



**2013**  
**FLORIDA HANDBOOK**  
**ON CIVIL DISCOVERY**  
**PRACTICE**

# TABLE OF CONTENTS

---

PREFACE .....	iii
Chapter 1: Available Weapons to Combat Discovery Abuse .....	1
In General .....	1
Award of Expenses and Fees on Motion to Compel .....	3
Exclusion of Expert Witness Opinions.....	5
Remedies Under Fla. Stat. §57.105.....	7
Sanctions for Failure to Obey Court Order.....	11
Required Due Process and Findings of Fact.....	12
Chapter 2: Remedies for Destruction of Evidence .....	16
Chapter 3: Remedies for Fraud on the Court.....	21
Selected Cases on Fraud on the Court.....	24
Chapter 4: Remedies Against Nonparty.....	35
Chapter 5: Work Product and Trade Secrets .....	40
Incident Reports.....	43
Claims Files .....	44
Surveillance Video .....	44
Chapter 6: Effect of a Motion for Protective Order on Pending Discovery .....	45
Issue .....	45
Discussion.....	45
Applicable Rules .....	45
Florida Case Law .....	46
Other Forms of Discovery .....	48
Conclusion .....	49
Chapter 7: “Speaking Objections” and Inflammatory Conduct at a Deposition .....	51
Chapter 8: Production of Documents by a Nonparty in Response to Subpoena.....	55
Chapter 9: Compulsory Medical Examinations and Discovery of Examiner Bias .....	57
Issue 1 .....	60
Resolution .....	60
Issue 2 .....	60
Resolution .....	60

Chapter 10: Obtaining Psychological Records When Pain and Suffering are at Issue .....	66
Issue 1 .....	70
Resolution .....	70
Issue 2 .....	71
Resolution .....	71
Chapter 11: <i>Fabre</i> Identification of Other Culpable Parties: When and How Should it Be Done? .....	73
Chapter 12: Electronic Discovery .....	79
Law, Policy, and Principles of Electronic Discovery .....	86
Framework for the Trial Lawyer Facing E-Discovery.....	87
Duties of Attorney and Client Regarding Preservation of ESI ...	91
Collection and Review of ESI .....	99
Conferring with Opposing Counsel.....	100
Inspection of Client Computers and Equipment.....	100
Requesting Production and Making Production of ESI.....	103
Production of ESI Pursuant to Subpoena.....	105
Conclusion .....	106
Appendix A: Comparison of Florida and Federal Rules of E-Discovery.....	107
Committee Notes to Florida's 2012 e-Discovery Rules Amendments.....	118
Chapter 13: Discovery of Lawyer-Client Privileged Communications .....	120
Privilege Logs .....	121
Inadvertent Disclosure .....	122
Third Party Bad Faith Actions .....	126
Examination Under Oath.....	126
Review of Privileged Documents for Deposition .....	126
Citation Index.....	127
Case Citations.....	127
Fla. R. Civ. P.....	133
Fed. R. Civ. P.....	134
Fed. R. Evid. ....	134
Florida Statutes.....	135
Fla. R. Jud. Admin.....	135
Fla. R. Prof. Conduct.....	135

## **PREFACE**

---

In 1994, the Trial Lawyers Section of The Florida Bar, the Conference of Circuit Judges, and the Conference of County Court Judges formed a joint committee to provide a forum for the exchange of ideas on how to improve the day-to-day practice of law for trial lawyers and trial judges. At the committee's first meeting, it was the overwhelming consensus that "discovery abuse" should be the top priority.

The original handbook and the later editions are the result of the continued joint efforts of the Trial Lawyers Section, the Conference of Circuit Judges, and the Conference of County Court Judges. It is intended to be a quick reference for lawyers and judges on many recurring discovery problems. It does not profess to be the dispositive legal authority on any particular issue. It is designed to help busy lawyers and judges quickly access legal authority for the covered topics. The ultimate objective is to help curtail perceived abuses in discovery so that the search for truth is not thwarted by the discovery process itself. The reader still should do his or her own research, to include a review of local administrative orders and rules. The first edition of this handbook was prepared in the fall of 1995. This 2013 (fourteenth) edition updates the handbook through January 2013.

# CHAPTER ONE

---

## AVAILABLE WEAPONS TO COMBAT DISCOVERY ABUSE

### IN GENERAL:

The language of Fla. R. Civ. P. 1.380 applies to all discovery: depositions, admissions, responses to requests to produce, etc. “If a deponent fails to answer a question propounded or submitted under rule 1.310 or 1.320, or a corporation or other entity fails to make a designation under rule 1.310(b)(6) or 1.320(a), or a party fails to answer an interrogatory submitted under rule 1.340, or if a party in response to a request for inspection submitted under rule 1.350 fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, or if a party in response to a request for examination of a person submitted under rule 1.360(a) objects to the examination, fails to respond that the examination will be permitted as requested, or fails to submit to or to produce a person in that party’s custody or legal control for examination, the discovering party may move for an order compelling an answer, or a designation or an order compelling inspection, or an order compelling an examination in accordance with the request.” The losing party shall be required to pay “reasonable expenses incurred,” including attorneys’ fees, in obtaining an order compelling discovery or successfully opposing the motion.<sup>1</sup>

Upon proper showing, the full spectrum of sanctions may be imposed for failure to comply with the order.<sup>2</sup> The rule sets out possible alternative sanctions: adopting as established facts the matters which the recalcitrant party refused to address or

---

<sup>1</sup> Fla. R. Civ. P. 1.380(a)(4).

<sup>2</sup> Fla. R. Civ. P. 1.380(b).

produce; prohibiting the disobedient party from supporting or opposing designated claims or defenses;<sup>3</sup> prohibiting the introduction of certain evidence;<sup>4</sup> striking pleadings, which could result in a dismissal of the action; the entry of a default judgment, including an order for liquidated damages;<sup>5</sup> contempt of court; and the assessment of reasonable expenses or attorney's fees.<sup>6</sup> The courts have crafted a few additional possibilities: fines;<sup>7</sup> granting a new trial;<sup>8</sup> and, in the case of lost or destroyed evidence, creation of an evidentiary inference<sup>9</sup> or a rebuttable presumption.<sup>10</sup> The court may rely on its inherent authority to impose drastic sanctions when a discovery-related fraud has been perpetrated on the court.<sup>11</sup>

---

<sup>3</sup> *Steele v. Chapnick*, 552 So. 2d 209 (Fla. 4th DCA 1989) (reversing dismissal because plaintiff substantially complied with defendant's discovery request, but authorizing alternative sanctions of precluding evidence on issues when plaintiff failed to reply to discovery demands, entering findings of fact adverse to plaintiff on those same issues, or imposing fines and fees).

<sup>4</sup> *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981) (trial court may exclude testimony of witness whose name had not been disclosed in accordance with pretrial order).

<sup>5</sup> *DYC Fishing, Ltd. v. Martinez*, 994 So. 2d 461, 462 (Fla. 3d DCA 2008) (reversing trial court's entry of default final judgment awarding unliquidated damages to the plaintiff and stating that in Florida, default judgments only entitle the plaintiff to liquidated damages). *Bertrand v. Belhomme*, 892 So. 2d 1150 (Fla. 3d DCA 2005)

<sup>6</sup> Rule 1.380(b)(2)(A)-(E) and (d). See *Blackford v. Florida Power & Light Co.*, 681 So. 2d 795 (Fla. 3d DCA 1996) (reversing summary judgment as sanction for failure to answer interrogatories, but authorizing attorneys' fees and costs); *United Services Automobile Association v. Strasser*, 492 So. 2d 399 (Fla. 4th DCA 1986) (affirming attorneys' fees and costs as sanctions for consistently tardy discovery responses, but reversing default).

<sup>7</sup> *Evangelos v. Dachiel* 553 So. 2d 245 (Fla. 3d DCA 1989) (\$500 sanction for failure to comply with discovery order, but default reversed); *Steele*, 552 So. 2d 209 (imposition of fine and/or attorneys' fees for failure to produce is possible sanction). The imposition of a fine for discovery violations requires a finding of contempt. *Hoffman v. Hoffman*, 718 So. 2d 371 (Fla. 4th DCA 1998). *Channel Components, Inc. v. America II Electronics, Inc.*, 915 So. 2d 1278 (Fla. 2nd DCA 2005) (ordering over \$79,000 as a sanction for violation of certain discovery orders does not constitute abuse of discretion).

<sup>8</sup> *Binger*, 401 So. 2d 1310 (intentional nondisclosure of witness, combined with surprise, disruption, and prejudice, warranted new trial); *Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283 (Fla. 1st DCA 1993) (new trial on punitive damages and attorneys' fees as sanctions for withholding documents that were harmful to manufacturer's case but were within scope of discovery request); *Smith v. University Medical Center, Inc.*, 559 So. 2d 393 (Fla. 1st DCA 1990) (plaintiff entitled to new trial because defendant failed to produce map that was requested repeatedly).

<sup>9</sup> *Federal Insurance Co. v. Allister Manufacturing Co.*, 622 So. 2d 1348 (Fla. 4th DCA 1993) (manufacturer entitled to inference that evidence, inadvertently lost by plaintiff's expert, was not defective).

<sup>10</sup> *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987) (rebuttable presumption of negligence exists if patient demonstrates that absence of hospital records hinders patient's ability to establish prima facie case); *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701 (Fla. 4th DCA 1995) (destruction or unexplained absence of evidence may result in permissible shifting of burden of proof).

<sup>11</sup> *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996) (affirming default against sheriff for intentionally omitting portion of videotape of automobile pursuit).

## **AWARD OF EXPENSES AND FEES ON MOTION TO COMPEL:**

Fla. R. Civ. P. 1.380(a)(4) is the most widely used authority for sanctions as a result of discovery abuses. The Rule gives the trial court broad discretion. The Rule requires the award of expenses, unless the court finds that the opposition to a motion to compel is justified or an award would be “unjust” – a concept “clear as mud.” The Rule provides:

**Award of Expenses of Motion.** If the motion [to compel] is granted and after opportunity for hearing, the court shall require the party or deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may include attorneys’ fees, unless the court finds that the opposition to the motion was justified, or that other circumstances make an award of expenses unjust. If the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys’ fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred as a result of making the motion among the parties and persons. *Id.* (emphasis added).

As set forth in the Rule, it is required that the court *shall* award expenses unless the court finds the opposition was justified or an award would be unjust. The trial court should *in every case*, therefore, award expenses which may include attorney fees where there is no justified opposition, as it would seem that the absence of a justifiable position should, “by definition,” render a sanction just. The party against whom the motion is filed is protected in that the Rule provides that the moving party shall pay the

opposing party's expenses if the motion is denied. If the court finds that the motion was substantially justified, then it can award expenses against the non-moving party.

The Rule contemplates that the court should award expenses in the majority of cases. The courts should take a consistent hard line to ensure compliance with the Rule. Counsel should be forced to work together in good faith to avoid the need for motion practice.

Generally, where a party fails to respond to discovery and does not give sound reason for its failure to do so, sanctions should be imposed.<sup>12</sup> For purposes of assessing failure to make discovery, an evasive or incomplete answer must be treated as a failure to answer.<sup>13</sup> The punishment should fit the fault.<sup>14</sup> Trial courts are regularly sustained on awards of attorney fees for discovery abuse.<sup>15</sup> The same holds for award of costs and expenses.<sup>16</sup>

Expenses, including fees, can be awarded without a finding of bad faith or willful conduct.<sup>17</sup> The only requirement under Fla. R. Civ. P. 1.380 is that the motion to compel be granted and that opposition was not justified.<sup>18</sup>

---

<sup>12</sup> *Ford Motor Co. v. Garrison*, 415 So. 2d 843 (Fla. 1st DCA 1982).

<sup>13</sup> Fla. R. Civ. P. 1.380(a)(3).

