasize that “electronic files must be readily reproducible and protected from inadvertent modification, degradation or destruction.”

L. Settlement agreements. While a case is pending or after a plaintiff’s verdict, defense counsel proposes a settlement in which plaintiff’s counsel must agree not to represent anyone else with a similar claim against the defendant. Is this permitted? A lawyer shall not participate in “an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.” (4-5.6(b)) This “prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.” (4-5.6 Comment) But see Lee v. Florida Department of Insurance, 586 So.2d 1185 (Fla. 1st DCA 1991) (“Rule does not reach agreements with or by the client to preclude the lawyer’s representation of other persons with respect to cases that involve the same facts, transactions, and events as does the case settled for the client.”) and Garfinkel v. Mager, 57 So.3d 221 (Fla. 5th DCA 2010) (The “public interest in ensuring that a litigant is free from the risk of opposition by a lawyer once privy to that litigant’s confidences” must be balanced with the public policy that “favors providing individuals with the right to retain an attorney of their choosing”; an agreement that properly balances these policies may be enforceable even though it restricts an attorney from accepting cases against a particular party.) There is an excellent discussion of this rule in Adams v. BellSouth, 2001 WL 34032759 (S.D. Fla.).
affects” the lawyer’s “ability to represent other clients” is “impermissible under Rule 4-5.6.”

2. Limiting use of information. ABA Opinion 00-417 states that a lawyer may not seek or agree to a settlement term prohibiting the lawyer’s future use of information obtained during the representation because “[a]s a practical matter ... this proposed limitation effectively would bar the lawyer from future representations....” (emphasis added).

3. Agreement to represent opposing party. In The Florida Bar v. St. Louis, 967 So.2d 108 (Fla. 2007), the Florida Supreme Court disbarred an attorney who agreed, as part of a settlement for his existing clients, to represent the opposing party in the future; the Court explained that “[t]he true purpose of the engagement was to create the appearance of a conflict,” which would prevent the lawyer from taking future cases against the defendant in violation of Rule 4-5.6(b).

M. Agreements to prevent reporting or withdraw grievance. Lawyers may not seek or assist in preparing an agreement to protect a lawyer from disciplinary charges. See The Florida Bar v. Frederick, 756 So.2d 79 (Fla. 2000) (attorney disciplined for conditioning refund of attorney’s fees on client’s agreement not to contact The Florida Bar); The Florida Bar v. Fitzgerald, 541 So.2d 602, 605 (Fla. 1989) (agreement not to file grievance is unenforceable); Jaffe v. Guardianship of Jaffe, 147 So.3d 578 (Fla. 3d DCA 2014) (“[A]n agreement conditioned upon the withdrawal of a Florida Bar complaint is unenforceable”).

N. Reporting violations. Lawyers have a duty to report a violation of the Rules of Professional Conduct by another lawyer if the violation raises “a substantial question” about the lawyer’s “honesty, trustworthiness, or fitness as a lawyer.” Likewise, a lawyer “who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.” However, this rule does not require disclosure of information protected by the confidentiality rule. (4-8.3)

O. Rule violations and malpractice. May a violation of the Rules of Professional Conduct be used as evidence of attorney malpractice? According to the Preamble to the Rules of Professional Conduct:

“Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.... The rules ... are not designed to be a basis for civil liability.... Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a

89

6.89
rule may be evidence of a breach of the applicable standard of conduct."

In Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A., 118 So.3d 867 (Fla. 3d DCA 2013), the appellate court held that “the decision to admit or exclude” evidence of violations of the Rules of Professional Conduct in an attorney malpractice case “remains vested in the broad discretion of the trial court, and will not be disturbed absent an abuse of that discretion.” Such evidence was not admitted in Greenwald, but, in contrast, it was admitted in Federal Deposit Insurance Corporation v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., 2013 WL 4402968 (M.D.Fla. 2013). See also Kathleen J. McKee, Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action, 50 ALR 5th 301 (1997).

P. Restricting right to practice. “A lawyer shall not participate in offering or making ... a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement...” (Rule 4-5.6(a))

1. No per se prohibition. The Rule does not create a “per se prohibition against severance agreements,” and it does not apply to the sale of a law practice in accordance with Rule 4-1.17. (4-5.6 Comment)

2. Example. An agreement stating that a law firm would be entitled to 75% of any fee from a client for whom a departing lawyer continued to perform legal services violates the Rule. (Opinion 93-4) Nevertheless, in Miller v. Jacobs & Goodman, P.A., 699 So.2d 729 (Fla. 5th DCA 1997), rev. denied, 717 So.2d 533 (Fla. 1998), the court held that “lawyers are free to enter into agreements which provide for post termination allocation of client fees.” Subsequent to this decision, the Board of Governors refused to recede from Opinion 93-4. Therefore, while such agreements may be enforced by some courts, the parties may be subject to discipline by The Florida Bar. See Restrictive agreements in law firms, Fla. B. News, June 1, 1999, at 26. (Fee splitting arrangements between law firms and departing lawyers are also discussed above in Section IV.)

Q. Leaving a firm. Rule 4-5.8 provides that “a lawyer who is leaving a law firm may not unilaterally contact ... clients ... unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication ... and bona fide negotiations have been unsuccessful.” The amended rule also describes the notice that may be given when negotiations have been unsuccessful. In 2012, the Florida Supreme Court suspended two lawyers who, while planning to leave a firm, unilaterally solicited the firm’s clients, took files without the firm’s permission and made misrepresentations. The Florida Bar v. Winters, 104 So.3d 299 (2012).
R. Selling a firm. May a law practice be sold? The answer was “no” prior to 1992, but Rules 4-1.17 and 4-5.4 now permit practices to be sold. See Advisory Opinion 03-1. In 2006, the Florida Supreme Court adopted an amendment to Rule 4-1.17, which permits the sale of the entire practice or the sale of an “entire area of practice” without selling the entire practice. (emphasis added)

S. Inventory attorneys. Rule 1-3.8(e), effective January 1, 2006, requires every bar member to designate another member who has agreed to serve as “inventory attorney” if the need arises. The main purpose of an inventory attorney is “to avoid prejudice to clients” of an attorney who ceases practicing, and a secondary purpose is to “prevent or reduce claims” against the attorney.

T. Multijurisdictional practice of law. Rule 4-5.5 has been extensively amended, effective January 1, 2006, to explain the circumstances under which lawyers from other states and other countries “may provide legal services on a temporary basis in Florida.” The rule now provides, among many other provisions, that a lawyer who is admitted in a state other than Florida may perform legal services in Florida on a “temporary basis” so long as the services “are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice” or “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” However, the rule states that such lawyers may not “establish an office or other regular presence in Florida for the practice of law.” The procedure for “Foreign Attorneys” to seek permission to appear in a Florida case is set forth in Rule 2.510, Judicial Administration Rules.

1. Rule 4-5.5 was further amended, effective January 1, 2009, to clarify, according to the Comment, that it “prohibits a lawyer who is not admitted to practice in Florida from appearing in a Florida court, before an administrative agency, or before any other tribunal in Florida unless the lawyer has been granted permission to do so.”

U. Criticizing judges. Rule 4-8.2(a) prohibits lawyers from making “a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”

1. Standard. In The Florida Bar v. Ray, 797 So.2d 556 (Fla. 2001), an attorney was publicly reprimanded for questioning a judge’s veracity and alleging that he was unfair. The Court, while emphasizing that it was not limiting “an attorney’s legitimate criticism of judicial officers,” explained that “the state’s compelling interest in preserving public confidence in the judiciary supports applying a different standard than applicable in defamation cases” and held that “the standard to be
applied is whether the attorney had an objectively reasonable factual basis for making the statements.”

2. First Amendment. In Ray, supra, the Florida Supreme Court concluded that the attorney had no “objectively reasonable factual basis” for making the statements, and, therefore, the Court rejected a First Amendment defense. Subsequently, in The Florida Bar v. Conway, 996 So.2d 213 (Fla. 2008), an attorney referred to a judge as an “Evil, Unfair Witch” or “EUW” in an internet blog and said she was “seemingly mentally ill,” among other statements. While the American Civil Liberties Union submitted a brief arguing that the attorney’s comments constituted protected free speech, The Florida Bar argued that the attorney had “no reasonable objective basis in fact” for the “personal attack” on the judge, and therefore his blogging did not constitute “protected free speech under the First Amendment.” The Supreme Court agreed with The Florida Bar and ordered a public reprimand. See John Schwartz, A Legal Battle: Online Attitude vs. Rules of The Bar, N.Y. Times, Sept. 12, 2009.
EXAMPLES OF ETHICS ISSUES WITH RECENT ACTIVITY

- May we ask for a gift from a client? (2018)
- May we accept referrals from the Avvo Advisor program? (2017)
- May a court impose “joint and several” liability on an attorney and a party pursuant to §57.105? (2017)
- Is a lawyer’s referral of a client to a doctor for treatment protected by the attorney-client privilege? (2017)
- Does being a Facebook “friend” with a judge constitute grounds to disqualify the judge? (2017)
- May we share legal fees with an out-of-state lawyer whose firm includes non-lawyer owners? (2017)
- Could we be disciplined merely because we have not attended courses relating to technology? (2017)
- May we pay a fact witness “for assistance with case and discovery preparations”? (2017)
- May we advise a client to remove information from a social media site in anticipation of litigation? (2015)
- If our trust account is overdrawn, may we deposit our own money in the account? (2015)

SOURCES OF ETHICS RULES

1. RULES REGULATING THE FLORIDA BAR
   A. ABA’s Model Rules of Professional Conduct, as modified and updated by The Florida Supreme Court
   B. Major revisions in 2013 and changes in 2014, 2015, 2016 and 2017

2. “ADVISORY OPINIONS” & “GUIDELINES” FROM THE FLORIDA BAR
   A. The Florida Bar’s Ethics Counsel, Professional Ethics Committee and Board of Governors have authority to issue advisory ethics opinions
   B. Advisory Opinions 16-1 and 16-2 were issued on October 21, 2016, and Advisory Opinion 17-1 was issued on June 23, 2017

3. JUDICIAL DECISIONS
   A. Disciplinary cases from the Supreme Court
   B. Other cases involving disqualification for conflicts, fees, and other ethics issues
"PROFESSIONALISM EXPECTATIONS"
Approved by Board of Governors January 30, 2015

"Essential Ingredients of Professionalism:
- character
- competence
- commitment
- civility

Marc Kasowitz, President Trump’s (former) personal attorney on the Russia investigation.

OATH OF ADMISSION

“To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”

In re Oath of Admission to The Florida Bar, 73 So.3d 149 (Fla. 2011)
“UNPROFESSIONAL CONDUCT”
(as defined by The Florida Supreme Court)

"'Unprofessional conduct' means substantial or repeated violations of:
• the Oath of Admission to The Florida Bar,
• The Florida Bar Creed of Professionalism,
• The Florida Bar Professionalism Expectations,
• The Rules Regulating The Florida Bar, or
• the decisions of The Florida Supreme Court.”

In re Amendments to the Code for Resolving Professional Complaints, 173 So.3d 995 (Fla. 2015)

IMPORTANCE OF KNOWING THE RULES

"As the number of lawyers increases to an unprecedented level, the responsibility of ensuring that all lawyers conduct themselves within the ethical bounds required by the Rules Regulating the Florida Bar continues to be a top priority for this Court." (emphasis added)

The Florida Bar v. Adorno, 60 So.3d 1016 (Fla. 2011)
IMPORTANCE OF KNOWING THE RULES

“. . . it is well established that ignorance of the law, especially by lawyers in disciplinary proceedings, is no excuse.”

*The Florida Bar v. Adorno*, 60 So.3d 1016 (Fla. 2011)

### Case Recommended Actual

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<tr>
<th>Case</th>
<th>Recommended</th>
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<td><em>The Florida Bar v. Cohen</em>,</td>
<td>Public reprimand</td>
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<td>157 So.3d 283 (Fla. 2015)</td>
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<td>60 days suspension</td>
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<td>(Fla. 2017)</td>
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<td>90 days suspension</td>
<td>3 year suspension</td>
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<td><em>The Florida Bar v. Marrero</em>,</td>
<td>3 year suspension</td>
<td>Disbarment</td>
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<td>157 So.3d 1020 (Fla. 2015)</td>
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<td>No violation</td>
<td>4 violations</td>
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<td>157 So.3d 1020 (Fla. 2015)</td>
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### OUTLINE AND REMARKS

1. Advertising and Solicitation
2. Conflicts of Interest
3. Attorneys’ Fees and Related Matters
4. Attorney-Client Relationship
5. Filing Suit and Pleadings
6. Communications with Adversaries, Parties, and Witnesses
7. Discovery and Evidence
8. Trial
9. Post-Trial
10. Rules Having General Applicability
CANON 27: ADVERTISING, DIRECT OR INDIRECT

"It is unprofessional to solicit professional employment. . . .

Indirect advertisements . . . offend the traditions and lower the tone of our profession and are reprehensible;

but the customary use of simple professional cards is not improper."

LAWYER ADVERTISING

“In the end, it will promote distrust of lawyers and disrespect for our own system of justice.”


SPECIALIST OR EXPERT

Rule 4-7.14(a)(4)

Lawyers can’t say they are "specialists" or "experts" unless they are certified by The Florida Bar (or by certain other entities having "comparable" standards).

This Rule was declared unconstitutional in Searcy v. The Florida Bar, 140 F. Supp. 3d 1290 (N.D. Fla. 2015)

The Florida Supreme Court declined to adopt proposed new rules on November 9, 2017.
Advertising or Solicitation?
Rule 4-7.11(a)

“All forms of communication seeking legal employment”

“Directed to a specific recipient”

SOLICITATION

“In-person”
• generally prohibited

“Written”
• permitted subject to reasonable regulations

STRICT ENFORCEMENT

“This Court will strictly enforce the rules that prohibit . . . improper solicitations and impose severe sanctions on those who commit violations of them.”

The Florida Bar v. Barrett
897 So.2d 1269 (Fla. 2005) (attorney disbarred).
IN-PERSON SOLICITATION

“I want to tell you how my firm can represent you effectively and efficiently.”

INADVERTENT SOLICITATION

A friend and client left a message for attorney stating that accident victim’s widow is “expecting his call.”

Spence, Payne, Masington & Grossman, P.A. v. Philip M. Gerson, P.A.
483 So.2d 775 (Fla. 3d DCA 1986)

POTENTIAL CONSEQUENCES OF IMPROPER SOLICITATION

• Forfeiture of fee
• Discipline by The Florida Bar
• Criminal charges
Rule 4-7.2

A lawyer shall not give anything of value to a person for recommending the lawyer’s services.

BONUSES TO NONLAWYERS

Rule 4-5.4(a)

“Bonus payments shall not be based on cases or clients brought to the lawyer or law firm by the actions of the nonlawyer.”

LAWYER REFERRAL SERVICES

“A lawyer may not accept referrals from a lawyer referral service unless it complies with the 11 conditions in Rule 4-7.22.

The Florida Supreme Court has asked the Bar to amend the Rule to clarify that lawyers can’t accept referrals from services that are “not owned or operated by a member of the Bar.” Amendments were proposed and rejected in 2017.

The Board of Governors has determined that the Avvo Advisor program is a lawyer referral service. As of January 18, 2018, the Avvo Advisor program was not in compliance with Rule 4-7.22.
OUTLINE AND REMARKS
1. Advertising and Solicitation
2. Conflicts of Interest
3. Attorneys’ Fees and Related Matters
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10. Rules Having General Applicability

CONFLICTS OF INTEREST
1. Existing Clients
2. Former Clients
3. Prospective Clients
4. Newly-Affiliated Lawyers and Non-Lawyer Employees

CONFLICTS - CURRENT CLIENTS
Rule 4-1.7, as amended in 2006
A lawyer shall not represent a client:
“. . . if the representation will be directly adverse to another client”
or
If there is a “substantial risk that the representation will be materially limited by responsibilities to”:
• another client;
• a former client;
• a third person; or
• “a personal interest of the lawyer”
IMPUTATION OF CONFLICTS
Rule 4.10(a)

A lawyer’s conflicts of interest are generally imputed to all lawyers who are “associated” with lawyer’s firm.

CONFLICT WAIVERS
CURRENT CLIENTS
Rule 4-1.7, as amended in 2006

Each affected client must give “informed consent, confirmed in writing or clearly stated on the record at a hearing.”

REPRESENTING MULTIPLE PARTIES
IN ONE LAWSUIT
Rules 4-1.7(c) and 4-1.8(g)

• Must explain “advantages and risks involved.”
• Duty of confidentiality among joint clients can be problematic. (Opinion 95-4)
• Can’t “participate in making an aggregate settlement” without written “informed consent.”
FAILURE TO OBTAIN "INFORMED CONSENT" OF MULTIPLE CLIENTS

Attorneys made aggregate settlement of claims against insurance companies for 441 clients without disclosing to all clients:

1. The total amount of the settlement.
2. The amount of fees going to each law firm.
3. The fact that some clients were waiving bad faith claims but others were not.

Result: Three attorneys disbarred.

The Florida Bar v. Kane, 282 So.3d 11 (Fla. Oct. 6, 2016)

RISKS OF DUAL REPRESENTATION

One lawyer represented both of the divorced parents of the decedent in a wrongful death case. The jury awarded $4,000,000 to the Mother but only $200,000 to the Father. The Father sued the lawyer for malpractice based, in part, on:

• the lawyer's alleged "unwillingness and reluctance to impeach the negative trial testimony of the Mother," and

• the lawyer's alleged failure to obtain the Father's "informed consent" to "joint representation," as required by Rule 4-1.7(b)(4)

Pitcher v. Zappitell, 160 So. 3d 145 (Fla. 4th DCA 2015) (summary judgment in favor of lawyer was reversed)

MAY AN ATTORNEY SIMULTANEOUSLY REPRESENT THE INSURER AND THE INSURED?

Yes, provided that their interests are not adverse. Progressive Express Ins. Co. v. Scoma, 954 So.2d 461 (Fla. 2d DCA 2007); See also Rule 4-1.8(c) and Comment.

However, the attorney's "primary duty" is to the insured.

Opinion 97-1
MAY AN ATTORNEY REPRESENT THE INSURED AND AN “ADDITIONAL INSURED”? 

Yes, sometimes, but not if both contend that the other was completely at fault.

University of Miami v. Great American Assurance Co. 112 So.3d 504 (Fla. 3d DCA 2013)

FORMER CLIENTS
Rule 4-1.9, as amended in 2006 

A lawyer may represent a party against a former client so long as the new matter and the former matter are not:

“substantially related.”

However, in any event, a lawyer cannot “use information relating to the representation to the disadvantage of the former client” unless “generally known” or subject to an exception in Rule 4-1.6.

FORMER CLIENTS
CONFLICTS OF INTEREST

May you withdraw from representing a client for the purpose of triggering the “former client” analysis?
HOT POTATO DOCTRINE

A lawyer may not “drop one client like a hot potato in order to treat it as though it were a former client for the purpose of resolving a conflict of interest dispute.”


CONFLICTS: FORMER CLIENTS
PASSAGE OF TIME

If at least ten (10) years have passed since you represented the former client in a substantially related matter, could you avoid disqualification?

No. “Notably, nothing in the rule or case law suggests that questions regarding conflicting representations turn on the passage of time.”

ASI Holding Company, Inc. v. Royal Beach & Golf Resorts, LLC., 163 So. 3d 648 (Fla. 1st DCA 2015).
PROSPECTIVE CLIENTS

If a lawyer receives an *unsolicited telephone call* from a prospective client, will the lawyer be disqualified from representing the opposing party?

