Basic Personal Injury

COURSE CLASSIFICATION: BASIC LEVEL

April 27, 2018

Live Presentation:
Tampa Airport Marriott
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Asset Protection in Florida covers all facets of asset preservation for Florida residents. The manual provides comprehensive analysis of the many steps available to protect assets from creditors’ claims, both pre- and post-mortem.

Among the many topics covered are homestead, trusts (both domestic and offshore), business planning, planning for dissolution of marriage, protection of retirement and education accounts, and the ethical aspects of advising clients on asset protection issues. Bankruptcy issues and tax planning are prominently featured throughout the text. Highlights of the Fifth Edition include new discussion of:

- Revocable trusts
- LLC membership interests
- Beneficiaries of annuities

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Florida Civil Practice Before Trial  
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Florida Civil Practice Before Trial walks you through the procedural steps necessary to prepare a case for trial. The popular reference includes recent significant changes made by case law, statutes, and rules amendments. Highlights of the Twelfth Edition include updated discussion of:

- Delayed discovery and due diligence
- Amount in controversy requirements
- Default judgments

Florida Civil Practice Before Trial is also the perfect complement to another Florida Bar title, Florida Civil Trial Practice.

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Practice Under Florida Probate Code
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Written by skilled probate attorneys, Practice Under Florida Probate Code provides comprehensive analysis of all the steps you need to take to administer an estate in Florida. Forms, sample accountings, and charts for basic probate practice enhance the book's practical utility. Includes discussion of new revised statutory provisions and rules related to:

- Florida Electronic Wills Act
- Florida Fiduciary Access to Digital Assets Act
- Elective share laws
- Apportionment of estate taxes
- Duty of the personal representative to resign
- Extension of deadline for objections to validity of will, venue, or jurisdiction

New case law discussions relate to:

- Ethical resolution when client designates drafting attorney as personal representative
- Disgorgement and surcharge against attorneys and personal representatives
- How to effect spouse's valid waiver of homestead rights
- Dependent relative revocation
- Formal and informal notice and in personam jurisdiction

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- 8.23 Extortion
- 8.25 Violation of a Condition of Pretrial Release from a Domestic Violence Charge
- 11.20 Transmission of Child Pornography by Electronic Device or Equipment
- 11.21 Transmission of Material Harmful to Minors by Electronic Device or Equipment
- 15.5 Resisting Recovery of Stolen Property
- 29.15(a) Unlawful Protests

The 2017 update includes the changes and additions to the Instructions published through April 27, 2017.

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Florida Standard Jury Instructions in Civil Cases with 2017 Supplement
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The 2017 Supplement offers current revisions to the massive update of the instructions. The handy loose-leaf includes:

- The reorganization and renumbering of the substantive areas into separate sections that incorporate pertinent standard instructions tailored to that specific area of the law
- Implementation of “plain English” terminology to improve juror understanding
- Reordering of the timing and sequencing of instructions during the trial process to improve communication to the jurors
- Revision of the Notes on Use to improve currency, eliminate outdated references, clarify the points being made, and point out areas where the committee has not taken a position

The 2017 Supplement updates the instructions, incorporating the revisions and corrections that have been made through 2017, including the addition of a new section 417, Unlawful Discrimination.

$167
Loose-leaf, supplemented annually, Pub. #22838, ISBN 9781632843852
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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](http://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](http://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 7.0 hours)

General.............................................. 7.0 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 BASIC.
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LECTURE PROGRAM

8:30 a.m. - 9:20 a.m.  Effective Use of Depositions
                        David Bianchi, Miami

9:20 a.m. - 10:10 a.m. Closing Argument
                       Steve Yerrid, Tampa

10:20 a.m. - 11:10 a.m. Motor Vehicle Crashes
                         Shannon Del Prado, Miami

11:10 a.m. - 12:00 p.m. Mentally Preparing for Trial
                         Dale Swope, Tampa

1:20 p.m. - 2:10 p.m.  Appellate Issues in Personal Injury
                        Chris Carlyle, Orlando

2:10 p.m. - 3:00 p.m.  Expert Discovery
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3:10 p.m. - 4:00 p.m.  Judicial Panel
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JUDICIAL PANEL
Hon. Jacqueline Hogan Scola, Miami
Hon. Rex Barbas, Miami
Hon. James S. Moody, Jr., Miami

No Materials
AUTHORS/LECTURERS

JUDGE REX BARBAS graduated from Jesuit High School in 1969. He attended and graduated from Loyola University in New Orleans, Louisiana with a B.A. in 1972 and a J.D. in 1975. He graduated law review and in the top 10%. He was awarded the Outstanding Graduating Senior Award given by the faculty and law review editorial board. In 1975 he joined the State Attorney’s office in Tampa, Florida, where he eventually prosecuted First Degree Murder cases and held the position of White Collar Crime Division Chief. In 1980 Judge Barbas went into private practice. In 1982 he was a founding partner of Mitcham, Weed and Barbas, now known as Barbas, Nunez, Sanders and Butler. While in private practice Judge Barbas tried cases in state and federal court involving complex civil and criminal cases. Judge Barbas is Florida Bar Board Certified in Civil Trial Law. He has been listed in MARTINDALE-HUBBELL with an AV rating (the top 7% of rated attorneys), the MARTINDALE-HUBBELL directory of preeminent attorneys (the top 1% of all rated attorneys), WHO’S WHO IN AMERICAN LAW, 1992-1993 Ed. and WHO’S WHO IN THE WORLD, 1997 Ed. In 1996 Judge Barbas was elected a Circuit Judge. He has been assigned to the Family, Criminal, General Civil and Dependency divisions of the court. Judge Barbas has lectured for The Florida Bar, American Academy of Matrimonial Lawyers, the Florida Circuit Judges Conferences and the Advance College of Judicial Studies and Fire Marshals and Police Academies. He has been an adjunct professor at the University of South Florida, the University of Tampa, the University of Phoenix and NOVA Southeast University in both the undergraduate and graduate divisions.

DAVID W. BIANCHI has represented clients in a wide variety of cases including business disputes, defective cars and trucks, class actions, suits arising from poorly constructed homes, medical and legal malpractice, automobile accidents, negligent security claims, claims against insurance agents and insurance companies, airplane crashes and many others. Mr. Bianchi obtained the largest fraternity hazing verdict in the country in a case that arose from the death of a pledge at the University of Miami and he obtained the first verdict in the country against Mercedes-Benz in a case involving a defective airbag system in a Mercedes S420 automobile. He has successfully represented clients in cases against Toyota, Nissan, Chrysler, Suzuki and Ford as well. To date, he has obtained verdicts and settlements of approximately $200,000,000.

CHRISTOPHER V. CARLYLE has been Board Certified by The Florida Bar in appellate practice since 2006. He is also AV rated by Martindale Hubbell and is a Certified Circuit Civil and Appellate Mediator. Mr. Carlyle has consistently been named to the Legal Elite by Florida Trend magazine, as well as being recognized as a Florida Super Lawyer by Thomas Reuters. Mr. Carlyle is an experienced appellate practitioner as well as having a background in commercial litigation. Prior to joining The Carlyle Appellate Law Firm, he practiced a wide range of commercial litigation with Holland & Knight, LLP and McLin & Burnsed, P.A. Mr. Carlyle has handled cases in all five of Florida’s District Courts of Appeal, the Supreme Court of Florida, the U.S. Circuit Court of Appeals for the Eleventh Circuit, and the Supreme Court of the United States. Most notably, Mr. Carlyle was involved in Koonz v. St. John’s River Water Management District, 133 S. Ct. 2586 (2013), a groundbreaking decision concerning property rights.

SHANNON del PRADO is the current President of the Miami-Dade Trial Lawyers Association. She is also a member of the Million Dollar Advocate Forum. Since 2004, she has been recognized as a Top Lawyer by the South Florida Legal Guide in the area of personal injury and medical malpractice. In 2011, she was named as a top lawyer in the Miami Herald. In her firt
trial, she won a $485,000 jury verdict. From there, she has gone on to obtain numerous successful results for her clients.

GEORGE KOOENCE is a civil litigator who handles medical malpractice, products liability, toxic torts and insurance defense cases. As a member of the firm's Medical Malpractice Practice Group, George works with the legal team that serves as lead counsel for a major South Florida medical school in both litigation and regulatory proceedings. He has experience defending health care facilities and medical practitioners against catastrophic claims involving a variety of allegations, from personal injury and wrongful death to negligence. George’s practice also includes the representation of manufacturers, distributors, insurers and retailers in the defense of claims that arise from exposure to hazardous materials. He has particular experience handling asbestos litigation. After eight years practicing in these specific areas, George has gained a broad understanding of medical, science and toxicology issues. This knowledge, combined with his legal skills, enables George to efficiently resolve pending claims.

JAMES S. MOODY, JR. received his accounting (with high honors), business graduate school and J. D. degrees (with honors) from the University of Florida where his activities earned selection to the U. of F. Hall of Fame and Florida Blue Key. Prior to being elected Circuit Judge in 1994, he was an AV-rated, board certified civil trial lawyer, certified public accountant, director of Hillsboro Sun Bank, Chair of two Florida Bar committees (Jurisprudence and Attorneys Fees), and president of the Hillsborough County Bar Association. He was engaged in private practice with Trinkle, Redman, Moody, Swanson & Byrd, P.A. in Plant City. Judge Moody has been a United States District Court Judge since July 2000. As a Circuit Court Judge from 1995 to 2000, Judge Moody presided over family law and general civil divisions of the Circuit Court. He was a member of the Education Steering Committee for the Conference of Circuit Court Judges and has taught the following courses at judicial education conferences: “Managing Trials Effectively,” December 1998; “Misconduct in the Courtroom,” June 1999; “Economic Loss Doctrine,” January 2000; “Punitive Damages,” January 2000; “The Fickle Finger of Fate & Courtroom Behavior,” May 2000; and “Civil Fundamentals: Post Trial Motions and Appeals,” September 2001.

JACQUELINE HOGAN SCOLA, Circuit Judge of the 11th Judicial Circuit, in Miami-Dade County, currently sits in the Civil Division where she serves as Associate Administrative Judge. Prior to civil, she was assigned for 9 years to the criminal division. Judge Hogan Scola was elected to the circuit court bench without opposition in 2003, 2009, and 2015. Prior to that, she worked from 1995 to 2003 as an Assistant United States Attorney in Miami in the Southern District of Florida. And before that she worked from 1982 to 1995 for Janet Reno in the Dade State Attorney’s Office as a Major Crimes prosecutor and trial attorney. She was the Director of Training and Professional Development for both offices during her tenure. Judge Hogan Scola graduated from the University of Miami School of Law where she won awards in Trial Advocacy; she taught in that same program for 24 years. Judge Hogan Scola is past chair of the Florida Supreme Court Committee on Jury Instructions in Criminal Cases, and as well, as past chair of The Florida Bar Rules of Civil Procedure Committee. She has also served as chair of The Florida Bar Grievance Committee (11-N), chair of the Federal Court Practices Committee, and President of the Florida Association for Women Lawyers. Judge Hogan Scola is also a regular instructor at Florida Judicial College for new judges, and has taught in The Advanced Trial Advocacy Program in Gainesville at the Levin School of Law at the University of Florida, and has taught at the Advanced Judicial College of Florida and the Florida Circuit Court Conference. She has presented regularly for local voluntary bar organizations as well as FIU
School of Law. Judge Hogan Scola matriculated at and received her undergraduate degree in Anthropology from the University of Florida.

**DALE SWOPE** is a Tampa native, and a graduate of Hillsborough High School, the University of South Florida, and the University of Florida Law School. Mr. Swope has received virtually every professional recognition available to lawyers who practice in his field. He has an AV rating (the highest possible) by Martindale-Hubbell, the oldest reviewing agency in the country. He has a ‘Superb’ rating (the highest possible) by AVVO.com, that is probably the newest rating agency in the country. He has been designated as a ‘Super Lawyer’ by Super Lawyers Magazine. He is also listed in ‘Best Lawyers in America,’ ‘Who’s Who in the South’ and ‘Who’s Who in American law.’ For more than a dozen years he has been Board Certified as a Civil Trial Specialist and was previously also Board Certified as a Business Litigation Specialist. These certifications are considered the most substantive credentialing of attorneys, since admission actually requires taking a substantial test and serious peer review by lawyers and judges familiar with the lawyer’s work.