<sup>14</sup> *Eastern Airlines, Inc. v. Dixon*, 310 So. 2d 336 (Fla. 3d DCA 1975).

<sup>15</sup> *First & Mid-South Advisory Co. v. Alexander/Davis Properties, Inc.*, 400 So. 2d 113 (Fla. 4th DCA 1981); *St. Petersburg Sheraton Corp. v. Stuart*, 242 So. 2d 185 (Fla. 2d DCA 1970).

<sup>16</sup> *Summit Chase Condominium Ass'n Inc. v. Protean Investors, Inc.*, 421 So. 2d 562 (Fla. 3d DCA 1982); *Rankin v. Rankin*, 284 So. 2d 487 (Fla. 3d DCA 1973); *Goldstein v. Great Atlantic and Pacific Tea Co.*, 118 So. 2d 253 (Fla. 3d DCA 1960).

<sup>17</sup> Where the attorney, and not the client, is responsible for noncompliance with a discovery order, a different set of factors must be applied in determining sanctions. *Sonson v. Hearn*, 17 So. 3d 745 (Fla. 4th DCA 2009).

<sup>18</sup> *But see Chmura v. Sam Rodgers Properties, Inc.*, 2 So. 3d 984 (Fla. 2d DCA 2008) (where a party has never been instructed by the court to comply with any discovery request, sanctions for noncompliance are inappropriate); *Thomas v. Chase Manhattan Bank*, 875 So. 2d 758 (Fla. 4th DCA 2004).

## **EXCLUSION OF EXPERT WITNESS OPINIONS:**

A recurring problem in trial practice is late disclosure of expert witness opinions. When expert witnesses form new or different opinions on the eve of trial or during trial, prejudice inevitably follows.

Generally, such last-minute testimony should not be admissible at trial. Failure to exclude such testimony prejudices the opposing party and constitutes reversible error.<sup>19</sup> A party who fails to disclose a substantial reversal in an expert's opinion does so at his peril.<sup>20</sup>

Inevitably, the party who seeks to introduce new expert opinions asserts that the opinions are based on newly discovered evidence. When this claim is truly valid, an equitable exception to the exclusion rule should be considered.

However, the trial court should scrutinize a claim of newly discovered evidence with some suspicion to determine if it is just a pretext for an ambush on the other party. Otherwise, the trial becomes a free-for-all, and the discovery and pretrial deadlines become meaningless. As the Fourth District said in *Office Depot*, “[a] party can hardly prepare for an opinion that it doesn’t know about, much less one that is a complete reversal of the opinion it has been provided.”<sup>21</sup>

This issue should be anticipated by counsel or by the court and specifically addressed at pretrial conference and in case management and pretrial orders. An orderly trial is most likely to occur when the judge enforces discovery and pretrial orders

---

<sup>19</sup> *Belmont v. North Broward Hospital District*, 727 So. 2d 992, 994 (Fla. 4th DCA 1999); *Garcia v. Emerson Electric Co.*, 677 So. 2d 20 (Fla. 3d DCA 1996); *Auto Owners Insurance Co. v. Clark*, 676 So. 2d 3 (Fla. 4th DCA 1996); *Keller Industries v. Volk*, 657 So. 2d 1200 (Fla. 4th DCA 1995); *Grau v. Branham*, 626 So. 2d 1059 (Fla. 4th DCA 1993); *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981); *Office Depot v. Miller*, 584 So. 2d 587 (Fla. 4th DCA 1991); *Florida Marine Enterprises v. Bailey*, 632 So. 2d 649 (Fla. 4th DCA 1994).

<sup>20</sup> *Gouveia v. F. Leigh Phillips, M.D.*, 823 So. 2d 215, 222 (Fla. 4th DCA 2002).

<sup>21</sup> *Id.* at 994.

strictly and requires each party to make full and proper disclosure before trial. The Fourth District Court of Appeal in *Central Square Tarragon LLC v. Great Divide Insurance Company*,<sup>22</sup> reiterated the need to “strictly enforce” provisions of pretrial stipulations. This prevents last minute gamesmanship, and makes disruption of the trial and error on appeal less likely.

As with other discovery violations, the sanctions must fit the offense. Striking the entire testimony of an expert witness is the most drastic remedy available.<sup>23</sup>

Under many circumstances, barring the expert from testifying will be too harsh.<sup>24</sup> In cases where an expert claims to have a new opinion, for example, it is probably best to bar the new opinion rather than the expert’s entire testimony.<sup>25</sup>

When an expert is the only witness a party has to establish a key element in the case, courts should be particularly hesitant to strike the expert’s testimony.<sup>26</sup> The same rule applies to an expert who could offer key rebuttal evidence.<sup>27</sup> Finally, where a plaintiff’s expert has already testified to new opinions, it is proper to allow the defense expert to give new opinions in order to respond.<sup>28</sup>

---

<sup>22</sup> 82 So. 3d 911, 914 (Fla. 4<sup>th</sup> DCA 2011), *rev. denied* (Fla. 2012) (admonishing defense counsel for engaging in “gamesmanship” by failing to honor the pretrial stipulation).

<sup>23</sup> *LoBue v. Travelers Insurance Company*, 388 So. 2d 1349, 1351 (Fla. 4th DCA 1980).

<sup>24</sup> *Id.*; see also *Jean v. Theodorsen*, 736 So. 2d 1240 (Fla. 4th DCA 1999); *Kaye v. State Farm Mut. Auto Ins. Co.*, 985 So. 2d 675 (Fla. 4th DCA 2008) (striking a witness for violation of discovery orders is a drastic remedy which should be utilized only under the most compelling circumstances).

<sup>25</sup> *Keller Industries, supra*, at 1203.

<sup>26</sup> *Keller Industries; LoBue*.

<sup>27</sup> *Griever v. DiPietro*, 708 So. 2d 666, 672 (Fla. 4th DCA 1998).

<sup>28</sup> *Gonzalez v. Largen*, 790 So. 2d 497, 500 (Fla. 5th DCA 2001). See also *Midtown Enterprises, Inc. v. Local Contractors Inc.*, 785 So. 2d 578 (Fla. 3d DCA 2001) (same ruling where lay rather than expert testimony involved).

A claimed violation of the pre-trial order or other discovery violation regarding any witness, including experts, is still subject to the *Binger v. King Pest Control*<sup>29</sup> test before a trial court can consider exclusion or other remedy.

Discovery disputes sometimes arise over the role of experts retained by a party. In *Carrero v. Engle Homes, Inc.*,<sup>30</sup> a trial court ordered disclosure of the names of experts a party had *consulted* for trial. The Fourth District Court of Appeal reversed. In doing so, it followed the well-settled rule that the names of consulting experts need not be disclosed.<sup>31</sup> The court held, however, that a trial court has “ample authority” to strike experts if a party unreasonably delays disclosing the names of trial (as opposed to consulting) experts.<sup>32</sup>

#### **REMEDIES UNDER FLA. STAT. §57.105:**

Historically, Florida courts had to rely on inherent power in order to award attorney’s fees and costs against parties who filed frivolous motions.<sup>33</sup> There was no state law equivalent of Rule 11 of the Federal Rules of Civil Procedure.

In October 1999, amendments to Fla. Stat. §57.105 became law. The amendments authorized courts to award sanctions against parties who raised claims and defenses not supported by material facts.<sup>34</sup> The pertinent portions of §57.105,

---

<sup>29</sup> 401 So. 2d 1310 (Fla. 1981).

<sup>30</sup> 667 So. 2d 1011 (Fla. 4th DCA 1996).

<sup>31</sup> *Carrero* at 1012.

<sup>32</sup> *Id.*

<sup>33</sup> *Patsy v. Patsy*, 666 So. 2d 1045 (Fla. 4th DCA 1996) (upholding an award of attorney’s fees after finding motion was frivolous); *see Rosenberg v. Gaballa*, 1 So. 3d 1149 (Fla. 4th DCA 2009) (“inequitable conduct doctrine,” allowing a court to use its inherent authority to impose attorney fees against an attorney for bad faith conduct, is not rendered obsolete by statute governing award of attorney fees as a sanction.) As for inherent power to strike pleadings and enter a default judgment, *see discussion infra of Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993) and *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996).

<sup>34</sup> Previously, a fee award was only permissible when there was no justifiable issue regarding claims and defenses. Fee awards were relatively rare under this high standard.

as amended July 1, 2010, state: Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation.

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

(2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay. (Emphasis supplied.)

(3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:

(a) Under paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of

new law, as it applied to the material facts, with a reasonable expectation of success.

(b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.

(c) Under paragraph (1)(b) against a represented party.

(d) On the court's initiative under subsections (1) and (2) unless sanctions are awarded before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A. voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

The amendments effective July 1, 2010, amended §57.105 to provide an exception to the imposition of sanctions against a represented party, and limited the authority of the court to impose sanctions on its own motion. As amended, represented parties are not subject to monetary sanctions for claims or defenses that could not be supported by the application of then existing law to the material facts. As amended, the court may only award monetary sanctions on its own initiative if the sanction is ordered before a voluntary dismissal or settlement of the claims by the party to be sanctioned.

Fees can be awarded if a specific claim or defense is baseless, even against a party who prevails in the case as a whole.<sup>35</sup>

Section 57.105(6) provides that the sanctions and remedies in the section supplement, rather than replace, other sanctions and remedies. Also, §57.105(2) specifically applies to the assertion of or response to any discovery demand taken primarily for the purpose of unreasonable delay.<sup>36</sup>

---

<sup>35</sup> *Barthlow v. Jett*, 930 So. 2d 739 (Fla. 1st DCA 2006); *Bridgestone/Firestone v. Herron*, 828 So. 2d 414 (Fla. 1st DCA 2002).

<sup>36</sup> *But see Rosenberg v. Gaballa*, 1 So. 3d 1149 (Fla. 4th DCA 2009) (§57.105 limited to claims or defenses and does not apply to not providing discovery requested).

## **SANCTIONS FOR FAILURE TO OBEY COURT ORDER:**

If a party (or managing agent) fails to obey a prior order to provide or permit discovery, the court in which the action is pending may make any of the orders set forth under the Rules. As an example, not a limitation, Fla. R. Civ. P. 1.380(b)(2) lays out specifically permissible sanction orders including:

A. An order that the matters regarding which the questions were asked or any other designated facts, shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

B. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

C. An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.

D. Instead of any of the foregoing orders or in addition to them, an order treating as contempt of court the failure to obey any orders except an order to submit to an examination made pursuant to Rule 1.360(a)(1)(B) or subdivision (a)(2) of this Rule.

E. When a party has failed to comply with an order under Rule 1.360(a)(1)(B) requiring that party to produce another for examination, the orders listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows the inability to produce the person for examination.

Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable expenses caused by the failure, which may include attorneys' fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust.

Such sanctions may be imposed only where the failure to comply with the court's order is attributable to the party. If the failure is that of another party or of a third person whose conduct is not chargeable to the party, no such sanction may be imposed.<sup>37</sup> For example, it is an abuse of discretion to strike a party's pleadings based on a nonparty's refusal to comply with discovery requests.<sup>38</sup>

For the trial court to be on solid footing it is wise to stay within the enumerated orders set forth in Fla. R. Civ. P. 1.380(b)(2). If the enumerated orders are utilized, it is doubtful that they will be viewed as punitive and outside the discretion of the court. Due process and factual findings do, however, remain essential, in ensuring the order will withstand appellate scrutiny.

#### **REQUIRED DUE PROCESS AND FINDINGS OF FACT:**

The trial court must hold a hearing and give the disobedient party the opportunity to be heard. Therefore, it is reversible error to award sanctions before the hearing on the motion to compel takes place.<sup>39</sup> By the same token, striking a party's pleadings before the deadline for compliance with discovery requires reversal.<sup>40</sup>

If the trial court dismisses an action or enters a default as a sanction for discovery violations, a finding that the violations were willful or deliberate must be made.<sup>41</sup> Detailed findings must be included in the order, as delineated in *Kozel v. Ostendorf*.<sup>42</sup> If the order does not contain such findings, it will be reversed.<sup>43</sup>

---

<sup>37</sup> *Zanathy v. Beach Harbor Club Assoc.*, 343 So. 2d 625 (Fla. 2d DCA 1977).