*Garner v. Somberg, 672 So.2d 852 (Fla. 3d DCA 1996)*

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PROSPECTIVE CLIENTS

**Rulings**

- consultation "with the view to employing" attorney invokes privilege
- relationship gave rise to an "irrefutable presumption that confidences were disclosed"
- trial court erred in denying motion to disqualify

*Garner v. Somberg, 672 So.2d 852 (Fla. 3d DCA 1996)"

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PROSPECTIVE CLIENTS

If a lawyer receives an *unsolicited email* with confidential information from a prospective client, will the lawyer be disqualified from representing the opposing party?
ADVISORY OPINION 07-3 (2009)

- Person sending unsolicited information “has no reasonable expectation” that a lawyer will treat information as confidential.
- The lawyer will not have a conflict of interest in representing the person’s adversary.
- The lawyer may disclose the information or even use it against the person who sent it.
- Disclosure statement on website recommended.

CONFLICTS – ATTORNEY SWITCHING FIRMS

Chinese Wall?

Edward J. DeBartolo Corp. v. Petrin,
516 So.2d 6 (Fla. 5th DCA 1987)

CONFLICTS – SWITCHING FIRMS
Comment to Rule 4-1.10, as amended in 2006

Paralegal or Secretary

Rule 4-1.10(a) (which sets forth the general imputation rule) “does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary.”

Screening

“Such persons, however, ordinarily must be screened from any personal participation in the matter.”
POTENTIAL CONSEQUENCES
OF CONFLICTS

• Disqualification
• Grievance
• Malpractice suit
• Forfeiture of fees
• Setting aside judgment

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2. Conflicts of Interest
3. Attorneys' Fees and Related Matters
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5. Filing Suit and Pleadings
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9. Post-Trial
10. Rules Having General Applicability

ATTORNEYS’ FEES
Rule 4-1.5(a)

Lawyers may not charge fees that are “clearly excessive” or obtained through improper advertising or solicitation.
COMMUNICATION OF FEES
Rule 4-1.5(E)

When a lawyer "has not regularly represented the client," the basis of the fee "shall be communicated" within a "reasonable time after commencing the representation".

- "preferably in writing"
- nonrefundable fees "shall be confirmed in writing"
- contingent fees must be in writing

REFERRAL FEES IN PI CASES

- Joint Liability
- Full Disclosure
- Written consent
- 25% Maximum
- No Referral Fee if Conflict Exists

DIVISION OF FEES WITH OUT-OF-STATE LAWYERS

Opinion 17-1
June 23, 2017

"Florida Bar members may divide legal fees with an out-of-state lawyer whose firm includes non-lawyer ownership” subject to certain conditions.
MEDICAL LIENS

Must a lawyer receiving a maximum 40% contingent fee resolve “medical liens and subrogation claims” related to the underlying case as part of the representation?

In re: Amendments to Rule Regulating The Florida Bar 4-1.5 – Fees and Costs for Legal Services, 202 So. 3d 37 (Fla. 2016)

Advancing Expenses
Rule 4-1.8

(e) Financial Assistance to Client. A lawyer is prohibited from providing financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

WHAT TYPES OF MEDICAL EXPENSES MAY WE ADVANCE?

Comment, Rule 4-1.8(e)

• Diagnostic examination for litigation?
• Medical treatment?
MAY WE WAIVE REPAYMENT OF COSTS ADVANCED EVEN IF THERE IS A RECOVERY?

A. At the outset of a case?
   No. Opinion 96-1

B. After a settlement has been obtained?
   Yes, if there has been no such agreement at the outset and the attorney will receive no fee. Opinion 16-1

GIFTS

used clothing and $200 check for "basic necessities"

The Florida Bar v. Taylor, 648 So.2d 1190 (Fla. 1994)
(no discipline – "an act of humanitarianism")

$250 to buy "clothes, groceries, and other personal goods"

The Florida Bar v. Roberto, 59 So.3d 1101 (Fla. 2011)
(attorney disciplined - the rule “could not be more clear”)

LIMITING LIABILITY

Clauses limiting liability in professional services contracts are invalid and unenforceable.

Witt v. La Gorce Country Club, Inc., 35 So. 3d 1033 (Fla. 3d DCA 2010)
ASKING FOR A RELEASE

In a fee dispute with a client, may you propose a mutual release?

The Florida Bar v. Head, 84 So. 3d 292 (Fla. 2012), citing Rule 4-1.8(h)

OUTLINE AND REMARKS

1. Advertising and Solicitation
2. Conflicts of Interest
3. Attorney's Fees and Related Matters
4. Attorney-Client Relationship
5. Filing Suit and Pleadings
6. Communications With Adversaries, Parties, and Witnesses
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FIDUCIARY DUTY

“The relationship between an attorney and his or her client is a fiduciary relationship of the very highest character.”

Elkind v. Bennett,
958 So.2d 1088 (Fla. 4th DCA 2007)

“There is no relationship between individuals which involves a greater degree of trust and confidence than that of an attorney and client.”

Gerlach v. Donnelly,
98 So.2d 493 (Fla. 1957)
HIGHER CALLING

“Too many members of the Bar practice with complete ignorance of or disdain for the basic principle that a lawyer’s duty to his calling and to the administration of justice far outweighs – and must outweigh – even his obligation to his client.”

Boca Burger, Inc. v. Forum, 912 So.2d 561 (Fla. 2005)

SCOPE OF ATTORNEY CONFIDENTIALITY

Comment to Rule 4-1.6(a)

“The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

CONFIDENTIALITY v. PRIVILEGE}

The Code of Professional Responsibility protects more than confidential communications, it protects confidences and secrets of client and such protection is broader than evidentiary attorney-client privilege
PRIVILEGE

Is a lawyer’s referral of a client to a doctor for treatment protected by the attorney-client privilege?

Worley v. Central Florida Young Men's Christian Ass'n, Inc., 228 So. 3d 18 (Fla. 2017)

SCOPE OF CONFIDENTIALITY

Could a document that is filed in the public records be subject to the confidentiality rule?
CONFIDENTIALITY – PUBLIC RECORDS

"The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it."


CONFIDENTIALITY

Comment to Rule 4-1.6, as revised in 2006

“A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these rules.”

CONFIDENTIALITY

CONFLICTS OF INTEREST

Rule 4-1.6(c)(6), as amended effective October 1, 2015

A lawyer may reveal confidential information “to detect and resolve conflicts of interest” arising from a lawyer’s change of employment but only if there is no prejudice to the client.
CONFIDENTIALITY – MEDIATION

Party’s pleadings were stricken as sanction for disclosing to the media a settlement offer made during mediation.

Paranzino v. Barnett Bank,
690 So.2d 725 (Fla. 4th DCA 1997)

CONFIDENTIALITY – SETTLEMENT AGREEMENTS

“My conversation with my daughter was that it was settled and we were happy with the results.”

Gulliver Schools, Inc. v. Snay,
137 So.3d 1045 (Fla. 3d DCA 2014)
(order enforcing settlement reversed)

CONFIDENTIALITY

Rule 2.420

A "Notice of Confidential Information within Court Filing" must be filed pursuant to Rule 2.420(a)(2) with any document containing certain types of confidential information specified in Rule 2.420(d)(1).
CONFIDENTIALITY
Rule 2.420 (continued)

• A person filing a court document "shall ascertain", as required by Rule 2.420(d)(3), whether any information contained within the document may be confidential ... notwithstanding that such information is not itemized" in Rule 2.420(d)(1).

• If such non-itemized confidential information is identified, a "Motion to Determine Confidentiality of Court Records" must be filed pursuant to Rule 2.420(d)(3) or (e) or, alternatively, an "oral motion" may be made pursuant to Rule 2.420(h).

CONFIDENTIALITY
Rule 2.420 (continued)

Suggestion:
To avoid the risk of confidential information becoming public if a judge denies a "Motion to Determine Confidentiality of Court Records," consider filing a "Motion for In Camera Review" prior to filing the document with the confidential information.

SANCTIONS FOR FILING CONFIDENTIAL INFORMATION
Judicial Administration Rule 2.425(c)

Sanctions may be imposed against a person who files "designated sensitive information," identified in Rule 2.425(a), such as birth dates, social security numbers and email addresses.
CONFIDENTIALITY - AFTER TERMINATION OF RELATIONSHIP

"After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 4-1.16."

Comment to Rule 4-1.5; See also The Florida Bar v. Knowles, 99 So.3d 918 (Fla. 2012).

CONFIDENTIALITY - RESPONDING TO CRITICISM

If a former client posts a negative review of an attorney on AVVO, may the attorney defend herself by posting an explanation that includes confidential information?

CONFIDENTIALITY - RESPONDING TO CRITICISM

Rule 4-1.6(a)

"A lawyer may reveal [information relating to representation of a client] to the extent the lawyer reasonably believes necessary;...

(2) To establish a claim or a defense ... in a controversy between the lawyer and client; ...

(4) To respond to allegations in any proceeding concerning the lawyer's representation of the client;"
CONFIDENTIALITY - RESPONDING TO CRITICISM

- No Florida authority directly on point.
- New York Ethics Opinion 1032 (October 30, 2014):
  
  “A lawyer may not disclose client confidential information solely to respond to a former client’s criticism of the lawyer posted on a website that includes client reviews of lawyers.”
- In re: Skinner, 758 S.E.2d 788 (Georgia 2014):
  A lawyer received a public reprimand for responding to a negative review on the Internet by disclosing, among other facts, the identity of the client and the amount of fees paid.

CONFIDENTIALITY - RESPONDING TO CRITICISM

But there may be a remedy.

Blake v. Giustibelli, 182 So.3d 881 (Fla. 4th DCA 2016) (attorney awarded $350,000 in punitive damages for defamatory on-line review posted by former client)

CONFIDENTIALITY - DECEASED CLIENTS

Should a lawyer disclose information upon the request of a deceased client’s personal representative or beneficiary?
CONFIDENTIALITY - DECEASED CLIENTS
Advisory Opinion 10-3
February 1, 2011

- duty of confidentiality continues
- disclosure depends on circumstances
- may disclose "to serve the deceased client's interests" (unless client previously instructed not to do so)
- resolve doubts in favor of nondisclosure
- raise privilege when good faith basis exists
- if ordered to disclose, lawyer may disclose or "first exhaust all appellate remedies"

GIFTS FROM CLIENTS
Rule 4-1.8(c)
As amended, effective February 1, 2018

"A lawyer is prohibited from soliciting any gift from a client ... or preparing an instrument giving the lawyer or a person related to the lawyer any gift" (unless the lawyer or other recipient of the gift is related to the client). (emphasis added)

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PLEADING STANDARD
Rule 4-3.1

Lawyers shall not assert a position that is “frivolous.”

The Comment explains that a position is not “frivolous” if it is supported by a “good faith” argument.

57.105

Court shall award fees against the losing party and the losing party’s attorney if they “knew or should have known” that a claim or defense:

• was not supported by the material facts; or
• was not supported by “then-existing law” or “good faith argument” for modification “with a reasonable expectation of success.”

NO JOINT AND SEVERAL LIABILITY

The award of fees under 57.105 is to be paid “in equal amounts by the losing party and the losing party’s attorney.”

Section 57.105 does not authorize “joint and several liability” against the attorney and party.

Austin & Laurato, P.A. v. State Farm Florida Ins. Co., 229 So. 3d 911 (Fla. 5th DCA 2017)
57.105 – ATTORNEY LIABILITY

Attorney who “acted in good faith” based on representations of his or her client is not liable.

Ferdie v. Isaacson, 8 So.3d 1246 (Fla. 4th DCA 2009)

In the absence of good faith, the court may order the attorney to pay all of the fees plus damages.

Korte v. US Bank National Association, 64 So.3d 134 (Fla. 4th DCA 2011)

57.105 – CONFLICT OF INTEREST?

Because the attorney or the client (or both) may be liable for fees, 57.105 “appears to set up an inherent conflict.” An “ethical duty may arise” to explain the situation to the client and “perhaps go so far as to recommend getting independent counsel.”

Kerzner v. Lerman, 849 So.2d 1185 (Fla. 4th DCA 2003)
PURPOSE OF 57.105

"The purpose of 57.105 is to discourage baseless claims" and "not to cast a chilling effect on use of the courts" or "discourage a party from pursuing a colorable claim." Therefore, section 57.105 "should be applied with restraint."

Swan Landing Development, LLC v. First Tennessee Bank N.A., 97 So.3d 326 (Fla. 2d DCA 2012)

57.105

Could a lawyer ever be sanctioned for merely defending a trial court's order on appeal?

57.105 SANCTIONS AGAINST ATTORNEY FOR APPELLEE

"[A]llowing sanctions against appellees or their counsel for defending indefensible orders requires the quintessentially professional act of admitting defeat when there is no chance of victory, or when victory will have been obtained at the price of integrity and truth."

Boca Burger, Inc. v. Forum, 912 So.3d 561 (Fla. 2005)
Could a lawyer be sanctioned for adding a *Fabre* defendant to a lawsuit?

Yakavonis v. Dolphin Petroleum, Inc., 934 So.2d 615 (Fla. 4th DCA 2006)

COULD SOMEONE WHO IS NOT A PARTY TO THE LAWSUIT BE HELD LIABLE UNDER 57.105?

“For the purpose of assessing fees pursuant to section 57.105, the term ‘party’ includes all “who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of [the] proceedings.”

Zwiebach v. Gordimer, 884 So.2d 244 (Fla. 2d DCA 2004)

OUTLINE AND REMARKS

1. Advertising and Solicitation
2. Conflicts of Interest
3. Attorney’s Fees and Related Matters
4. Attorney-Client Relationship
5. Filing Suit and Pleadings
6. Communications with Adversaries, Parties, and Witnesses
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8. Trial
9. Post-Trial
10. Rules Having General Applicability
PAYMENT TO FACT WITNESS

"Offering financial inducements to a fact witness is extremely serious misconduct."

_The Florida Bar v. Wohl_, 842 So.2d 811 (Fla. 2003)
(attorney suspended for 90 days)

PAYMENT TO FACT WITNESS

Rule 4-3.4(b)
(effective June 1, 2014)

A lawyer shall not "offer an inducement to a witness."

However, "a lawyer may pay ... reasonable compensation to reimburse a witness for loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings." (emphasis added)

However, "a lawyer may pay ... reasonable compensation to a witness for time spent preparing for, attending, or testifying at proceedings." (emphasis added)

PAYMENT TO FACT WITNESSES

"[T]he rule does not expressly state that witnesses may be paid for 'assistance with case and discovery preparations.' But . . . we hold that the rule's language is broad enough to encompass such payments."

_Trial Practices, Inc. v. Hahn Loeser & Parks, LLP_, 228 So. 3d 1184 (Fla. 2d DCA 2017)

Note: The 2d DCA certified this issue to the Florida Supreme Court.
CONTACTING OPPOSING PARTY’S EMPLOYEES

CURRENT EMPLOYEES
- Prohibited as to those:
  - "who have managerial responsibility"
  - "whose act or omission may be imputed"
  - "whose statements may constitute admissions"

FORMER EMPLOYEES
- Generally permitted
- But cannot discuss privileged matters

H.B.A. Management, Inc. v. Estate of Schwartz, 693 So.2d 541 (Fla. 1997); Opinions 78-4 and 88-14

FORMER EMPLOYEES – FEDERAL COURT

Plaintiff's counsel could contact former managers of insurance company who worked on Plaintiff’s claims “but must do so through Defense counsel.”


FORMER EMPLOYEES – FEDERAL COURT GUIDELINES

1. Confirm no longer employed
2. Confirm not represented
3. Advise of right to counsel
4. Advise of right to decline to talk
5. Advise not to disclose privileged matters
6. Preserve notes and statements

Lang v. Reedy Creek Improvement District, 988 F. Supp. 1143 (M.D. Fla. 1995)
EMPLOYEES & INDEPENDENT CONTRACTORS
Rule 4-5.3 (Comment)

“A lawyer must give” assistants, including secretaries, paralegals and investigators, “appropriate instruction and supervision concerning the ethical aspects of their employment.”

PRIVATE INVESTIGATORS

How bad could it get?

U.S. v. Christensen
828 F.3d 763 (9th Cir. 2015),
petition for certiorari denied 2017

OUTLINE AND REMARKS

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ADVISORY OPINION 14-1
June 25, 2015

May we advise a client to change privacy settings on social media in anticipation of litigation?

Yes, “a lawyer may advise that a client change privacy settings on the client’s social media pages so that they are not publicly accessible.”

ADVISORY OPINION 14-1
June 25, 2015

May we advise a client to remove information and photos from a social media site in anticipation of litigation?

Yes, “as long as an appropriate record of the social media information or data is preserved.”

INADVERTENT DISCLOSURE
Rule 4-4.4, as amended in 2006

A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.
INADVERTENT DISCLOSURE
STEPS AFTER NOTIFICATION
COMMENT TO RULE 4-4.4(b), as amended in 2006

“Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived.”

CONSEQUENCES OF INADVERTENT DISCLOSURE

Will the attorney who receives privileged documents be disqualified?

Abamar Housing v. Lisa Daly, 724 So.3d 918 (Fla. 1999)
(attorney who returns documents immediately “without exercising any unfair advantage” will not be disqualified)

CONSEQUENCES OF INADVERTENT DISCLOSURE

If privileged documents are inadvertently produced, will the privilege be waived?
WAIVER OF PRIVILEGE

Five Factors Test
• reasonableness of precautions to prevent disclosure
• number of disclosures
• extent of disclosures
• promptness in trying to rectify
• overriding interests of justice

Nova Southeastern University, Inc. v. Jacobson,
25 So.3d 82 (Fla. 4th DCA 2009)

RULE 502
FEDERAL RULES OF EVIDENCE
(Adopted in 2008)

"Inadvertent" disclosure does not waive privilege if:
• Reasonable steps to prevent disclosure
• Prompt action to rectify the error

RULE 1.285
FLORIDA RULES OF CIVIL PROCEDURE
(Effective January 1, 2011)

Party asserting that inadvertently disclosed documents are privileged must serve written notice within 10 days of discovering the inadvertent disclosure.
• Recipient must “promptly return, sequester or destroy” materials
• Recipient may dispute privilege by serving notice within 20 days
DO\textsc{documents wrongfully obtained by client}

What do you do if your client brings you documents obtained by hacking into a computer or other improper means?

\textsc{documents wrongfully obtained by client}

Opinion 07-1

- Inform client that documents cannot be "retained, reviewed or used without informing the opposing party."
- If client refuses to disclose, attorney must withdraw
- Confidentiality remains
- Advise client to get criminal representation?

\textsc{consequences of using usb drive obtained unlawfully}

- Disqualification
- Firm's computers examined by third party at firm's expense
- Indemnify opposing party for all resulting damages
- Pay opposing party's fees

\textit{Castellano v. Winthrop, 27 So.3d 134 (Fla. 5th DCA 2010)}
OUTLINE AND REMARKS
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FALSE EVIDENCE
Opinion 04-1
Evidence **BELIEVED** to be false
vs.
Evidence **KNOWN** to be false

REASONABLE REMEDIAL MEASURES
Rule 4-3.3(a)(4)
"If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures."
Mandatory Disclosure
Opinion 04-1

If . . . the client offers false testimony, then the lawyer must convince the client to agree to disclosure and remediation of the false testimony; failing that, the lawyer must disclose to the court anyway.

FALSE EVIDENCE
Depositions

“Remedial measures” required even if deposition is not filed.

Opinion 75-19
and
The Florida Bar v. Dupee
160 So.3d 838 (Fla. 2015)

COMMUNICATIONS WITH PROSPECTIVE JURORS
Rule 4-3.5

A lawyer may not “communicate” with anyone the lawyer knows to be a member of the jury pool or with any juror.