**STEVE YERRID,** a Georgetown law graduate, has been repeatedly acknowledged as one of America’s top trial lawyers. His career accomplishments demonstrate an unwavering commitment to justice and the people it serves. Mr. Yerrid has experienced a career of other noteworthy achievements, including over 250 verdicts and settlements of $1 million or more. Among those was a jury verdict of $217 million, the largest medical malpractice award in Florida’s history, and the nation’s largest verdict in 2006. In 2009, he again obtained the country’s largest verdict rendered in a wrongful death case that year, with a jury award of $330 million. Additionally, Mr. Yerrid was honored to be appointed as Special Counsel to the Office of the Chief Judge (13th Judicial Circuit) and the Florida Conference of Circuit Judges. Representing Florida’s judiciary, he successfully argued before the Florida Supreme Court and protected state judges and staff from public disclosure of the confidential records and internal communications within the court system.
EFFECTIVE USE OF DEPOSITIONS

By

David Bianchi, Miami
MAXIMIZING YOUR RETURN ON DEPOSITIONS

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MAXIMIZING YOUR RETURN ON DEPOSITIONS

Depositions can be time consuming and expensive but they can be worth every penny if you end up with testimony that will help you win your case. How much you get out of it, however, depends on how much you put into it. You will maximize your return if you maximize your preparation but to accomplish that, you need to know your case inside and out and you need to know how to prepare.

WHAT IS YOUR OBJECTIVE?

With every deposition, you have to ask yourself beforehand: “What is my objective?” Is it a classic discovery deposition where you know very little about critical facts and you are hoping the witness will educate you? Is it a deposition where you are expecting to obtain testimony that will decide the case one way or the other? Is it the deposition of a party where you can elicit admissions that will bind the party and narrow the issues for trial? Is it a deposition of someone who will be unavailable at trial and this will be your one and only opportunity to obtain their testimony? There are many different reasons why depositions are taken and knowing precisely what your objective is will help you properly prepare.

TO VIDEO OR NOT TO VIDEO

A threshold consideration for every deposition is whether you should have it videotaped. It has long been my practice to videotape every deposition that I take. Although it costs more, if the deposition is worth taking it is usually worth videotaping. You have to always assume that at least some portion of the deposition will be used at trial and seeing the witness testify, listening to the witness answer the questions and watching their facial expressions as they testify is almost always better than simply reading a dry transcript to the jury. You should always give serious consideration to videotaping your depositions.

Tip: I always instruct the videographer to not put the date and time on the video. That makes life much easier should you decide to play excerpts from the deposition at trial because you can edit the video and play parts of it out of turn without making it obvious to the jury.

DIFFERENT TYPES OF DEPOSITIONS

Deposition of an Eye-Witness

Preparing for the deposition of an eye-witness to an accident is relatively simple. The objective in most instances is to find out the following:

1. What the witness claims he saw.
2. Where he was located when he claims to have witnessed the event.
3. Whether there were any obstructions to his view.
4. Whether he has any relationship to any of the parties in the case which might reflect bias.
5. Whether he has given any prior statements whether written or recorded.
6. Whether he took any photographs or video at the scene.
7. Whether there are any photographs showing the witness at the scene.
8. Whether the witness told anyone at or about the time of the incident that he witnessed the event.
9. Whether the witness is credible when he recounts what he claims he saw.
10. Whether his name appears in any official report of the incident such as an accident report, fire rescue report or ‘911’ call.
11. Whether there are any other witnesses who can confirm that the witness was present at the time.
12. Whether the witness will be available for trial or has plans to travel.
13. Whether the witness is adamant about what he saw or whether he equivocates on cross-examination.
14. Whether other evidence in the case substantiates the eye-witness account or undermines it.
15. Etc.

Your preparation for the deposition should include a visit to the area where the witness claims to have been located so that you have a clear understanding of how the area was configured and whether the witness had a good opportunity to make his observations.

**Tip:** Use an aerial photo to have the witness clearly identify where he was located and have him place a mark on the photo. You can get the photo from the internet.

**Deposition of A Party**

Depositions of a party may be the most important of them all. It is your chance to obtain critical admissions that can make or break your case. Admissions of a party in a deposition can be used in trial and played to the jury, they can be used to defeat defenses and to get a summary judgment and, with just a few good questions and answers, they can help you win your case and substantially increase the value of your case as well. If you do nothing else in your day to day practice, you need to make sure that you thoroughly prepare for taking a party’s deposition.

In preparation for taking the deposition of the opposing party you must absolutely, positively propound interrogatories and a request for production of documents well in advance of the deposition to learn as much as you can about the issues in the case before the deposition begins and you need to do that far enough in advance so that you can send follow-up discovery to fill in any of the gaps in your preparation should that be necessary. Although it should go without saying, it is worth saying any way: once the discovery responses come in you need to read them and think about how you can use them most effectively at the deposition of the opposing party. If documents are being produced to you during discovery they need to be organized so that you know what you have and can quickly access them during the deposition. Organization is everything. If you don’t know what you have, all of your pre-deposition work is useless. Everything must be at your fingertips and ready to go during the deposition.

The following are some of the things you should consider exploring in the deposition of a party.
When the party is a corporation:

1. Have the witness confirm that he was selected as the person with the most knowledge to address the issues set forth in your Rule 1.310(b)(6) deposition notice.

Q: How many people work at your company?

A: 100.

Q: And out of all those people you were selected as the person with the most knowledge to address the subject matters in this deposition notice that we will mark as exhibit #1 is that right?

A: Yes.

Q: And you are here to do that?

A: Yes.

Q: Tell me what you did to prepare for this deposition.

2. The educational and employment history of the witness.

3. His current job title and job responsibilities.

4. How he first learned of the fact that this case was filed and what role he played in any of the relevant issues.

5. Proceed to ask questions about each of the numbered paragraphs in your deposition notice.

6. Have the documents properly organized and ready to be referred to as you continue your questioning.

7. Have the videographer call-up each document from his computer so that they can be shown to the witness and the lawyers in the room simultaneously.

8. Use the “picture in picture” feature of the videographer’s technology so that the final video product that you will receive from the videographer will enable the jury to see the documents that are being referred to and see the witness at the same time.

9. What is your objective with this deposition? Simply to gather information or to extract critical admissions? Have you accomplished your objective?

Tip: Have your key documents organized chronologically and move through them efficiently to build up to the point you want to make. Short, crisp, articulate questions.
**When the party is an individual:**

1. You need to be particularly careful to go gently on the party when the deposition of an individual starts. Presumably, the deposition is being videotaped and parts of it may be played to the jury. As a result, how you comport yourself during this deposition is very important. While this is true in all depositions, it is particularly true here.

2. Use the deposition as an opportunity to expand upon what you have already learned about the party from interrogatories and document requests.

3. What is your objective here and what do you need to do to accomplish the objective?

4. What can you ask to narrow the issues in the case?

5. If you are deposing a defendant, go through each of the affirmative defenses raised in the Answer and ask him what evidence he has to support that defense. You will frequently catch the party off-guard and therefore be able to obtain helpful concessions that can eliminate these defenses.

**Tip:** Make sure the witness answers the question. Do not get diverted from obtaining the answer by long-winded answers designed to obfuscate.

**Deposition of An Expert**

Taking the deposition of an experienced expert can be challenging. Many of them have been deposed countless times, they have heard every question before, have carefully crafted answers that have been edited and rehearsed with the lawyers who have hired them and they know the subject matter better than you ever will. So how do you prepare for the deposition of an expert?

Like every other deposition, you will only get out of it what you put into it. To prepare for the deposition of an expert you should:

1. Obtain deposition transcripts of that expert from other cases and read them. See what you can use in your case that might be helpful.

2. Carefully review the expert’s CV to determine whether he is really as qualified as he claims to be and pay particular attention to the organizations he claims to belong to. You will often find that many of them are bogus, or never really meet, or have no membership criteria or even better – only require an annual payment to become a member. They are simply resume enhancers with no substance at all. You need to expose the bogus ones for what they are.

3. Review whatever articles or other publications the expert claims to have authored or co-authored. They can be a treasure trove of information that you can use to cross-examine the expert at his deposition and to extract critical admissions.
4. Make sure you have all of the bills generated by the expert and his firm. If the billing is excessive that can become an effective point to score when challenging the expert’s motivation to testify as he did.

5. Obtain his entire file in advance of the deposition including all communications that he had with the law firm that hired him. Do not wait to get this at the deposition.

6. Obtain a list of all cases he has previously been hired in or testified in (in deposition or at trial) in the last five (5) years and get the names of the lawyers who hired him. Ask him at his deposition to identify those cases from the list that had the same or similar issue to the issue in your case. Once you have that information contact the lawyers that opposed him in those cases and see what useful information you can obtain.

7. Do a WestLaw search of the expert and see what you can uncover.

8. Contact your local or statewide trial lawyers groups and post an inquiry about the expert on their list serve. That will frequently result in some useful information.

Tip: Have the expert circle on his resume the articles he has written that he believes are relevant to the issues in your case. That often exposes the irrelevancy of most of the publications on his resume.

**USING EXHIBITS AT A DEPOSITION**

It can be cumbersome to use exhibits with a witness at a deposition, particularly when the deposition is videotaped. The challenge is to use the exhibits in a way where both you and the witness can easily refer to them while doing so in a manner that will enable the jury that watches the deposition at a later date to clearly see and understand them as well. The best way to do that is with the help of technology.

The hallmark of every successful deposition is preparation and that is particularly true for a video deposition where important documents or photographs will be used. To do it properly, you need to decide what documents you intend to use at least a few days before the deposition is to take place and then have your videographer scan them into the hard drive of the equipment he will be bringing to the deposition or you can send them to him as a PDF so that he can create an index of all of the documents. When setting up for the deposition the videographer will place a video monitor in front of the witness and then place several other monitors on the table so that each of the lawyers can see what is being referred to as well. Once the deposition is underway, all you then need to do is to say to the witness:

Q: I want to show you a document dated March 3, 2017, do you see that on your video monitor?

Your videographer will then refer to his index and put up the appropriate document for everyone to see. But it gets better. If you have the right technology, the examining lawyer can then touch his video monitor to highlight, circle or underline any part of the document or photograph
and whatever the lawyer wants to call attention to will instantly appear on the witness’s monitor as a highlighted, circled or underlined document. And, when it is time to play the video in the trial, the jury will easily see the same thing. It is the most effective way to present documents and photographs at a deposition and at a trial.

**WHO SHOULD YOU DEPOSE FIRST?**

When setting depositions you need to give careful thought to the order in which the depositions will be taken. After you have deposed the first witness in the case, opposing counsel will have a clear idea of where you are going, what your theory of recovery is and what your strategy is and be in a much better position to “prepare” his witnesses. As a result, your best opportunity to catch witnesses off-guard will be with the first witness who is deposed. Think about who you believe the most critical witness may be and set that deposition first before the deposition “prep” contaminates what the witness is likely to say.

**GENERAL RULES**

1. Ask crisp and precise questions.
2. Avoid saying “OK” after the witness answers.
3. Avoid “uh huh”.
4. Avoid slang and derogatory terms.
5. Frame your questions so that if they are read to the jury they will have all of the information contained in them for the jury to understand the point you are making. Don’t give the witness wiggle room at trial because a point you thought you successfully made in the deposition had an escape hatch due to inadequate information in the question itself.
6. Get an answer to the questions asked.
7. Do not make speaking objections at the deposition. These are not permitted in Florida and have a corrupting influence on the witness. The Trial Lawyers Section of Florida Bar has a chapter on this in their on-line Discovery Practice Handbook which you should print and bring with you to every deposition. If opposing counsel starts to make speaking objections during a deposition you can immediately use the Handbook to stop it. If it continues, terminate the deposition and go see the judge.

**YOUR Demeanor**

You should assume that every deposition you take will be played to the jury in your case and act accordingly. The objective in most depositions is to obtain useful information to help build your case and use that testimony as substantive evidence at trial. To accomplish that, however, you will have to play the videotaped deposition during the trial and, when you do that, the jury will be making judgments about you just as they are making judgments about the witness. As a result, how you conduct yourself is very important.

Here are a few general rules.

1. Be polite. It is not necessary to badger a witness to do an effective job.
2. Do not interrupt the witness while he is talking.

3. Do not argue with the witness.

4. Do not raise your voice or yell at the witness.

5. Act professionally and choose your words carefully.

6. Assume that every question you ask will some day be reviewed by the judge, the jury or maybe even the Florida Bar.

**WATCH HOW EXPERIENCED LAWYERS DO IT**

If you are a young or relatively inexperienced lawyer you should consider sitting in on an important deposition taken by more experienced lawyers. They are often willing to let you do that. Alternatively, contact an experienced lawyer and ask if they will send you a video deposition they have taken that you can watch and learn from.

No one was born with finely tuned deposition skills. Everyone has had to learn the skills over time. You can accelerate your learning by watching how more experienced lawyers do it.

**CONCLUSION**

Cases are won or lost based upon what witnesses testify to in a deposition. Regardless of whether you are representing the plaintiff or defendant if you properly prepare, have a clear objective and skillfully ask questions you will maximize your return on the depositions you take. Get out there and do it.
CLOSING ARGUMENT

By

Steve Yerrid, Tampa
I. KNOWLEDGE AND EXPERTISE EQUAL SINCERITY

Preparation is key. A trial lawyer must be an expert in the case. The jury expects and demands a trial lawyer have command of the facts. A courtroom lawyer able to demonstrate a thorough understanding of the facts, of the issues before the jury, and every detail in every exhibit, bolsters the perception the lawyer is a reliable and trustworthy source.