<sup>38</sup> *Haverfield Corp. v. Franzen*, 694 So. 2d 162 (Fla. 3d DCA 1997).

<sup>39</sup> *Joseph S. Arrigo Motor Co., Inc. v. Lasserre*, 678 So. 2d 396, 397 (Fla. 1st DCA 1996) (reversing an award of \$250 in sanctions where the award was entered before the motion hearing).

<sup>40</sup> *Stern v. Stein*, 694 So. 2d 851 (Fla. 4th DCA 1997).

<sup>41</sup> *Rose v. Clinton*, 575 So. 2d 751 (Fla. 3d DCA 1991); *Zaccaria v. Russell*, 700 So. 2d 187 (Fla. 4th DCA 1997).

<sup>42</sup> 629 So. 2d 817 (Fla. 1993).

It is reversible error to dismiss a case for discovery violations without first granting the disobedient party's request for an evidentiary hearing. The party should be given a chance to explain the discovery violations.<sup>44</sup>

Important and fundamental aspects of discovery abuse and efforts to sanction or correct it, are that the underlying court order (compelling a discovery response) or process (e.g., a subpoena, whether issued by the court or an attorney "for the court"), must be clear and unambiguous, properly issued, and properly served. A court can only enforce an order compelling conduct (e.g., providing discovery or enjoining one to or not to do something) when the order is clear, because otherwise, the concept of violating it (which requires a specific intent to violate the order/process) becomes far too murky to meet due process requirements.<sup>45</sup> Further, issuance and service of the court order/process must be proper, for otherwise, that paper is nothing more than an invitation, as only through properly issued and served process does the court obtain jurisdiction over the person from whom action is sought (and without jurisdiction there can be no "enforcement").

Discovery sanctions should be "commensurate with the offense."<sup>46</sup> It has been held that the striking of pleadings for discovery misconduct is the most severe of

---

<sup>43</sup> *Zaccaria v. Russell*, 700 So. 2d 187 (Fla. 4th DCA 1997).

<sup>44</sup> *Medina v. Florida East Coast Rwy.*, 866 So. 2d 89 (Fla. 3d DCA 2004), *appeal after remand and remanded*, 921 So. 2d 767 (2006).

<sup>45</sup> See generally, *Powerline Components, Inc. v. Mil-Spec Components, Inc.*, 720 So. 2d 546, 548 (Fla. 4th DCA 1998); *Edlund v. Seagull Townhomes Condominium Assoc., Inc.*, 928 So. 2d 405 (Fla. 3d DCA 2006); *American Pioneer Casualty Insurance Co. v. Henrion*, 523 So. 2d 776 (Fla. 4th DCA 1988); *Tubero v. Ellis*, 472 So. 2d 548, 550 (Fla. 4th DCA 1985).

<sup>46</sup> *Drakeford v. Barnett Bank of Tampa*, 694 So. 2d 822, 824 (Fla. 2d DCA 1997); *Cape Cave Corporation v. Charlotte Asphalt, Inc.*, 384 So. 2d 1300, 1301 (Fla. 2d DCA 1980), *appeal after remand*, 406 So. 2d 1234 (1981).

penalties and must be employed only in extreme circumstances.<sup>47</sup> The Fourth District further found in *Fisher*:

The striking of a party's pleadings is justified only where there is "a deliberate and contumacious disregard of the court's authority." *Barnett v. Barnett*, 718 So. 2d 302, 304 (Fla. 2d DCA 1998) (quoting *Mercer*, 443 So. 2d at 946). In assessing whether the striking of a party's pleadings is warranted, courts are to look to the following factors:

**1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for the noncompliance; and 6) whether the delay created significant problems of judicial administration.**

*Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). The emphasis should be on the prejudice suffered by the opposing party. See *Ham v. Dunmire*, 891 So. 2d 492, 502 (Fla. 2004). After considering these factors, if a sanction less severe than the striking of a party's pleadings is "a viable alternative," then the trial court should utilize such alternatives. *Kozel*, 629 So. 2d at 818. "The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation" and "[t]his purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal" or the striking of a party's pleadings. *Id.*<sup>48</sup>

The failure to make the required findings in an order requires reversal.<sup>49</sup>

---

<sup>47</sup> *Fisher v. Prof'l. Adver. Dirs. Co., Inc.*, 955 So. 2d 78 (Fla. 4th DCA 2007).

<sup>48</sup> *Fisher*, 955 So. 2d at 79-80.

<sup>49</sup> See *Bank One, N.A. v. Harrod*, 873 So. 2d 519, 521 (Fla. 4th DCA 2004) (citing *Fla. Nat'l Org. for Women v. State*, 832 So. 2d 911, 914 (Fla. 1st DCA 2002)); see also *Carr v. Reese*, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001) (holding that trial court's failure to consider all of the factors as shown by final order requires reversal).

In *Ham v. Dunmire*,<sup>50</sup> the Florida Supreme Court held that participation of the litigant in the misconduct is not required to justify the sanction of dismissal. Relying on its prior decision in *Kozel v. Ostendorf*,<sup>51</sup> the court held that the litigant's participation, while "extremely important," is only one of several factors which must be weighed:

[A] litigant's involvement in discovery violations or other misconduct is not the exclusive factor but is just one of the factors to be weighed in assessing whether dismissal is the appropriate sanction. Indeed, the fact that the *Kozel* Court articulated six factors to weigh in the sanction determination, including but not limited to the litigant's misconduct, belies the conclusion that litigant malfeasance is the exclusive and deciding factor. The text of the *Kozel* decision does not indicate that litigant involvement should have a totally preemptive position over the other five factors, and such was not this Court's intent. Although extremely important, it cannot be the sole factor if we are to properly administer a smooth flowing system to resolve disputes.

However, the Court reversed the dismissal in the case before it, finding that the attorney's misconduct (and the prejudice to the opposing party) did not rise to the level necessary to justify dismissal under the *Kozel* test.

---

<sup>50</sup> 891 So. 2d 492 (Fla. 2004).

<sup>51</sup> Cited *supra*

## CHAPTER TWO

---

### REMEDIES FOR DESTRUCTION OF EVIDENCE

The essential elements of a negligent destruction of evidence cause of action are:

1. existence of a potential civil action;
2. a legal or contractual duty to preserve evidence which is relevant to the potential civil action;
3. destruction of that evidence;
4. significant impairment in the ability to prove the lawsuit;
5. a causal relationship between the evidence destruction and the inability to prove the lawsuit; and
6. damages.<sup>1</sup>

If a party destroyed relevant and material information (and that information is so essential to the opponent's defense that it cannot proceed) then striking of pleadings may be warranted.<sup>2</sup>

While striking pleadings and/or dismissal with prejudice is considered a harsh sanction, doing so is justified in some cases.

In *Tramel v. Bass*,<sup>3</sup> the trial court struck a defendant's answer and affirmative defenses and entered a default judgment after finding that the defendant had altered critical videotape evidence. The First District upheld the trial court's action, stating:

---

<sup>1</sup> *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1091 (Fla. 4th DCA 2001); see also *Sullivan v. Dry Lake Dairy, Inc.*, 898 So. 2d 174 (Fla. 4th DCA 2005).

<sup>2</sup> *New Hampshire Ins. Co. v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990); *Sponco Manufacturing, Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995); *rev. dismissed*, 679 So. 2d 771 (Fla. 1996).

<sup>3</sup> *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996).

The reasonableness of a sanction depends in part on the willfulness or bad faith of the party. The accidental or negligent destruction of evidence often justifies lesser sanctions directed toward compensating the victims of evidence destruction. The intentional destruction or alteration of evidence undermines the integrity of the judicial process and, accordingly, may warrant imposition of the most severe sanction of dismissal of a claim or defense, the striking of pleadings, or entry of a default. Thus, in the case of the intentional alteration of evidence, the most severe sanctions are warranted as much for their deterrent effect on others as for the chastisement of the wrongdoing litigant.<sup>4</sup>

In *Tramel*, the egregious nature of the defendant's misconduct justified the entry of a default judgment. Note, however, that a default judgment can be entered without a finding of fraud or willful misconduct.

If a plaintiff cannot proceed without certain evidence and the defendant fails to preserve that evidence, a default judgment may be entered against the defendant on that basis.<sup>5</sup> A finding of bad faith is not imperative.<sup>6</sup> Conversely, in cases where evidence is destroyed unintentionally and the prejudice is not fatal to the other party, lesser sanctions should usually be applied.<sup>7</sup>

In *Figgie International, Inc. v. Alderman*,<sup>8</sup> the trial court entered a default judgment against a defendant for numerous discovery violations, including destruction of relevant documents. On appeal, the Third District Court of Appeal affirmed. It agreed with the trial court that defendant violated the discovery rules willfully and in bad faith, and that the most severe sanction was justified.

---

<sup>4</sup> 672 So. 2d at 84 (citations and footnotes omitted).

<sup>5</sup> *Sponco Manufacturing, supra*.

<sup>6</sup> *Id.*

<sup>7</sup> *Aldrich v. Roche Biomedical Laboratories, Inc.*, 737 So. 2d 1124 (Fla. 5th DCA 1999).

<sup>8</sup> *Figgie International, Inc. v. Alderman*, 698 So. 2d 563 (Fla. 3d DCA 1997).

As the Third District observed in *Figgie International*, severe sanctions are justified when a party willfully fails to comply with discovery obligations. Therefore, destruction of documents alone can trigger a default order as long as the destruction is willful.

In *Figgie International*, however, there was more than document destruction involved. The trial court also found the defendant presented false and evasive testimony through its safety director and provided incomplete discovery responses. That conduct provided additional support for the trial court's decision to enter a default judgment.

The Third District also upheld dismissal in *Lent v. Baur Miller & Webner, P.A.*<sup>9</sup> In that case, the plaintiff and her counsel apparently tried to intimidate a critical witness to prevent him from testifying. The plaintiff also refused to allow the witness's deposition to be taken though the court had entered an order compelling her to consent. The court's opinion explained that consent to the deposition was required under the applicable German law.<sup>10</sup> Apparently, German law would have otherwise made the discussions between the plaintiff and the witness privileged.

The Fourth District Court of Appeal has recognized an independent cause of action for spoliation of evidence.<sup>11</sup> In doing so, it followed the lead of the Third District Court of Appeal, which had previously recognized this cause of action.

For purposes of spoliation, "evidence" does not include the injured part of a litigant's body. Thus, a plaintiff who suffered a herniated disc was not obligated to

---

<sup>9</sup> 710 So. 2d 156 (Fla. 3d DCA 1998)

<sup>10</sup> *Id.* at 157.

<sup>11</sup> *St. Mary's Hospital, Inc. v. Brinson*, 685 So. 2d 33, 35 (Fla. 4th DCA 1996).

forego surgery and preserve the damaged disc for examination.<sup>12</sup> The court suggested, however, that a personal injury litigant might be guilty of spoliation if he or she had surgery while a request for a defense medical examination was pending.

Worker's compensation immunity does not bar an employee's action against an employer for spoliation.<sup>13</sup> The issue is unrelated to worker's compensation, because spoliation is an independent cause of action. Furthermore, the employer's spoliation might harm the employee's causes of action against third parties, rather than the employer itself.<sup>14</sup>

The Florida Supreme Court clarified the application of spoliation law to parties and nonparties. In *Martino v. Wal-Mart Stores, Inc.*,<sup>15</sup> the Court held that the remedy for spoliation against a first party defendant is not an independent cause of action for spoliation. Rather, the remedy is imposition of discovery sanctions and a rebuttable presumption of negligence for the underlying tort. The Court did not decide whether there is an independent claim for spoliation available against a third party.<sup>16</sup>

The Second District has held that a legal duty to preserve video recordings does not arise until the injured party makes a written request for preservation of the recorded information.<sup>17</sup>

*Hernandez v. Pino*,<sup>18</sup> involved the unintentional misplacement of dental x-rays by plaintiff's counsel. The court held that summary judgment was inappropriate in that

---

<sup>12</sup> *Vega v. CSCS International, N.V.*, 795 So. 2d 164, 167 (Fla. 3d DCA 2001).