Question
May a lawyer review a prospective juror’s Facebook pages?
ABA FORMAL OPINION 466
(April 24, 2014)

• We may “passively review” a juror’s “public presence” on the Internet
• We may not request access to a “private area” on a juror’s social media pages

What if a prospective juror becomes aware that a lawyer is reviewing his Internet presence as a result of a notification from a network setting?

RESEARCHING JURORS

“There is no prohibition in Florida law against an attorney researching jurors before, during, and throughout a trial so long as the research does not lead to contact with a juror.”

Tenev v. Thurston, 198 So.3d 798, 802 (Fla. 2d DCA 2016) (reversing award of sanctions against an attorney who had moved to strike juror after client’s wife discovered that juror was a Facebook friend of a party’s employee).

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POST-TRIAL COMMUNICATION WITH JURORS

Lawyer shall not "initiate" communication with any juror except "to determine whether the verdict may be subject to legal challenge" (4-3.5(d))

- Must file and serve notice before interviewing (4-3.5(d))
- Must file motion within 15 days of verdict (or later with good cause) for permission to interview (1:431(h))
- SJI 801.4 provides that while lawyers may not "initiate" communications, jurors "may speak to the lawyers" about the trial

CONSEQUENCES OF IMPROPER POST-TRIAL CONTACT WITH JURORS

- may not be able to use information obtained
  
  *Walgreens, Inc. v. Newcomb*, 603 So.2d 5 (Fla. 4th DCA 1992) (motion to interview jurors denied)

- may be held in contempt
  
  *Alan v. State*, 39 So.3d 343 (Fla. 1st DCA 2010) (attorney sentenced to jail)

SETTLEMENT AGREEMENTS

May an attorney agree not to accept any similar cases as part of a settlement?

- Opinion 04-2 (any agreement that "negatively affects the lawyer's ability to represent other clients" is not "permissible under Rule 4-5.6")
- *The Florida Bar v. St. Louis*, 967 So.2d 108 (Fla. 2007) (attorney disbarred for violating rule)
- *Garfinkel v. Mager*, 57 So.3d 221 (Fla. 5th DCA 2010) (such an agreement may be enforceable if it balances policies of allowing people to retain attorneys of their choice and protecting confidential information)
OUTLINE AND REMARKS

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GENERAL MISCONDUCT

Rule 3-4.3: Lawyers may be disciplined for any act that is “contrary to honesty and justice” even if:
- not specifically enumerated;
- not in Florida, and
- not in the course of practicing law

PERSONAL FINANCES

In connection with purchasing an apartment in New York City, a Florida attorney:
- exaggerated his ownership interest in a Florida law firm and
- failed to disclose that 100% of his purchase price was being financed.

The Florida Bar v. Adler, 126 So.3d 244 (Fla. 2013) (91 day suspension)
TECHNOLOGY AMENDMENTS
(effective January 1, 2017)

Rule 4-1.1  COMPETENCE

Comment
Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.

Rule 6-10.3  MINIMUM CONTINUING LEGAL EDUCATION STANDARDS

(b) Minimum Hourly Continuing Legal Education Requirements

3 of the 33 credit hours must be in approved technology programs.

CONFIDENTIALITY – HARD DRIVES
Opinion 10-2

A lawyer who uses devices with hard drives must:

• keep abreast of technology (to identify potential threats to confidentiality)
• develop and implement policies
• supervise non-lawyers
• confirm device has been stripped of all confidential information after disposal
SUFFICIENT ELECTRONIC PROCEDURES

“Counsel has a duty to have sufficient procedures and protocols in place to ensure timely notice of appealable orders. This includes use of an email spam filter with adequate safeguards and independent monitoring of the court’s electronic docket.”

Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC,
227 So. 3d 752 (Fla. 1st DCA 2017)

TRUST ACCOUNTS

If you discover that your bookkeeper has embezzled trust funds, what should you do?

• hire outside counsel?
• hire outside accountant?
• call The Florida Bar?
• contact the police?
• use your personal funds to cover part of the deficit?
• borrow funds to cover part of the deficit?

The Florida Bar v. Rousso,
117 So.3d 756 (Fla. 2013)
(attorneys disbarred)

TRUST ACCOUNTS

Rule 5-1.1(a)(1)

May you deposit your own funds into your trust account to replenish a shortage?

Yes, as of October 1, 2015, but you must notify The Florida Bar.
FACEBOOK “FRIENDS”

Does being a Facebook “friend” with a judge constitute grounds to disqualify the judge?

Yes, Facebook “friendship” is grounds for disqualification.

Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012)

No, Facebook “friendship” is not grounds for disqualification.

Law Offices of Herssein and Herssein, P.A. v. United States Automobile Association, 229 So. 3d 408 (Fla. 3d DCA 2017)


CRITICIZING JUDGES

Rule 4-8.2(a)

Prohibits false statements concerning the “qualifications or integrity of a judge.”

• First Amendment applies
• Standard: “reasonable objective basis in fact” for criticism?
• EUW

The Florida Bar v. Conway, 996 So.2d 212 (Fla. 2008) (approving Referee’s Report)
THEMES

- Ethics rules frequently change and evolve.
- Reliance solely on one's instincts, experience and sense of "right and wrong" can be problematic.
- Lawyers need to keep up to date with developments relating to ethics just as we keep up to date with substantive laws in our practice areas.
ELECTRONIC DISCOVERY

By

US. Magistrate Judge Mac R. McCoy
Fort Myers
Carlos A. Baradat
Naples
E-Discovery Practice & Procedure

2018 Civil Trial Update & Board Certification Review
The Florida Bar
Trial Lawyers Section
February 2, 2018

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Hon. Mac R. McCoy
United States Magistrate Judge
United States District Court
Middle District of Florida
Fort Myers Division
DISCUSSION AGENDA
• Federal Rules v. Florida Rules
• Proportionality & Accessibility
• Top 3 E-Discovery Cases You Should Know
• Other Useful Case Law
• Practical Considerations
• Resources

FEDERAL RULES

KEY FEDERAL RULES
• Rule 16. Pretrial Conferences; Scheduling; Management.
• Rule 26. Duty to Disclose; General Provisions Governing Discovery.
• Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things.
• Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.
FED. R. CIV. P. 16

- Governs use of pretrial conferences, scheduling orders, and case management.
- Requires the trial court to enter a scheduling order within a specified timeframe.
- Rule prompts the parties and the court to address ESI early and productively.

FED. R. CIV. P. 16(3)(B)

- The scheduling order may, among other things:
  - modify the extent of discovery;
  - provide for disclosure, discovery, or preservation of ESI; and
  - include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Fed. R. Evid. 502.
FED. R. CIV. P. 26(f)

- Requires the parties to confer and, among other things:
  - discuss any issues about *preserving discoverable information*, and
  - develop a proposed *discovery plan*.

FED. R. CIV. P. 26(f)(3)

- Discovery plan must state the parties' views and proposals on, among other things:
  - the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
  - any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; and
  - any issues about claims of privilege or of protection as trial-preparation materials, including if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

FED. R. CIV. P. 26(a)(1)(A)(ii)

- Governs mandatory initial disclosures.
- Must, without awaiting a discovery request, provide to the other parties a copy—or a description by category and location—of all documents, *electronically stored information*, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.
FED. R. CIV. P. 34
• A document request may specify the form or forms in which ESI is to be produced. Rule 34(b)(1)(C).
• An objection must state whether any responsive materials are being withheld on the basis of that objection. Rule 34(b)(2)(C).
• Responding party may object to the requested form for producing ESI. If responding party objects – or if no form was specified in the request – the responding party must state the form or forms it intends to use. Rule 34(b)(2)(D).

FED. R. CIV. P. 34
• If a request does not specify a form for producing ESI, the responding party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. Rule 34(b)(2)(E)(ii).
• Party need not produce the same ESI in more than one form. Rule 34(b)(2)(E)(iii).

FED. R. CIV. P. 37(e)
If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
FED. R. CIV. P. 37(e)
(1) upon finding *prejudice* to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

FED. R. CIV. P. 37(e)
(2) only upon finding that the party acted with the *intent to deprive* another party of the information’s use in the litigation may:
(A) presume that the lost information was unfavorable to the party;
(B) instruct the jury that it may or must presume the information was unfavorable to the party; or
(C) dismiss the action or enter a default judgment.

FLORIDA RULES
KEY FLORIDA RULES

• Rule 1.201. Complex Litigation.
• Rule 1.280. General Provisions Governing Discovery.
• Rule 1.350. Production of Documents and Things.
• Rule 1.380. Failure to Make Discovery; Sanctions
• Rule 1.285. Inadvertent Disclosure of Privileged Materials


• Meet & Confer not mandatory.
• Great opportunity to discuss:
  • ESI agreements
  • Form of production
  • Search terms and time-frames
  • Cooperation and shared costs

Rule 1.201. Complex Litigation.

• Resembles 26(f) meet and confer.
• Only mandatory if falls under "complex litigation" definition.
• Not easy to qualify.
Rule 1.280. General Provisions Governing Discovery. (FRCP 26)
• First look at proportionality.
• Sets forth ESI limitations.
• Cost shifting.
• Can object if not reasonably accessible because of burden or cost.
• A request of discovery that might otherwise be denied because of undue burden or cost, might be saved by knowing where the ESI is located.
• Might be burdensome to retrieve information from archived backups, but not from a virtual cloud server.

Rule 1.350. Production of Documents and Things. (FRCP 34)
• Form in which it is being produced
• Whatever ESI you ask for, other side will most likely ask the same of you.
• Failure to list all categories of requested “documents” can lead to the omission of key data sources and important information.
• “Be careful what you wish for” as a native file is only as good as the software that you have to use it.

Rule 1.380. Failure to Make Discovery; Sanctions (FRCP 37)
• Very similar to FRCP 37 language.
• Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI – as a result of the routine, good faith operation of an electronic information system.
• Landry v. Charlotte Motor Cars (Fla. 2d DCA 2017)
  • 3 step inquiry 1. Did the ESI exist 2. Was there a duty to preserve 3. Was it crucial to prove the prima facie case or defense.
Rule 1.285. Inadvertent Disclosure of Privileged Materials
• Not identical to FRCP
• Because of the vast amount of ESI today –
  • “it isn’t a matter of if, but when”
• Clawback agreement
  • … Inadvertently produced documents can be returned upon demand without waiving the attorney-client privilege, regardless of the circumstances under which they were disclosed.

Federal v. Florida
Other Key Differences
• Proportionality analysis is framed differently.
• Mechanics of addressing inadvertent disclosure of privileged materials are different.
• Florida has not (yet) adopted the current (post-2015) Federal Rules standard for sanctions.

PROPORTIONALITY & ACCESSIBILITY
Fed R. Civ. P. 26(b)(1)
• Limits the scope of discovery to any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering . . .

Fed R. Civ. P. 26(b)(1)
• the importance of the issues at stake in the action,
• the amount in controversy,
• the parties’ relative access to relevant information,
• the parties’ resources,
• the importance of the discovery in resolving the issues, and
• whether the burden or expense of the proposed discovery outweighs its likely benefit.

See also Fed R. Civ. P. 26(b)(2)(B)
• Imposes specific limitations on discovery of ESI based on accessibility:
  • A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost.
  • On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.
  • If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).
• The court may specify conditions for the discovery.
TOP 3 CASES YOU SHOULD KNOW

1. Zubulake v. UBS Warburg LLC (4 relevant reported decisions)
   220 F.R.D. 211 (S.D.N.Y. 2003) (Zubulake III)
   229 F.R.D. 422 (S.D.N.Y. 2004) (Zubulake IV)

2. Pension Committee of the Univ. of Montreal Pension Plan v.

3. Da Silva Moore v. Publicis Groupe, No. 11 Civ. 1279 (ALC) (AJP),
   287 F.R.D. 182 (S.D.N.Y. 2012)

IMPORTANT CAVEATS

• Many seminal decisions pre-date the 2006 and 2015 amendments to the Federal Rules of Civil Procedure, which directly address discovery of electronically stored information.
• Must have a working knowledge of the rules as they are currently written when reading older case law.

- **Issue:** “To what extent is inaccessible electronic data discoverable, and who should pay for its production?”

- **Answer**, according to Judge Scheindlin: “Deciding disputes regarding the scope and cost of discovery of electronic data requires a three-step analysis.”

---

1. Understand the responding party’s computer systems, including active data and stored data. Cost shifting should be considered only when electronic data is relatively inaccessible.

2. Determine what data may be found on the inaccessible media; requiring restoration and production of a small sample is appropriate in most cases.

3. In conducting a cost-shifting analysis, a seven-factor test should be considered, weighted more-or-less in the following order:

---

**Seven-factor test for cost shifting:**

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

- Cost shifting deemed appropriate, but court expressly delineated between the cost of restoring and searching the backup tapes versus the cost of reviewing and producing the emails.
- Plaintiff was allocated 26% of the cost of restoring the backup tapes. All other costs were allocated exclusively to the employer.

**Zubulake IV, 220 F.R.D. 212 (S.D.N.Y. 2003)**

- The duty to preserve attached at the time the litigation was reasonably anticipated.
- Employer was under a duty to preserve what it knew, or reasonably should have known, is relevant to the action, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.
- Duty extended to employees likely to have relevant information – i.e., the "key players" in the case.

**Zubulake IV, 220 F.R.D. 212 (S.D.N.Y. 2003)**

- Employer was required to retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attached and any relevant documents created thereafter.
- Must suspend routine document retention / destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.
Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents.

Counsel must make certain all sources of potentially relevant information are identified and placed on hold.

Counsel must communicate with information technology personnel and key players to understand how information is stored and backup procedures.

The litigation hold should be periodically re-issued.

Counsel should instruct all employees to produce electronic copies of relevant active files.

Backup media should be identified, segregated, and stored in a safe place.

"[I]t is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. . . . Counsel and client must take some reasonable steps to see that sources of relevant information are located."
Pension Committee of the Univ. of Montreal
Pension Plan v. Banc of Am. Secs.,

• Post-Zubulake IV and V, “the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”

• The duty to preserve evidence arises when a party reasonably anticipates litigation.

• A plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.

Pension Committee of the Univ. of Montreal
Pension Plan v. Banc of Am. Secs.,

• A litigation hold must direct employees to preserve all relevant records—both paper and electronic—and must create a mechanism for collecting the preserved records so that they can be searched by someone other than the employee.

• “While litigants are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation.”

Da Silva Moore v. Publicis Groupe,
No. 11 Civ. 1279 (ALC) (AJP), 287 F.R.D. 182
(S.D.N.Y. 2012)

• One of the earliest rulings approving the use of computer assisted review and predictive coding protocols.

• “The Court recognizes that computer-assisted review is not a magic, Staples–Easy–Button, solution appropriate for all cases. The technology exists and should be used where appropriate, but it is not a case of machine replacing humans: it is the process used and the interaction of man and machine that the courts needs to examine.”
OTHER USEFUL CASES

**League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015)**

Why this case is useful:
- Florida Supreme Court confirmed and clarified that a “reasonable anticipation of litigation” triggers the duty to preserve potentially relevant evidence.
- Legislature had deleted almost all emails related to the redistricting.
- Pre-Detzner case law was inconsistent and unpredictable.


Why this case is useful: Supervision and provides case law that a client performed preservation is defensible if done properly.
- Plaintiff sought to compel Defendant to conduct additional search of ESI. Asserted that responsive communication was being withheld from production.
- Court was satisfied with proper steps taken
- Counsel assumed responsibility
- Particularly, if no factual evidence of foul play is presented.

Why this case is useful:
- RICO dispute between healthcare providers.
- Resulted in loss of data.
- Plaintiff wanted summary judgment or an adverse inference.
- Court found no bad faith.

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Why this case is useful: The often forgotten third parties and who controls the data for litigation purposes.
- Adverse inference imposed for failure to preserve non-party text messages.
- With the increasing amount of ESI stored on various data sources, it is important to consider including third parties that may have relevant data when implementing legal holds.
- Documents are considered to be under a party's control if the party has a practical ability to obtain the documents from another, irrespective of his legal entitlement.
- Court imposed adverse inference for failure to preserve text messages in possession of a non-party.

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Why this case is useful:
- Illustrates potential consequences of failing to issue a timely litigation hold.
- Party failed to preserve network file shares, and laptops and work computers belonging to key custodians.
- Litigation holds may include mobile devices, whether company-issued or BYOD devices.
- Special master recommended entry of default judgment, along with further sanctions, in favor of the plaintiffs due to widespread failure to preserve data.
**Nuvasive, Inc. v. Madsen Med. Inc.,**
No. 13cv2077 BTM(RBB), 2016 WL 3050966
(S.D. Cal. Jan. 26, 2016)

Why this case is useful:

- Plaintiff filed a motion to reconsider an order imposing adverse inference for failure to preserve ESI.
- Addresses failure to preserve text messages.
- Illustrates how 2015 Federal Rules changes impacted a sanctions analysis for spoliation.

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**PRACTICAL CONSIDERATIONS**

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**PRE-SUIT CONVERSATIONS**

- Reasonable anticipation of litigation triggers the duty to preserve.
- Identify custodians and sources of potentially relevant ESI.
- Issue an appropriate written litigation hold and follow up.
- Think about data in the possession of third parties.
- Preserve, preserve, and preserve.
- Suspend any automatic retention/deletion policy.
- Assemble an eDiscovery Team, including vendor(s).
ONCE LITIGATION COMMENCES:

- Be prepared for the meet and confer.
- Think about production formats.
- Consider a confidentiality agreement.
- Seek court intervention early.
- Update and expand the litigation hold as needed and issue periodic reminders.

RESOURCES

• The Florida Bar Trial Lawyers Section
  Discovery Handbook
  floridatls.org/discovery-handbook/
• The Sedona Conference
  thesedonaconference.org
• EDRM (Duke Law)
  edrm.net
RESOURCES

- Middle District of Florida Discovery Handbook
  flmd.uscourts.gov/forms/Civil/2015-
  Civil_Procedure_Handbook.pdf
- Southern District of Florida Local Rules and
  Checklist for Rule 26(f) Conference re: ESI
  flsd.uscourts.gov/wp-content/uploads/
  adminOrders/2017/2017-51.pdf

RESOURCES

- “60+ eDiscovery Resources: An Abridged
  Overview (Updated)”
  complexdiscovery.com/info/2014/03/11/101-
  ediscovery-resources-an-abridged-overview/
- ABA LTRC, “FYI: Electronic Discovery”
  americanbar.org/groups/departments_offices/
  legal_technology_resources/resources/
  charts_fyis/ediscovery.html

Questions?

Carlos Baradat, Esq.  
Hon. Mac R. McCoy
RECENT DEVELOPMENTS IN PERSONAL INJURY AND WRONGFUL DEATH

By

Gary D. Fox, Miami
Amy S. Farrior, Tampa
Raymond T. Eligett, Jr., Tampa
Introduction and Caveat.

The outline was revised in early 2018. All references to the Florida Statutes are to the 2016 statutes unless otherwise indicated. This outline is not intended to be exhaustive, nor could it be. For the topics covered, it should provide a starting point for further research and analysis. There are special rules that apply to some practice areas that are beyond the scope of this outline (such as pre-suit notice in medical malpractice cases or cases against governmental entities).

I. GENERAL CONCEPTS.

A. Negligence Elements.

A cause of action based on negligence is comprised of four elements:

1. A duty, or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks

2. A failure on the defendant’s part to conform to the standard required: a breach of the duty

3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as “legal cause,” or “proximate cause,” and which includes the notion of cause in fact.

4. Actual loss or damage

_Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1227 (Fla. 2010); Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003)._
the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses. *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992) (paver company could be liable for incorrectly marking “safe” areas to dig when mechanical trencher operator struck cable). The law imposes an obligation on everyone who attempts to do anything, even gratuitously, to exercise some degree of care and skill in the performance of that act. *See Clay Elec. Coop.*, 873 So. 2d at 1186.