Caldwell, Perin and Frost describe this phenomenon as the “halo effect”. If jurors like you, they unconsciously want you to win. The more they like you, the better your evidence sounds. As noted by Thorndike, the aura of goodness that forms around counsel is even resistant (not waterproof) to contrary evidence. Knowledge equals expertise that evokes trust and goodness. Preserve that goodwill by thanking the jury for their service.

Stuart Spiser writes in the Master Advocates’ Handbook that throughout the entire trial, you “should strive to create an atmosphere of sincerity -- that you and your client are honest and moral people. Throughout the trial, it is important to avoid exaggeration and deception.”
II. DEPRIVE THE DEFENSE OF THE HIGH GROUND

Challenge the jury to hold you, as well as the defense, accountable for the statements they made to the jury in opening statement. Note the promises the defense will make during their opening statement and ask the jury to hold them accountable for failing to meet those promises. Listen carefully to the points made by the defense. Look for misstatements or insincere arguments and bring that contradiction to the jury. When available, those points should lead and help define the closing statement. For example, after deciding the alternative causation theory did not survive the trial, in closing the defense argued they did not contest how the plaintiff was injured. On rebuttal, the testimony of the doctor contesting his responsibility for the injury was read to the jury. The defense and the doctor knew they had no case and that contradiction proved they knew it.

When the defense argues that bad things happen through the fault of no one, challenge the jury to reject that argument. That defense theory would mean there could be no medical negligence, no stop lights that govern conduct, no standards for people to judge the conduct of professionals.

When possible, sanitize your case through motions in limine. Despite a strong liability case, a defense verdict was obtained when the jury was moved by the admission by the plaintiff he had consistently “declared” less than his full amount of income. Other bad conduct can be found in medical records or marriage counseling notes. The defense will contend these notes are admissible even though these notes are not regularly checked for accuracy. Consequently, we would question whether such notes are trustworthy and meet the reliability requirement for records kept in the ordinary course of business. These records may also contain spousal communications that are still protected. Unfortunately, on these issues, judges do err on the side of letting everything in. With that said, motions in limine should be utilized when possible to preserve the halo effect of both you and your client.
III. WINNING CLOSING ARGUMENT

A. START PREPARING THE FIRST DAY YOU MEET WITH THE CLIENT: WHAT IS YOUR THEORY OF THE CASE (THE STRING OF PEARLS)

The initial meeting with your client is probably the most critical meeting and your most important decision. When you meet with the client, have them explain how they were hurt, or wronged. Have the prospective client explain the impact of the wrongdoing and evaluate the “belief system” (both the client’s and yours). Evaluate the client: Are they believable? Likeable? What type of presentation will the client make to the jury? Does the background and life story compel people? Family is important. Look for some redeeming quality in your plaintiff and use that as the benchmark to judge his character. For instance, with an older Pinellas jury, the character of the grumpy optometrist was changed when it was brought out he was in uniform on the steps of the Pentagon when protestors were burning their draft cards. Remember that jurors are more likely to award significant damages or acquit someone they like. Most prosecutors will tell you that media figures are extremely difficult to convict, because people like them.

Is there a theme that is consonant with your client’s case? People tend to simplify complex problems by finding the path of least resistance. A coherent theme in and of itself is a rhetorical device that can persuade the jury in your favor.

Begin preparing your closing argument that day, imagine it. Create and envision a theme, a common thread tying those themes, thoughts and ideas together. After the client meeting prepare a closing argument. Simple, general, but focused. The process will help orient the case and provide you homework for the arduous task ahead. You should simplify the essential facts and make them memorable.

String the pearls. Case development should be around that initial theory. Cases do change, but your goal should be to make a consistent theory throughout your case development and presentation. In that initial meeting, you need to anticipate the defense theory of the case and understand that like
a criminal trial, the defendant will create a defense. That defense needs to be dealt with from the very beginning to the absolute end.

The defense challenges must be addressed directly. Do not hope the jurors will make your arguments for you. When possible, make their points your points. For instance, in a punitive damages case, the defense argued certain evidence was making a mountain out of a mole hill. In response, that same analogy was used with regard to punitive damages. A marble can impose a burden on his mole hill, but a marble is insignificant on a mountain. The damages must be substantial not to the jury, but to the mountain whose conduct they seek to curb. By stealing the defense metaphor, you earn the benefit of the time they invested in the argument.

The affirmative defenses that are pled are a starting point, but defense counsel will develop more subtle theories that will resonate with the jury. These would be the rules of the road for the defense. The defense can always withdraw an affirmative defense of comparative negligence for strategic, or even evidentiary, reasons. Nevertheless, during voir dire or in opening statement, the defense will raise the issue by asking the venire whether any of them have ever called a physician in the middle of the night. Or, have they ever taken a child to the emergency room. These common experiences will resonate with the jury before the plaintiff has a chance to present evidence that explains the facts of the case. These submarine defenses must be closely guarded against with a motion in limine and diligent objection. But they must also be part of your string of pearls.

As a matter of routine, move to strike affirmative defenses if improperly pled. We also move for summary judgment to force the defense to put their evidence on the record.

B. MAKING THE CLOSING ARGUMENT

Pull that initial closing argument out of the file. It contains your thoughts and ideas from the first client meeting throughout the pre-trial discovery and right up to the last witness called to the stand. It has the nuggets and itemized pearls on your necklace of evidence. It will help you remember why the case was so important to you a “year or two” earlier. Without these
initial anchors, the pressures of trial will make last minute preparation of the statement difficult. As much work that can be done in advance should be prepared.

C. THE JURY IS YOUR SPARK PLUG

Thank them for their service. Let them know how important they are to this process.

A) Know your jury.

B) Know your psychological anchor.

C) Know the trial testimony.

D) Defense demonstratives can work for you.

E) Use the verdict form and show the jury.

Go back to voir dire. What was important to the jurors sitting on your case. Use those themes. What books or newspapers have the jurors been reading. Let that author make your argument for you as they are bound to be more eloquent than us.

Go back through the questions jurors asked during witness testimony. Answer those questions again, as those are the issues on which the jurors focused during the trial.

Challenge the jury to appreciate the value of human life. Use a story to draw out the emotions of the jury. We never leave our marines behind. You cannot put a price on humanity. Americans are at their best whether we want to bring back three astronauts in Apollo 13 or save the downed flier from thugs on the ground.

Express to the jury the work done for the client. The files prepared, the exhibits made, the depositions taken, the efforts you have made on behalf of your client. When the trial is over, you can look back and know you did
 everything you could. Now that responsibility to carefully consider the evidence and to render a just verdict resides with them.

This effort also demonstrates the magnitude of the case. Alert the jury not only to the stack of boxes on your side of the courtroom, note the defense records as well. All of this effort reflects the magnitude of the case. This is a big case that warrants a big number, otherwise this effort would not have been made.

Talk about the credentials of your witnesses. High powered experts would not be involved in this case unless it was a big case. Also note the difficulties of doctors testifying against doctors.

When the treating physicians are used to show what happened and the defense uses retained experts to argue an alternative theory of causation, note that the plaintiff presented the team of doctors who worked to try and save the patient. Their findings are more credible than the conclusions of the doctors who never treated her.

Having the court reporter transcribe specific statements in the transcript and using these in closing argument can be effective. Also, it is critical for you and your staff to keep notes of the trial testimony and highlights of the case that the jury heard. Remember, that case may be markedly different than the one interpreted before trial. These notes should be transcribed and summarized nightly so you can maintain a pulse on the evidence presented to the jury, and the notes are invaluable for closing argument.

Certain key jury instructions should also be produced for the jury, along with the verdict form. Review the verdict form with the jury. They need guidance on how to correctly complete it. The jury also needs to hear argument on the application of these principles to the evidence and completion of the verdict form. This is a record that will exist forever. The truth is not in the medical records, but in what is decided on the verdict form.

Save some of your demonstrative exhibits for summation. The jury needs to receive the evidence through different modalities, and final argument is often the most dramatic and effective. Seize the high ground and take your opponent’s demonstratives to prove your points.
Use the mortality tables. Remind the jury no one would respond to an ad in the classifieds that obligates them for the remainder of their life. Remind the jury that we cannot turn back time (because inevitably, there will be jurors with the thought that no amount of money can bring someone back or make someone better); that our system of justice does not provide an eye for an eye; but rather, that our great system of justice provides for monetary restitution.

Take the string of pearls and let the jury know how you feel about your client without crossing the line. These expressions are measured by having the jury hear from you the intimate details of how the client suffers and magnitude of the loss.

Lastly, be yourself. Allow the sincerity and belief you have in the case to come through. In the end, the justness of the cause multiplied by your commitment and effort will equal success.
MOTOR VEHICLE CRASHES

By

Shannon Del Prado, Miami
PERSONAL INJURY INTERVIEW

CLIENT’S NAME, HOME & WORK ADDRESS:

____________________________________________________________________________

____________________________________________________________________________

____________________________________________________________________________

SPouse & children’s names:

____________________________________________________________________________

____________________________________________________________________________

CONTACT NAME:

____________________________________________________________________________

CLIENT TELEPHONE INFO:

HOME : __________________________
WORK : __________________________
CELL : __________________________
FAX : __________________________
EMAIL : _________________________

DOB : __________________________
SSN : __________________________
D/I : __________________________

DESCRIPTION OF INCIDENT:

____________________________________________________________________________

____________________________________________________________________________

____________________________________________________________________________

____________________________________________________________________________
CLIENT'S INSURANCE INFORMATION (HEALTH, AUTO, DISABILITY, ETC.):


CLIENT'S PLACE OF EMPLOYMENT:


CLIENT'S SALARY: ______________

CLIENT'S WAGES: ______________

CLIENT'S PRESENT COMPLAINTS REGARDING INJURIES:


DOCTOR'S/HOSPITALS:


DEFENDANT'S CARRIER:


DEFENDANT'S NAME:


WITNESSES:

NAME: __________________________ ADDRESS: __________________________
DEFENDANT'S POSITION REGARDING LIABILITY, AND NATURE OF ANY INVESTIGATION (PHOTOS, INTERVIEWS) UNDERTAKEN BY DEFENDANT:

_________________________________________

_________________________________________

_________________________________________

_________________________________________

_________________________________________

_________________________________________

_________________________________________

ALL PRIOR INJURIES AND HOSPITALIZATIONS, BE SPECIFIC FOR ANY INJURY OR COMPLAINTS INVOLVING THE AREA AFFECTED NOW:

_________________________________________

_________________________________________

_________________________________________

_________________________________________

_________________________________________

_________________________________________

ANY CRIMINAL BACKGROUND:

_________________________________________

_________________________________________

_________________________________________

ANY DRUG REHAB OR SUBSTANCE ABUSE BACKGROUND:

_________________________________________
ALL PRIOR CLAIMS OR LAWSUITS, AND NATURE OF EACH:


SOCIAL MEDIA - DISCUSSED WITH CLIENT:


INTERVIEW DATE AND BY WHOM INTERVIEWED:


REFERRED BY:


AUTHORITY TO REPRESENT

I, ____________________, (Client), employ ____________________________ (Attorneys) to represent me in connection with the following matter:

__________________________________________________________

As compensation for the services rendered, or to be rendered, Client agrees to pay Attorneys the greater of the quantum merit court ordered fees, or the following percentages from the total recovery, including court awarded attorneys fees:

- 33.3 percent of any gross recovery up to $1 Million through the time of the filing of an Answer or the appointment of arbitrators.  
- 40 percent of any gross recovery up to $1 Million through the trial of the case.  
- 30 percent of any gross recovery between $1 and $2 Million.  
- 20 percent of any gross recovery in excess of $2 Million.

If all defendants admit liability at the time of filing an Answer and the only issue at trial is the recovery of damages, the fee schedule becomes as follows:

- 33.3 percent of any gross recovery up to $1 Million through trial.  
- 20 percent of any gross recovery between $1 Million and $2 Million.  
- 15 percent of any gross recovery in excess of $2 Million.  
- 5 percent if an appeal is taken from the lower court by either side or if garnishment or any proceeding after judgment has to be brought to collect the judgment or any portion thereof, an additional 5% of the gross recovery shall be charged for said additional action in addition to the above-stated charges.

This agreement is based on a contingency fee.  This means that if there is no recovery, Client owes no attorney fees to Attorneys.

Client is responsible for all costs that Attorneys incur that they deem necessary to pursue the case.  But Client is not responsible for these costs if there is no recovery.  Costs will be paid out of any recovery.  These costs are in addition to attorney fees.

If Client terminates this Agreement, however, Client must immediately pay all costs and expenses that Attorneys incurred and must immediately pay Attorneys the reasonable value of services performed to date of termination or the applicable percentage of the most recent settlement offer, whichever is greater.  Attorneys will have a lien on Client’s file, documents, property or money in their possession for the payment of all sums due.
There will be a division of fees between ______________ and ____________________ who will receive 25% of the total fees, based on the named attorney and/or law firm jointly assuming the responsibility of legal representation and in particular making himself/herself available for consults with the client, and engaging case-related matters on behalf of client.