<sup>13</sup> *Townsend v. Conshor*, 832 So. 2d 166 (Fla. 2d DCA 2002).

<sup>14</sup> *Id.*

<sup>15</sup> 908 So. 2d 342 (2005).

<sup>16</sup> *Id.* at 345 n. 2.

<sup>17</sup> *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389 (Fla. 2d DCA 2012).

defense counsel had given the x-rays to its expert (before they were misplaced) and was able to defend the case. No willful conduct was found.<sup>19</sup>

---

<sup>18</sup> 482 So. 2d 450 (Fla. 3d DCA 1986)

<sup>19</sup> *Aldrich v. RocheBiomedical Laboratories, Inc.*, *supra*

## CHAPTER THREE

---

### REMEDIES FOR FRAUD ON THE COURT

A trial court has the inherent authority to dismiss an action as a sanction when a party has perpetuated a fraud on the court. However, this power should be exercised cautiously, sparingly, and only upon a clear showing of fraud on the court.<sup>1</sup> Fraud on the court occurs where there is clear and convincing evidence “that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.”<sup>2</sup>

A trial court’s decision on whether to dismiss a case for fraud on the court is reviewed under a narrow abuse of discretion standard.<sup>3</sup> For the trial court to properly exercise its discretion, there must be an evidentiary basis to dismiss the case.<sup>4</sup>

In more recent cases where fraud upon the court was raised, it appears Florida appellate courts have arguably receded from holdings in earlier cases. In *Jacob v. Henderson*,<sup>5</sup> a personal injury plaintiff denied being able to perform certain household activities and chores in deposition. However, surveillance taken earlier showed her performing those same tasks. The trial court found fraud on the court and dismissed the case with prejudice.

On appeal, the Second District Court of Appeal reversed. It found that the extent of the plaintiff’s injuries were factual issues for the jury to decide. “This is not a

---

<sup>1</sup> *Ramey v. Haverty Furniture Cos.*, 993 So. 2d 1014, 1018 (Fla. 2d DCA 2008).

<sup>2</sup> 993 So. 2d at 1018.

<sup>3</sup> See *Cherubino v. Fenstersheib & Fox, P.A.* 925 So. 2d 1066 (Fla. 4th DCA 2006).

<sup>4</sup> See *Ramey*, 993 So. 2d at 1018.

<sup>5</sup> 840 So. 2d 1167 (Fla. 2d DCA 2003).

case in which [the plaintiff] suffered no injury,” the court wrote. “The question is the severity of her injuries.”<sup>6</sup> While the court found that the surveillance could hurt the plaintiff’s credibility, it considered dismissal too harsh a sanction.<sup>7</sup>

Similarly, in *Amato v. Intindola*,<sup>8</sup> a trial court dismissed a claim after finding apparent contradictions between deposition testimony and a plaintiff’s activities on surveillance films. The Fourth District Court of Appeal reversed, citing *Jacob v. Henderson*. “In most cases of personal injury,” the court wrote, “there is a disparity between what the plaintiff believes are the limitations caused by the injuries and what the defense thinks.” It acknowledged that surveillance may reveal discrepancies, but did not consider those discrepancies alone to justify dismissal. See also *Ruiz v. City of Orlando*,<sup>9</sup> (reversing dismissal because factual inconsistencies and even false statements “are well managed through the use of impeachment and traditional discovery sanctions”).

In *Ibarra v. Izaguirre*,<sup>10</sup> the court held that the movant must prove the existence of fraud by clear and convincing evidence before dismissal is warranted. Such a burden will almost always require an evidentiary hearing.

The trial court must be careful to ensure that the sanction imposed is tailored to meet the nature of the fraudulent conduct and the extent to which it affects the claims presented. In *Hair v. Morton*,<sup>11</sup> the trial court dismissed with prejudice plaintiff’s personal injury claim upon proof that she had provided false answers to interrogatories

---

<sup>6</sup> *Id.* at 1169-70.

<sup>7</sup> See also *Rios v. Moore*, 902 So. 2d 181 (Fla. 3d DCA 2005); *Cross v. Pumpco, Inc.*, 910 So. 2d 324 (Fla. 4th DCA 2005).

<sup>8</sup> 854 So. 2d 812 (Fla. 4th DCA 2003).

<sup>9</sup> 859 So. 2d 574 (Fla. 5th DCA 2003).

<sup>10</sup> 985 So. 2d 1117 (Fla.3d DCA 2008).

<sup>11</sup> 36 So. 3d 766 (Fla. 3d DCA 2010).

and deposition testimony regarding back problems and treatment prior to the accident in question. In reversing the dismissal, the Third District held:

While Hair's discovery responses might preclude some of her claimed damages regarding her lower back, they do not address the issue of liability, nor address all of Hair's claimed damages so as to justify dismissal of her action. Indeed, any allegations against Hair regarding inconsistencies, non-disclosure or even falseness are more appropriately dealt with through cross-examination or impeachment before a jury -- not through dismissal of her action.<sup>12</sup>

Dismissal is also not appropriate when a party testified inaccurately based on a mistaken belief. In *Arzuman v. Saud*,<sup>13</sup> a plaintiff testified that he owned stock in a corporation, but also testified that the defendant was the sole owner of that corporation. The Fourth District declined to dismiss the case. The court found that the statements revealed a "lack of understanding of corporate structure," not an attempt at fraud.<sup>14</sup> See chart of additional cases at the end of this chapter, compiled by retired circuit judge Ralph Artigliere.

---

<sup>12</sup> *Id.*

<sup>13</sup> 843 So. 2d 950 (Fla. 4th DCA 2003).

<sup>14</sup> *Id.* at 953.

## SELECTED CASES ON FRAUD ON THE COURT

The requisite fraud on the court for dismissal occurs only where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion an unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense. When reviewing a case for fraud, the court should consider the proper mix of factors and carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system. An order granting a dismissal or default for fraud on the court will almost always require an evidentiary hearing and must include express written findings supported by the evidence demonstrating that the trial court has carefully balanced the equities and supporting the conclusion that the moving party has proven, clearly and convincingly, that the non-moving party implemented a deliberate scheme calculated to subvert the judicial process. The appellate court will review using an "abuse of discretion" standard narrowed by the clear and convincing requirements for fraud.

Misconduct that falls short of the rigors of this test, including inconsistency, nondisclosure, poor recollection, dissemblance, and even lying, is insufficient to support a dismissal for fraud, and potential harm must be managed through cross-examination. In some cases, even where requisite fraud is shown, the appellate court will narrow dismissal to affected claims or limit sanction to fees and costs.

Cases in the following chart show how the respective district courts of appeal handle fraud on the court.

CASE	RULING	UPHELD?	NOTES
<b><i>First DCA</i></b>			
<i>Wells Fargo Bank, N.A. v. Reeves, 92 So. 3d 249 (Fla. 1<sup>st</sup> DCA 2012)</i>	Dismissal	REVERSED	Mortgage foreclosure case dismissed for allegedly fraudulent allegations in the complaint regarding ownership of the paper at issue; assertions in a motion to dismiss the complaint do not provide an evidentiary basis for finding fraud upon the court
<i>Jesse v. Commercial Diving Acad., 963 So. 2d 308 (Fla. 1<sup>st</sup> DCA 2007)</i>	Dismissal	Affirmed	Record disclosed that appellant intentionally falsified testimony on material issues. No abuse of discretion with sanction of dismissal.

<i>Johnson v. Swerdzewski</i> , 935 So. 2d 57 (Fla. 1 <sup>st</sup> DCA 2006)	JNOV after verdict	REVERSED	Dental malpractice case in which Defendant moved for directed verdict based on fraudulent answers to pretrial discovery that were uncovered during cross-examination; court deferred ruling until after verdict and granted JNOV for fraud on court; REVERSED because review of dismissal for fraud prior to trial (abuse of discretion) is not equivalent to standard of review for JNOV; review is far less deferential to trial judge once jury verdict is entered.
<i>Hutchinson v. Plantation Bay Apartments, LLC</i> , 931 So. 2d 957 (Fla.1 <sup>st</sup> DCA 2006)	Dismissal	Affirmed	Failure to disclose past attack by dog and pre-existing symptoms rose to level of effort to stymie discovery on central issue amounting to fraud.
<i>Distefano v. State Farm Mut. Auto. Ins. Co.</i> , 846 So. 2d 572 (Fla. 1 <sup>st</sup> DCA 2003)	Dismissal	Affirmed	Plaintiff gave false deposition testimony by not disclosing <i>subsequent</i> accident and prior treatment and symptoms that were central to case; faulty memory not an excuse under these facts; this case has been cited in later cases.
<i>Baker v. Myers Tractor Services, Inc.</i> , 765 So. 2d 149 (Fla. 1 <sup>st</sup> DCA 2000)	Dismissal	Affirmed	Trial judge found that plaintiff intentionally omitted prior knee injury and treatment which was central to case; appellate court noted that court could have fashioned a lesser sanction, but “while this court might have imposed a lesser sanction, the question in this case is close enough that we cannot declare the lower court to have abused its discretion.”
<b>Second DCA</b>			
<i>Pena v. Citizens Prop. Ins. Co.</i> , 88 So. 3d 965 (Fla. 2d DCA 2012)	Dismissal	REVERSED in favor of fees and costs sanction	Affidavits submitted by Plaintiffs in opposition to summary judgment were false hampering the presentation of Defendant’s procedural defense; fraud was proven, but dismissal with prejudice too severe where liability was admitted

<i>King v. Taylor, 3 So. 3d 405 (Fla. 2d DCA 2009)</i>		Dismissal of Appeal	Divorce support enforcement case in which former husband filed appeal from lower court ruling but then sent fraudulent correspondence to the entity responsible for disbursing the military retirement benefits and also supplied it with phony court orders in an effort to unburden him from requirements of lower court's order.
<i>Ramey v. Haverty Furniture Cos. Inc., 993 So. 2d 1014 (Fla. 2d DCA 2008)</i>	Dismissal	Affirmed	The court stated that the evidence concerning Mr. Ramey's conduct "demonstrated clearly and convincingly that the plaintiff sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate this matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." The court further stated that "the injuries that were lied about are the nexus of the case." App ct found that The trial court properly exercised its discretion in imposing the severe sanction of dismissal for the clearly established severe misconduct of fraud on the court.
<i>Kubel v. San Marco Floor &amp; Wall, Inc., 967 So. 2d 1063 (Fla. 2d DCA 2007)</i>	Dismissal	REVERSED	Plaintiff's husband got report from treater with info inconsistent with wife's testimony and gave it to his lawyer; report by treating doctor was then changed at request of plaintiffs. Defendant failed to produce clear and convincing evidence of fraud; issue best managed on cross at trial.
<i>Miller v. Nelms, 966 So. 2d 437 (Fla. 2d DCA 2007)</i>	Dismissal	REVERSED	Complaint was dismissed as sham pleading; App ct found that trial court lacked evidentiary basis for dismissal.
<i>Howard v. Risch, 959 So. 2d 308 (Fla. 2d DCA 2007)</i>	Dismissal	REVERSED	Trial judge dismissed for failure to disclose criminal history and full medical history; app ct found that trial ct did not have evidence to support findings of fact based on