2. The statutes and case law are not required to catalog every conceivable risk in order for it to give rise to a duty of care. *McCain*, 593 So. 2d at 503. In *Curd, supra*, the supreme court reiterated that duties may arise from: (1) legislative enactments or administrative regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of a case.

3. *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d 520 (Fla. 1980), observes:

a. It may be shown that the particular defendant had actual knowledge that the same type of harm had resulted in the past from the same type of negligent conduct. But, the absence of a history of similar accidents does not necessarily preclude a finding of duty to protect against such accidents. *Springtree Properties, Inc. v. Hammond*, 692 So. 2d 164 (Fla. 1997).

b. The harm may have so frequently resulted from the same type of negligence that, in the field of human experience, the same type of result may be experienced again.

4. Duty can also be created through an express or implied contract. A contractual obligation to provide services generally gives rise to a duty to exercise due care in the performance of the contract. *Langner v. Charles A. Binger, Inc.*, 503 So. 2d 1362 (Fla. 3d DCA 1987). Holding when there is an express contract to perform certain duties, there are no implied duties outside of that express contract, see *Swartz v. Ford, Bacon & Davis Constr. Corp.*, 469 So. 2d 232 (Fla. 1st DCA 1985).

5. In analyzing duty as a question of law, the court considers whether the defendant’s conduct foreseeably created a broader “zone of risk” that poses a general threat of harm to others. In this context, foreseeability is a minimal threshold legal requirement. *McCain*, 593 So. 2d at 502.

For an example of a court analyzing the duty to guard against crime in different contexts, see the discussion in *Vazquez v. Lago Grande Homeowners Ass’n*, 900 So. 2d 587 (Fla. 3d DCA 2004). Once the court determines as a matter of law that there was a duty to guard against criminal
activity in the given situation, the jury would decide if the duty had been breached and whether the injury was a foreseeable result of the breach of duty (namely, was proximately caused by the breach).

6. A duty can also arise from a special relationship. *Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d 86 (Fla. 2000) (university owed duty to warn student it assigned to internship site that it could be dangerous).

7. *Pollack v. Florida Dep’t of Highway Patrol*, 882 So. 2d 928 (Fla. 2004), holds Florida Highway Patrol (FHP) did not have duty to remove stalled or abandoned vehicles from state highways; statute that authorized FHP to remove such vehicles made it clear that this was permissive rather than mandatory, and was in furtherance of its authority to enforce traffic laws, rather than pursuant to duty to keep highways free from obstructions. FHP did not owe duty of care to individuals who were killed in accident with stalled tractor-trailer under zone of risk theory, where FHP officers had not arrived on scene of stalled vehicle or assumed any degree of control over situation.

8. *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001), holds conditions on landowner’s property resulting in injuries to plaintiff off landowner’s property should be evaluated by established principles of negligence law, even if conditions on landowners property are natural ones, such as foliage. Service station owner owed duty of care to pedestrians injured on adjacent property when struck by motorist whose vision upon departing station was allegedly obscured by foliage on station’s premises, as owner’s conduct in permitting foliage to grow created foreseeable zone of risk.

9. *Williams v. Davis*, 974 So. 2d 1052 (Fla. 2007), holds the landowners’ duty not to permit the growth of foliage on their property to extend into the public right-of-way does not apply to foliage that does not extend into the public right-of-way.

10. *Goldberg v. Florida Power & Light Co.*, 899 So. 2d 1105 (Fla. 2005), holds the power company had legal duty to warn motorists of hazardous condition it created by intentionally deactivating traffic signal to repair downed power line; power company employee should have known that opening fuse on utility pole would terminate power to traffic signal; repair work being done was not true emergency, police officer was advised that he was not needed at the scene even though proper safety procedures required power company to notify police, power company had time and means to warn motorists of inoperable traffic light, and rainy, overcast weather exacerbated dangerous traffic conditions. One who undertakes action assumes duty to perform the action non-negligently. Whether plaintiff motorist’s negligence in failing to treat inoperable traffic signals as four-way stops constitutes an
intervening and superseding cause relieving the initial tortfeasors of liability for automobile collision is a question of fact for the factfinder.

11. *United States v. Stevens*, 994 So. 2d 1062 (Fla. 2008), holds laboratory that manufactures, grows, tests or handles ultra-hazardous materials B anthrax in this case B owes duty of reasonable care under foreseeable zone of risk analysis to members of general public to avoid unauthorized interception and dissemination of materials.

12. *Demelus v. King Motor Co.*, 24 So. 3d 759 (Fla. 4th DCA 2009), held a dealership did not create a foreseeable zone of risk for injuries from a car stolen from its lot under the facts of that case, distinguishing cases holding defendants’ liable because the keys to the vehicle were made readily available by the defendants’ own conduct.

13. *Dorsey v. Reider*, 139 So. 3d 860 (Fla. 2014), held that the second bar patron’s conduct of blocking first patron’s ability to escape from escalating situation when second patron’s friend retrieved second patron’s tomahawk from truck while first patron was trapped between truck and adjacent car during altercation between patrons, created legal duty of care on part of second patron regarding the first patron; conduct created foreseeable zone of risk posing general threat of harm to others.

14. *Kohl v. Kohl*, 149 So. 3d 127 (Fla. 4th DCA 2014), held, in a case of first impression, that the former wife could state common law claim for negligent transmission of a sexually transmissible disease against her former husband. But such a claim can only be based on actual knowledge, and not constructive knowledge, because of zone of risk created by such conduct.

15. **Undertaker doctrine:**

A duty to act with reasonable care can arise when one undertakes to act, even when under no obligation to act. This is known as the “undertaker’s doctrine.” Voluntarily undertaking to do an act that if not accomplished with due care might increase the risk of harm to others or might result in harm to others due to their reliance upon the undertaking confers a duty of reasonable care, because it thereby creates a foreseeable zone of risk. In *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009), the Florida Supreme Court applied the undertaker’s doctrine to find that a cause of action had been stated against a sheriff who had undertaken to provide aid to an unconscious woman in her home, but who increased the risk of harm to the woman by reassuring concerned neighbors that she was merely sleeping instead of in the diabetic coma the neighbors feared.
White v. Advanced Neuromodulation Sys., Inc., 51 So. 3d 631 (Fla. 2d DCA 2011), held a spinal cord stimulator’s programming technician, who was a registered nurse, did not assume a duty to ensure the patient received appropriate follow-up medical care by attempting to arrange appointments for patient with neurosurgeon after patient’s incision became infected; technician’s voluntary actions in observing and assessing patient did not increase risk of harm to patient or cause other people to refrain from rendering aid to patient.

De La Torre v. Flanigan's Enterprises, Inc., 187 So. 3d 330 (Fla. 4th DCA 2016): Restaurant's actions in “cutting off” patron from alcohol and encouraging her to drink water, pursuant to internal policy designed to prevent intoxicated patrons from driving did not trigger application of undertaker's doctrine to remove restaurant from protection of statute insulating businesses from liability for damages caused by intoxicated customers; restaurant's actions did not increase risk of harm; did not undertake to perform duty owed by patron to third parties; unreasonable to assume patron would not have driven but for restaurant's actions.

Jordan v. Nienhuis, 203 So. 3d 974 (Fla. 5th DCA 2016): To impose governmental liability on county sheriff in wrongful death action arising from alleged negligence of 911 operator in responding to call for medical assistance, decedent's estate required to plead sufficient facts that, if proven, demonstrated special relationship between sheriff and decedent. Alleged statements to decedent's wife by 911 operator that “help was on the way” and that wife should “just leave him there on the floor” while awaiting further assistance, did not increase risk of harm to decedent or control situation so did not provide a basis for wrongful death liability of sheriff’s office, pursuant to undertaker's doctrine.

16. Curd v. Mosaic Fertilizer, supra, held the owner of a fertilizer storage facility near fishing waters owed a duty to licensed commercial fishermen, who had a special interest within the zone of risk created by the facility’s operations (they were dependent on those waters to earn their livelihood).

17. A party with a nondelegable duty may contract the performance of that duty to a subcontractor, but the party with the duty remains liable for the proper performance of the duty. Daniel v. Morris, 181 So. 3d 1195 (Fla. 5th DCA 2015). The liability for the breach of a nondelegable duty arises from direct, instead of imputed, liability.

18. The Las Olas Holding Co. v. Demella, 228 So. 3d 97 (Fla. 4th DCA 2017): Severely intoxicated driver swerved from roadway, traveled across sidewalk, through bushes and collided with hotel’s pool cabana, killing hotel guest. Trial court erred in denying hotel’s motion for directed verdict.
on issue of negligence; hotel’s knowledge of roadway’s slight curve and that some speeding occurred on road was legally insufficient to establish hotel knew or should have known dangerous condition existed on premises. But even if hotel breached duty, death was attributable only to an “improbable freak” accident.

C. Proximate Cause.

1. Foreseeability is also crucial to the proximate cause inquiry, but in a different way. For proximate cause, foreseeability is concerned with the specific, narrow factual details of the case. McCain, 593 So. 2d at 503. It is immaterial that the defendant could not foresee the precise manner in which the injury occurred. McCain, 593 So. 2d at 503.

2. “The question of foreseeability as it relates to proximate causation generally must be left to the fact-finder to resolve.” McCain, 593 So. 2d at 504. The supreme court reiterated that it is improper to reweigh conflicting expert testimony on the issue of causation in Friedrich v. Fetterman & Assocs., P.A., 137 So. 3d 362 (Fla. 2013).

3. Chirillo v. Granicz, 199 So. 3d 246 (Fla. 2016): Duty is determined as a matter of law and is the tool used by jury to assess defendant's behavior; whereas proximate cause is a fact-specific assessment by jury to determine whether the exact injury is likely to recur if defendant's same conduct is repeated in a similar context. Although duty analysis considers some general facts of case, it does so only to determine whether a general, foreseeable zone of risk was created, without delving into the specific injury that occurred or whether such injury was foreseeable. Primary care physician did not have duty to prevent suicide of outpatient. Foreseeability of patient’s suicide relevant to proximate cause analysis, not determination of duty.


a. Person who has been negligent is not liable for the damages suffered by another when some separate force or action is the active and efficient intervening cause, the sole proximate cause, or an independent cause. See, e.g., DOT v. Anglin, 502 So. 2d 896 (Fla. 1987).

(1) Intervening cause is foreseeable if the harm that occurred is within the scope of the danger attributable to the defendant’s negligent conduct. See Pacheco v. Florida Power & Light Co., 784 So. 2d 1159 (Fla. 3d DCA 2001) (contractor’s negligence in failing to inform FPL that its workers would
be nearby so that FPL could de-energize its line, an injured worker’s potentially negligent act of “running” a metal tape measure into the wire did not constitute unforeseeable, independent, or intervening acts so as to preclude FPL’s responsibility for the accident).

(2) The question of whether an intervening act is foreseeable is for the trier of fact. *Gibson*, 386 So. 2d at 522; *Conklin v. Carroll*, 865 So. 2d 597 (Fla. 2d DCA 2004).

5. **Concurring Cause.**

a. If a person’s negligence operates in combination with (1) the act of another, (2) a natural cause, or (3) some other cause occurring at the same time, that negligence will be considered a legal cause of injury or damage if it contributes substantially to producing the injury or the damage. *Fla. Std. Jury Instr. (Civ) 5.1(b); Goldschmidt v. Holman*, 571 So. 2d 422 (Fla. 1990) (concurring causes are two separate and distinct causes that operate contemporaneously to produce single injury).

b. Under the “indivisible injury” standard, where a plaintiff sues one of two successive tortfeasors and establishes liability but the jury cannot apportion the injury between the two, the defendant is liable for the entire injury. *Gross v. Lyons*, 763 So. 2d 276 (Fla. 2000). The case extends the rationale that a second tortfeasor is liable in that situation to the first tortfeasor.

c. If evidence supports concurring causes as being causative of the injury, it is reversible error not to give the concurring cause charge. *Banks v. Hosp. Corp. of Am.*, 566 So. 2d 544 (Fla. 4th DCA 1990). In addition to “simultaneous” acts, temporally preceding conditions can conjoin with a defendant’s subsequent negligence to require the concurring case instruction to be given to the jury. *Zigman v. Cline*, 664 So. 2d 968 (Fla. 4th DCA 1995).

**D. Comparative Negligence.**

1. In *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), the supreme court abolished the rule that any contributory negligence of the plaintiff would bar recovery and adopted a rule that the plaintiff’s recovery would be reduced by the plaintiff’s comparative negligence.
2. *Philip Morris USA, Inc. v. Arnitz*, 933 So. 2d 693 (Fla. 2d DCA 2006), holds that a plaintiff may plead his own comparative fault in a strict liability case alleging design defect in cigarettes.

3. *Schoeff v. R.J. Reynolds Tobacco Company*, 42 Fla. L. Weekly S951 (Fla. December 14, 2017), holds the comparative fault statute does not apply when the jury finds for the plaintiff on intentional tort claims.


5. Section 768.36 provides a plaintiff may not recover damages for loss or injury if the trier of fact finds at the time the plaintiff was injured that the plaintiff was under the influence of any alcoholic beverage or drug to the extent the plaintiff’s normal faculties were impaired, and as a result of the influence of such beverage or drug, the plaintiff was more than 50% at fault for his or her own harm.

E. The Impact Doctrine.

1. The impact rule requires that before plaintiff may recover damages for emotional distress, he or she must demonstrate that the emotional distress suffered flowed from injuries sustained in a physical impact. *R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360 (Fla. 1995). However, there are numerous exceptions to the impact doctrine.


3. *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846 (Fla. 2007), held that a criminal assailant making contact with the plaintiff’s temple with the assailant’s gun, and touching the plaintiff’s body while searching for money, was a sufficient physical contact to qualify as an impact for purposes of maintaining an action for emotional distress against the hotel in whose parking lot this criminal assault occurred.
4. *Kennedy v. Byas*, 867 So. 2d 1195 (Fla. 1st DCA 2004), held the impact rule precluded dog owner from recovering damages for emotional distress arising out of alleged veterinary malpractice in treatment of dog; animals were personal property, not family members, and expanding familial relationships exception to include pets would place unnecessary burden on courts’ caseload. *But see Johnson v. Wander*, 592 So. 2d 1225 (Fla. 3d DCA 1992) (jury question existed as to whether dog owner was entitled to recover punitive damages and emotional distress damages in professional malpractice action against veterinarian).

5. *G4S Secure Solutions USA, Inc. v. Golzar*, 208 So. 3d 204 (Fla. 3d DCA 2016): High school student in residential community brought action against private security company retained by that community after one of its guards used his cell phone to record a video of the plaintiff in a state of undress at her home. She alleged the company had negligently hired, retained and supervised the guard. Impact doctrine applies to torts of negligent hiring, retention and supervision.

6. Exceptions:
   a. Intentional Tort or Physical Injury.

      There is a cause of action, however, if the psychological trauma causes a demonstrable physical injury such as death, paralysis, or muscular impairment or if the act producing the trauma amounts to an intentional tort. *Brown v. Cadillac Motor Car Div.*, 468 So. 2d 903 (Fla. 1985) (rejecting claim for psychic injuries to son who witnessed his mother’s death).

   b. Bystander Cases.

      (1) This exception allows for recovery for emotional distress where a person suffers “death or significant discernible physical injury when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person.” *Champion v. Gray*, 478 So. 2d 17, 20 (Fla. 1985), modified, *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995).

      (2) *Champion v. Gray* permitted a claim by the estate of a mother who heard the impact of a drunk driver strike her daughter, came to scene and, upon seeing daughter’s body, collapsed and died on spot; *see also Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995) (adult daughter who heard explosion and
saw father scorched, mutilated, and dying had insomnia, depression, memory losses, physical pain in joints, and inability to swallow and difficulty breathing; holding temporal proximity between psychic injury and physical injury is a factor to be considered).

(3) *Watters v. Walgreen Co.*, 967 So. 2d 930 (Fla. 1st DCA 2007), holds that stepchildren who do not have a legal relationship with the injured party can satisfy the relationship element of *Champion*.

c. The impact rule does not apply to cases where a plaintiff suffers emotional distress as a direct result of the consumption of a contaminated beverage or food item. *Hagan v. Coca-Cola Bottling Co.*, 804 So. 2d 1234 (Fla. 2001).

d. The impact rule does not apply where plaintiff suffers direct physical injuries, which result from a reasonable attempt to escape peril caused by the defendant’s negligence, even though there was no impact between the defendant’s vehicle and the plaintiff, a pedestrian plaintiff should be entitled to recover. *Lowd v. Cal Kovens Constr. Corp.*, 546 So. 2d 1087 (Fla. 3d DCA 1989). (This case discusses other non-impact cases in Florida).

e. The impact rule does not apply when a laboratory or other health care provider is negligent in failing to keep confidential the results of an HIV test. *Florida Dep’t of Corr. v. Abril*, 969 So. 2d 201 (Fla. 2007).

f. Other exceptions have been created from claims for intentional infliction of emotional distress, *Eastern Airlines, Inc. v. King*, 557 So. 2d 574 (Fla. 1990); wrongful birth, *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992); negligence claims involving stillbirth, *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997); bad faith claims against an insurance carrier, *Time Ins. Co., Inc. v. Burger*, 712 So. 2d 389 (Fla. 1998); a claim by incarcerated defendant against public defender’s office for failing to act timely when he gave them a document that could have secured his immediate release, *Rowell v. Holt*, 850 So. 2d 474 (Fla. 2003).

g. *Southern Baptist Hosp. of Florida, Inc. v. Welker*, 908 So. 2d 317 (Fla. 2005), declined to rule on a certified question on the impact rule where there was an otherwise viable cause of action for negligent interference with parental rights.
h. In *Woodard v. Jupiter Christian Sch., Inc.*, 913 So. 2d 1188 (Fla. 4th DCA 2005), a student sued a private Bible-centered school for negligent infliction of emotional distress, etc., based on chaplain’s disclosure of student’s homosexuality to school’s administrators, who disclosed information to others. The DCA held this was not an exception to the impact doctrine.

F. Joint and Several Liability/Apportionment of Liability.

1. Before 2006, §768.81(3)(a), Fla. Stat., was amended several times to modify the common law doctrine of “pure” joint and several liability, so that the plaintiff’s ability to obtain damages from a particular defendant varied according to whether the plaintiff was found to be with or without fault, and according to the respective percentages of fault for different defendants.

2. 2006 Revision abolishing joint and several liability.
   a. In 2006, the legislature amended §768.81 to provide in subsection (3): “In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party’s percentage of fault and not on the basis of the doctrine of joint and several liability.”
   b. The amended statute continues the requirements that a defendant must affirmatively plead the fault of a non-party and must prove at trial the fault of the non-party in causing the plaintiff’s injuries. §768.81(3)(a),(b). The bill adopting the revision provides that it shall take effect April 26, 2006 and apply to causes of action that accrue on or after that date.
   c. *T & S Enter. Handicap Accessibility, Inc. v. Wink Indus. Maint. & Repair, Inc.*, 11 So. 3d 411 (Fla. 2d DCA 2009), held that, in light of the 2006 revision of joint and several liability, a defendant could no longer bring a third-party contribution complaint. The court said it was not addressing what might happen if the defendant settled and obtained a release that included the alleged joint tortfeasor.
   d. *Wilson v. Liberty Mut. Ins. Co.*, 56 So. 3d 895 (Fla. 1st DCA 2011), held the defendant in a tort action does not have standing to appeal a judgment in favor of a co-defendant where there is no right of contribution.
e. *Port Charlotte HMA, LLC v. Suarez*, 210 So. 3d 187 (Fla. 2d DCA 2016), holds the trial court erred in applying a setoff from a settling tortfeasor to a judgment against another tortfeasor.