Client will pay all hospital and medical expenses related to the case. Attorneys will use their best efforts to negotiate these expenses in order to increase the client’s net recovery. Client understands that ERISA liens and government liens, such as Medicaid and Medicare, are difficult to negotiate due to the statutory and legal protection that the law provides for these liens. Attorneys will pay these expenses from the balance of the gross proceeds after payment of attorney fees and costs.

Attorneys can withdraw if Client has misrepresented any matter or for any other reason permitted by the Florida Code of Professional Responsibility. Client agrees to execute a Stipulation for Substitution of Counsel at the Attorneys’ request if this happens.

Attorneys may use Client’s name in all legal proceedings. Attorneys are empowered to settle the Client’s claim for any valuable consideration that at their discretion they believe is in Client’s best interest with Client’s approval. Upon settlement or recovery, Client will execute all documents necessary to complete the settlement/recovery and the distribution of same. Attorneys can file suit on Client’s behalf, at their sole discretion. Client will cooperate to assist Attorneys in the litigation procedures. Client shall give Attorney a Power of Attorney to endorse and deposit into the firm Trust Account all checks or funds obtained by them on any claim in order to expedite distribution and ensure that checks clear.

Before signing this agreement, Client has received and read the Statement of Client’s Rights and understands the Rights therein. Client has received a signed copy to keep and refer to while being represented by Attorneys.

This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client.

If Client terminates this agreement after a three (3) day period, Client will immediately pay all costs and expenses incurred by the attorneys and will immediately pay Attorneys the reasonable value of the services performed to date, or the appropriate percentage of the last settlement offer or the amount of any judgment, whichever is greater. In the event Client speaks only Spanish, this agreement has been translated orally for me.

I have read this agreement and I have signed this agreement freely and without coercion. The agreement has been read to me and I understand it.

Client: ___________________________ Date ___________________________
Client: ___________________________ Date ___________________________

Accepted upon the terms and conditions as stated above:

Attorney: ___________________________ Date ___________________________
CLIENT'S BILL OF RIGHTS

BEFORE YOU, the client, arrange a contingency fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money in a case. You, the client have the right to talk with your lawyer about the proposed fee and to bargain about the rate of percentage as in any other contract. If you do not reach an agreement with one lawyer, you may talk with other lawyers.

2. Any contingency fee contract must be in writing and you have three business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within three business days of signing the contract. If you withdraw from the contract within the first three days, you do not owe the lawyer a fee although you may be responsible for the lawyer actual costs during that time. But if your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the three-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you the client, have the right to know about the lawyer’s education, training, and experience. If you ask, the lawyer should tell you specifically about his or her actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingency fee contract with you, a lawyer must advise you whether he or she intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers, he or she should tell you what kind of fee arrangement will be made with the other lawyers. If lawyers from different firms will represent you, at least one lawyer from each firm must sign the contingency fee contract.

5. If your lawyer intends to refer a case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with
other lawyers, you should sign a new contract which includes the other lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interest and is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include one which you might have to pay to your lawyer all costs, and liability you might have for attorneys’ fees to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of your case. Until you approve the closing statement, you need not pay any money to anyone, including your attorney. You also have the right to have every law firm working on your case sign the closing statement.

9. You, the client have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer’s ability.

10. You, the client have the right to make the final decision regarding settlement of your case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept the settlement. However, you must make the final decision to accept or reject the settlement.

11. If at any time you, the client, believe that your lawyer has charged an excessive or illegal fee, you, the client, have the right to report the matter to the Florida Bar, the
agency overseeing the practice and behavior of all lawyers in Florida. For information on how to reach the Florida Bar, call 1-800-342-9062 or contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court, and you may wish to hire another lawyer to help you resolve the disagreement. Usually a fee dispute must be handled in a separate lawsuit.

Client: 

Date 

Client: 

Date 

Accepted upon the terms and conditions as stated above: 

Date
PATIENT AUTHORIZATION FOR THE RELEASE OF
PROTECTED HEALTH INFORMATION (PHI)

Date: ____________________ Patient Name: ____________________ D.O.B.: ____________________

I, ____________________, hereby authorize ____________________ (hospital, health provider name) or its
designated copy service, and/or their agents, employees, and associates, to release the protected
health information that is described below to the law firm of (INSERT LAW FIRM and ADDRESS),
or to any representatives or investigators of said law firm.

The protected health information released herein is specifically as follows:

1. All medical records or reports, hospital records, medication records, physician’s notes,
   Nurse’s notes, progress notes, discharge summary, history and physical, consultation notes,
   including psychological or psychiatric treatment or evaluations, drug and alcohol treatment or
   evaluations and any other notes, records, bills, statements, insurance claims, payments, or
   documents regarding the above referenced patient.

2. This authorization also includes the provision of all diagnostic tests, scans, studies,
   reports, x-rays, bills, correspondence or other communications of any type, nature or kind.

3. This authorization also includes all HIV testing results and HIV status pursuant to
   Florida Statutes §381.609(3) and information regarding Sexually Transmitted Diseases pursuant
   to Florida Statutes §384.29.

4. This is a request for all monitoring strips, including, but not limited to, heart, EKG,
   EEG, respiration, blood pressure, fetal heart rate, infant cardiac, uterine contraction, or any
   other monitor of any nature, type or kind.

5. This is a request for your entire file regarding the above referenced patient, including
   all papers, documents, films, photographs, microfiche or any other records stored in any format
   in your possession or control.

This protected health information is to be used for the purpose of legal investigation. This
authorization expires on two years from the date shown above.

This release may be revoked by a signed and properly dated written revocation, delivered to
the hospital and/or provider provided that this release cannot be revoked as to protected health
information that had been previously released in reliance on this document.

I understand that a refusal to sign this form will not result in denial of health care by the
hospital, provider or any of its business associates.

I understand that once the PHI is disclosed, it may be re-disclosed to individuals or
organizations that are not subject to the federal privacy regulations such as expert witnesses,
litigants, insurance companies and even may become public record if filed with a court of law.
In the event any of the above requested information is not in your possession, but is in your
control and can be obtained by you, we request that you obtain said information and provide it
in compliance with this request.

_________________________ Patient or Personal Representative or Next of Kin

_________________________ Patient’s Social Security Number

INSERT LAW FIRM  Tel: (xxx) xxx-xxxx  Fax: (xxx) xxx-xxxx
Insert Law Firm Address

CONTACT PERSON: ____________________

3.11
MODEL LANGUAGE

PROOF OF REPRESENTATION

The language below should be used when you, the Medicare beneficiary, want to inform the Centers for Medicare & Medicaid Services (CMS) that you have given another individual the authority to represent you and act on your behalf with respect to your claim for liability insurance, no-fault insurance, or workers' compensation, including releasing identifiable health information or resolving any potential recovery claim that Medicare may have if there is a settlement, judgment, award, or other payment. You are not required to use this model language, but proof of representation must include the information provided in this model language. Your representative must also sign that he/she has agreed to represent you. This model language also makes provisions for the information your representative must provide.

Type of Medicare Beneficiary Representative (Check one below and then print the requested information):

( ) Individual other than an Attorney: Name: ____________________________

( ) Attorney*: Relationship to the Medicare Beneficiary: ________________________

( ) Guardian*: Firm or Company Name: ________________________________

( ) Conservator*: Address: ____________________________________________

( ) Power of Attorney*: _____________________________________________

Telephone: ____________________________________________

* Note -- If you have an attorney, your attorney may be able to use his/her retainer agreement instead of this language. (If the beneficiary is incapacitated, his/her guardian, conservator, power of attorney etc. will need to submit documentation other than this model language.) Please visit www.msprc.info for further instructions.

Medicare Beneficiary Information and Signature/Date:

Beneficiary's Name (please print exactly as shown on your Medicare card): __________________________

Beneficiary's Health Insurance Claim Number (number on your Medicare card): ______________________

Date of Illness/Injury for which the beneficiary has filed a liability insurance, no-fault insurance or workers' compensation claim: ______________________

Beneficiary Signature: __________________________ Date signed: ________________

Representative Signature/Date:

Representative's Signature: __________________________ Date signed: ________________
Authorization for the Use and Disclosure of Protected Health Information

Federal law states that we cannot share an individual's health information without the individual's permission, except in certain situations. By signing this form, you are giving us permission to share the information you indicate below. If you decide later that you do not want us to share this information any more, you can revoke this authorization at any time in writing or sign the REVOCATION SECTION on the back of this form and return it to Xerox Recovery Services. This form must be completed and signed by the Medicaid recipient or by an individual who has the authority to act on the Medicaid recipient's behalf (parent of a minor, legal guardian, trustee, power of attorney, personal representative of the estate, grantor of an annuity).

1. Personal Information:

Medicaid Recipient's Name: ____________________________ Date of Birth: ____________________________

Medicaid ID Number: ____________________________ Social Security Number: ____________________________

2. I give permission to the Agency for Health Care Administration (AHCA) and its contract representatives to share the health information listed below with the following:

   Name of the Law Firm or Law Office: ____________________________
   Name of the Insurance Company: ____________________________
   Other: ____________________________________________________________

3. Indicate the purpose for which the disclosure is to be made:

   - To substantiate Medicaid's lien relating to a lawsuit
   - To substantiate Medicaid's claim against the estate or against a trust account or annuity
   - Other: ____________________________________________________________

4. Indicate the information that you want to be disclosed, related to the following (check one):

   - The Medicaid lien relating to the injury or negligence claims, for the period beginning with the date of incident.
   - Medicaid's claim against the estate.
   - The amount that is due Medicaid from the trust account. (Please send a copy of the trust agreement.)
   - The amount that is due Medicaid from the annuity account. (Please send a copy of the annuity agreement.)
   - Other: ____________________________ (Please be specific).

5. Enter the specific date that you want this authorization to expire: (i.e., one year from date of release). ____________________________

   (If you do not enter a date, this authorization will expire in five years.)

I understand that the information described above may be disclosed by the person or group that I hereby give AHCA and its contract representatives permission to obtain my information with, and that my information would no longer be protected by the federal privacy regulations. Therefore, I release AHCA, its workforce members, and its contract representatives from all liability arising from the disclosure of my health information pursuant to this agreement. I understand that I may inspect or request copies of any information disclosed by this authorization if AHCA or its contract representatives initiated this request for disclosure. I understand that I may revoke this authorization by notifying AHCA through its contract representatives, in writing, knowing that previously disclosed information would not be subject to my revocation request. I understand that I may refuse to sign this authorization and that my refusal to sign will not affect my ability to obtain treatment, payment, or eligibility for benefits.

6. Recipient Signature: ____________________________ Print Name: ____________________________ Date: ____________________________

   OR

   Name of Legal Representative (Print): ____________________________ Relationship: ____________________________

   Signature of Legal Representative: ____________________________ Date: ____________________________

   * If you are not the individual, but represent the individual, please attach a copy of the legal document that verifies that you are a representative (parent of a minor, legal guardian, trustee, power of attorney, personal representative of the estate, grantor of an annuity).
The Centers for Medicare & Medicaid Services (CMS) is the federal agency that oversees the Medicare program. Many Medicare beneficiaries have other insurance in addition to their Medicare benefits. Sometimes, Medicare is supposed to pay after the other insurance. However, if certain other insurance delays payment, Medicare may make a "conditional payment" so as not to inconvenience the beneficiary, and recover after the other insurance pays.

Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), a new federal law that became effective January 1, 2009, requires that liability insurers (including self-insurers), no-fault insurers, and workers' compensation plans report specific information about Medicare beneficiaries who have other insurance coverage. This reporting is to assist CMS and other insurance plans to properly coordinate payment of benefits among plans so that your claims are paid promptly and correctly.

We are asking you to answer the questions below so that we may comply with this law.

Please review this picture of the Medicare card to determine if you have, or have ever had, a similar Medicare card.

---

Section I

Are you presently, or have you ever been, enrolled in Medicare Part A or Part B?  □ Yes  □ No

If yes, please complete the following. If no, proceed to Section II.

Full Name: (Please print the name exactly as it appears on your SSN or Medicare card if available.)

Medicare Claim Number:  

Date of Birth (Mo/Day/Year)  

**Social Security Number:  
(If Medicare Claim Number is Unavailable)  

□ Female  □ Male

*Note: If you are uncomfortable with providing your full Social Security Number (SSN), you have the option to provide the last 5 digits of your SSN in the section above.

Section II

I understand that the information requested is to assist the requesting insurance arrangement to accurately coordinate benefits with Medicare and to meet its mandatory reporting obligations under Medicare law.

Claimant Name (Please Print)  Claim Number

Name of Person Completing This Form If Claimant is Unable (Please Print)

Signature of Person Completing This Form  Date

If you have completed Sections I and II above, stop here. If you are refusing to provide the information requested in Sections I and II, proceed to Section III.