			heightened clear and convincing standard and no showing criminal record had anything to do with issues in trial and medical omissions involved minor incidents.
<i>Myrick v. Direct General Ins. Co.</i> , 932 So. 2d 392 (Fla. 2d DCA 2006)	Dismissal	REVERSED	Trial judge took no evidence at dismissal hearing, so appellate court had same cold record as the trial judge and found that finding of fraud was an abuse of discretion; stringent standard for extreme sanction not met.
<i>Laschke v. R. J. Reynolds Tobacco Co.</i> , 872 So. 2d 344 (Fla. 2d DCA 2004)	Dismissal	REVERSED	Plaintiff in tobacco case asked oncologist to put in records that smoking caused her cancer then denied doing so on deposition; dismissal too stringent, as this thwarted effort would not hamper defense.
<i>Jacob v. Henderson</i> , 840 So. 2d 1167 (Fla. 2d DCA 2003)	Dismissal	REVERSED	Plaintiff stated under oath that she could not do several things that surveillance video demonstrated that she was capable of doing; trial judge dismissed for fraud; DCA reviewed the same surveillance tape and deposition as trial judge, so less deference is given; when degree of injury as opposed to fact of injury is involved, it is a credibility issue for jury and not a calculated scheme to impede the defense.
<i>Morgan v. Campbell</i> , 816 So. 2d 251 (Fla. 2d DCA 2002)	Dismissal	Affirmed	Plaintiff claimed no prior back treatment when she had been treated 16 times; at evidentiary hearing, judge weighed credibility of plaintiff (deference given); Plaintiff's disclosure of some treatment does not constitute "truthful disclosure"
<b>Third DCA</b>			
<i>Empire World Towers, LLC v. Cdr Créances</i> , 89 So. 3d 1034 (Fla. 3d DCA 2012)	Striking of Pleadings	Affirmed as to certain Defendants, REVERSED as to one Defendant	Trial court made specific factual findings supported by clear and convincing evidence that Defendants attempted to defraud the court and conceal ownership interests by: (1) producing fabricated corporate documents; (2) committing perjury in affidavits and depositions; and (3)

			suborning the perjury of material witnesses and providing them with scripts of lies to repeat under oath; supported by overwhelming clear and convincing evidence.
<i>Suarez v. Benihana Nat'l of Fla. Corp., 88 So. 3d 349 (Fla. 3d DCA 2012)</i>	Dismissal	VACATED and REMANDED to Reinstate Case	P.I. case alleging failure to provide adequate security; answers in depo in P.I. case differed from testimony in criminal case three years earlier; record fails to show clearly and convincingly a scheme to hide the truth; contradictions do not "go to the very heart" of claims in P.I. case
<i>Gilbert v. Eckerd Corp. of Fla, Inc., 34 So. 3d 773 (Fla. 3d DCA 2010)</i>	Dismissal	REVERSED	Premises liability case; Plaintiff claimed lost wages from a company she never worked for according to deposition testimony. Evidence on employment was conflicting, so trial judge should have held a hearing and made findings to resolve inconsistency; but if matter would not meet summary judgment standards, then it is not proper for dismissal
<i>Laurore v. Miami Auto. Retail, Inc., 16 So. 3d 862 (Fla. 3d DCA 2009)</i>	Dismissal	REVERSED	Inconsistencies in sworn discovery responses in P.I. case may have given rise to dismissal of some claims but not entire case; failure to disclose pre-existing disability due to mental stress may result in loss of some damage claims but not liability issue and back injury claims.
<i>Sky Dev., Inc. v. Vistaview Dev., Inc., 41 So. 3d 918 (Fla. 3d DCA 2010)</i>	Dismissal	Affirmed	Officers of plaintiff corporation passed note to witness during depo and text message to witness during trial; ample evidence for the trial court to conclude unconscionable scheme was underway
<i>Hair v. Morton, 36 So. 3d 766 (Fla. 3d DCA 2010)</i>	Dismissal	REVERSED	P.I. Plaintiff failed to disclose past back problems; burden on moving party to prove fraud, which almost always requires evidentiary hearing; inconsistencies may bar some back claims but impact on liability and remaining claims best dealt with on cross examination

<i>Ibarra v. Izaguirre</i> , 985 So. 2d 1117 (Fla. 3d DCA 2008)	Dismissal	REVERSED	Discovery response did not reveal prior slip and fall in which there was no attorney and no case filed; could be misinterpretation not fraud.
<i>Papadopoulos v. Cruise Ventures</i> , 974 So. 2d 418 (Fla. 3d DCA 2007)	Dismissal	Affirmed	Plaintiff made material representations about medical and litigation history that were established in the record.
<i>Austin v. Liquid Distributors, Inc.</i> , 928 So. 2d 521 (Fla. 3d DCA 2006)	Dismissal	Affirmed	Judge's order recited extensive discrepancies in discovery that go to the heart of the claim and are so extensive that they belie the claim plaintiff was confused or forgot.
<i>Medina v. Florida East Coast Ry. L.L.C.</i> , 921 So. 2d 767 (Fla. 3d DCA 2006)	Dismissal	REVERSED	We reverse for a jury trial because it is clear the alleged misconduct did not rise to the level of egregiousness required to merit the extreme sanction of dismissal.
<i>Canaveras v. Continental Group, Ltd.</i> , 896 So. 2d 855 (Fla. 3d DCA 2005)	Dismissal	REVERSED	Plaintiff informed opposing counsel of the prior incident and the treatment he received as a consequence early on and medical history stemming from that incident was known and investigated by the defendants; fact that prior injury was not fully admitted in deposition does not warrant dismissal.
<i>Rios v. Moore</i> , 902 So. 2d 181 (Fla. 3d DCA 2005)	Dismissal	REVERSED	Although plaintiff did not accurately describe her injuries in a prior accident, inconsistencies did not rise to level of fraud.
<i>Bertrand v. Belhomme</i> , 892 So. 2d 1150 (Fla. 3d DCA 2005)	Dismissal	REVERSED	Plaintiff claimed defendant took inconsistent position re ownership of funds in dispute in prior bankruptcy and divorce case; judge dismissed for fraud; DCA held that plaintiff will not be denied day in court, there was no concealment in this case; inconsistencies can be used to impeach.
<i>Long v. Swofford</i> , 805 So. 2d 882 (Fla. 3d DCA 2001)	Dismissal	Affirmed.	P.I. Plaintiff lied about pre-existing back injury; false or misleading statement given under oath concerning issues central to her case amounted to fraud.

<i>Metropolitan Dade County v. Martinsen</i> , 736 So. 2d 794 (Fla. 3d DCA 1999)	Denial of Motion to Dismiss	REVERSED and case dismissed	DCA: Plaintiff's misrepresentations and omissions about her accident and medical history in interrogatories and in deposition went to the heart of her claim and subverted the integrity of the action. The extensive nature of plaintiff's history belie her contention that she had forgotten about the incidents, injuries and treatment; "[t]he integrity of the civil litigation process depends on truthful disclosure of facts."
<i>Hanono v. Murphy</i> , 723 So. 2d 892 (Fla. 3d DCA 1998)	Denial of Motion to Dismiss	REVERSED and case dismissed	Plaintiff found guilty of perjury for testimony in the very case in which dismissal was sought; trial judge ruled that case should go before jury; DCA reversed because of fraudulent attempts to subvert the process.
<i>Young v. Curgil</i> , 358 So. 2d 58 (Fla. 3d DCA 1978)	Dismissal	REVERSED	Trial court inferred collusion on the part of plaintiffs based on suspicious circumstances; matter debatable and the issue should have been determined by the jury; dismissal should be used cautiously and sparingly and only upon blatant showing of fraud, pretense, collusion
<b>Fourth DCA</b>			
<i>Chacha v. Transp. USA, Inc.</i> , 78 So. 3d 727 (Fla. 4 <sup>th</sup> DCA 2012)	Dismissal	REVERSED and remanded to make specific findings	P.I. case in which Plaintiff allegedly concealed prior back problems from treating doctors and defendants; abuse of discretion to dismiss an action without express written findings of fact
<i>Bass v. City of Pembroke Pines</i> , 991 So. 2d 1008 (Fla. 4 <sup>th</sup> DCA 2008)	Dismissal	Affirmed	Patient's unexplained inconsistencies in discovery answers about prior medical problems and having been in a prior case (albeit a divorce) meant that reasonable minds could differ on the remedy, so trial judge affirmed.
<i>Sunex Intern Inc. v. Colson</i> , 964 So. 2d 780 (Fla. 4 <sup>th</sup> DCA 2007)	Dismissal on Motion to Strike	REVERSED	Trial judge dismissed claim on Motion to Strike as sham pleading but app ct reversed on grounds that the fact that trial ct perceived little chance of success on merits is not grounds for dismissal as sham.

			Hearing on such a motion is not to try issues but instead to determine whether there are any issues to try.
<i>Gray v. Sunburst Sanitation Corp.</i> , 932 So. 2d 439 (Fla. 4 <sup>th</sup> DCA 2006)	Dismissal	Affirmed	Judge's order sets out proper standard and analysis; PCA.
<i>Cherubino v. Fenstersheib and Fox, P.A.</i> , 925 So. 2d 1066 (Fla. 4 <sup>th</sup> DCA 2006)	Dismissal	REVERSED	Legal malpractice case in which most of the inconsistencies attributed to plaintiffs occurred in the underlying automobile action; not clear and convincing evidence of scheme to defraud in the malpractice case.
<i>Cross v. Pumpco, Inc.</i> , 910 So. 2d 324, (Fla. 4 <sup>th</sup> DCA 2005)	Dismissal	REVERSED	Plaintiff who failed to recall neck injury from five years prior to accident argued that he did not intentionally withhold information from the defense, but rather, was confused as to the date of the prior accident and did not recall the full extent of his injuries; that this was not a scheme calculated to interfere with ability to impartially adjudicate; that extent of his injuries related to present accident is a question for the jury.
<i>McKnight v. Evancheck</i> , 907 So. 2d 699 (Fla. 4 <sup>th</sup> DCA 2005)	Dismissal	Affirmed	Extent of misrepresentation and concealment of prior injuries set forth in prison records justified dismissal.
<i>Piunno v. R. F. Concrete Const., Inc.</i> , 904 So. 2d 658 (Fla. 4 <sup>th</sup> DCA 2005)	Dismissal	Affirmed	Extent of misrepresentation and concealment of prior injuries relating to same damages alleged in instant case justified dismissal.
<i>Bob Montgomery Real Estate v. Djokic</i> , 858 So. 2d 371 (Fla. 4 <sup>th</sup> DCA 2003)	Dismissal	REVERSED	Real estate broker's attachment of a forged and an altered document to complaint did not warrant sanction of dismissal in action against real estate agents for tortious interference with contractual relationships, where source of additions to documents remained open to speculation, and there was no evidence that broker submitted documents with intent to deceive.