3. Section 768.81 applies only to negligence cases. '768.81(4)(a). Whether a case is one for “negligence” is based on the substance of the action, independent of whatever conclusory terms are used by the parties. *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560 (Fla. 1997).

   a. It is error to place an intentional tortfeasor on the verdict form with a negligent tortfeasor whose acts or omissions gave rise to or permitted the intentional tortfeasor’s actions. *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560 (Fla. 1997); *Stellas v. Alamo Rent-A-Car, Inc.*, 702 So. 2d 232 (Fla. 1997).

   b. In *Merrill Crossings Assocs. v. McDonald*, a case in which the plaintiff was shot in a shopping center parking lot, the substance of the action was that the plaintiff was the victim of an intentional tort; the action against the defendant based on negligent security measures had at its core an intentional tort by someone. *See also Stellas v. Alamo Rent-A-Car, Inc.*

   c. Driving while intoxicated does not constitute an intentional tort for purposes of '768.81. *D’Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001), other holding abrogated by statute.

4. Note that the apportionment discussed herein applies to joint tortfeasors – not subsequent tortfeasors. *See Beverly Enterprises-Florida, Inc. v. McVey*, 739 So. 2d 646, 650 (Fla. 2d DCA 1999). See the discussion on subsequent tortfeasors below.

5. The seminal case addressing “comparative fault” is *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), modified, *Wells v. Tallahassee Mem’l Reg’l Med. Ctr., Inc.*, 659 So. 2d 249 (Fla. 1995). It held the 1991 version of '768.81(3) required the trial court to reduce the plaintiff’s recovery by the percentages of negligence attributable to both parties and non-parties – commonly referred to as “Fabre defendants.”

6. There must be evidence of fault of non-party before jury can determine the percentage of fault of that non-party. It is the defendant’s burden to present such evidence. *Nash v. Wells Fargo Guard Serv., Inc.*, 678 So. 2d 1262 (Fla. 1996).

   a. In order to include a non-party on the verdict form, the defendant must plead as an affirmative defense the negligence of the non-party
and specifically identify the non-party. Notice prior to trial is necessary. *Nash v. Wells Fargo*, 678 So. 2d 1262.

b. Non-parties who are only vicariously liable may not be placed on the verdict form. *Id.* See, e.g., *Suarez v. Gonzalez*, 820 So. 2d 342 (Fla. 4th DCA 2002) (where named defendant property owner negligently hired independent contractor, she is vicariously liable for his negligence; accordingly, there being no joint tortfeasors, '768.81 is not applicable).

7. Where the evidence supports it, a joint negligent tortfeasor is placed on the verdict form even though it is statutorily immune under the worker’s compensation law. *Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180 (Fla. 1993).

8. If any of the entities in a distribution chain may have had liability for an accident, then all of those entities should appear on the jury verdict form. *Am. Aerial Lift, Inc. v. Perez*, 629 So. 2d 169 (Fla. 3d DCA 1993).

9. *Am. Home Assurance Co. v. National R.R. Passenger Corp.*, 908 So. 2d 459 (Fla. 2005), addresses how comparative fault applies where, instead of an active tortfeasor’s damage recovery being reduced by its percentage of apportioned negligence, a vicariously liable party has stepped into the active tortfeasor’s shoes. The Supreme Court held that '768.81, providing that any award of damages is to be diminished proportionately by “any contributory fault chargeable to the claimant,” must be read to include parties, other than those that are directly liable, and thus applies to vicariously liable parties, or else the word “chargeable” would be reduced to mere surplusage. So the negligence of the active tortfeasor is apportioned to the vicariously liable party.

10. *R.J. Reynolds Tobacco Co. v. Grossman*, 96 So. 3d 917 (Fla. 4th DCA 2012), held the husband’s conduct in buying cigarettes for his wife did not violate any duty to protect wife from the risks of cigarette smoking and, therefore, he should not have been included on the verdict form as a *Fabre* defendant. A husband has no statutory or common law duty to control the actions of his wife.

11. A plaintiff should not sue an alleged *Fabre* defendant simply based on another defendant’s assertion of *Fabre* liability. *Yakavonis v. Dolphin Petroleum, Inc.*, 934 So. 2d 615 (Fla. 4th DCA 2006), affirmed sanctions for a frivolous claim against a defendant by a plaintiff where the plaintiff added that defendant in response to the original defendant’s claim of *Fabre* liability.
12. Pre-Trial Settlements by One or More Joint Tortfeasors.

a. Given the 2006 abolition of any joint and several liability for economic damages, a defendant should not be entitled to any setoff for damages based on prior settlements of other tortfeasors after the effective date of the 2006 amendment. *See Wal-Mart Stores, Inc. v. Strachan*, 82 So. 3d 1052 (Fla. 4th DCA 2011) addressing the trial court’s ruling denying Wal-Mart’s request for a discovery of settlement amounts the plaintiff had received from other co-defendants, based on the trial court’s holding the 2006 amendments abolished the right of remaining defendant to seek a set-off. The appellate court did not need to reach the correctness of that legal ruling in denying the cert petition; *see also Schippers v. United States*, 2011 WL 6112354 (M.D. Fla. 2011)(no right to set off under Florida law because joint and several liability has been abolished).

b. Case law predating the 2006 amendment held set-off statutes did not apply to non-economic damages and the allocation of settlement proceeds between economic and non-economic damages should be in the same proportion as the jury’s verdict. *Wells v. Tallahassee Mem’l Reg ’l Med. Ctr., Inc.*, 659 So. 2d 249 (Fla. 1995).

G. Subsequent Negligence of a Physician.

1. If the plaintiff uses due care in selecting his treating physician, the original tortfeasor may be held responsible for the injuries caused by the latter negligent treatment by that physician. *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977).

2. *Stuart v. Hertz Corp.* held the tortfeasor in an automobile accident could not bring a third-party action for indemnity against a physician for damages attributable to alleged malpractice when allegedly aggravated the plaintiff’s injuries.

3. The same rule applies in medical malpractice cases. A health care provider whose negligence results in the patient being treated by others is liable to the patient for injuries suffered by the negligence of the subsequent treating health care providers. *Farina v. Zann*, 609 So. 2d 629 (Fla. 4th DCA 1992).

4. The *Stuart v. Hertz* jury instruction is permissible where defense produces evidence and argues that plaintiff’s surgery was unnecessary, even if term “medical malpractice” is not used; trial court views necessity of treatment from the point of view of the injured party, not warring experts. *See Pedro v. Baber*, 83 So. 3d 912 (Fla. 2d DCA 2012); *Costa v. Aberle*, 96 So. 3d 959
See also Berrios v. Deuk Spine, 76 So. 3d 967 (Fla. 5th DCA 2011) (defendant unsuccessfully argued neither he nor plaintiff should have to pay medical provider’s bills that defendant alleged were unrelated to accident, noncompensable and unlawful).

5. The Florida Supreme Court has adopted Standard Jury Instruction 501.5c, “Subsequent injuries caused by medical treatment.” In re Standard Jury Instructions, 135 So. 3d 281 (Fla. 2014).

6. Holmes Regional Medical Center, Inc. v. Allstate Insurance Company, 225 So. 3d 780 (Fla. 2017): Driver and driver’s automobile insurer that had judgment entered against them in favor of victim of motor vehicle accident were not entitled to seek equitable subrogation from subsequent tortfeasors, who were medical providers, until judgment had been fully satisfied. Even partial payment does not give rise to equitable subrogation right.

H. Statute of Limitations.

Caveat: some claims have specific requirements (such as pre-suit procedures) and time limits. Always check.

1. Section 95.11(3)(a), Fla. Stat., provides that the statute of limitations for an action founded upon negligence is four years.

2. Section 95.11(4)(d), Fla. Sta., specifies a two year limitation for an action for wrongful death.

3. Philip Morris USA, Inc. v. McCall, 42 Fla. L. Weekly D2629 (Fla. 4th DCA Dec. 13, 2017), holds that because the wife’s loss of a consortium claim was a separate and distinct cause of action, she was not entitled to the tolling benefit of Engle class membership.

4. Section 95.11(4)(a), Fla. Stat., provides that the statute of limitations for an action founded upon professional malpractice is two years.

5. Medical Malpractice - ‘95.11(4)(b).

   a. Two years from the time the incident giving rise to the action occurred, or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence.

   b. Statute of Repose: The action must be commenced within four years of the date of the incident upon which the claim is based.
c. *Woodward v. Olson*, 107 So. 3d 540 (Fla. 2d DCA 2013), holds discreet incidents of malpractice (there, failing to inform patient about potential cancer in separate x-rays) each have their own four year statute of repose.

d. When fraud, concealment, or intentional misrepresentation prevented discovery of the injury, the period is extended two years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but not to exceed seven years from the date of the incident upon which the claim is based.

e. The four-year statute of repose period and the seven-year statute of repose period do not operate to bar claims against minor children before the eighth birthday.

6. The four-year statute of limitations applies for an action founded upon sovereign immunity claims (but notice must be given within three years of when the action occurs '768.28(6)(a), Fla. Stat.).

7. Section 95.031(2)(b) provides 12 and 20-year statutes of repose for products, and an exception if the manufacturer concealed the defect.

8. Section 95.051, Fla. Stat., provides: (1) The running of the time under any statute of limitations (with certain exceptions) is tolled by: (h) The minority or previously adjudicated incapacity of the person entitled to sue during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the minor or incapacitated person, or is adjudicated to be incapacitated to sue; except with respect to the statute of limitations of a claim for medical malpractice as provided in '95.11. In any event, the action must be begun within seven years after the act, event, or occurrence giving rise to the cause of action.

9. Section 95.10 provides that when the cause of action arose in another state or territory and its laws forbid the maintenance of the action because of lapse of time, no action may be maintained in Florida.

10. *Larson & Larson, P.A. v. TSE Indus., Inc.*, 22 So. 3d 36 (Fla. 2009), rejects the continuing representation doctrine as a basis to toll the statute of limitations in a legal malpractice claim. The opinion holds the malpractice period on an original adverse judgment began to run when the judgment became final and the appellate process had run its course. The limitations period was not extended based on additional underlying litigation over a sanction order that resulted in a separate judgment.
I. Workers Compensation Immunity.

1. Section 440.11(1), Fla. Stat., was revised in 2003 to make it more difficult for an employee to overcome the defense available if an employer has secured payment of workers’ compensation. This effectively overruled the decision in *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000).

2. The intentional tort exception now requires that an employee prove: (1) the employer deliberately intended to injure the employee, (2) or the employer engaged in conduct the employer knew, based on prior similar accidents or explicit warnings, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger. ’440.11(1)(b).

3. *Jones v. Martin Elec., Inc.*, 932 So. 2d 1100 (Fla. 2006), held an employee can file a tort action against an employer if the employee has received workers’ compensation benefits and petitioned for an adjustment in attendant care. The court held this did not amount to a pursuit to a conclusion on the merits of his workers’ compensation claim, and therefore did not constitute an inconsistent election of remedies.

4. Cases recognize other theories of recovery against a defendant who has comp immunity, for example under products liability or dangerous instrumentality theories. *See, e.g. Lazerlere v. Employers Ins. of Wausau, 613 So. 2d 510* (Fla. 2d DCA 1993). Some recent cases have called into question the constitutionality of parts of the workers compensation act, and the act as a whole.

5. *Wert v. Camacho*, 200 So. 3d 787 (Fla. 2d DCA 2016): Unrelated works exception to workers' compensation immunity did not apply in negligence action brought by injured employee of subcontractor against superintendent and superintendent's employer. Superintendent and employer were entitled to raise immunity defense, where subcontractor and employer were not part of same contract work with general contractor, and no vertical relationship existed between subcontractor and employer.

6. Recent cases have found parts of the workers compensation act unconstitutional. *E.g.*, *Westphal v. City of St. Petersburg*, 194 So. 3d 11 (Fla. 2016).
J. Familial Immunity.

1. Interspousal.
   a. The Florida Supreme Court abrogated the interspousal immunity doctrine in *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993).

2. Parental.
   a. In tort action for negligence arising from an accident and brought by an unemancipated minor child against one of his parents, the doctrine of parental immunity is waived to the extent of the parent’s available liability insurance coverage. *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982). *Cybroski v. Wright*, 927 So. 2d 1089 (Fla. 4th DCA 2006), holds the child may maintain an action against a parent for violating the seat-belt law, to the extent of the parents’ liability insurance.
   
   b. If the parent is without liability insurance or if the policy contains an exclusion clause for household or family members, then parental immunity is not waived and the child cannot sue the parent.
   
   c. Right of contribution is available against a joint tortfeasor who is the parent of the injured minor to the extent of the parent’s available liability coverage. *Joseph v. Quest*, 414 So. 2d 1063 (Fla. 1982); *see also Woods v. Withrow*, 413 So. 2d 1179 (Fla. 1982).
   
   d. An award received by a child may not be used by the parents as a set-off for their liability. *Joseph v. Quest*, 414 So. 2d 1063 (Fla. 1982).
   
   e. Both an affirmative defense of the parent’s comparative negligence and a counterclaim for contribution may be maintained in a single action. *Chinos Villas, Inc. v. Bermudez*, 448 So. 2d 1179 (Fla. 3d DCA 1984).
   
   f. The parental immunity doctrine does not bar a child’s claim against a parent for intentional sexual abuse. *Herzfeld v. Herzfeld*, 781 So. 2d 1070 (Fla. 2001).
   
   g. Parent of minor child plaintiff alleged to be at fault may be included on jury verdict form provided there is sufficient evidence of fault of the parent, and irrespective of whether the parent is immune from
suit by child, tortfeasor, or both. *Y.H. Inv., Inc. v. Godales*, 690 So. 2d 1273 (Fla. 1997).

K. **Compensatory Damages.** [See below re wrongful death damages]

1. Florida law allows for the recovery of both pecuniary and non-pecuniary damages. Non-pecuniary damages include mental pain and suffering resulting from the incident. Spouses also have a consortium claim for the loss of companionship due to the injury of their spouse.


3. Parents may recover when their child is severely injured: (1) loss of child’s filial consortium as a result of a significant injury resulting in child’s permanent disability, and (2) services above those recoverable as a general component of loss of filial consortium (parent must establish child’s extraordinary income-producing abilities prior to injury). *U.S. v. Dempsey*, 635 So. 2d 961 (Fla. 1994). The right to recover loss of filial consortium damages extends only to the child’s age of majority. *Cruz v. Broward County Sch. Bd.*, 800 So. 2d 213 (Fla. 2001).

4. *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1 (Fla. 2004), holds the personal representative of nursing home resident cannot bring a cause of action for violation of Patient’s Bill of Rights under pre-amendment version of the statute, where the alleged violation did not cause the resident’s death. In 2001, the Legislature amended ’400.023(1) to allow a personal representative to bring suit regardless of the cause of death.

5. Section 768.76 provides for a reduction in damages for amounts paid to the claimant from collateral sources, and defines collateral sources.

6. *Packaging Corp. of Am. v. DeRycke*, 49 So. 3d 286 (Fla. 2d DCA 2010), holds that a purchase of stock by a company, triggered by the decedent’s death and funded by life insurance proceeds paid to the company, does not come within the life insurance exception for a collateral source offset. Namely, the insurance payment is set off against stock loss (where the premature stock sale was triggered by death).

7. *Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005), holds a contractual discount, representing the difference between amounts billed by plaintiff’s medical providers and amounts paid pursuant to fee schedules in contracts between
plaintiff’s HMO and the providers, was a payment made on plaintiff’s behalf, thus warranting a setoff pursuant to 768.76.

8. *Dolgin v. Dombkowski*, 942 So. 2d 1 (Fla. 5th DCA 2006), held the defendant was not entitled to a setoff for contractual discounts where he failed to meet his burden to prove no subrogation lien existed that could give rise against the plaintiffs for past medical expenses. The court also reversed a reduction of a social security disability payment collateral source setoff that was based on the amount the plaintiff paid in his social security over a lifetime, holding there was no authority for such a credit and that she could not demonstrate the payments were to secure the disability payments the plaintiff actually received.

9. *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So. 3d 1084 (Fla. 1st DCA, 2010), holds the plaintiff is entitled to introduce the full amount of her medical bills into evidence, rather than the discounted amount paid by the plaintiff’s private health insurance (in contrast to the situation where the discount results from the Medicare payment).

10. *Durse v. Henn*, 68 So. 3d 271 (Fla. 4th DCA 2011), cited *Harrell* and held the trial court erred in preventing the plaintiff from introducing the full amount of his bills. The plaintiff did not have health insurance, but had negotiated a lower amount.

11. *Chester v. Doig*, 842 So. 2d 106 (Fla. 2003), held in medical malpractice action arising from death of her husband, claimant’s arbitration award for damages against physician was not subject to setoff by settlement award claimant received from hospital; settlement award was not collateral source or collateral source payment for purposes of medical malpractice statute, which could have specifically provided for such application.

12. *Joerg v. State Farm Mutual Automobile Insurance Co.*, 176 So. 3d 1247 (Fla. 2015), holds evidence of eligibility for future benefits from Medicare, Medicaid and other social legislation is inadmissible as a collateral source (receding from *Florida Physician’s Insurance Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984)).

13. *Waste Mgmt., Inc. v. Mora*, 940 So. 2d 1105 (Fla. 2006), holds a plaintiff who receives an additur, but still believes the award is too low, is adversely affected and can appeal.

15. Florida recognizes a claim for damages for loss of earning capacity, rather than future loss of earnings. *Truelove*, 954 So. 2d at 1288. Thus, simply because a party is earning more after the injury, he is not precluded from recovering damages for loss of future earning capacity. 954 So. 2d at 1288.

16. Claims against governmental entities typically involve sovereign immunity issues. Holding the Department of Transportation could not invoke immunity to defeat a contractual indemnity claim is *Florida Dept. of Transportation*, 188 So. 3d 840 (Fla. 2016).

L. **Punitive Damages.**

1. Section 768.72, Fla. Stat., requires a claimant move to amend his or her complaint to assert punitive damages. The allegations must be legally sufficient. *See Coronado Condo. Assoc., Inc. v. La Corte*, 103 So. 3d 239 (Fla. 3d DCA 2012)(complaint erroneously assumed misconduct of employees is misconduct of association).

2. Section 768.725, Fla. Stat., requires a plaintiff to establish entitlement to punitive damages by clear and convincing evidence.

3. Section 768.73, Fla. Stat., imposes limitations on punitive damages in certain situations.

4. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 128 S.Ct. 96 (2007), made a number of holdings regarding punitive damages and other aspects of this tobacco class action. It affirmed a finding that it was error to have a punitive damage award before compensatory damages had been determined and discusses, among other things, United States Supreme Court decisions on the issue of excessiveness.

M. **Death of a Party.**

Fla. R. Civ. P. 1.260 requires a motion for substitution of a party within 90 days of the suggestion of death. See also “Wrongful Death” below.
II. **AUTOMOBILE**

A. **Dangerous Instrumentality.** [Note B state and federal statutory changes]

1. Generally, under the dangerous instrumentality doctrine, an owner who gives authority to another to operate the owner’s vehicle, by either express or implied consent, has a non-delegable obligation to insure that the vehicle is operated safely. *Hertz Corp. v. Jackson*, 617 So. 2d 1051 (Fla. 1993).