3.14
Section III

Claimant Name (Please Print) ___________________________ Claim Number ________________

For the reason(s) listed below, I have not provided the information requested. I understand that if I am a Medicare beneficiary and I do not provide the requested information, I may be violating obligations as a beneficiary to assist Medicare in coordinating benefits to pay my claims correctly and promptly.

Reason(s) for Refusal to Provide Requested Information:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Signature of Person Completing This Form ___________________________ Date ____________

3.15
DATE

Via Facsimile and U.S. Mail

Insurance Carrier

RE: Your Insured/Owner :
Our Client :
Date of Loss :
Claim No. :

Dear Sir or Madam:

Please be advised we represent (INSERT NAME OF CLIENT). Kindly forward a PIP application together with any and all other forms required by your company to be completed by my client.

In addition, please forward a statement, under oath, of a corporate officer or the insurer's claims manager or superintendent setting forth the following information with regard to each known policy of insurance, including excess or umbrella insurance:

   a) The limits of coverage (PIP, MedPay, UM or UIM);
   b) A statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement; and
   c) A copy of the policy.
   d) A copy of the UM/UIM selection form.

Thank you,

Attorney

XXX/xx
DATE

Via Facsimile and U.S. Mail
Insurance Carrier

RE: Your Insured/Owner :
Our Client :
Date of Loss :
Claim No. :

Dear Sir or Madam:

This firm represents (INSERT NAME OF CLIENT). Under Florida Statute 627.4137, formal demand is made on you for disclosure of insurance information.

**Within 30 days, you and each of your insurance carriers must provide** a statement, under oath, of a corporate officer or the insurer's claims manager or superintendent setting forth the following information with regard to each known policy of insurance, including excess or umbrella insurance:

a) The name of the insurer;
b) The name of each insured;
c) The limits of the liability coverage;
d) A Statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement; and
e) A copy of the policy.

Your failure to notify your insurance carriers of this letter will expose you financially. And your carriers' failure or refusal to provide this information will expose the carrier to direct action.

Thank you,

Attorney

XXX/xx
DATE

Via Facsimile and U.S. Mail
Insurance Carrier

RE: Your Insured/Owner:
    Our Client:
    Date of Loss:
    Claim No.:

Dear Sir or Madam:

This firm represents (INSERT NAME OF CLIENT). Under Florida Statute 627.4137, formal demand is made on you for disclosure of insurance information.

Further, we hereby demand that you preserve your insured’s vehicle, so that we can inspect it and download the black box data before you make any repairs or modifications to the vehicle. We further demand that you preserve all data, including dash cam recording, and records that have anything to do with the Carlos Acosta’s activities on the date of accident.

Finally, we demand that you preserve all information and evidence that have anything to do with your insured, your insured’s vehicle, the driver, driving history, and the crash.

Do not tamper with the Black Box or any other evidence requested. Your failure to preserve this evidence may subject you to a claim for negligent destruction of evidence, spoliation of evidence, or it may result in an adverse jury instruction at trial. See Martino v. Wal-Mart Stores, Inc., 908 So.2d 342 (Fla. 2005); and Golden Yachts, Inc. v. Hall, 920 So.2d 777 (Fla. 4th DCA 2006).

Within 30 days, you and each of your insurance carriers must provide a statement, under oath, of a corporate officer or the insurer’s claims manager or superintendent setting forth the following information with regard to each known policy of insurance, including excess or umbrella insurance:

a) The name of the insurer;
b) The name of each insured;
c) The limits of the liability coverage;
d) A Statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement; and
e) A copy of the policy.
Your failure to notify your insurance carriers of this letter will expose you financially. And your carriers’ failure or refusal to provide this information will expose the carrier to direct action.

Thank you,

Attorney

XXX/xx
DATE

Via U.S. and Certified Mail
(NAME)
(Address)

RE: Our Client
Date of Accident
Location
Time

REQUEST FOR VIDEO PRESERVATION.
URGENT ATTENTION REQUESTED.

Dear Sirs or Madams:

This firm represents (INSERT NAME OF CLIENT). Formal demand is made for preservation of evidence.

We request that you preserve the video of the incident, any photos it may have taken, and share those with us. We appreciate your efforts in this matter. This crash involve a fatality. We need the video to fully understand the crash and to bring justice to the matter.

Please forward a copy of all video recordings and photo evidence, or allow us to come view them. If you have any questions, please contact our office. Your failure to preserve the video any other photographic evidence may subject you to a claim for negligent destruction of evidence, spoliation of evidence, See Martino v. Wal-Mart Stores, Inc., 908 So.2d 342 (Fla. 2005); and Golden Yachts, Inc. v. Hall, 920 So.2d 777 (Fla. 4th DCA 2006).

Thank you for your anticipated cooperation.

Thank you,

Attorney

XXX/xx

3.20
DATE

Via Facsimile and U.S. Mail
Insurance Carrier

RE: OUR CLIENT : SUBSCRIBER ID :
GROUP NUMBER :
SSN :
DOB :
D/Accident :

Dear Sir or Madam:

This firm has been retained to represent (INSERT NAME OF CLIENT) claim for damages resulting from an accident on the referenced date. You are notified under F.S. 768.76 of our intent to claim damages from the third party tortfeasor(s).

Please provide a statement of payments made on behalf of our client within thirty (30) days once you receive this letter. Also, please provide a statement asserting your right of subrogation or reimbursement for all payments made on behalf of our client.

Failure to provide this information within thirty (30) days of receipt of this letter will result in a waiver of any claim to subrogation or reimbursement that you may have. Attached is an authorization signed by our client.

Thank you,

Attorney

XXX/xx
DATE

Via Facsimile and U.S. Mail
Police Department
Address

RE:  Driver:
     Reporting Agency Case No.:
     Crash Report No.:
     DOA:
     Location:

Dear Sir or Madam:

This firm represents (INSERT NAME OF CLIENT) for injuries sustained in an automobile accident on (INSERT DATE). Please provide us with a copy of the accident report. We have enclosed an authorization signed by the client, our firm check in the amount of $XX and a self-addressed, stamped envelope for your convenience.

If you have any questions, please contact me.

Thank you,

Attorney

XXX/xx
Encl.
DATE

Via U.S. and Certified Mail
Police Department
Address

REQUEST FOR LOGS AND RECORDINGS

RE: PATIENT:
CLIENT:
DATE OF BIRTH:
SSN:
DOA:
LOCATION:

Dear Sir or Madam:

This firm represents (INSERT NAME OF CLIENT) for injuries sustained on (INSERT DATE). (INSERT NAME) was involved in an auto accident on the above referenced date. We request that you send us a copy of the following:

- All 911 logs; all dispatch logs; and all logs of any kind related to the incident.
- All audio recordings related to any 911 calls or emergency response related to the incident.

Enclosed is a medical authorization signed by our client, and a copy of the accident report for your reference. If you have any questions, please contact me.

Thank you,

Attorney

XXX/xx
Encl.
MENTALLY PREPARING FOR TRIAL

By

Dale Swope, Tampa
I. PREPARING FOR TRIAL—The Ultimate Checklist!

A. When you serve the notice for trial, you are committing to just about double the amount of work and costs that will have been invested in the case so far, so….

1. Before serving your notice, (assuming you are not in Federal Court) force yourself to do a comprehensive review of the file.

2. Re-read every single important page in your file, to make sure you understand not just YOUR case, but the other side’s as well.

   a. Review:
      1. Pleadings
      2. Discovery
      3. Medical records (not summaries)
      4. Employment records (not summaries)
      5. Depositions
      6. Expert Reports
      7. Proposals for Settlement
      8. Communications with your client and with the adverse side.
      9. And everything else!

3. Use this exercise to make, on a single word processing document, at first:
   a. A list of things you do not fully understand, that you need to sort out before going forward.
      1. Also, a list for things that need to be corrected or amended.
      2. And a list for things that need to be done.
         (a) Visualize yourself a day before the trial and ask yourself—what are the main things I would wish I had gotten done before now?
   b. Notes about the fundamental story of your case, that you intend to tell.
      1. And try to do the same for the opposing side – what are THEY going to try and say?
   c. A ‘we say/they say/ we say back’ analysis of the major issues in the case.
      1. Marshalling the evidence on both sides of these issues.
   d. A list of legal issues that you can currently predict.
      1. Especially those, like Duabert issues, that will require an evidentiary hearing.
         (a) Prepare hearing notebooks at least 5 days before a hearing and determine if you want to file a separate memo of law to be filed prior to the hearing.
         (b) Also, remember to give the judge a hearing notebook.
         (c) Make sure any evidence that you want to rely upon is filed with the court, at least 20 days before the hearing.
2. Prepare an estimate of how many hours each will require for research and documentation.

e. **Be positive you can say, with precision, what your special damage claim is:**
   1. On medicals, make sure you know the current gross billed, amount paid, write down/off and net balance owed.
   2. Always make sure to update all medical expenses and lien information (you may need this information further down the line, so these figures should be as accurate as possible).
   3. Also, make sure to know the formula for subrogation and reimbursement for any first-party payors.

4. Repeat this loop, until you are confident you really ARE ready to file.

5. Now be sure that it is a case that HAS to be tried.
   a. *Cases that settle ‘on the courthouse steps,’ after costs and other expenses have been spent, are generally a financial disaster for the client, so that should generally be avoided, whenever possible.*
   b. **Re-evaluate your position on settlement NOW, not a week before trial by:**
      1. Calculating what the client would net now if the last offer were accepted (assuming you can get negotiated compromises with collateral source lien holders).
      2. Calculate what you will need to get, in a verdict, to exceed what the client can net today (when collateral sources will not be as negotiable) and taking into account non-taxable costs.
      3. Calculate the range of verdicts you would foresee as the case appears now, and determine what the client’s net recovery will be on those – taking into account the appeals fee on the higher end verdicts.
   c. *If your last demand produces a net recovery higher than what you estimate the net will be after trial, devise a strategy to lower your demand accordingly.*
      1. In one step or many, ultimately make a demand that nets no more than what you believe you are going to get at trial.
   d. *And don’t plan to serve a notice for trial as an ‘extension of negotiation’ in the same way that war is an ‘extension of diplomacy.’*
      1. Once it is noticed, give settlement to someone else and never ever talk about it again.

6. After you have exhausted the final settlement effort, do a new Proposal for Settlement at the lowest amount you can possibly go without it being accepted.
   a. **Remember:**
      1. A Proposal for Settlement can be served as early as 90 days after Service of Process on the defendant and as late as 45 days before the
first day of trial—and acceptance of a Proposal must be done within 30 days of Service.

2. A proposal does not get filed with the Court unless it is accepted.
3. Proposals should be served by email, fax, and certified mail.

b. You must get client’s written permission to serve a Proposal for Settlement.
   1. As soon as you get their written permission, immediately set a reminder to serve the Proposal.

c. If a Proposal for Settlement is served on your client:
   1. Immediately prepare a letter to your client asking them if they want to accept the proposal.
   2. Immediately set a reminder to respond within 30 days.

7. Start tracking your time daily — even if you have never done it before.

B. Scheduling
   1. Make sure you estimate the correct amount of time for trial.
      a. Under estimate and you get a mistrial or end up butchering your case by rushing it.
      b. Over estimate and you may be waiting for months, un-necessarily.
      c. This requires a very rough version of your order of proof.
         1. List witnesses, think about how much each will need to say.
         2. Consult with the other side about what they are thinking too.
   2. Many people need to coordinate with the trial date — not just you and the defense lawyer.
      a. Make sure you advise IN WRITING:
         1. Your client
         2. Your experts
         3. Your treaters
         4. The cops, ems, and other lay witnesses you need to have present to be able to win.

II. WHEN TRIAL IS SET
   A. As a general rule, recognize that the days and even weeks before trial will be filled with things that simply cannot be done earlier.
      1. Responding to Motions in Limine, or Daubert challenges, or surprise witnesses, or motions to continue, etc.
      2. You need to save ALL the time just before trial for those things, and get EVERYTHING ELSE done as early as possible.
      3. Managing the project that is trial.
         a. In those courts that do not impose them on you, press for a case management order, with deadlines, and interim milestones, and consequences for not meeting them, for at least:
            1. CME’s
2. Discovery cutoff
3. Witnesses exchanges
4. Exhibit reviews
5. Daubert challenges to experts
6. Depo designations
7. Jury instructions

b. If the court imposes them of their own accord, docket those dates, with deadlines and follow them. Especially in Federal Court, where the consequences of non-compliance can be dire.
1. Remember, that if you are winning, the defense will almost always move for a continuance.
2. Give them no grounds.

c. These favor the prepared lawyers.

B. At Least 120 Days Out.
1. Review your notes from your comprehensive analysis.
   a. Break out the todo list.
   1. Be general and person specific.
   b. Create a folder you call your trial notebook.
   1. A master control with your todo’s and your OOP’s.
   2. Subfolders for each witness.