<i>Amato v. Intindola</i> , 854 So. 2d 812 (Fla 4 <sup>th</sup> DCA 2003)	Dismissal	REVERSED	Court compared testimony to surveillance video and dismissed for fraud; DCA reviewed same record and REVERSED based on <i>Jacob, supra</i> .
<i>Arzuman v. Saud</i> , 843 So. 2d 950 (Fla. 4 <sup>th</sup> DCA 2003)	Dismissal	REVERSED	Contract action in which trial judge dismissed due to conflicting testimony on ownership of a corporation; this testimony was not intended to deceive but was the result of Arzuman's ignorance of corporate structure.
<i>Savino v. Florida Drive In Theatre Management, Inc.</i> , 697 So. 2d 1011 (Fla. 4 <sup>th</sup> DCA 1997)	Dismissal	Affirmed	Plaintiff in PI case shown to have lied about pre-accident mental abilities; produced a false diploma for a college degree; and lied about not working post-accident; fraud permeated the case.
<b>Fifth DCA</b>			
<i>Jones v. Publix Super Mkts., Inc.</i> , 2012 Fla. App. LEXIS 12217, 2012 WL 3044250 (Fla. 5 <sup>th</sup> DCA July 27, 2012)	Motion to Dismiss Denied	Dismissal REVERSED but Sanction Applied	Premises liability case in which counsel for Defendant withheld address of witness until it was too late to develop evidence on circumstances of fall; appellate court would have supported dismissal under facts, but deferred to trial court's discretion to not dismiss; however, it was error to not assess fees and costs for discovery violations
<i>Wenwei Sun v. Aviles</i> , 53 So. 3d 1075 (Fla. 5 <sup>th</sup> DCA 2010)	Dismissal	Affirmed	P.I. case; evidence showed three claimants over a span of six years lied repeatedly about Plaintiff's work and his abilities to perform basic functions of daily life; defense rendered virtually impossible.
<i>Perrine v. Henderson</i> , 85 So. 3d 1210 (Fla. 5 <sup>th</sup> DCA 2012)	Dismissal	Affirmed	Trial judge held two thorough hearings and determined that Plaintiff made numerous material misrepresentations regarding his medical history and current injuries, which were core issues in the case.
<i>Bologna v. Schlanger</i> , 995 So. 2d 526 (Fla. 5 <sup>th</sup> DCA 2008)	Dismissal	REVERSED	Dismissal in Plaintiff PI case (alleged fraud re lack of disclosure of prior treatment) reversed because there could have been confusion due to

			broad questioning, plaintiff's interrogatory answers led the defense to the truth, and the judge did not hold an evidentiary hearing. Did not meet <i>Cox v. Burke</i> test (see <i>Cox</i> case below).
<i>Villasenor v. Martinez</i> , 991 So. 2d 433 (Fla. 5 <sup>th</sup> DCA 2008)	Dismissal	REVERSED	Question of whether inconsistencies argued intentional fraudulent conduct, forgetfulness, result of a limited command of the English language, or efforts to unlawfully live and work in the country, trial court erred in dismissing with prejudice without evidentiary hearing.
<i>Granados v. Zehr</i> , 979 So. 2d 1155 (Fla. 5 <sup>th</sup> DCA 2008)	Dismissal	REVERSED	Plaintiff in PI case misrepresented prior condition but revealed names of treating physicians who revealed true problems so defense not hampered.
<i>Saenz v. Patco Trans. Inc.</i> , 969 So. 2d 1145 (Fla. 5 <sup>th</sup> DCA 2007)	Dismissal	Affirmed	Whether dismissal was an appropriate sanction for concealment of prior medical issues presented a close question for DCA, but they affirmed the sanction as being in sound discretion of trial judge.
<i>Gehrmann v. City of Orlando</i> , 962 So. 2d 1059 (Fla. 5 <sup>th</sup> DCA 2007)	Dismissal	REVERSED	Discrepancies between testimony of PI plaintiff and defense investigation not sufficiently tested at hearing to show requisite intent to defraud and that discrepancies were sufficient for dismissal.
<i>Brown v. Allstate Ins. Co.</i> , 838 So. 2d 1264 (Fla. 5 <sup>th</sup> DCA 2003)	Dismissal	Affirmed	Plaintiff in PI case knowingly and intentionally concealed his lack of employment at the time of the accident; misrepresentation was central to the issue of lost wages and that issue was an integral part of his claim.
<i>Ruiz v. City of Orlando</i> , 859 So. 2d 574 (Fla. 5 <sup>th</sup> DCA 2003)	Dismissal	REVERSED	Except in the most extreme cases, where it appears that the process of trial has itself been subverted, factual inconsistencies, even false statements are well managed through the use of impeachment and traditional discovery sanctions; record in this case does not demonstrate clearly and convincingly a knowing and unreasonable

			scheme to interfere with the judicial system's ability to impartially adjudicate the claim.
<p><i>Cox v. Burke</i>,* 706 So. 2d 43 (Fla. 5<sup>th</sup> DCA 1998)</p> <p>*Cox case is frequently cited as authority in cases involving dismissal for fraud on the court.</p>	Dismissal	Affirmed	<p>"In this case, there is a good deal that Burke and Gordon put forth as "fraud" that is either not fraud or is unproven. . . . Cox clearly gave many false or misleading answers in sworn discovery that either appear calculated to evade or stymie discovery on issues central to her case. The integrity of the civil litigation process depends on truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way. Although Cox insists on her constitutional right to have her case heard, she can, by her own conduct, forfeit that right. This is an area where the trial court is and should be vested with discretion to fashion the apt remedy. While this court might have imposed a lesser sanction, the question in this case is close enough that we cannot declare the lower court to have abused its discretion."</p>

## CHAPTER FOUR

---

### REMEDIES AGAINST NONPARTY

Much discovery is obtained from nonparties. On occasion, nonparties object to some or all of the discovery sought, and courts are called upon to rule upon what discovery is appropriate under the circumstances. Frequent disputes arise from discovery addressing expert witnesses, treating physicians, and physicians conducting examinations under Fla. R. Civ. P. 1.360 in personal injury cases.

With regard to persons expected to be called as an expert witness at trial, Fla. R. Civ. P. 1.280(b)(5)(A) (in 2012 renumbered from 1.280(b)(4)(A)) describes the discovery of financial information that can be obtained from such witnesses. In relevant part, the rule provides:

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service;
2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants;
3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial; and
4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required

to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of this rule concerning fees and expenses as the court may deem appropriate.

Importantly, the (b)(4)(a) information must be provided if requested in discovery, and if it is not, the expert may not be permitted to testify.<sup>1</sup> The court in *Smith v. Eldred*<sup>2</sup> held that Rule 1.280(b)(4)(B) confines both the discovery methods that can be employed when directed to expert witnesses and the subject matter of that discovery. The court pointed out that the rule calls for a party to first propound interrogatories. Once disclosed as an expert, that person may be deposed. In the deposition discovery within the scope of subsection (iii) of the rule may be sought. However, production of financial and business records may be required only under the most unusual or compelling circumstances and a request for production is simply not a method condoned by the rule except “under motion.”

Rule 1.280(b)(5)(A) limits financial bias discovery from retained experts, and while it was drafted to protect retained experts only, the court in *Steinger v. Geico*<sup>3</sup> stated that “for purposes of uncovering bias, we see no meaningful distinction between a treating physician witness, who also provides an expert opinion (the so-called ‘hybrid

---

<sup>1</sup> *Orkin Exterminating Co. v. Knollwood*, 710 So. 2d 697 (Fla. 5<sup>th</sup> DCA 1998).

<sup>2</sup> 96 So. 3d 1102 (Fla 4<sup>th</sup> DCA 2012). See also *Price v. Hannahs*, 954 So. 2d 97 (Fla 2d DCA 2007).

<sup>3</sup> No. 4D 11-4162 (Fla 4<sup>th</sup> DCA Nov. 21, 2012).

witness') and retained experts. However, the court in *Steinger* went on to say: "We stress that the limitations on financial bias discovery from expert witnesses under Rule 1.280(b)(5)(A) cannot be used as a shield to prevent discovery of relevant information from a material witness – such as a treating physician. The rule limits discovery of the general financial information of the witness where it is sought solely to establish bias. However, trial courts have discretion to order additional discovery where relevant to a discreet issue in a case. See *Katzman v. Rediron Fabrication, Inc.*"<sup>4</sup> The *Katzman* case involved a physician who treated a patient referred by a lawyer under a letter of protection agreement wherein the physician agreed to obtain payment from any recovery. The doctor performed an allegedly controversial outpatient surgical procedure on both plaintiffs within a few weeks of an allegedly "minor auto accident" and for which he billed a total of \$81,000.00. Defendant believed that a large portion of the doctor's income was generated by recommending the procedure for patients referred to him in litigation cases and charged more for the procedure in litigation cases than in non-litigation cases. Defendant sought discovery from the doctor as to how often he had ordered such procedure over the past four years and what he has charged in litigation and non-litigation cases. The doctor objected, moved for a protective order, and argued that the discovery was overbroad and exceeded the financial discovery permitted from retained experts under Rule 1.280(b)(5)(A). After two hearings, the circuit court ruled that the doctor must respond by providing the amounts he had collected from health insurance coverage for the same procedure over the four year period and the amounts he collected under letters of protection during the same period, stating the number of patients involved in each category. The doctor petitioned for

---

<sup>4</sup> 76 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2012).

certiorari review of the order. The appellate court, in allowing the discovery, pointed out that the discovery sought was not relevant merely to show that the doctor may be biased based on an ongoing financial relationship with a party or lawyer, but the discovery was relevant to a discrete issue, whether the expert recommended an allegedly unnecessary and costly procedure with greater frequency and at a higher cost in litigation, which was relevant to substantive issues, i.e., the reasonableness of the cost and necessity of the procedure. In the appellate court's view, it met the requirement of "unusual and compelling circumstances," and the court rejected petitioner's attempt to create a per se rule that all financial discovery from any expert, regardless of whether the expert is also a treating doctor, is always strictly limited to those matters set forth in Rule 1.280(b)(5)(A). Finally, the court pointed out that trial courts have broad discretion in controlling discovery and in issuing protective orders, and should not allow discovery to become a tactical litigation weapon to harass the witness, the party, or the law firm(s).

In each case the trial court must balance the need for the discovery against the burden placed upon the witness, and each case raising these issues should be decided on its own facts and circumstances. *Katzman v. Ranjana Corp.*<sup>5</sup>

Under Rule 1.380(b)(1), sanctions cannot be imposed on a nonparty for a discovery violation in the absence of a finding of contempt.<sup>6</sup> Accordingly, before seeking sanctions against a nonparty for failure to provide discovery, a motion to

---

<sup>5</sup> 90 So. 3d 873 (Fla. 4<sup>th</sup> DCA 2012).

<sup>6</sup> In *Cooper v. Lewis*, 719 So. 2d 944 (Fla. 5<sup>th</sup> DCA 1998), the trial court struck an IME doctor from defendant's witness list and assessed costs and attorneys' fees against the defendant for the doctor's failure at his deposition to provide requested information relating to his past experience in performing IMEs. The records were produced at subsequent depositions of the doctor's staff, except copies of IMEs relating to other patients, which were withheld based on doctor-patient privilege. The appellate court reversed, saying: "At least before imposing such sanctions, the trial court should find that someone is in contempt of court or has violated an appropriate court order." *Id.* at 945. See *Pevsner v. Frederick*, 656 So. 2d 262 (Fla. 4<sup>th</sup> DCA 1995).

compel discovery should be filed and an order should be entered directing the nonparty to provide the requested discovery. If the nonparty again refuses to provide the requested discovery, a motion for contempt should be filed asking the court to find the nonparty in contempt of court for violation of a court order directing discovery. The nonparty should be served with the motion and notice of the hearing on the motion for contempt. The moving party should subpoena the nonparty to attend the sanctions hearing to avoid any argument that the trial court lacks jurisdiction to impose sanctions against the nonparty. Whether sanctions may be imposed on a party for a nonparty's discovery violation is not clear.<sup>7</sup>

---

<sup>7</sup> *Haverfield Corp. v. Frazen*, 694 So. 2d 162 (Fla. 3d DCA 1997) (workers' compensation affirmative defense struck because of nonparty insurer's failure to produce documents). But see *Edwards v. Edwards*, 634 So. 2d 284 (Fla. 4th DCA 1994) (reversible error to impose sanction that punishes party who bears no responsibility for discovery violation committed by another).