2. **Scope of the Dangerous Instrumentality Law:**
   
   a. Where the owner of the motor vehicle entrusts the vehicle to a repairman or serviceman, the owner is not liable as long as the owner did not have the beneficial ownership or control of the vehicle at the time of the accident and injury the person with the beneficial ownership should bear the responsibility. *Michalek v. Shumate*, 524 So. 2d 426 (Fla. 1988). The exception to an owner’s liability for negligent use during servicing does not protect an owner who authorizes another to transport his car to a service agency. The owner is in control and ultimately liable until the car is delivered to the agency for service. Liability reattaches when service is complete and the car is being returned to the owner, even if it is being driven by the servicing agency’s employee. *Grilli v. Le-Bo Properties Corp.*, 553 So. 2d 352 (Fla. 2d DCA 1989). *Estate of Villanueva v. Youngblood*, 927 So. 2d 955 (Fla. 2d DCA 2006), holds the exception for the owner’s liability for leaving the automobile with a shop did not apply where the owner had consigned the car for sale to a used car dealer.

   b. Liability under the dangerous instrumentality doctrine will not be imposed upon the holder of mere naked title to the vehicle, where such holder had no beneficial ownership or authority over the use of the vehicle. *See Aurbach v. Gallina*, 753 So. 2d 60 (Fla. 2000).

   c. *Christensen v. Bowen*, 140 So. 3d 498 (Fla. 2014), holds absent evidence that the title-holder holds only naked legal title under a conditional sales contract or a faulty incomplete transfer, the certificate titleholder is a beneficial owner as a matter of law and is liable for the permissive use of the vehicle by another under the dangerous instrumentality doctrine. The title co-owner may not avoid vicarious liability under dangerous instrumentality doctrine by asserting that he relinquished control of the vehicle to the co-owner.
d. Conversion or theft. In order to avoid application of the dangerous instrumentality doctrine, the owner bears the burden of demonstrating that a conversion or theft to the vehicle occurred in order to avoid liability for the accident. *Dockery v. Enter. Rent-A-Car Co.*, 796 So. 2d 593 (Fla. 4th DCA 2001). Whether a vehicle has been the subject of a conversion or theft is a factual question.

e. A co-bailee has no right of action against the owner of the vehicle because the co-bailee’s status prevents the imputation of the bailee’s or co-bailee’s negligence to the owner under the dangerous instrumentality doctrine. *Toombs v. Alamo Rent-A-Car, Inc.*, 833 So. 2d 109 (Fla. 2002).

f. *Burch v. Sun State Ford, Inc.*, 864 So. 2d 466 (Fla. 5th DCA 2004), holds the dangerous instrumentality doctrine applies even when operator is involved in intentional misconduct, unless operator makes “weapon-like use” of the vehicle with the intent to cause physical harm; however, if weapon-like use is reasonably foreseeable to owner, liability will be imputed nevertheless.

g. *Chandler v. Geico Indem. Co.*, 78 So. 3d 1293 (Fla. 2011), holds that under Florida’s dangerous instrumentality doctrine, the named insured’s consent to use a vehicle cannot be eviscerated by a third-party rental agreement attempting to limit who may drive the vehicle; so the insured’s automobile insurer owed a duty to defend and indemnify for a covered temporary substitute auto.

h. *Rippy v. Shepard*, 80 So. 3d 305 (Fla. 2012), holds the dangerous instrumentality doctrine applies to farm tractors.


a. Section 324.021(9)(b)(3) provides limits of liability for a natural person who loans a motor vehicle to a permissive user.

b. 49 U.S.C. ‘30106, the “Graves Amendment,” abolishes the dangerous instrumentality doctrine for vehicle lessors and rental companies. *Vargas v. Enterprise Leasing Co.*, 60 So. 3d 1037 (Fla. 2011), holds the Graves Amendment preempted the Florida statute, which placed caps on, but preserved short-term (not longer than a year) lessors’ vicarious liability for damages caused by the negligence of lessees.
c. *Rosado v. DaimlerChrysler Fin. Serv. Trust*, 112 So. 3d 1165 (Fla. 2013), held the Graves Amendment applied to preempt the Florida Statute on leases of longer than a year. §324.021(9)(b)(1).

d. Section 324.021(9)(b)(3) places limits on the liability of an individual who loans a vehicle – which depend on the user’s insurance limits.

**B. Insurance - Tort Threshold.**

1. Under '627.737, Fla. Stat., a claimant may assert a tort claim only if he or she suffers an injury consisting of:

   a. Significant and permanent loss of an important bodily function;
   
   b. Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement;
   
   c. Significant and permanent scarring or disfigurement;
   
   d. Death.

2. Permanency Evidence.

   a. Conflicting expert testimony on permanency is generally an issue of fact for the jury, even where the defendant does not present expert testimony. *Wright v. Ring Power Corp.*, 834 So. 2d 329 (Fla. 5th DCA 2003).

   b. The jury is allowed to reach a verdict contrary to uncontradicted expert medical testimony on the issue of permanency, where there is conflicting lay testimony. *Easkold v. Rhodes*, 614 So. 2d 495 (Fla. 1993).

   c. *Wald v. Grainger*, 64 So. 3d 1201 (Fla. 2011), holds a jury is free to weigh opinion testimony of expert witnesses, and either accept, reject or give that testimony such weight as it deserves, the reasons given by the witness and all other evidence in the case, including lay testimony. However, when medical evidence on permanence is undisputed, unimpeached, or not otherwise subject to question based on the other evidence presented at trial, the jury is not free to simply ignore or arbitrarily reject that evidence and render a verdict in conflict with it.
3. A plaintiff who fails to reach the no-fault threshold of permanent injury may still recover future medical expenses and lost income not recoverable under PIP coverages. *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89 (Fla. 1995).

4. On the requirements for a plaintiff to be entitled to a PIP recovery, see generally '627.736, Fla. Stat., and *Blish v. Atlanta Cas. Co.*, 736 So. 2d 1151 (Fla. 1999). There are numerous other nuances and sub-issues regarding PIP coverage that are beyond the scope of this outline.

C. **Uninsured Motorist Coverage - '627.727, Fla. Stat.**

1. Definition of Uninsured Motorist - includes an insured motor vehicle when the liability insurer has provided limits of bodily injury liability that are less than the total damages sustained by the plaintiff. '627.727(3)(b). Also includes where insurer insolvent. '627.727(3)(a).

2. Statutory requirements under Section 627.727, Fla. Stat.
   
   a. Section 627.727 requires that the limits of uninsured motorist coverage shall not be less than the limits of bodily injury liability insurance purchased by the insured, although the UM policy may provide coverage greater than that required by the statute. *Universal Underwriters Ins. Co. v. Morrison*, 574 So. 2d 1063 (Fla. 1990).

   b. No motor vehicle insurance policy is to be delivered or issued for delivery without uninsured motorist coverage, unless UM coverage was rejected by any named insured on the policy. *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971).

3. Where an under-insured motorist insurer is properly sued and joined in an action against a tortfeasor, the jury should be made aware that the insurer is a party in the case. *Gov‘t Employees Ins. Co. v. Krawzak*, 675 So. 2d 115 (Fla. 1996). Failure to do so is reversible error per se. *Medina v. Peralta*, 724 So. 2d 1188 (Fla. 1999).

4. Hit and run vehicles and phantom vehicles (without contact) are uninsured motorists. *Brown v. Progressive Mut. Ins. Co.*, 249 So. 2d 429 (Fla. 1971). For a hit and run or phantom vehicle, there is typically a requirement in the policy to notify the UM carrier within a certain length of time. Failure to do so creates a rebuttable presumption of prejudice, although the presumption may be overcome. *Allstate Ins. Co. v. Korschun*, 350 So. 2d 1081 (Fla. 3d DCA 1977); see generally, *Bankers Ins. Co. v. Macias*, 475 So. 2d 1077 (Fla. 1985).
5. The mere existence of a policy does not constitute an insured vehicle; liability policy exclusions may make the driver uninsured. *Allstate Ins. Co. v. Boynton*, 486 So. 2d 552 (Fla. 1986).

6. A policy provision that excludes UM coverage for accidents involving a vehicle owned or operated by a self-insurer is void. *Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80 (Fla. 2000).

7. Persons insured under UM coverage:

Section 627.727(1) requires the insurer to notify the insured at least annually of UM coverage options. Notice must be part of the premium notice and must provide for a means to request UM coverage. If the carrier fails to comply with this requirement, UM limits will be at least the same as the bodily injury liability limits. *Marchesano v. Nationwide Property and Cas. Ins. Co.*, 506 So. 2d 410 (Fla. 1987).

8. Stacking: Section 627.727(9) permits insurers to limit UM coverage, including limiting to highest limits of UM coverage for any one vehicle, by the named insured signing a selection form, which is conditionally presumed to be a knowing acceptance on behalf of all insureds (as amended in 2013).

9. Set Off:

a. Section 627.727(1) provides that UM coverage is “over and above, but shall not duplicate the benefits available . . . under any motor vehicle liability insurance coverages . . . and shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of the coverage provided under this section. The amount of coverage available under this section shall not be reduced by a setoff against any coverage, including liability insurance.”

b. As to the unavailability of setoffs in general for future benefits, see *Joerg v. State Farm Mutual Automobile Insurance Co.*, 176 So. 3d 1247 (Fla. 2015).

10. Statute of Limitations:


c. Uninsured motorist’s benefits are available even when a procedural defense, such as the statute of limitations, would defeat recovery from an uninsured motorist. *Lewis v. Allstate Ins. Co.*, 667 So. 2d 261 (Fla. 1st DCA 1995).

11. Arbitration:

   a. Many policies have deleted the arbitration provisions for UM coverage.


12. An insured may sue his or her UM carrier without first suing the tortfeasor. *Hartford Ins. Co. of the Midwest v. Minagorri*, 675 So. 2d 142 (Fla. 3d DCA 1996).


   Choice of law issues can be critical in determining UM coverage. The *lex loci contractus* rule (the law in the state where the contract was made) generally applies unless there is a public policy exception. *See State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160 (Fla. 2006).
14. **Settling the Liability Claim.**

a. Section 627.727(6), Fla. Stat., provides that if an injured person agrees to settle his claim with the liability insurer, he must give written notice of the proposed settlement to the UM carrier by certified or registered mail. UM carrier then has 30 days to reply. If the UM carrier authorizes settlement or fails to respond within 30 days, the injured party may proceed to settlement with the tortfeasor with no prejudice to the UM carrier. However, if the UM carrier refuses permission to settle, the UM carrier must pay to the injured party the amount of the written offer. The UM carrier is entitled to credit against “total damages” for the full amount of the underinsured liability coverage, regardless of the actual settlement amount. “Total damages” means total damages sustained by the injured party, not the amount of UM coverage.

b. An insured is entitled to accept less than the total liability limits of the third-party tortfeasor and still proceed against the UM carrier for UM coverage. *Abberton v. Colonial Penn Ins. Co.*, 421 So. 2d 6 (Fla. 2d DCA 1982).

c. If the UM carrier refuses claimant the right to settle with the third-party carrier, then the claimant can file directly for arbitration (if provided in the policy) but can claim only the excess over the third-party’s coverage. *Arrieta v. Volkswagen Ins. Co.*, 343 So. 2d 918 (Fla. 3d DCA 1977), or follow the procedures in '627.727(6) and go to court against both the UM carrier and the third party.

d. Plaintiff’s settlement and release of third-party tortfeasor without written permission of the UM carrier may prevent recovery under the UM policy. *Southeastern Fid. Ins. Co. v. Earnest*, 378 So. 2d 787 (Fla. 3d DCA 1979).

e. Plaintiff may have a cause of action against the UM carrier if the UM carrier unreasonably withholds permission to settle or proceed to judgment. *Abberton v. Colonial Penn Ins. Co.*, 421 So. 2d 6 (Fla. 2d DCA 1982).

D. **Seat Belt Defense.**

1. Section 316.614, Fla. Stat., requires that every driver and front-seat passenger in a motor vehicle be restrained by a safety belt.
2. Section 316.614 provides a violation shall not constitute negligence per se, or be used as prima facie evidence of negligence or be considered in mitigation of damages, but may be considered as evidence of comparative negligence.

3. When a jury is considering whether an auto accident plaintiff was negligent in failing to use a seat belt, the jury should be instructed to calculate the single total percentage for comparative negligence, whether it involves seat-belt issue or other issue, rather than reducing the plaintiff’s award by comparative fault in causing the accident and then reducing it again by deducting the percentage of fault caused by failure to use a seat belt. There should be a single calculation for comparative negligence on the verdict form. *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934 (Fla. 1996).

4. Traffic violations can be considered as evidence of comparative negligence. A violation of this statute is relevant as is any other violation of a traffic statute, and it is reversible error for the court to fail to inform the jury that violation of the traffic regulation mandating use of a seat belt constitutes evidence of negligence. *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934 (Fla. 1996).

5. The defendant has the burden to present evidence establishing a causal relationship between the alleged failure to wear the seat belt and the motorist’s injuries. *DO & CO Miami Catering, Inc. v. Chapman*, 899 So. 2d 1236 (Fla. 3d DCA 2005).

6. *Quarantello v. Leroy*, 977 So. 2d 648 (Fla. 5th DCA 2008), holds '316.613(3), Florida Stat., providing that failure to provide and use child passenger restraint was not to be considered comparative negligence, nor was it to be admissible as evidence of negligence, did not bar use of this evidence in context of personal injury action brought by child’s court-appointed guardian against grandmother to recover damages for injuries child sustained in accident that resulted in child being thrown from booster seat.

### E. Multiple Accidents.

1. Where there have been multiple, but separate accidents, and damages are not readily apportionable, all defendants may be joined in one lawsuit. *Lawrence v. Hethcox*, 283 So. 2d 41 (Fla. 1973).

F. Damages.

1. In auto accident cases, evidence of PIP benefits must be presented to trier of fact, whether judge or jury, for purpose of setoff defense. *Caruso v. Baumle*, 880 So. 2d 540 (Fla. 2004). Effective February, 2006, the Florida Supreme Court adopted a new standard jury instruction on the jury not awarding damages that are paid (or perhaps payable) by PIP. Fla. Std. Jury Instr. (Civ.) 6.13(c).

2. *Norman v. Farrow*, 880 So. 2d 557 (Fla. 2004), holds damages in auto accident cases should be computed by deducting amount of PIP benefits paid or payable from amount of economic damages awarded, and then applying the percentage of comparative negligence to reduce damages recoverable.

G. Alcohol and Vehicles.

1. Section 768.125, Fla. Stat., “liability for injury or damage resulting from intoxication,” provides:

   A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

2. Violation of §768.125, makes the vendor vicariously liable for the actions of the minor or habitual drunk to whom the vendor willfully (minor) or knowingly (habitual drunk) sold the alcohol. *Publix Supermarkets, Inc. v. Austin*, 658 So. 2d 1064 (Fla. 5th DCA 1995) (mere negligent sale is not enough to impose liability).

3. Seller can be found to have sold beer not only to minor who actually made the purchase but also minor who occupied the car in which purchaser was riding, if purchaser made statements putting seller on notice that the beer was destined for purchaser’s underage companions waiting in car. *O’Neale v. Hershoff*, 634 So. 2d 644 (Fla. 3d DCA 1993).

4. Whether a vendor “knowingly” served a person habitually addicted to the use of alcohol may be proved with circumstantial evidence. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991). However, the act of serving multiple drinks (3 or 4) to an anonymous patron on one occasion is not,
alone, sufficient to meet the statutory criteria for liability on the server. *Fleuridor v. Surf Café, 775 So. 2d 411* (Fla. 4th DCA 2001) (affirming summary judgment in favor of seller of alcohol).


6. Because a question of fact existed as to foreseeability, the Fifth DCA reversed summary judgment for a drinking establishment that sold beer to a minor who was injured while a passenger in a vehicle driven by a drunk who was legal age. The plaintiff contended he had been rendered incapable of making a proper decision as to whether to get in the car and wear his seat belt. *Nieves v. Camacho Clothes, Inc., 645 So. 2d 507* (Fla. 5th DCA 1994).

7. However, plaintiff is not required to prove the exact manner of the injury to support a claim under 768.125. *Fritsch v. Rocky Bayou Country Club, Inc., 799 So. 2d 433* (Fla. 1st DCA 2001) (reversing summary judgment where plaintiff shot by person allegedly habitually addicted).

8. Where a Disney employee became intoxicated at a company party, went to sleep in this car, was ordered by a Disney guard to move his car and leave, and promptly ran into a light pole, a defense summary judgment was reversed. The court held that although the guard had no duty to help the plaintiff, he had a duty to refrain from ordering him to drive unless he reasonably believed the plaintiff could safely do so. *Bardy v. Walt Disney World Co., 643 So. 2d 46* (Fla. 5th DCA 1994). Compare *Aguila v. Hilton, Inc., 878 So. 2d 392* (Fla. 1st DCA 2004) (no liability of hotel that did not serve alcohol when security guard ordered intoxicated college student to leave private party).

9. The court affirmed the dismissal of a claim against a valet service by the estate of a decedent who was killed in an automobile accident after the valet service returned the keys to the intoxicated car owner, holding there was no duty to third parties to refrain from returning the keys. *Weber v. Marino Parking Sys., Inc., 100 So. 3d 729* (Fla. 2d DCA 2012).

10. Proof that defendant was driving while intoxicated is sufficient to create a jury issue on punitive damages. *Ingram v. Pettit, 340 So. 2d 922* (Fla. 1976). Simple negligence by the owner is enough to hold the owner responsible for punitive damages if the driver’s conduct was willful, wanton or in reckless disregard. *See Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545* (Fla. 1981).
H. Rear-end collisions.

The Florida Supreme Court has clarified that because tort recovery is governed by principles of comparative negligence, the presumption that a rear driver’s negligence is the sole cause of a rear-end collision can be rebutted and its legal effect dissipated by the production of evidence from which a jury could conclude the front driver was negligent in the operation of his or her vehicle. The court also went on to hold a presumption that the rear driver’s negligence is the sole cause of the rear-end collision is available whether the plaintiff is the driver of the front or rear vehicle or a passenger in either, and regardless of whether the driver of the rear vehicle is a party to the litigation. See Birge v. Charron, 107 So. 3d 350 (Fla. 2012); Cevallos v. Rideout, 107 So. 3d 348 (Fla. 2012).

III. PREMISES LIABILITY.

A. Responsible Parties.

1. Two or more parties may share control over land or business premises, and each owe a duty to potential claimants. Metsker v. Carefree/Scott Fetzer Co., 90 So. 3d 973 (Fla. 2d DCA 2012).

2. In case of first impression in the state, the court held that negligent security cases are governed under the standards of premises liability, rather than ordinary negligence. Nicholson v. Stonybrook Apartments, LLC, 154 So. 3d 490 (Fla. 4th DCA 2015). Thus, the jury properly considered evidence that the plaintiff was a trespasser on the property, as opposed to an invitee.

B. Status of Plaintiff.

1. The status of the claimant is pertinent to the duty of care owed by the landowner. Wood v. Camp, 284 So. 2d 691 (Fla. 1973). The status of a person is generally a question of fact. Poe v. IMC Phosphates MP, Inc., 885 So. 2d 397, 402 (Fla. 2d DCA 2004).

2. The status of the plaintiff is relevant only if the injury results from a condition of the premises. Maldonado v. Jack M. Berry Grove Corp., 351 So. 2d 967 (Fla. 1977).

3. Invitees.

   a. An invitee is one who comes upon the premises for purposes connected with the business of the owner or occupant, or who, as a member of the public, is invited onto the premises for a purpose for which the land is held open to the public. Post v. Lunney, 261 So.
2d 146 (Fla. 1972). Invitees also include those “licensees” who have come upon the premises by express or limited invitation. 

*Wood v. Camp*, 284 So. 2d 691 (Fla. 1973). Police officer performing illegal warrantless search is not lawfully on the premises and is not an invitee. 

*Potts v. Johnson*, 654 So. 2d 596 (Fla. 3d DCA 1995).

b. The landowner owes two duties to invitees: (1) to use reasonable care to maintain the premises in a safe condition, and (2) to give the invitee warning of concealed perils that are or should be known to the landowner and that are unknown to the invitee and cannot be discovered through the exercise of due care. 