C. Start Your Prep From Two Documents.
1. A working opening statement.
   a. This is your trial story.
   b. Work to ensure that you can prove everything you have said.
   c. Read and revise it just about every time you work on the case.
   1. Consider 2-3 different approaches to telling the story as you work through your prep.

2. A working OOP.
   a. Not just names, but also subjects for testimony.
   b. Exhibits likely to be used.
   c. Anticipated objections to testimony and exhibits.
   d. Don’t forget defense witnesses and documents.
   1. Anticipate who they are likely to call.
      (a) Who they HAVE to call.

3. Convert your todo list into a schedule, and place it into a tickler, or calendar, or database software—like a Gantt chart.
a. Gantt charts are commonly used in business to monitor all kinds of projects. Preparing for trial is a massive project and this type of chart will help keep you mindful of all deadlines while tracking where you are in the bigger picture.

1. By putting all the deadlines in a manner that you can see where you are and what you have completed, you will stay on top of your deadlines.

2. You can download Gantt chart software online.

b. Make sure to anticipate the opposition deadlines and leave time to react.

4. Design RFA’s that the other side should be able to admit.

a. Include:

1. Special damages admissibility, document authenticity, etc.

D. 90 Days Out.

1. Work up your cross-exam of defense witnesses, including specific deposition passages, and exhibits you expect to use.

2. Prepare your Motions in Limine and jury instructions — even if you don’t file them.

3. If you are going to do a mock trial or focus group, do it now, to adjust your approach as needed.

E. 60 Days Out.

1. Schedule the witness preparation meetings.

a. The meetings themselves.

1. Chances are you will only have one, or possibly two of each.

2. Come with questioning outline in hand.

3. Bring their deposition, but recall that this meeting may be discoverable, and certainly may be disclosed freely by the witnesses.

4. List exhibits you are likely to use.

5. Adjust your opening and OOP as needed to match.

6. Reaffirm their schedule within the trial.

7. Assign a contact number for them to reach your team.

2. Design any custom exhibits required.

3. Design who is going to be ‘in the can’ and get their videos set two weeks before trial.

a. Probably one witness in five is a good rule for this.

4. Pursue proofs on routine matters that should have been admitted, but were not.

5. Served subpoenas’ on all witnesses (including friendlies and experts).


a. For the experts and friendlies, as well.
F. 45 Days Out.
1. Get your medicals and other records updated.
2. Organize and mark your exhibits; block out references to insurance or other inappropriate things.
3. Set exhibit review and attorney pre-trial meeting for 30 days out.
4. Work on voir dire now.
a. Including ‘scoresheets’ or whatever system you use.
5. Finalize your custom exhibits.
6. Rebuild your working file, as needed into a system to retrieve what you need promptly.

G. 30 Days Out.
1. Clear your calendar as much as possible.
a. Do attorney pre-trial:
   1. Ensure that THEY are coming with disclosures.
   2. Exhibits are reviewed.
   3. Stipulations concerning admissibility are made.
   4. Review jury instructions and verdict form.
   5. Have court reporter present to records all agreements made.
   6. Produce desk sized versions of exhibits.
   7. Come with draft pre-trial stipulations and order.
2. Verify service on your subpoenas.
3. Write opening and start practicing.
4. Write the last two minutes of rebuttal and begin to practice it.
5. Go to work on witness notebooks, with exhibits, and law related to anticipated legal issues.
6. Anticipate stress and panic, and make time to relieve it.

H. 15 Days Out.
1. Have all boards and exhibits done, and sort them by which day they will be needed, unless they can be left at courthouse.
2. Set-up your ‘war room’ with a wall mounted OOP and todo list.
3. Leave time to react to defense’s panic.
a. Especially, the inevitable Motion to Continue.
4. Complete the hearings on evidence.
a. Adjust your OOP, opening statement, and closing notes based on those rulings.
5. Double check with your experts, ensure that they are available and all is as it should be.

I. 10 Days Out.
1. Prepare checklist for loading each day.
a. Determine what stays at the courthouse for witness room ‘operations.’
b. Determine what has to come home each day.
2. Verify your clothes are clean and everything fits, shoes are polished, etc.

J. 5 Days Ahead.
1. Take your clients to the courthouse.
2. Try out the chairs.

K. 3 Days Ahead.
1. Prepare YOU, and your trial team.
APPELLATE ISSUES IN PERSONAL INJURY

By

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Appellate Issues in Personal Injury

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Appellate issues arise in every case, personal injury or otherwise. These materials will provide some general background to first understand the avenues of appeal in Florida appellate courts, while then addressing general concepts of preservation of error. When issues unique to personal injury arise, they will be addressed as appropriate. These materials are not meant to be exhaustive, and indeed separate day-long seminars can be, and are, devoted to distinct subjects addressed here. For example, the jurisdiction of the Supreme Court of Florida is not mentioned, and neither are the mechanics of the appellate process, brief writing, or oral argument. These materials are intended to make the practitioner aware of potential appellate avenues and issues that arise in general trial practice.

The Avenues of Appeal

Generally speaking, there are three paths to gain the jurisdiction of the intermediate appellate courts in Florida, two of them mandatory, and one discretionary. A party has the right to an appeal of a final order, and likewise has the right to appeal certain specified non-final orders. Appellate jurisdiction may also be sought to obtain extraordinary writs, or what are known as Original Proceedings under Florida Rule of Appellate Procedure 9.100. As will be discussed below, the decision to require a response to a petition, or to consider the petition itself, is always a discretionary decision of the appellate court.

I. FINAL ORDERS

A. Defined

1. An order is considered final when the trial court’s judicial labors are at an end. The surest sign of a final order is a final judgment entering judgment for or against a party to the case on all causes of action. Put simply, final judgment is reached as to a particular party when there is nothing left for the court to do to resolve the substantive controversy as to that party.

B. Procedure Under Florida Rule Of Appellate Procedure 9.110

1. Rule 9.110 addresses the procedural aspects of appeals to review final orders. Jurisdiction is invoked by filing a original and one copy of a notice of appeal (see Rule 9.900(a)), along with the appropriate fees, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed.

2. The notice need only have the final order attached because appellate review encompasses all interlocutory orders. See Fla. R. App. P. 9.110(h).

C. Areas Of Potential Confusion
1. Premature Appeals  
a. If a notice of appeal is filed before a final order is rendered, the appeal is subject to being dismissed as premature. Fla. R. App. P. 9.110(l). However, the lower court retains jurisdiction to render a final order, and if a final order is rendered before the appeal is dismissed, the premature notice is sufficient to vest jurisdiction in the appellate court. Before dismissal, the appellate court may grant the parties additional time to obtain a final order from the lower court.

2. Orders Granting Motions To Dismiss Or For Summary Judgment  
a. An area of some confusion concerns orders that grant a motion for summary judgment or a motion to dismiss. An order that does this, without more, is not appealable as a final order. An order does not become appealable until the court acts upon the order granting the motion by entering a judgment for the plaintiff or defendant as a result of the granting of the motion. Note that an order may have the requisite language of finality in it to be treated as a final judgment.

3. Judgment As To Less Than All Parties  
a. An order that fully disposes of all claims as to one or more parties is considered final as to that party or parties. The order must be appealed within 30 days or the right to appeal is forever lost.

4. Judgment As To Less Than All Counts  
a. An order that disposes of none of the parties to a case but disposes of less than all counts or causes of action is generally not a final order and is not appealable.  
b. If the count that is dismissed is factually and legally distinct from the balance of the case, the dismissal of that count can be considered a partial final judgment and is appealable.  
c. If the dismissed counts involve the same parties, the same transaction, and same factual background, they are not likely to be considered separate and distinct for the purposes of supporting an appeal.

5. Partial Final Judgments  
a. Partial final judgment may be appealed immediately or at the end of the case. Rule 9.110(k).  
b. An order disposing of less than all of the claims in a case is considered a partial final judgment only when the claim is not interdependent with other pleaded claims. For example, an order to enforce a settlement agreement may well be appealable as a partial final judgment because the issues raised are likely to be separate and distinct from the balance of the case.

6. Attorneys’ Fees And Costs, and Interest  
a. The trial court will often enter a final judgment while reserving jurisdiction to award fees or costs. Cost and fee awards are considered collateral to the main claim. Thus, the fact that these issues remain to be resolved will not deprive an otherwise final judgment of its finality. The 30 day deadline to file a notice begins to run upon entry of judgment on the main claim and does not await the fee or cost award.
b. A fee or cost award may be appealed by filing a separate appeal within 30 days of the rendition of the fee or cost judgment. Of course, if the notice of appeal can be filed within 30 days of the order of the main claim and any fee or cost award, one notice can be used to appeal the main claim and the fee or cost award but refer specifically to each order. Rule 9.110(h).

c. After obtaining a verdict, it is the responsibility of the plaintiff’s attorney to promptly seek to obtain a judgment so that post-judgment interest begins to run. See Amerace v. Stallings, 823 So. 2d 110 (Fla. 2002).

7. Rendition Of Orders/Judgments
   a. Most appellate deadlines run from the “rendition” of the order in the lower tribunal. See, e.g., Rule 9.110(b). An order is considered to be “rendered” when a signed, written order is filed with the clerk of the lower tribunal. Rule 9.020(j).
   b. The filing of an authorized and timely motion for new trial or rehearing, clarification, or certification; to alter or amend; for judgment notwithstanding verdict or in accordance with prior motion for directed verdict, or in arrest of judgment; or a challenge to the verdict postpones rendition of the order until an order disposing of the motion is rendered. Note that such a motion filed by one party will not have any effect on another.
   c. An untimely or unauthorized motion for rehearing will not toll the time for taking an appeal.

8. Orders Granting New Trials
   a. Orders granting new trial are appealed under Rule 9.110, which deals with the procedure for appealing final orders. Although an order for new trial is appealed under the same rules as a final order, an order granting a new trial is considered a non-final order. This is important because a motion for rehearing is not authorized from a non-final order and will not toll rendition for the purpose of calculating the date for filing the notice of appeal.

II. NON-FINAL ORDERS
   A. Controlled By Florida Rule Of Appellate Procedure 9.130
      1. Only non-final orders specifically listed that Rule 9.130 may be appealed, and the Rule is narrowly construed.

      A notice of appeal must be filed within 30 days of rendition of the order to be reviewed. The Initial Brief shall be served within 15 days of filing the notice, the Answer Brief shall be served with 20 days of the Initial Brief, and the Reply Brief shall be served within 20 days of the Answer Brief.

      There is no record prepared by the lower tribunal. Rather, the Briefs must be accompanied by an appendix as addressed in Rule 9.220.

      Note that while an appeal of a listed non-final order may be taken, there is no requirement that such an appeal must be taken. If a party chooses not to take an appeal of a non-final order, then that order may be addressed in an appeal from a final order.
If the lower court does not enter a stay, it may continue forward with the matter, including trial. However, the lower court may not enter a final judgment while the appeal of a non-final order is pending.

B. Listed Orders:
1. Orders concerning venue.
2. Orders that grant, continue, modify deny or dissolve injunctions, or that refuse to modify or dissolve injunctions.
3. Orders that determine jurisdiction of the person.
4. Orders that determine the right to immediate possession of property (including orders that grant or refuse to grant writs of replevin, garnishment or attachment).
5. Certain orders in family law matters.
6. Orders that determine entitlement to arbitration.
7. Orders that deny, as a matter of law, that a party is not entitled to workers compensation immunity.
8. Orders that class should or should not be certified.
9. Orders that determine as a matter of law that a party is not entitled to absolute or qualified immunity in civil rights claim arising under federal law.
10. Orders determining that a governmental entity has taken action that inordinately burdened property under the Bert Harris Act.
11. Orders that determine issues of forum non conveniens.
12. Orders that determine, as a matter of law, a party is not entitled to immunity under section 768.28(9).
13. Orders that determine, as a matter of law, that a party is not entitled to sovereign immunity.
14. Orders that grant, deny, terminate or refuse to terminate the appointment of a receiver.

C. Impact Of Rehearing In Appeals From Non-Final Orders.
1. Rendition is calculated the same manner in appeals from final and non-final orders. An order is considered rendered when a signed, written copy of the order is filed with the clerk. Rule 9.020(g). However, there is one very important difference. The rules of civil procedure do not authorize motions for rehearing from non-final orders. Thus, a motion for rehearing, reconsideration, clarification, or other similar motion does not toll the time for taking an appeal from a non-final order. As stated in Rule 9.130(a)(5), “Motions for rehearing directed to these orders will not toll the time for filing a notice of appeal.”

III. EXTRAORDINARY WRITS (ORIGINAL PROCEEDINGS)

As noted above, Florida Rule of Appellate Procedure 9.100 specifies the writs that might be sought from a court of competent jurisdiction. Among those are petitions for writs of habeas corpus and quo warranto (as well as the “all writs” power) which do not have any practical application in the personal injury context. Practitioners should be aware of the following writs, however.