## CHAPTER FIVE

---

### WORK PRODUCT AND TRADE SECRETS

The work product privilege protects from discovery “documents and tangible things otherwise discoverable” if a party prepared those items “in anticipation of litigation or for trial.” Fla. R. Civ. P. 1.280(b)(3). There is no requirement in this rule that for something to be protected as work product, it must be an item ordered to be prepared by an attorney.<sup>1</sup> Materials may qualify as work product even if no specific litigation was pending at the time the materials were compiled. Even preliminary investigative materials are privileged if compiled in response to some event which foreseeably could be made the basis of a claim.<sup>2</sup>

The standard to be applied in the First, Second, Third and Fifth District Courts in determining whether documents are protected by the work product doctrine, is whether the document was prepared in response to some event which foreseeably could be made the basis of a claim in the future.<sup>3</sup> The Fourth District applies a somewhat stricter standard, requiring that when the documents are prepared, the probability of litigation must be “substantial and imminent.”<sup>4</sup> However, the Fourth District may have attempted to either recede from or discount that standard in the recent case of *Neighborhood Health Partnership, Inc. v. Merkle*.<sup>5</sup> Whether the explanation of the *Cotton States*

---

<sup>1</sup> See, e.g. *Barnett Bank v. Dottie-G. Dev. Corp.*, 645 So. 2d 573 (Fla. 2d DCA 1994); *Time Warner, Inc. v. Gadinsky*, 639 So. 2d 176 (Fla. 3d DCA 1994).

<sup>2</sup> *Anchor Nat'l Fin. Servs., Inc. v. Smeltz*, 546 So. 2d 760, 761 (Fla. 2d DCA 1989).

<sup>3</sup> See *Marshalls of Ma, Inc. v. Minsal*, 932 So. 2d 444 (Fla. App. 3d Dist. 2006), and the cases cited therein.

<sup>4</sup> *Cotton States Mutual Insurance Co., v. Turtle Reef Associates, Inc.*, 444 So. 2d 595 (Fla. 4<sup>th</sup> DCA 1984).

<sup>5</sup> 8 So. 3d 1180, 1184-1185 (Fla. 4<sup>th</sup> DCA 2009).

standard in *Merkle* and the holding therein brought the Fourth District in accord with the other districts is not clear.

When a party asserts the work product privilege in response to a request for production, the party need only assert in their response the objection and reason for the objection. It is not required that the objecting party file with the objection an affidavit documenting that the incident report was prepared in anticipation of litigation. If the opposing party wants to pursue the request over the objection, they may move to compel production. If the motion to compel challenges the status of the document as work product, defendants must then show that the documents were prepared in anticipation of litigation.<sup>6</sup>

Under Fla. R. Civ. P. 1.280(b)(3), a party may obtain discovery of an opposing party's "documents ... prepared in anticipation of litigation ... only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Need and hardship "must be demonstrated by affidavit or sworn testimony."<sup>7</sup> Documents protected by the work product immunity must not be lightly invaded, but only upon a particularized showing of need satisfying the criteria set forth in Rule 1.280. The rationale supporting the work product doctrine is that one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.<sup>8</sup>

---

<sup>6</sup> Fla. R. Civ. P. 1.350. See also *Wal-Mart Stores, Inc. v. Weeks*, 696 So. 2d 855 (Fla. 2d DCA 1997).

<sup>7</sup> *N. Broward Hosp. Dist. v. Button*, 592 So. 2d 367 (Fla. 4<sup>th</sup> DCA 1992).

<sup>8</sup> *DeBartolo Aventura, Inc. v. Hernandez*, 638 So. 2d 988 (Fla. App. 3d Dist. 1994).

It should be noted that if attorney work product is expected or intended for use at trial, it is subject to the rules of discovery. The Florida Supreme Court has held that the attorney work product doctrine and work product privilege is specifically bounded and limited to materials not intended for use as evidence or as an exhibit at trial, including rebuttal.<sup>9</sup>

A “trade secret” is defined in section 688.002(4), Florida Statutes, as:

Information, including a formula, pattern, compilation, program, device, method, technique or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Section 90.506, Florida Statutes provides:

A person has a privilege to refuse to disclose, and to prevent other persons from disclosing a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice. When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require.

“When a party asserts the need for protection against disclosure of a trade secret, the court must first determine whether, in fact, the disputed information is a trade secret [which] usually requires the court to conduct an in camera review.” *Summitbridge Nat’l Invs. V. 1221 Palm Harbor, L.L.C.*<sup>10</sup> In *Laser Spine Institute, LLC v. Makanast*<sup>11</sup> the

---

<sup>9</sup> See, *Northup v. Howard W. Acken, M.D.*, 865 So. 2d 1267 (Fla. 2004).

<sup>10</sup> 67 So. 3d 448, 449 (Fla. 2d DCA 2011); see also *Westco, Inc. v. Scott Lewis’ Gardening & Trimming*, 26 So. 3d 620, 622 (Fla. 4<sup>th</sup> DCA 2009) (holding that where a party claims a document is privileged and the trial court fails to conduct an in camera review or balancing test, the trial court has departed from the essential requirements of the law).

<sup>11</sup> 69 So. 3d 1045, 1046 (Fla. 2d DCA 2011).

court held that where a trial court directs disclosure of trade secrets, “it must take appropriate measures to protect the interests of the trade secret holder, the interests of the parties, and the furtherance of justice.” 69 So. 3d at 1046 citing § 90.506, Fla. Stat. (2010); see also *Summitbridge Nat’l Invs.*, supra, concluding that the trial court departed from essential requirements of law by ordering disclosure of information without conducting in camera review to determine if information was, in fact, a trade secret and, if so, whether the party requesting it had shown a reasonable necessity for it and whether safeguards were required to prevent its dissemination.

Some examples of rulings on claims of work product privilege in areas of frequent dispute follow:

**Incident Reports:**

Incident reports have generally been considered not discoverable as falling within the work product privilege because they are typically prepared solely for litigation and have no other business purpose.<sup>12</sup> Incident reports may be prepared for a purpose other than in anticipation of litigation, and when this is so the reports are not work product. For example, reports prepared solely for personnel reasons, such as to decide whether an employee should be disciplined, are not work product.<sup>13</sup> However, even if an incident report is prepared for one reason not in anticipation of litigation, it will still be protected as work product if it was *also* prepared for litigation purposes.<sup>14</sup>

---

<sup>12</sup> *Winn-Dixie Stores v. Nakutis*, 435 So. 2d 307 (Fla. 5<sup>th</sup> DCA 1983) petition for review denied 446 So. 2d 100 (Fla. 1984); *Sligar v. Tucker*, 267 So. 2d 54 (Fla. 4<sup>th</sup> DCA 1972) cert. denied (Fla. 1972); *Grand Union Co., v. Patrick*, 247 So. 2d 474 (Fla. 3d DCA 1971).

<sup>13</sup> See *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1385-86 (Fla. 1994).

<sup>14</sup> *Federal Express Corp. v. Cantway*, 778 So. 2d 1052, 1053 (Fla. 4<sup>th</sup> DCA 2001); see also *District Board of Trustees of Miami-Dade County College v. Chao*, 739 So. 2d 105 (Fla. 3d DCA 1999).

### **Claims Files:**

A party is not entitled to discovery related to the claim file or the insurer's business practices regarding the handling of claims until the obligation to provide coverage and damages has been determined.<sup>1</sup>

However, the claims file may be discoverable when an insurer is sued for bad faith after any coverage dispute has been settled.<sup>2</sup>

### **Surveillance Video:**

Surveillance video is regarded as work product unless it is going to be used at trial, and if it is, it need not be produced until the surveilling party has had the opportunity to depose the subject of the video.<sup>3</sup>

---

<sup>1</sup> *State Farm Mutual Automobile Ins. Co. v. Tranchese*, 49 So. 3d 809, 810 (Fla. 4<sup>th</sup> DCA 2010); see also *Scottsdale Ins. Co. v. Camara*, 813 So. 2d 250, 251-52 (Fla. 3d DCA 2002).

<sup>2</sup> *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1129-30 (Fla. 2005).

<sup>3</sup> *State Farm Mutual Auto Ins. Co. v. H. Rehab, Inc.*, 775 So. 3d 724 (Fla. 3d DCA 2011); *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980).

## CHAPTER SIX

---

### EFFECT OF A MOTION FOR PROTECTIVE ORDER ON PENDING DISCOVERY

#### **ISSUE:**

Whether a motion for a protective order automatically stays pending discovery. This issue most commonly arises in connection with a scheduled or court ordered deposition. Objections to written discovery are generally dealt with in a different manner as discussed in Section 3 hereof.

#### **DISCUSSION:**

##### **1. Applicable Rules:**

Fla. R. Civ. P.1.280(c), states in pertinent part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; . . .

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 1.380(a)(4) addresses a party's failure to permit discovery and sanctions against the party wrongfully thwarting discovery.

## **2. Florida Case Law:**

In *Canella v. Bryant*,<sup>1</sup> an attorney sought to postpone a deposition when he learned on the afternoon before the scheduled deposition that it would conflict with a hearing scheduled for that same day. He had irreconcilable conflicts preventing his appearance at the deposition. The attorney exerted every possible effort to obtain a court order to prevent the deposition from going forward, including calling opposing counsel and filing a motion for a protective order. The attorney also tried to arrange for the court to hear his motion for a protective order and offered to have the deposition taken at another time. Despite these efforts, nothing could be done to prevent the deposition from occurring. The trial court entered a default for the party seeking protection when the party failed to appear for deposition. On appeal, the default was set aside.

The attorney in the *Canella* case recognized his duty to obtain a court order to excuse his attendance at the deposition. Rather than simply filing a motion for a protective order and expecting it to act as a stay, the attorney made every effort to obtain a court order and explain the reasons why he was unable to appear. In reversing, the District Court of Appeal noted counsel's diligence and the absence of willfulness.

In *Momenah v. Ammache*,<sup>2</sup> the plaintiff violated two court orders. The first order concerned discovery cutoff and indicated that the trial court would strictly enforce all discovery deadlines. Additionally, the trial court entered an order commanding the plaintiff, a resident of Saudi Arabia, to appear for deposition when a newly added

---

<sup>1</sup> 235 So. 2d 328 (Fla. 4th DCA 1970).

<sup>2</sup> 616 So. 2d 121 (Fla. 2d DCA 1993).

defendant served a notice of taking the plaintiff's deposition only nine days in advance of the date he was scheduled to appear in Naples, Florida. The plaintiff failed to appear for his deposition and the trial court entered an order commanding him to appear within 30 days for deposition in Collier County. The court advised that it would dismiss the action if the plaintiff failed to appear. Thereafter, the plaintiff's newly hired attorneys filed a motion for a protective order, seeking to postpone the plaintiff's deposition because of his health or to accommodate him in some other manner. Apparently, the trial court originally granted the motion, but reversed its ruling on rehearing, denied the motion, and struck the appellant's pleadings. The plaintiff attempted to have the motion for a protective order heard *before* he was scheduled to appear, and a congested calendar was the only thing preventing him from being heard.

On appeal, the District Court of Appeal, Second District, stated:

[W]hen . . . a party seeking the order makes his motion *as soon as the need for it becomes known* and *tries to obtain a hearing* on the motion *before* the time set for compliance with the order, his diligence should be considered in determining whether his pleadings should be stricken and his action dismissed. . . . Since the appellant's attorney did all he could do to protect his client's rights by filing a motion for protective order and trying to have it heard in time to comply with the court's order if it was denied, the court should have afforded him a reasonable opportunity to appear before striking his pleadings and dismissing his action. (Emphasis added.)

Another Florida case on point is *Stables v. Rivers*.<sup>3</sup> Although this is a workers' compensation case, *Stables*, like *Momenah*, stands for the proposition that the filing of

---

<sup>3</sup> 559 So. 2d 440 (Fla. 1st DCA 1990).

a motion for a protective order does *not* act as an automatic stay of a scheduled deposition.<sup>4</sup>

The failure to file timely a motion for a protective order or to limit discovery may result in a waiver. However, it does not bar a party from asserting privilege or exemption from matters outside the scope of permissible discovery.<sup>5</sup>

### **3. Other Forms of Discovery**

Preservation of objections to other forms of discovery is generally accomplished in accordance with the Rule of Civil Procedure applicable to that particular method of discovery. For instance, objections to interrogatories served under Rule 1.340 are preserved by serving any objections to the interrogatories within 30 days after service of the interrogatories. If objections are served, the party submitting the interrogatories may move for an order under Rule 1.380(a) on any objection to or in the event of failure to answer an interrogatory. Similarly, in the case of production of documents under Rule 1.350, a party objecting to the production of documents shall state its objection in the written response to the document production request, in which event the party submitting the request may seek an order compelling the discovery in accordance with Rule 1.380. Similar procedures exist for the production of documents and things without a deposition under Rule 1.351 and for the examination of persons under Rule 1.360.