*E.g.*, *St. Joseph’s Hosp. v. Cowart*, 891 So. 2d 1039 (Fla. 2d DCA 2004).

c. An invitee may lose his status and become a licensee or trespasser by, for example, going to a part of the premises that is beyond the scope of his or her invitation, or staying beyond a reasonable time within which to accomplish the purpose for which he is invited to enter or remain. An invitee does not lose his status, as a matter of law, merely because he participates in a brawl with other customers in the store’s parking lot. Whether the invitee’s behavior is sufficient to cause him to lose his status as invitee is a question of fact for trial. 

*Byers v. Radiant Group, L.L.C.*, 966 So. 2d 506 (Fla. 2d DCA 2007).

4. Licensees.

a. A licensee is one who enters the property of another solely for his own convenience and without invitation, either express or implied, under the circumstances. 


b. A landowner’s duties to a licensee are: (1) to avoid willful and wanton harm to him, and (2) to warn him of a defect or condition known by the landowner to be dangerous when such danger is not open to ordinary observation by the licensee or trespasser. 

*Poe v. IMC Phosphates MP, Inc.*, 885 So. 2d 397, 400 (Fla. 2d DCA 2004).

c. A “known trespasser” is the legal equivalent of an “uninvited licensee.” 

*Lane v. Morton*, 687 So. 2d 53 (Fla. 3d DCA 1997).
5. Trespassers.
   
a. Trespassers are those who come upon the premises of another without license, invitation or other right, and intrude for some definite purpose of their own, or at their own convenience. *Post v. Lunney*, 261 So. 2d 146 (Fla. 1972).

b. The property owner’s duty to a trespasser is only to avoid willful and wanton harm to him and, upon discovery of the trespasser’s presence, to warn him of known dangers not open to ordinary observation. *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973).

c. Section 768.075, Fla. Stat., provides defenses to landowners for some claims. These include a person committing a felony on the property, even where there is no causal connection to the injury. *Kuria v. BMLRW, LLLP*, 101 So. 3d 425 (Fla. 1st DCA 2012). An organization that contracted for the right to use a parking lot was held to have a controlling interest in the property, making it immune from liability for a trespasser under the influence of alcohol in *Ryan v. Nat’l Marine Mfrs. Ass’n*, 103 So. 3d 1001 (Fla. 3d DCA 2012).

6. A landowner may also be liable for injuries to children based on an “attractive nuisance” theory. See Fla. Std. Jury Instr. (Civ) 3.2C; *Martinello v. B & P USA, Inc.*, 566 So. 2d 761 (Fla. 1990).

C. Reasonably Safe Condition and Notice or Knowledge of the Condition.

1. Effective July 1, 2010, the Legislature enacted ’768.0755, which provides that if a person slips and falls on a transitory foreign substance at a business establishment, the person must prove the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it.

   Constructive knowledge may be proven by circumstantial evidence showing that (a) the dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or (b) the condition occurred with regularity and was therefore foreseeable.

2. Subpart (b) appears similar to the “negligent mode of operation” theory: that if the premises owner could reasonably anticipate that dangerous conditions would arise as a result of its mode of operation, then whether the owner had actual or constructive knowledge of the specific foreign substance is not an issue. *Markowitz v. Helen Homes of Kendall Corp.*, 826 So. 2d 256 (Fla. 2002).
3. *Kenz v. Miami-Dade County*, 116 So. 3d 461 (Fla. 3d DCA 2013), holds the 2010 version of business establishment premises liability statute applies to incidents before its effective date. *Pembroke Lakes Mall, LTD v. McGruder*, 137 So. 3d 418 (Fla. 4th DCA 2014), holds that Section 768.0755, Florida Statutes, is substantive rather than procedural in nature and, therefore, applies prospectively. It certified conflict with *Kenz*.

4. The landowners’ duty to exercise reasonable care can extend to the approaches to the premises. *Thompson v. Gallo*, 680 So. 2d 441 (Fla. 1st DCA 1996); *Levy v. Home Depot, Inc.*, 518 So. 2d 941 (Fla. 3d DCA 1987).

5. *Del Rio v. City of Hialeah*, 904 So. 2d 484 (Fla. 3d DCA 2005), reversed a summary judgment in favor of an owner abutting a city sidewalk with a dangerous condition, based on an ordinance that made such owners liable.

6. *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864 (Fla. 2d DCA 2010), holds the owner’s non-delegable duty to maintain the premises in a reasonably safe condition gives rise to a theory of direct liability, rather than a claim of vicarious liability based on the party to whom the owner had delegated the duty.

7. *Hanrahan v. Hometown Am., LLC*, 90 So. 3d 915 (Fla. 4th DCA 2012), held that a landlord has no duty to guard against fire ants. Florida law does not require the owner or possessor of land to anticipate the presence of or guard against harm from animals ferae naturae unless he has reduced the animals to possession, harbors such animals, or has introduced onto his premises wild animals not indigenous to the locality.

8. A split opinion, *Sewell v. Racetrac Petroleum, Inc.*, 43 Fla. L. Weekly D47 (Fla. 3d DCA Dec. 27, 2017), held a property owner had a qualified privilege to apply for a median cut in a road, but could be liable for painting driveway markings on its property that encourage drivers to turn left out of the property when the owner knew or should have known such turns were unreasonable dangerous.
D. **Obvious Danger.**

1. The “obvious danger doctrine” recognizes that owners and occupiers should be legally permitted to assume the invitee will perceive that which would be obvious to them upon the ordinary use of their own senses, but it does not discharge the landowner’s or possessor’s duty to maintain the property in a reasonably safe condition. *Trainor v. PNC Bank*, 211 So. 3d 366 (Fla. 5th DCA 2017) (reversing summary judgment where patron stepped in a pothole in the parking lot).

2. Florida appellate courts hold that ordinary curbs outside cannot be dangerous conditions for which a landlord is responsible. See *Aventura Mall Venture v. Olson*, 561 So. 2d 319 (Fla. 3d DCA 1990); *Gorin v. City of St. Augustine*, 595 So. 2d 1062 (Fla. 5th DCA 1992). But other cases have held that speed bumps or indentations in a parking lot can present jury issues on liability. *Bryant v. Lucky Stores, Inc.*, 577 So. 2d 1347 (Fla. 2d DCA 1990); *Weir v. Krystal Co.*, 612 So. 2d 665 (Fla. 1st DCA 1993).

3. A difference in floor levels in a house does not constitute a dangerous condition creating a duty on homeowner to warn a social guest, even when dim lighting or other guests obscure the difference in levels. *Casby v. Flint*, 520 So. 2d 281 (Fla. 1988). The court recognized other circumstances may create a dangerous situation with a duty to warn, citing *Kupperman v. Levine*, 462 So. 2d 90 (Fla. 4th DCA 1985); *Northwest Florida Crippled Children’s Ass’n v. Harigel*, 479 So. 2d 831 (Fla. 1st DCA 1985).

4. *Kenley v. Inwood Property Inv., Inc.*, 931 So. 2d 1053 (Fla. 4th DCA 2006), holds the “open and obvious” doctrine is applied to bodies of water when the drowning victim was a young child.

E. **Latent v. Patent Defect.**

1. Under the “Slavin doctrine,” also known as the “completed and accepted” rule, a contractor is not liable for injuries to third parties after the owner has accepted the work unless the defect at issue was latent and could not have been discovered by the owner, or unless the contractor was dealing with inherently dangerous elements. With latent defects, the contractor’s original negligence remains the proximate cause of the plaintiff’s injuries. *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1958); *Foreline Sec. Corp. v. Scott*, 871 So. 2d 906 (Fla. 5th DCA 2004).

2. A latent defect is not apparent by use of one’s ordinary senses from a casual observation of the premises. The test for latency is not whether the object
itself is obvious, but whether the defective nature of the object was obvious. *Kala Inv., Inc. v. Sklar*, 538 So. 2d 909 (Fla. 3d DCA 1989).

3. Owner is liable to employee of independent contractor if he has actual or constructive knowledge of a latent defect and fails to warn or protect against the defect. *Mozee v. Champion Int’l Corp.*, 554 So. 2d 596 (Fla. 1st DCA 1989). However, plaintiff may not recover from owner where plaintiff was injured by the very condition he was hired to correct. *Parrish v. Matthews*, 548 So. 2d 725 (Fla. 3d DCA 1989).

F. Landlord/Tenant.

1. In *Mansur v. Eubanks*, 401 So. 2d 1328 (Fla. 1981), the Florida Supreme Court held in a residential rental that (1) the landlord has the duty to reasonably inspect the premises before allowing the tenant to take possession and to make necessary repairs to render the dwelling safe, unless waived by the tenant, and (2) after the tenant takes possession, the landlord has the continuing duty to exercise reasonable care to repair dangerous defective conditions upon notice given to the landlord. See Fla. Std. Jury Instr. (Civ) 3.5i.

2. But see *Veterans Gas Co. v. Gibbs*, 538 So. 2d 1325 (Fla. 1st DCA 1989), where an owner/lessor of an office building (commercial property) was not liable for injuries sustained by tenant’s employees after owner/lessor surrendered complete possession and control of premises.

3. In *Haskell Co. v. Lane Co., Ltd.*, 612 So. 2d 669 (Fla. 1st DCA 1993), the doctrine of caveat emptor precluded a purchaser’s tenants from recovery of damages from the vendor and builder of a commercial property due to defect in building’s roof.

4. Landlord is relieved from liability for any defect not discoverable by reasonable inspection, i.e., latent defects. *Fitzgerald v. Cestari*, 569 So. 2d 1258 (Fla. 1990).

5. The Supreme Court held the McCain analysis applied in determining whether a landowner owed a duty of care to pedestrians to keep foliage trimmed in *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001) (reversing dismissal of pedestrian’s claim that gas station operator owed duty to trim foliage that obscured driver’s view of the sidewalk, rejecting “agrarian rule”).

1. The landowner may be liable to plaintiff who is injured by criminal acts of a third person if the landowner has actual or constructive knowledge of similar criminal acts, or if landlord has provided inadequate security. *Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So. 2d 98 (Fla. 3d DCA 1980); see also *Merrill Crossings Assoc. v. McDonald*, 705 So. 2d 560 (Fla. 1997) (citing various criminal acts cases); *Vazquez v. Lago Grande Homeowners Ass’n*, 900 So. 2d 587 (Fla. 3d DCA 2004).

2. Section 768.0705, Fla. Stat., provides a presumption against liability for criminal acts for convenience store owners who implement specified security measures.

3. *T.W. v. Regal Trace, Ltd.*, 908 So. 2d 499 (Fla. 4th DCA 2005), holds owners and management had a duty to warn tenants of alleged sexual assault committed by a co-tenant on a tenant child, but they did not have duty to investigate the alleged assault.

IV. WRONGFUL DEATH.

A. Statutory Overview: Section 768.16 - 768.27, Fla. Stat.

1. Legislative Intent: It is the public policy of the state to shift the losses resulting when wrongful death occurs from survivors of the decedent to the wrongdoer. The Wrongful Death Act is remedial and shall be liberally construed. '768.17, Fla. Stat., *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977).

2. Right of Action.

   a. A wrongful death action may be brought in Florida when the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person including those occurring on navigable waters. '769.19, Fla. Stat.

   b. The action is brought by the personal representative of the estate on behalf of any and all “survivors” as defined by the statute. '769.20; *Wiggins v. Estate of Wright*, 850 So. 2d 444, 446 (Fla. 2003).

   c. *Greenfield v. Daniels*, 51 So. 3d 421 (Fla. 2010), holds biological child of man not married to mother may qualify for survivor damages in a wrongful death action so long as it is established that the decedent is the biological parent and that he acknowledged
responsibility for support; the trial court could make a factual
determination as to whether child qualified as a survivor.

d. An unborn viable fetus is not “a person” for the purposes of the
So. 2d 482 (Fla. 1996).

e. Instead, a suit for negligent stillbirth is now recognized as a


(1) “Survivors” means decedent’s spouse, children, parents, and
decedent’s blood relatives and adoptive brothers and sisters when
partly or wholly dependent on decedent for support of services.

(2) “Minor Children” means children under the age of 25 (regardless of
dependency).  *Zimmerman v. Cruz & Garcia*, 449 So. 2d 996 (Fla.
4th DCA 1984).

(3) “Support” includes contribution in kind as well as money.

(4) “Services” means tasks usually of a household nature, regularly
performed by the decedent that will be a necessary expense to the
survivors of the decedent.  “Services” need not be replaced or
purchased by survivors.  *Smyer v. Gaines*, 332 So. 2d 655 (Fla. 1st
DCA 1976).

(5) “Net accumulations” means net business or salary income,
including pension benefits, that decedent probably would have
retained as savings and left as a part of his estate if he had lived a
normal life expectancy.  “Net business or salary income” is the
decedent’s probable gross income after taxes excluding income
from investments continuing beyond death that remains after
deducting decedent’s personal expenses and support of survivors,
excluding contributions in kind.

Net accumulations do not include investment income, but can
include investment return on future savings of the decedent.  No
particular method is required to determine effective inflation for
552 So. 2d 1089 (Fla. 1989).
B. Parties.  '768.20, Fla. Stat.

1. The cause of action must be brought by the personal representative on behalf of the decedent’s survivors and estate for all damages. Where the deceased minor’s father filed a wrongful death cause of action before qualifying as the personal representative, subsequent qualification as personal representative relates back to the minor’s death. Griffin v. Workman, 73 So. 2d 844 (Fla. 1954); see also Berges v. Infinity Ins. Co., 896 So. 2d 665 (Fla. 2004).

2. The personal representative is the only plaintiff, and the personal representative has the statutory authority to accept or reject an offer of judgment. Accordingly, a single offer of judgment made to the personal representative in a wrongful death action involving numerous survivors is a valid proposal offer of judgment. Thompson v. Hodson, 825 So. 2d 941 (Fla. 1st DCA 2002).

3. If the wrongdoer dies, her personal representative shall be named as the defendant. Fla. R. Civ. P. 1.260(a) requires a party move for substitution of the personal representative within 90 days of the suggestion of death of a party (whether plaintiff or defendant, and in all cases, not just wrongful death actions).

4. All potential beneficiaries must be identified in the complaint and the relationship to the decedent stated in the complaint. '768.21, Fla. Stat.


1. When personal injury to the decedent causes death, no action for personal injury shall survive, and any such action pending at the time of death shall abate. '768.20, Fla. Sta.

2. This is an exception to the general rule that no cause of action dies with the person, and all causes of action survive. '46.021, Fla. Stat.

3. When a plaintiff dies during litigation, the trial court should permit the personal representative to be substituted to pursue a wrongful death action if the defendant’s actions caused the death, a survival action if they did not, or to pursue both, where the cause of death may be disputed. Capone v. Philip Morris USA, Inc., 116 So. 3d 363 (Fla. 2013).

4. Note that when a party dies and a suggestion of death is filed, the motion for substitution of parties must be made within 90 days after the suggestion of death, to avoid dismissal of the action as to the deceased party. Fla. R. Civ. P. 1.260(a).
D. Defenses.

1. Depending on the situation, a defense that would have barred a claim by the decedent may bar a wrongful death action. See Variety Children’s Hospital v. Perkins, 445 So. 2d 1010 (Fla. 1983) (recovery for personal injuries while alive barred later wrongful death action for same tortious act); Hudson v. Keene Corp., 445 So. 2d 1151 (Fla. 1st DCA 1984) (running of a personal injury statute of limitations before decedent’s death barred wrongful death action based on same tortious conduct, even though filed within wrongful death limitations); Nissan Motor Co., Ltd. v. Phlieger, 508 So. 2d 713 (Fla. 1987) (products liability statute of repose was inapplicable to bar action for wrongful death based on products liability); Safecare Health Corp. v. Rimer, 620 So. 2d 161 (Fla. 1993) (prior settlement of decedent’s claim for personal injuries against one tortfeasor did not bar wrongful death action against the other tortfeasor). See generally, Toombs v. Alamo Rent-A-Car, Inc., 833 So. 2d 109 (Fla. 2002).

2. A defense that would bar or reduce survivor’s recovery if he or she were the plaintiff may be asserted against that survivor, but not against other survivors. See, e.g., Hess v. Hess, 758 So. 2d 1203 (Fla. 4th DCA 2000) (where mother of deceased child was 100% liable for accident which resulted in death of the child, the mother was foreclosed from recovery as her survivor).


E. Damages. ‘768.21, Fla. Stat.

1. Survivors.
   a. Loss of support and services from the date of injury to the date of death, with interest.
   b. Future loss of support and services reduced to present value. The future loss of support and services need not be calculated with mathematical certainty. Boud v. Touchette, 349 So. 2d 1181 (Fla. 1977).
   c. Medical and funeral expenses may be recovered by a survivor who paid them.
   d. In evaluating loss of support and services, the following may be considered:
(1) The survivor’s relationship to the decedent.

(2) The amount of decedent’s probable income available for distribution to the particular survivor.

(3) The replacement value of the decedent’s services to the survivor.

e. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and period of minority may be considered.

2. Surviving Spouse.

a. Companionship and protection, and mental pain and suffering from the date of injury. For discussions of mental pain and suffering, see Metropolitan Dade County v. Dillon, 305 So. 2d 36 (Fla. 3d DCA 1974); Compania Dominicana de Aviacion v. Knapp, 251 So. 2d 18 (Fla. 3d DCA 1971).

3. Minor Children and all children if there is no surviving spouse.

a. Loss of parental companionship, instruction and guidance; mental pain and suffering from the date of injury.

b. Bellsouth Telecommunications, Inc. v. Meeks, 863 So. 2d 287 (Fla. 2003), holds damages recoverable by minor child under wrongful death statute are not limited to period of minority, but should have been calculated based on the joint life expectancy of minor child and deceased parent.

4. Parent.

a. Each parent of a deceased minor child may recover mental pain and suffering from the date of injury until the minor reaches the age of majority. Cruz v. Broward County Sch. Bd., 800 So. 2d 213 (Fla. 2001). The recovery by one parent will not be reduced because of negligence of the other parent. Singletary v. Nat’l R.R. Passenger Corp., 376 So. 2d 1191 (Fla. 2d DCA 1979).

b. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.
5. Decedent’s Estate.
   
a. Loss of earnings from injury to the date of death, less support to survivors plus interest.
   
b. Loss of prospective net accumulations reduced to present value if:
   
   (1) The decedent’s survivors include a surviving spouse or lineal decedent; or
   
   (2) If the decedent is not a minor child as defined in ’768.18(2), Fla. Stat., there are no lost support and services recoverable under ’768.21(1), and there is a surviving parent. See Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986).
   
c. Medical and funeral expenses not paid to survivors under ’768.21(5).
   
d. The above awards are subject to the claims of creditors. See Ross v. Agency for Health Care Admin., 947 So. 2d 457 (Fla. 3d DCA 2006) (personal representative required to allocate proceeds of settlement to pay the full amount of the Medicaid lien).
   
6. As noted, minor children of the decedent, and all children if there is no surviving spouse, may recover for pain and suffering and lost parental companionship, guidance, and instruction pursuant to ’768.21(3). And parents of an adult child may recover for pain and suffering if there are no other survivors pursuant to ’768.21(4).

   If the decedent died as a result of medical malpractice, then the damages in ’768.21(3) shall not be recoverable by adult children and the damages in ’768.21(4) shall not be recoverable by the parents of an adult child. ’768.21(8).

7. In an action for wrongful death of a child, the jury’s award to the non-negligent parent as a survivor cannot be reduced by the comparative negligence of the other parent. Childers v. Schachner, 612 So. 2d 699 (Fla. 3d DCA 1993).