A. Certiorari
1. A writ of certiorari is used to review and remedy a lower tribunal’s order that departs from the essential requirements of law and results in a material injury for the remainder of the trial that cannot be corrected in post-judgement appeal.

2. A petition for writ of certiorari may not be used to circumvent Rule 9.130.

3. The writ may only quash an order entered by the lower court; it may not order the lower court to enter contrary orders.

4. Petition must be filed by 30th day after rendition of the order to be reviewed. This is jurisdictional.

5. Examples of uses:
   a. Orders granting or denying a motion to disqualify counsel.
   b. “Cat out of the bag” discovery orders requiring the disclosure of trade secrets; work product; attorney-client communications; clergy communications; patient medical information, Boecher discovery.
   c. Orders compelling production of documents by nonparty.

B. Mandamus
1. A writ of mandamus is an order issued by a court commanding a tribunal or public official to perform an act or duty that the entity or person is legally obligated to perform. It cannot be used to enforce private rights.

2. Petitioner must demonstrate a clear and established right to requested relief, and must show that there is no adequate remedy at law.

3. The act to be performed must be a ministerial act, not a discretionary act.

4. Examples of uses:
   a. Compel lower tribunal to rule on a matter.
   b. Compel trial court to set a date for trial upon filing of notice for trial.

C. Prohibition
1. A writ of prohibition is an order issued by a court to prevent a lower court or tribunal possessing judicial or quasi-judicial power from considering matters not within its jurisdiction.

2. Examples of uses:
   a. Disqualification of individual judge.
   b. Improper jurisdiction of lower tribunal.

**Preservation of Error**

The most egregious errors occurring at trial are of no interest to the appellate court unless they are preserved. In the absence of jurisdictional defect or fundamental error, only points properly raised and decided in the trial court may be considered on appeal. *City of Orlando v. Birmingham*, 539 So. 2d 1133 (Fla. 1989). Simply put, the appellate court wants to be assured that the issue was fairly presented to the trial court, and that court had an opportunity to address it. *J.B. v. State*, 705 So. 2d 1376 (Fla. 1998). Timely objections in the trial court also afford the opposing party the opportunity to correct the error and avoid its prejudicial effect. *See Parlier v. Eagle-Picher Industries, Inc.*, 622 So. 2d 479 (Fla. 5th DCA 1993).

Trial counsel must be vigilant throughout the proceedings in the lower tribunal – from the pleading stage through post-trial motions – to make an adequate record by timely and specific objections to preserve disputed rulings for appellate review. Not only must the complaining party make a timely and appropriate objection, a ruling on the objection or issue raised below must be
obtained. See Fleming v. Peoples First Financial Sav. And Loan Ass’n, 667 So. 2d 273 (Fla. 1st DCA 1995) (appellate court would not review appellant’s claim that the trial court erred by denying his motion for leave to amend where trial court did not expressly rule on the motion); Armstrong v. State, 642 So. 2d 730 (Fla. 1994).

While preservation issues arise in every phase of trial, this outline will address a few areas of particular interest in the context of personal injury law. Specifically, jury selection, offers of proof, expert testimony, jury instructions, and closing argument all present issues that may arise in this context.

I. JURY SELECTION

A. To preserve any alleged errors made by the trial court in the manner used to select a jury, the complaining party must object at trial to the jury as finally composed. Ter Keurst v. Miami Elevator Co., 486 So. 2d 547 (Fla. 1986) (party waived objection to trial court’s erroneous method of exercising peremptory challenges when no objection made to jury as finally composed). Always make one last objection to the jury before it is sworn.

B. Challenges for cause: In order to preserve for review the issue whether the trial court erred in refusing to excuse a juror for cause, all peremptory challenges must be exhausted and a request made for additional challenges. Sebring Associates, Ltd. v. Aumann, 673 So. 2d 875 (Fla. 2d DCA 1996). Further, the aggrieved party must show that he was forced to accept the objectionable juror. Trotter v. State, 576 So. 2d 691 (Fla. 1990).

C. Discrimination-based peremptory challenges: Both the United States and Florida Constitutions prohibit peremptory strikes that are based on the prospective juror’s race and gender. See Batson v. Kentucky, 476 U.S. 79, 85-89 (1986) (race); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130-31 (1994) (gender); State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (race); Abshire v. State, 642 So. 2d 542, 544 (Fla. 1994) (gender). To ensure that litigants comply with these constitutional requirements, the Florida Supreme Court has set forth a mandatory three-step procedure trial courts must follow “whenever a race-[or gender-] based objection to a peremptory challenge is made.” Melbourne, 679 So. 2d at 764.

Under the first step, “[a] party objecting to the other side’s use of a peremptory challenge on racial [or gender-based] grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group [or gender], and c) request that the court ask the striking party its reason for the strike.” Id. In step two, “the burden of production shifts to the proponent of the strike to come forward with a race-[or gender-] neutral question” for the strike. Id. Step three requires the trial court, “given all the circumstances surrounding the strike,” to make a determination on the record whether the offered explanation for the strike is a pretext. Id.

During step three, “[t]he court’s focus . . . is not on the reasonableness of the explanation [offered for the strike], but rather its genuineness.” Id. The trial court’s “genuineness” analysis turns “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.’” Hayes v. State, 94 So. 3d 452, 462 (Fla. 2012) (quoting State v. Slappy, 552 So. 2d 18, 22 (Fla. 1988)).
The “Melbourne procedure does not require the trial court to recite a perfect script or incant specific words in order to properly comply with its analysis under step three . . . there is no requirement that trial court specifically use the word ‘genuine.’” *Hayes*, 94 So. 3d at 463 (quoting *Haskins v. State*, 965 So. 2d 1, 12 (Fla. 2007)). However, the trial court must undertake an on-the-record genuineness inquiry to satisfy the third step of the *Melbourne* procedure. *Hayes*, 94 So. 3d at 463.

II. OFFERS OF PROOF
A. An appellate court will not reverse a judgment or order a new trial on the basis of excluded evidence unless the substance of the evidence is made known to the court by offer of proof or is apparent from the context of the record. Fla. R. Civ. P. 1.450(b); § 90.104(1)(b), Fla. Stat. (1995). See *Key v. Angrand*, 630 So. 2d 646 (Fla. 3d DCA 1994), *quashed in part on other grounds*, 657 So. 2d 1146 (Fla. 1995); *Callihan v. Turtle Kraals, Ltd.*, 523 So. 2d 800 (Fla. 3d DCA 1988). Documentary evidence also must be proffered. The proffer must be timely to afford the trial judge an opportunity to rule on the evidence at the time it is offered. *Diaz v. Rodriguez*, 384 So. 2d 906 (Fla. 3d DCA 1980) (proffer made on post-trial motions untimely since jury may have rendered same verdict if the court, after hearing proffer at trial, ruled favorably on the issue).

B. The proffer may be made by presenting the testimony outside the presence of the jury, or, in some instances, by summary or stipulation. See Fla. R. Civ. P. 1.450(a).

C. The trial court’s refusal to permit the proffer generally is reversible error. *Thunderbird Drive-In Theatre, Inc. v. Reed*, 571 So. 2d 1341 (Fla. 4th DCA 1990), rev. denied, 577 So. 2d 1328 (Fla. 1991).

III. EXPERT TESTIMONY
A. A critical and confusing issue has arisen over the past several years concerning the standards for admissibility of expert testimony in Florida, and this can be particularly important in personal injury cases. Florida courts had long applied the standards set forth in *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923) in determining whether expert testimony was admissible. See, e.g., *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993). Under the *Frye* standard, expert testimony was admissible so long as it was “generally accepted by the relevant members of the [experts] particular field.” *Hadden v. State*, 690 So. 2d 573, 576 (Fla. 1997). Further, courts held that in certain circumstances, the *Frye* standard did not need to be met. Particularly, when the method of formulating an expert opinion was not new or novel, and it was widely accepted based upon established scientific principles and methodology, an expert could render pure opinion testimony based on the expert’s training, experience, education, or knowledge. *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007).

B. In 2013, the Florida legislature amended sections 90.702 and 90.704 with the intention of replacing the *Frye* standard with the generally perceived as stricter standard formed in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). That legislation eliminated the use of pure opinion testimony and required the expert to be qualified in his or her field, to base his or her opinion on reasonable data and evidence, and to employ a reasonable methodology to reach the conclusions and to apply that methodology in a
reliable way.

C. In 2017, the Supreme Court of Florida issued its opinion *In Re: Amendments to the Florida Evidence Code*, 2010 So. 3d 1231 (Fla. 2017). That 4-2 decision expressed “grave constitutional concerns” with the legislative amendments, and the Court ultimately refused to adopt the legislative amendments to the extent that they were procedural and not substantive.

D. On March 6, 2018, the Supreme Court of Florida heard oral arguments in the case *Richard Delisle v. Crane Co.*, SC16-2182 and considered a decision from the Fourth District Court of Appeal which reversed a significant asbestosis litigation verdict because the expert testimony did not meet the *Daubert* standard.

E. This situation obviously presents interesting challenges for attorneys trying personal injury cases, or any cases involving expert testimony. It would seem that given the present uncertainty on the issue, the safest course of action would be to seek admission and/or exclusion of expert testimony under both standards and seek to have the court rule specifically on each. Those findings might prove to be invaluable at some point with the Supreme Court of Florida clarifies its decision.

IV. JURY INSTRUCTIONS AND VERDICT FORMS

A. To preserve for review the trial court’s refusal to give an instruction, the requested instruction must be reduced to writing. *Jackson v. Harsco Corp.*, 364 So. 2d 808 (Fla. 3d DCA 1978). The requested instruction must be brought to the trial court’s attention, and not merely filed. *Luthi v. Owens-Corning Fiberglas Corp.*, 672 So. 2d 650 (Fla. 4th DCA 1996).

B. Florida Rule of Civil Procedure 1.470(b) mandates that no party may claim the giving of a jury instruction as error unless that party objects thereto at the charge conference. Specifically, the rule states that at the “conference, all objections shall be made and ruled upon and the court shall inform counsel of such instructions as it will give. No party may assign as error the giving of any instruction unless that party requests the same.” Fla. R. Civ. P. 1.470(b). Under the clear language of the rule, the failure to timely raise any objections waives such objections. *See e.g., High, Clark & Feneis, Inc. v. Public Serv. Mut. Ins. Co.*, 238 So. 2d 169 (Fla. 3d DCA 1970) (affirming where appellant did not object to jury instruction at charge conference).

C. The failure to object to an instruction even waives a later argument on appeal that the instruction amounted to fundamental error. As the Florida Supreme Court has stated, any argument concerning fundamental error is “waived where defense counsel affirmatively agrees to an improper instruction.” *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012) (citing *State v. Lucas*, 645 So. 2d 425 (Fla. 1994)).


E. As with the case of jury instructions, an appellate court will not review an error in the form of verdict in the absence of a timely objection. *Hurley v. Government Employees Insurance Co.*, 672 So. 2d 450 (Fla. 4th DCA 1996).
Ins. Co., 619 So. 2d 477 (Fla. 2d DCA 1993); McDonough Power Equipment, Inc. v. Brown, 486 So. 2d 609 (Fla. 4th DCA 1986).

V. CLOSING ARGUMENT

A. In Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000), the Supreme Court established standards for unobjected-to comments that make it difficult, if not impossible, to raise those comments as a viable issue on appeal. Murphy provides “an escape valve with a very narrowly defined parameter and of extremely limited application . . .” Id. at 1026. One court has recognized the narrowness and limits of that “valve” by stating that “Murphy’s lesson to trial counsel is clear – a remedy will almost always be tied to a contemporaneous objection.” Bocher v. Glass, 874 So. 2d 701, 704 (Fla. 1st DCA 2004).

B. Murphy’s basic premise seems to be this: if a comment was so outrageous that you are seeking a new trial because it was made, then why on earth didn’t you object? If the lack of an objection to the allegedly outrageous comment is part of a strategy to wait back and see how the trial turns out and then raise the issue, then forget that, because the bar at that point will be set at a level that is almost impossible to satisfy. Allowing the trial court to address alleged errors by way of a specific, contemporaneous objection is a bedrock principle under Florida law, and Murphy reinforces the need to allow the trial court to address issues as they arise.

C. As noted above, Murphy clarified and severely limited the ability of a party to claim error when comments during closing were not objected to. The party must raise the issue in a motion for new trial, and must demonstrate that the argument was 1) improper, 2) harmful, 3) incurable, and 4) so damaging to the fairness of the trial that the public’s interest in our system of justice requires a new trial. Murphy, 766 So. 2d at 1028. As will be seen, satisfaction of these four elements is “extraordinarily demanding.” Mercury Ins. Co. v. Moreta, 957 So. 2d 1242, 1250 (Fla. 2d DCA 2007); Platz v. Auto Recycling & Repair, Inc., 795 So. 2d 1025, 1027 (Fla. 3d DCA 2001).