8. Grief experts may be permitted to testify if trial court determines that such testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue. Angrand v. Key, 657 So. 2d 1146 (Fla. 1995).
9. *St. Mary’s Hosp., Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), held arbitration provisions of the Medical Malpractice Act governed elements of all the damages available, including economic damages, regardless of whether the medical malpractice action involves a wrongful death. The legislature then amended sections 766.207 and 766.202. *Barlow v. North Okaloosa Med. Ctr.*, 877 So. 2d 655 (Fla. 2004), held these amendments to Medical Malpractice Act providing damages be awarded as provided by general law, including the Wrongful Death Act, did not apply to incidents before amendments became effective.

10. *Copeland v. Buswell*, 20 So. 3d 867 (Fla. 2d DCA 2009), holds a tortfeasor did not have the authority to settle medical expenses incurred by the decedent and thereby eliminate that portion of the estate’s wrongful death claim.

V. **PRODUCTS LIABILITY.**

A. **Theories of Liability - Overview.**

1. In addition to negligence, product liability theories encompass strict liability, express warranty, and implied warranties of merchantability and fitness for a particular purpose. Unlike negligence and strict liability theories, the warranty theories require privity between the injured party and the defendant. In general, see, Fla. Standard Jury Instructions PL.


5. Manufacturers are held to the knowledge and skill of an expert and have a duty to fully test their products to uncover all scientifically discoverable dangers before the products are sold. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 943 (Fla. 2000).

6. *Aubin v. Union Carbide Corporation*, 177 So. 3d 489 (Fla. 2015), makes several important holdings. It holds Florida applies the consumer expectations test, rather than the risk utility test, to design defect claims. Under the consumer expectations test, a product is defectively designed if it did not perform as safely as an ordinary consumer would expect when used in the intended or reasonably foreseeable manner. But even using this test, the plaintiff is not precluded from proving his case by showing that alternative, safer designs exist. Similarly, the defendant is not precluded from showing it could not have made the produce any safer through reasonable alternative designs. Parties may also argue whether the
benefits of an alternative design outweighed the risks.

_Aubin_ also holds causation in a design defect claim addresses only whether the defect caused the harm. It is improper to compare the dangerousness of one product with another unreasonably dangerous product.

A manufacturer is liable on a failure to warn claim if it knowingly placed a dangerous product on the market, the dangerous condition of which is unnoticeable, and failed to properly warn of the dangerous condition.

In a failure to warn action, the manufacturer may be able to rely on a learned intermediary to relay warnings to the end user, but the learned intermediary doctrine is not a complete defense to such a claim. The intermediary's level of education, knowledge, expertise and relationship with the end-user is informative, but not dispositive on the issue of whether it was reasonable for the manufacturer to rely on that intermediary to relay the warning. The manufacturer may not rely on a learned intermediary if the manufacturer knows the necessary warnings would render the product less valuable and provide an incentive to the intermediary to withhold the necessary information from the consumer, or if the manufacturer does not adequately convey the danger to the intermediary or take steps to ensure that the intermediary would adequately warn the end-user. The reasonableness of the manufacturer's reliance on a learned intermediary is impacted by the dangerousness of the product.

5. Both negligence and strict liability cases recognize design defects, manufacturing defects, and defects resulting from misinformation or inadequate warnings. _See Force v. Ford Motor Co., 879 So. 2d 103, 106_ (Fla. 5th DCA 2004).

6. Since the adoption of strict liability, Florida cases continue to recognize product liability claims sounding in negligence for:


   b. negligent design. _Standard Havens Prod., Inc. v. Benitez_, 648 So. 2d 1192 (Fla. 1994) (product misuse is not an absolute bar to a products liability claim sounding in negligence). _Vincent v. C.R. Bard, Inc., 944 So. 2d 1083_ (Fla. 2d DCA 2006), holds the designer of a product may be liable based on negligence to a foreseeable user of its product although there are intervening manufacturers and distributors.

7. *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859 (Fla. 5th DCA 1996), held allegations that the manufacturer failed to conduct reasonable tests and inspections to discover the defective conditions before placing the product into the stream of commerce stated a claim for negligence. The alleged breach of a manufacturer’s duty to inspect and test a product is not a separate cause of action in strict liability because the duty to test is part of the manufacturer’s duty to design the product with reasonable care, and is subsumed in the claims for defective design and failure to warn. *Adams v. G.D. Searle & Co., Inc.*, 576 So. 2d 728 (Fla. 2d DCA 1991).

8. Defective design claims include claims for “crash worthiness” based on the defective design or manufacture. Such cases are often referred to as “secondary collision” or “enhanced injury” cases where an alleged defective condition created by a manufacturer does not cause the initial accident, but causes additional and distinct injuries beyond those suffered in the primary collision. Florida courts have applied this doctrine to motor vehicles, *Force v. Ford Motor Co.*, 879 So. 2d 103, 106 (Fla. 5th DCA 2004); motorcycles, *Nicolodi v. Harley-Davidson Motor Co., Inc.*, 370 So. 2d 68 (Fla. 2d DCA 1979); and to pleasure boats, *Rubin v. Brutus Corp.*, 487 So. 2d 360 (Fla. 1st DCA 1986).

9. *Force v. Ford Motor Co.* holds a consumer was entitled to submit his products liability case alleging a design defect in seat belts to the jury under the consumer-expectation test, as well as the risk-utility test.

10. *D’Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001), held that *Fabre* principles of comparative fault concerning the cause of the underlying crash (i.e., the automobile accident) will not ordinarily apply in crash worthiness or enhanced injury cases. In 2011, the Legislature amended §768.81(3)(b) to overrule *D’Amario* and provide that the jury shall be instructed on the apportionment of fault to all persons who contribute to the accident.

11. In *Tiara Condo Ass’n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013), the supreme court receded from other cases and held the economic loss rule applies to limit recovery for economic losses only in the products liability context. It does apply to limit claims for personal injury or damage caused to property other than the defective product.
B. **Strict Liability.**

1. **Seller of unreasonably dangerous product is liable.**

   The Florida Supreme Court adopted the Restatement (Second) of Torts Section 402(a), which provides that anyone who sells a product unreasonably dangerous to the user of the product is liable for injuries to the user if the seller is engaged in the business of selling that type of product and it is expected to and does reach the user without substantial change in the condition in which it was sold. *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976).

2. **Plaintiff’s Burden of Proof.**

   *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st DCA 1981), held that in order to make a case for strict liability, the plaintiff need only prove:

   a. the product was defective; not that it was unreasonably dangerous;

   b. the defect caused injuries; and

   c. the defect existed at the time the retailer parted with possession.

   The court held the plaintiff did not have to pinpoint the specific defect, and if the product fails in ordinary use, the plaintiff need not negate other non-negligent potential causes. When a product malfunctions during normal operation, a legal inference of the product’s defectiveness arises and the plaintiff establishes a prima facie case for the jury. 396 So. 2d at 1148; *Zyferman v. Taylor*, 444 So. 2d 1088 (Fla. 4th DCA 1984).

   *Zyferman* also holds the plaintiff does not have a burden to prove the product was used and maintained properly from the time it left the manufacturer to the time of the malfunction. Both sides may submit evidence relevant to the product’s handling since it left the manufacturer.

   The question of whether a product is inherently dangerous or has dangerous propensities and whether a manufacturer or distributor has a duty to warn under the circumstances are usually questions of fact for the jury. *Advance Chem. Co. v. Harter*, 478 So. 2d 444 (Fla. 1st DCA 1985).
3. Defenses to Strict Liability:

a. *Hardin v. Montgomery Elevator Co.*, 435 So. 2d 331 (Fla. 1st DCA 1983), holds the manufacturer’s placement of a product on the market knowing it is not to be used without inspection for defects is not a defense to strict liability, but a factor to be considered with others (such as the product’s age, state of repair, etc.) to be considered in determining whether the plaintiff made a prima facie showing that the product was defective while still within the manufacturer’s control.

b. *Hartman v. Opelika Mach. & Welding Co.*, 414 So. 2d 1105 (Fla. 1st DCA 1982), holds strict liability applies to a manufacturer who assembles or manufactures products according to the specifications or design of another, even if the product is sold exclusively to the designer.

c. The “patent danger” or “open and obvious hazard” is not an exception to liability on the part of a manufacturer, but rather a defense the manufacturer can urge to show comparative negligence of the plaintiff. *Auburn Machine Works Co., Inc. v. Jones*, 366 So. 2d 1167 (Fla. 1979).

d. An affirmative defense that a product is unavoidably unsafe must be proven by the defendant showing that the product’s benefits outweigh its own risks. *Adams v. G.D. Searle & Co., Inc.*, 576 So. 2d 728 (Fla. 2d DCA 1991).

e. Congress may preempt state law through legislation. *Ferlanti v. Liggett Group, Inc.*, 929 So. 2d 1172 (Fla. 4th DCA 2006), holds claims based on a design defect in cigarettes are not barred by the doctrine of conflict preemption. *Liggett Group, Inc. v. Davis*, 973 So. 2d 467 (Fla. 4th DCA 2007), holds a negligence claim based on the manufacturer continuing to make cigarettes after the health risks were known conflicted with federal law.

f. *R.J. Reynolds Tobacco Company v. Marotta*, 214 So. 3d 590 (Fla. 2017): Federal law does not implicitly preempt state law claims of strict liability and negligence by *Engle* progeny plaintiffs. Individual members of the *Engle* class are not precluded from seeking punitive damages.
4. **Inconsistent Verdicts:**

Submitting a products liability case to a jury on strict liability and negligence can pose the risk of an inconsistent verdict. The Florida Supreme Court resolved a conflict by holding: “When a jury in a civil case returns with an inconsistent verdict and a party does not object before the jury is discharged, the well-established law has been that the party waives any objections to the inconsistent verdict.” *Coba v. Tricam Industries, Inc.*, 164 So. 3d 637 (Fla. 2015). The court went on to hold there was no “fundamental nature” exception in the products liability context, where the jury finds the defendant was negligent in the design of the product, but also finds the product did not contain a design defect.

C. **Contractual Warranty Claims.**

1. **Express Warranty:**
   a. Section 672.313 sets forth the conditions by which a seller creates express warranty. Representations must be a fact, rather than opinion, and may be oral or written. They need not use the formal words “warranty” or “guarantee.”

   b. Pleading a cause of action for breach of express or implied warranty requires allegations in respect to the sale of the goods, identification of the types of warranties created, the facts in respect to the creation of the particular warranty, the facts in respect to the breach of the warranty, notice to the seller of the breach, and the injuries sustained by the buyer as a result of the breach of warranty. *Dunham-Bush, Inc. v. Thermo-Air Serv., Inc.*, 351 So. 2d 351 (Fla. 4th DCA 1977).


2. **Implied Warranties:**
   a. The Uniform Commercial Code provides for implied warranties of merchantability that the product is reasonably fit for the uses intended or reasonably foreseeable ('672.314) and fitness for a particular purpose for which the defendant knowingly sold the product and for which the purchaser bought the product in reliance on the judgment of the defendant, '672.315. Warranties may be excluded pursuant to '672.316.
b. Delivering, presenting or explaining the manufacturer’s warranty, without doing more, does not render the dealer a co-warrantor by adoption. *Motor Homes of Am., Inc. v. O’Donnell*, 440 So. 2d 422 (Fla. 4th DCA 1983).

c. The intent of the seller does not control as to whether a warranty arises. *Carter Hawley Hale Stores, Inc. v. Conley*, 372 So. 2d 965 (Fla. 3d DCA 1979). See also *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092 (11th Cir. 1983) (allegation of breach of express warranty does not require proof of intent).

D. **Spoliation.**

1. Florida courts have recognized a cause of action for spoliation of evidence involving products and other evidence. A plaintiff cannot assert an independent claim for spoliation of evidence against a first-party defendant in the underlying tort action. The available remedies are discovery sanctions and a rebuttable presumption of negligence for the underlying tort. *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005).

2. *Landry v. Charlotte Motor Cars, LLC*, 226 So. 3d 1053 (Fla. 2d DCA 2017), holds that to dismiss a case based solely on prejudice to the movant, the spoliated evidence must be so crucial as to completely prevent the movant from defending itself, not merely prevent the movant from defending itself completely.

VI. **MISCELLANEOUS (Tort-Related Decisions That Do Not Fit Above).**

A. The Florida Supreme Court found a medical malpractice arbitration agreement void as against public policy because it excluded required provisions of the Medical Malpractice Act. *Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016).

B. *Saunders v. Dickens*, 151 So. 3d 434 (Fla. 2014), holds a physician cannot insulate himself from liability for negligence by presenting a subsequent treating physician who testifies that adequate care by the defendant physician would not have altered the subsequent care.

C. *Special v. West Boca Medical Center*, 160 So. 3d 1251 (Fla. 2014), holds the harmless error rule requires the beneficiary of the error in the trial court to prove the error did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove there is no reasonable possibility that the error complained of contributed to the verdict.
D. *Vallardares v. Bank of America Corp.*, 197 So. 2d 1 (Fla. 2016), holds a cause of action arises for the negligent reporting of a crime when there is also punitive conduct by the reporting party.

E. *Worley v. Central Florida Young Men’s Christian Ass’n*, 228 So. 3d 18 (Fla. 2017): Attorney-client privilege protects a party from being required to disclose that his or her attorney referred the party to a physician for treatment.


G. *Debrincat v. Fischer*, 217 So. 3d 68 (Fla. 2017), holds the litigation privilege does not bar a claim for malicious prosecution.
ELECTRONIC DATA AND THE EROSION OF THE RULES AGAINST HEARSAY EVIDENCE

(No Materials)

By

Stephen A. Marino, Jr.
Miami
THERE’S MORE TO EXPERTS THAN DAUBERT & FRYE

By

Professor Charles H. Rose, III
St. Petersburg
There’s more to experts than Daubert & Frye.

**Daubert v. Frye**

How did we get reviewing the law?

**Frye v. United States**

293 F. 1013 (1928)

- Expert testimony permits expert opinion as long as the testimony is generally accepted in its particular field.
- Jury weighs the expert testimony, in the same way the jury weighs any other evidence.
REVIEWING THE LAW

DAUBERT V. MERRELL DOW PHARMACEUTICALS
509 U.S. 579 (1993)

Focuses on both Relevance and Reliability
Initially thought to open wide the door to “junk science”
Actually resulted in a narrowing of the admissibility of Expert Witness Testimony
Factors for Reliability:
  • Peer Review
  • Error Rate
  • Accepted by the Community
  • Testable

SO WHAT IS THE BIG DEAL?

PURE OPINION TESTIMONY IS THE ACTUAL ISSUE BEHIND THE ISSUE HERE

THE FLORIDA LEGISLATURE INTENDED TO PROHIBIT PURE OPINION TESTIMONY

MARSH V. VALYOU, 977 SO. 2D 542 (FLA 2007)

NEITHER DAUBERT NOR THE FEDERAL RULES OF EVIDENCE ADMIT OPINION EVIDENCE CONNECTED TO EXISTING DATA ONLY BY THE IPSE DIXIT OF THE EXPERT.”

GENERAL ELEC. CO. V. JOINER, 522 U.S. 136, 146 (1997)
EXCLUDED PLAINIF'S EXPERT OPINION THAT STRESS CAUSED PATIENT'S PLACENTAL ABRUPTION, WHERE "HIS CONCLUSIONS WERE PURELY HIS OWN PERSONAL OPINION, NOT SUPPORTED BY AN CREDIBLE SCIENTIFIC RESEARCH")
When addressing the Daubert Rule adopted by the legislature...

"[W]e decline to adopt, to the extent they are procedural, any of the legislative changes addressed in the Committee’s report."

Florida Supreme Court in Re: Amendments to the Florida Evidence Code, February 16, 2017

- Cited recommendations from the Committee
- Cited “grave constitutional concerns”
- Potential to undermine right to a jury trial
- Potential to deny access to the courts
- What does it all mean?

Court left open the constitutional challenges relating to admissibility of expert testimony - need for a proper case or controversy to identify them
- Daubert? Frye? Something in between?
- No definitive answer as to which one now controls “procedurally”
HOW IT MIGHT WORK

IS THE QUESTION OF ADMITTING EXPERT TESTIMONY PROCEDURAL OR SUBSTANTIVE?

PROCEDURAL - APPLY FRYE

SUBSTANTIVE: APPLY DAUBERT, BUT DETERMINE CONSTITUTIONALITY

IF CONSTITUTIONAL APPLY DAUBERT

UNCONSTITUTIONAL APPLY FRYE

REVIEWING THE LAW

FEBRUARY 2017 OPINION

- Rejected Daubert to the extent it is procedural as opposed to substantive
- Standard of care experts in a medical malpractice action are NOT required to specialize in the same specialty as the health care provider whose care is the subject of the action
- Rejected a change to the hearsay exception relating to reports of abuse by elderly persons or disabled adults, based upon constitutional concerns grounded in Crawford v. Washington
HOW TO APPROACH NOW

ISSUES TO CONSIDER WHEN DEALING WITH EXPERTS

Before trial:

▸ What type of expert do you have?
▸ What type of opinion are you soliciting?
  ▸ Is it “Ipsi Dixit?”
  ▸ Generally Accepted with the relevant Community?
  ▸ Novel? First Impression?
  ▸ Is a Constitutional right implicated?

OTHER EXPERT ISSUES....
EXPERT WITNESSES

“WE MUST NOT MAKE A SCARECROW OF THE LAW, SETTING IT UP TO FEAR THE BIRDS OF PREY, AND LET IT KEEP ONE SHAPE, TILL CUSTOM MAKE IT THEIR PERCH AND NOT THEIR TERROR.”

WILLIAM SHAKESPEARE, MEASURE FOR MEASURE

RESOURCES

- Fundamental Trial Advocacy, Rose, WEST
- Fundamental Pretrial Advocacy, Rose & Underwood, WEST
- Advocacy Training Modules (ATMs) – Stetson University College of Law
- www.youtube.com/user/TRIALADVOCACY
- www.advocacyteaching.blogspot.com

DIRECT EXAMINATION OF EXPERT WITNESSES

- Tell the Jury Why She is Here
- Foundation for Expertise
- Proffer the Expert in Specific Area
- Ask for the Major Opinions
- Ask for the Basis (Learned Treatises)
- Diffuse Weaknesses (Assumptions)
- Restate Main Opinion
CROSS-EXAMINATION

- Identify Areas of Agreement (Learned Treatises)
- Avoid Confrontation or Challenge
- Emphasize Facts Not Relied on
- Establish Limitations of Opinion
- Narrow Disagreement

UNDERSTANDING THE DISTINCTION

- Expert Witnesses and Expert Consultants are not the Same
- Consultants Help Prepare Case
- Expert Witnesses Testify
- Methodology is Different

QUALIFYING THE EXPERT

- Business or occupation
- Education
- Previously recognized as an expert
- Experiences in their specialty
- Licenses
- Professional associations
- Other background
- Publications, lectures, consulting work
ATTACKING THE QUALIFICATIONS OF THE EXPERT

- Preparation is the key
- Address each of the following issues before the witness takes the stand
  - Know the subject area of the expert
  - Review all documentation within the file
  - Connect your case analysis to the expertise of the witness
  - Identify the basis of the expert’s testimony

PROVIDE THE MAJOR OPINION

- Clear statement of the opinion
- Establish the basis of the major opinion with details
  - Word choice is crucial
- Diffuse Weaknesses
- Restate the major opinion

EXPERTS

- Tell Jury Why Expert is Here
- Qualifications of the Expert
- Proffer Expert in those Jurisdictions that allow it
- State the Major Opinions
- Explore the basis of the Major Opinion
- Diffuse Weaknesses
- Restate the Major Opinions