D. Summarizing the scope of the Murphy standards, the Court later commented that “[t]o justify granting a motion for a new trial based on unobjected-to improper argument, the trial court must find that the improper argument is of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments.” Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1271 (Fla. 2006) (emphasis added). A trial court’s ruling on a motion for new trial raising a Murphy challenge is then reviewed by an appellate court under an abuse of discretion standard.

E. As if satisfying the Murphy standards is not hard enough, courts have emphasized that practitioners should carefully craft their motion for new trial in order to preserve the right to seek review. Clearly, Murphy requires raising the unobjected-to comments in the motion for new trial, or that argument is waived on appeal. See Santiago v. Abramovitz, 96 So. 3d 1091 (Fla. 4th DCA 2012) (finding that appellant did not preserve Murphy argument in motion for new trial). Yet, even if the issues are raised in a motion for new trial, they must be raised adequately. For example, in Bradley v. Southern Baptist Hospital, 943 So. 2d 202, 207 (Fla. 1st DCA 2006), the court found that appellants failed to preserve a Murphy issue where motion for new trial did not include all allegedly

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improper comments and therefore “did not sufficiently apprise the trial court” of the improper comments. In *USAA Cas. Ins. Co. v. Howell*, 901 So. 2d 876, 879 (Fla. 4th DCA 2005), the court likewise held that it would only address those comments specifically set forth in motion for new trial.
EXPERT DISCOVERY

By

George Koonce, Miami
EXPERT DISCOVERY

I. WHAT IS EXPERT DISCOVERY

a. Experts are specialized witness that are sometimes paid to review a case and offer an opinion. Expert discovery allows for the discovery of an expert’s opinions and basis for said opinions. It also allows for the discovery of information you can use to impeach the expert.

b. Two Types of Experts

   i. Consulting Expert

      1. Experts that you retain and pay but you do not disclose to the other side

   ii. Disclosed Expert

      1. Expert that you disclose to the opposing side through expert disclosure (as per the trial/scheduling order)

II. SELECTION OF EXPERT

a. Think about the case you have

   i. Exposure/Value

      1. Understand the value of your case when considering if you want to hire an Expert.

   ii. Location of Expert

      1. Local Expert/Out of Town Exert

         a. Local Expert

            i. Easier to meet with

            ii. Less cost regarding deposition expenses

         b. Out of State Expert

            i. Can provide Expertise not found locally

            ii. Can provide credentials not found locally

            iii. Expensive to meet in person and travel to the deposition

            iv. Experts may be unavailable for trial.
iii. Out of the Box Experts

1. Sometimes you need to find Experts that are outside of the normal. Think about your case and decide if you need such an Expert

   a. Examples

      i. Education Expert

      ii. Specialized Business Valuation Experts

      iii. Executive Compensation Experts

      iv. Biomechanical

      v. Fire Causation Experts

b. Personal Injury (Car Accident, Negligent Security, Slip and Fall)

   i. Car Accident Case

      1. Accident Reconstruction

         a. These Experts are consulted when there is a question regarding how the accident occurred.

   ii. Medical Experts to Opine regarding the injuries/current condition of the Plaintiff.

      1. Plaintiff

         a. Can look to a treating physician to assist your client at deposition.

      2. Defendant

         a. IME/CME physician

            i. Physician who can examine the Plaintiff and then render an opinion.

            ii. These Experts should be carefully considered as a report must be produced following the examination.

c. Medical Malpractice

   i. Experts are the key in your case
1. They will allow you to build the allegations and defenses in your cases.

2. They will also let you know if you have a case.

ii. Plaintiff

1. In most cases the Plaintiff will need an Expert to begin the case
   a. When you get a case, will need to find an Expert to match the specialty of the criticized care.
   b. This is the Expert that will likely drive your Pre-suit and sign the Pre-suit affidavit.
   c. This does not need to be your actual suit Expert. However, this Expert could be deposed in certain situations.

iii. Defendant

1. Need to find an Expert to defend the medical care providers.
   a. Key is finding an Expert to speak for your client.

iv. Product Liability

1. Need to find a highly specialized Expert that can speak about the product.

2. Plaintiff

   a. Look up past jury verdicts to see who others have used in similar cases.

3. Defense

   a. Manufacturer of the product can be helpful

III. DISCLOSURE OF EXPERT

a. Trial Order
   i. Always review the trial order regarding Expert Witnesses
   
   ii. Need to comply with the trial order regarding the disclosure of your Experts

   1. There could be grave consequences if you do not comply
iii. Examples

1. Disclose reports from your Experts (Generally in Federal Court)
   a. These reports are critical
   b. Need to make sure that the Expert report matches your theory of the case

2. Provide certain information regarding Experts
   a. Testimonial History of Expert
   b. General Litigation Experience of the Expert.
      i. The % of testimony for the Plaintiff v Defense

3. Requirement to provide dates for deposition of Expert
   a. Make sure you are in communication with Expert, so you can comply with the trial order.

IV. WRITTEN EXPERT DISCOVERY

a. Expert Interrogatories and Request for Production
   i. Generally, this discovery is related to the opinions of your Experts
      1. Need to answer this discovery as accurately as possible. If you do not there could be consequences from the court.

ii. Boecher Discovery
      1. This is discovery designed to gather information about the relationship between your firm and an Expert
         a. This type of discovery must be taken seriously. Failure to answer properly could have profound consequences.

b. Expert Reports
   i. Some jurisdictions and Federal Court require Expert reports
      1. Providing Expert reports and complying with the deadlines are critically important.
      2. Make sure the reports contain all of the requirements from the trial order. (Examples)
a. Expert’s background and qualifications
b. Expert’s testimonial history
c. Clearly state Expert’s opinion and the basis for said opinion.

V. EXPERT DEPOSITION

a. Preparing the Expert

i. Materials to the Expert

1. Need to make sure your Expert has all of the available records from the case.

   a. Look at the depositions in the case and try to determine what the Expert will need to formulate their opinions
   b. Medical Records
   c. Discovery
   d. Other documents which form the basis of the Expert’s opinions.

b. Travel or not Travel

i. Traveling

   1. This is always preferred as it reduces the chances for miscommunication
   2. Can be expensive and time consuming

ii. No Travel

   1. Make sure whatever electronic means you are using for appearance is tested 24hrs in advance.

c. Expert Deposition Notice

i. The Expert Deposition Notice can be utilized to force an Expert to bring certain items, in their possession, to the deposition.

   1. Examples of items

      a. Expert file
b. Records Reviewed
   i. Depositions
   ii. Medical records
   iii. Other materials received from the lawyer

c. CV

d. Billing Records

e. Depositions reviewed

f. Notes created by the Expert

g. Correspondence between the Expert and the opposing lawyer

ii. These items can assist you in gathering information regarding the Expert’s background and what materials shaped the Expert’s overall opinions.

d. Preparing for the Expert deposition

i. Research the Expert

1. Internet research

   a. Expert Databanks

   i. Can provide background on the number of times an Expert has testified on behalf of the opposing counsel

   ii. Can provide prior deposition transcripts

   iii. Can provide information regarding the lawyers who have dealt with the Experts in the past.

2. Public databases

3. Websites of Professional organizations

4. Talking to other lawyers

   a. Talk to other lawyers in your firm and outside of your firm regarding the Expert.

5. Obtain Published articles of Expert

6.6
a. Determine if opinions in scholarly articles match the opinions of Expert in deposition.

6. Prepare an Outline
   a. Make sure your thoughts are organized

   e. Taking an Expert Deposition
      i. The essential parts of the Expert deposition are as follows
         1. Obtain testimony from the Expert identifying all of the Expert’s opinions.
         2. Also need to determine what the Expert will and will not be testifying about.
         3. The basis and support for the Expert’s opinion
            a. Get the Expert to cite in the record the basis for his opinions.
      ii. Gather information on the Expert’s qualifications
      iii. Gather information regarding any bias the Expert may have
         1. Ask questions regarding:
            a. Number of times Expert has consulted with opposing counsel
            b. Amount of money Expert has been paid on this case
            c. Amount of time Expert witnesses spends doing Expert reviews and testimony as a percentage of their overall professional time.
            d. Overall percentage of income derived from Expert work.
      iv. Gather information regarding the materials reviewed by the Expert
         1. Did Expert review all of the available materials in this matter
         2. Did the Expert review any summaries or outlines prepared by opposing counsel.
         3. What did the Expert and opposing counsel correspond about prior to the deposition.
      v. Test Cross-Examination strategies for trial
1. A deposition is a place where you can challenge an Expert’s opinion.

2. Continued challenges to an Expert’s opinion can expose your theories and help the opposing Expert prepare for trial.

f. Defending an Expert Deposition

i. Timing of the Expert deposition

1. When defending a case, ensure the deposition of the Plaintiff’s Expert is completed prior to the deposition of your Expert.

   a. In some jurisdictions this is codified in scheduling and trial orders.

ii. Preparation for Defending the Expert Deposition

1. Make sure your Expert has all of the materials for their Expert opinion

2. Make sure your Expert knows the time and location of the Expert deposition

3. Make sure your Expert has the Deposition Notice

   a. Go over the Deposition Notice to see what the Expert has in response. See what you can provide. Remember to file the necessary objections

iii. Pre-Deposition Conference

1. If you are doing it in person or over the phone, the pre-deposition conference is critical

   a. Need to make sure the Expert has all of the materials prior to the deposition

   b. Perform a “Mock Deposition”

      i. Ask the Expert questions about his/her opinions and listen to their answers.

      ii. If they are incorrect, provide corrections

   c. Expert Opinions

      i. Make sure Expert opinions are supportive of your case.
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- Two Types of Experts
  - Consulting Expert
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- Think about the case you are handling
- Exposure/Value
- Location of Expert
- “Out of the Box” Experts
CASE SPECIFIC EXPERT CONSIDERATIONS

Personal Injury (Car Accident, Negligent Security, Slip and Fall)

- **PLAINTIFF**
  - Can look to a treating physician to assist your client at deposition.

- **DEFENDANT**
  - IME/CME physician
  - Physician who can examine the Plaintiff and then render an opinion.
  - These experts should be carefully considered as a report must be produced following the examination.

CASE SPECIFIC EXPERT CONSIDERATIONS

Medical Malpractice

- **EXPERTS ARE THE KEY IN YOUR CASE**

- **PLAINTIFF**
  - When you get a case, will need to find an expert to match the specialty of the criticized care.
  - This is the expert that will likely drive your Pre-suit and sign the Pre-suit affidavit.

- **DEFENDANT**
  - Need to find an expert to defend the medical care providers.
  - Key is finding an expert to speak for your client.

CASE SPECIFIC EXPERT CONSIDERATIONS

Product Liability

- Need to find a highly specialized expert that can speak about the product.

- **Plaintiff**
  - Look up past jury verdicts to see who others have used in terms of experts

- **Defense**
  - Manufacturer of the product can be helpful
DISCLOSURE OF EXPERTS

• TRIAL ORDER
  • Always Review the Trial Order
  • Must comply with Trial Order
• Examples
  • Disclose Reports
  • Provide Certain Information Regarding Experts

WRITTEN EXPERT DISCOVERY

• EXPERT INTERROGATORIES AND REQUEST FOR PRODUCTION
• BOECHER DISCOVERY
  • Detailed discovery that needs to be answered carefully
• EXPERT REPORTS
  • Need to make sure it contains the requirements of the trial order

EXPERT DEPOSITION

• PREPARING THE EXPERT
  • Need to ensure the expert has all of the materials relevant to their opinions
• TRAVEL
  • If you decide to not travel, make sure your electronic method of appearance is checked 24hrs prior to deposition
• EXPERT DEPOSITION NOTICE
  • This pleading can be utilized to ensure an expert brings certain documents to a deposition.
EXPERT DEPOSITION
(Continued)

▪ PREPARING FOR THE EXPERT DEPOSITION
  ▪ Research the Expert
  ▪ Expert Databanks
  ▪ Public Databases
  ▪ Professional Societies
  ▪ Talk to other Lawyers

▪ PREPARE AN OUTLINE
  ▪ Need to have a roadmap so you can keep your thoughts organized

EXPERT DEPOSITION
(Continued)

▪ TAKING AN EXPERT DEPOSITION
  ▪ The key is to obtain the Expert’s Opinions
  ▪ Gather information regarding the Expert’s qualifications
  ▪ Gather information regarding an Expert’s potential bias
  ▪ Gather information regarding the materials reviewed by the expert
  ▪ Test Potential Trial Cross-Examination Theories

EXPERT DEPOSITION
(Continued)

▪ DEFENDING AN EXPERT DEPOSITION
  ▪ TIMING OF EXPERT DEPOSITION
  ▪ PRE-DEPOSITION CONFERENCE
    ▪ “Mock Deposition”
JUDICIAL PANEL

No Materials

By

Hon. Jacqueline Hogan Scola, Miami
Judge Rex Barbas, Miami
Honorable James Moody, Jr., Miami