The timely filing of objections to written discovery as described above effectively stays any obligation of the party objecting to the discovery to provide same until such time as the objections are ruled upon. This does not, of course, prevent the court from

---

<sup>4</sup> See also *Don Mott Agency, Inc. v. Pullum*, 352 So. 2d 107 (Fla. 2d DCA 1977).

<sup>5</sup> *Liberty Mutual Insurance Co. v. Lease America, Inc.*, 735 So. 2d 560 (Fla. 4th DCA 1999); *Insurance Company of North America v. Noya*, 398 So. 2d 836 (Fla. 5th DCA 1981). See also: *Berman, Florida Civil Procedure* §280.4[1][b] (2005 Edition).

granting an award of attorneys' fees or other sanctions under Rule 1.380 in the event that the court finds that the objections were without merit.

**CONCLUSION:**

A party who seeks a protective order to prevent discovery must make every reasonable effort to have a motion heard before a scheduled deposition or other discovery is to occur. The movant bears the burden of showing good cause and obtaining a court order related to the pending proceeding before discovery is to be had. Furthermore, it appears likely that a lawyer who schedules a last minute hearing on a motion for a protective order in advance of a scheduled proceeding or who fails to promptly file objections and motions for protective orders can be sanctioned if the objection is overruled and the nonmovant is prejudiced.<sup>6</sup>

In sum, a motion or a protective order does not automatically stay pending discovery. Rather, the movant must file the motion as soon as the need for protection arises, schedule the motion for hearing sufficiently in advance of the pending proceeding, and show good cause why discovery should not go forward.

As always, lawyers should cooperate with each other concerning the scheduling of discovery and the timing of a hearing on a motion for a protective order. Except where the taking of a deposition is an urgent matter or where the cancellation of a scheduled deposition would be prejudicial to a party, it is generally in the best interest of both parties to have the court rule on objections to depositions prior to the time that the deposition is conducted in order to avoid the necessity for a second deposition of a witness after objections are later resolved. Faced with a decision as to whether to

---

<sup>6</sup> Fla. R. Civ. P. 1.380(a)(4).

attend a deposition while a motion for protective order is pending (and for which a prior hearing is unavailable), a lawyer often must make the difficult decision of whether to waive the objection by appearing at the deposition or risking sanctions by the court for not appearing. While the filing of a motion for protective order does not act as a stay until such time as an order is procured from the court, the courts have the authority to grant or withhold sanctions for failing to appear based upon the factors enumerated in the case law, including the diligence and good faith of counsel.

## CHAPTER SEVEN

---

### “SPEAKING OBJECTIONS” AND INFLAMMATORY CONDUCT AT A DEPOSITION

Speaking objections to deposition questions are frequently designed to obscure or hide the search for the truth by influencing the testimony of a witness. Objections and statements that a lawyer would not dare make in the presence of a judge are all too often made at depositions. For example:

- “I object. This witness could not possibly know the answer to that. He wasn’t there.”

*The typical witness response after hearing that:* “I don’t know. I wasn’t there.”

- “I object. You can answer if you remember.”

*The typical witness response after hearing that:* “I don’t remember.”

- “I object. This case involves a totally different set of circumstances, with different vehicles, different speeds, different times of day, etc.”

*The typical witness response after hearing that:* “I don’t know. There are too many variables to compare the two.”

In 1996, the Supreme Court of Florida amended Rule 1.310(c) in an attempt to curb the practice of “speaking objections” during depositions, as well as to reflect existing case law which limited instructions not to answer. Rule 1.310(c) now provides that “[a]ny objection during a deposition *shall* be stated concisely and in a non-argumentative and non-suggestive manner.” (Emphasis added.)

At the same time it amended Rule 1.310(c), the Supreme Court of Florida also amended Rule 1.310(d) to provide that a “motion to terminate or limit examination” may

be based on conduct in violation of the amendment to Rule 1.310(c) requiring objections to be stated concisely and in a nonsuggestive manner.

Starting on the date of admission to The Florida Bar, counsel pledges fairness, integrity and civility to opposing parties and their counsel, not only in court but also in all written and oral communications. Oath of Admission to the Florida Bar. The Rules Regulating The Florida Bar also prohibit a lawyer from “unlawfully obstruct[ing] another party’s access to evidence,” “fabricat[ing] evidence” or “counsel[ing] or assist[ing] a witness to testify falsely.” Rule 4-3.4. See also Rule 3-4.3 and -4.4 (misconduct may constitute a ground for discipline); Rule 4-3.5 (Disruption of a Tribunal); Rule 4-4.4 (Respect for Rights of Third Persons); Rule 4-8 (Maintaining the Integrity of the Profession).

The Florida Bar’s “Guidelines for Professional Conduct,” promulgated jointly by the Conference of Circuit Court Judges, the Conference of County Court Judges, and the Trial Lawyers Section of The Florida Bar, specifically address deposition conduct. See Section F (2008 edition). These guidelines make clear that counsel should refrain from repetitive and argumentative questions, as well as questions and comments designed to harass or intimidate a witness or opposing counsel. Objections should be asserted by stating: “I object to the form of the question.” The grounds should not be stated unless asked for by the examining attorney. When the grounds are requested, they should be stated succinctly. Coaching the deponent or suggesting answers through objections or otherwise should not occur. Counsel are also advised not to engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

Let there be no doubt that violations of these rules of fairness and civility may result in significant disciplinary action. In *The Florida Bar v. Ratiner*,<sup>1</sup> a lawyer was publicly reprimanded by the Supreme Court of Florida, suspended for sixty days, and put on probation for two years, all for engaging in deposition misconduct. See also *5500 North Corp. v. Willis*,<sup>2</sup> in which the Fifth District Court of Appeal approved the trial court's referral of deposition conduct issues to The Florida Bar. The appellate court noted that in terms of counsel's deposition behavior, "[w]e would expect more civility from Beavis and Butthead."

Many judges permit counsel to telephone the court for a brief hearing if irreconcilable issues arise at deposition. Counsel should first exhaust all efforts to resolve a dispute that threatens the ability to proceed with deposition. Failing agreement, counsel may want to take a break during the deposition and call chambers, requesting a brief hearing to resolve the matter. This is especially true if the deposition is out-of-state and would be costly to reconvene. It helps to know the judge's preferences in this regard, but judges generally are aware that the use of this procedure--if not abused by counsel--provides an excellent opportunity to attempt to resolve issues on the spot before they develop into more costly and complex proceedings after the fact.

All else failing, a party or witness who reasonably believes that a deposition is "being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the witness or party," or that "objection and instruction to a deponent not to

---

<sup>1</sup> 46 So. 3d 35 (Fla. 2010)

<sup>2</sup> 729 So. 2d 508, 514 (Fla. 5<sup>th</sup> DCA 1999).

answer are being made in violation of rule 1.310(c),” may terminate the deposition and immediately move for protective order. Rule 1.310(d); see *a/so* Court Commentary and Authors’ Comment—1967 to Rule 1.310(d). Rule 1.310(d) provides courts the power to terminate or limit the scope of a deposition “on motion of a party or of the deponent.” All phases of the examination are subject to the control of the court, which has discretion to make any orders necessary to prevent abuse of the discovery and deposition process.

## CHAPTER EIGHT

---

### PRODUCTION OF DOCUMENTS BY A NONPARTY IN RESPONSE TO SUBPOENA

In the past, before the subpoena was issued, some attorneys would send to the nonparty with the proposed subpoena, a “courtesy” copy of a notice of intent to subpoena. This sometimes resulted in a nonparty sending the documents requested in the proposed subpoena before the parties to the action had an opportunity to object. Amendments to Fla. R. Civ. P. 1.351 have alleviated the legal and ethical issues raised by its predecessor. The rule now requires that notice be served on every party at least 10 days before the subpoena is issued if service is by “delivery,” and 15 days if service is by mail. A “courtesy” copy of the notice or proposed subpoena may not be furnished to the person on whom the subpoena is to be served. The procedure for serving the notice is to be done pursuant to Fla. R. Civ. P. 1.080. As of September 1, 2012, service by e-mail is considered to be appropriate service. Any objection raised by any party within 10 days of service of the notice prohibits the production of those documents under this rule. A party’s recourse after an objection is filed is to follow the procedure set forth in Fla. R. Civ. P. 1.351(d), which specifies that the party seeking the production of the objected to documents may file a motion with the Court seeking a ruling on the objection or may proceed under Rule 1.310, which governs depositions.

If no objection is made, two alternatives exist: (1) the attorney of record in the action may issue the subpoena and may serve it in compliance with Fla. R. Civ. P. 1.410(d); or (2) the party desiring production must deliver to the clerk for issuance a subpoena and a certificate of counsel or pro se party that no timely objection has

been received from any party, and the clerk must issue the subpoena and deliver it to the party desiring production.<sup>1</sup>

The subpoena must be identical to the copy attached to the notice and must *specify* that no testimony is to be taken and only the production of the delineated documents or things is required. If the party being served with the subpoena objects, the documents or things requested may not be produced and the requesting party's only recourse is through Rule 1.310, which outlines the procedures for taking depositions.

The committee notes indicate that Rule 1.351 was amended to avoid premature production of documents by nonparties, to clarify the clerk's role in the process, and to clarify further that the recourse to any objection is through Rule 1.351 and the procedures set forth therein. Likewise, the rule prohibits a party from prematurely sending a nonparty a copy of the required notice or proposed subpoena. Attorneys in the action may issue subpoenas in conjunction with Rule 1.410.

---

<sup>1</sup> Rule 1.351(c).

## CHAPTER NINE

---

### COMPULSORY MEDICAL EXAMINATIONS AND DISCOVERY OF EXAMINER BIAS

Fla. R. Civ. P. 1.360 provides that a party may request that any other party submit to an examination by a qualified expert when the condition that is the subject of the requested examination is in controversy and the party submitting the request has good cause for the examination. The party making the request has the burden to show that the rule's "good cause" and "in controversy" requirements have been satisfied.<sup>1</sup> Verified pleadings or affidavits may be sufficient to satisfy the rule's requirements instead of an evidentiary hearing. The party making the request also must disclose the nature of the examination and the extent of testing that may be performed by the examining physician.<sup>2</sup> Although the examination may include invasive tests, the party to be examined is entitled to know the extent of the tests, in order to seek the protection of the court in providing for reasonable measures so that the testing will not cause injury. A party requesting a compulsory medical examination is not limited to a single examination of the other party; however, the court should require the requesting party to make a stronger showing of necessity before the second request is authorized.<sup>3</sup>

Rule 1.360 does not specify where the examination is to be performed. The Rule requires that the time, place, manner, conditions, and scope be "reasonable." The determination of what is reasonable depends on the facts of the case and falls

---

<sup>1</sup> *Russenberger v. Russenberger*, 639 So. 2d 963 (Fla. 1994); *Olges v. Dougherty*, 856 So. 2d 6 (Fla. 1st DCA 2003). Once the mental or physical condition ceases to be an issue or "in controversy," good cause will not exist for an examination under Rule 1.360, and *Hastings v. Rigsbee*, 875 So. 2d 772, (Fla. 2d DCA 2004).

<sup>2</sup> *Schagrin v. Nacht*, 683 So. 2d 1173 (Fla. 4th DCA 1996).

<sup>3</sup> *Royal Caribbean Cruises, Ltd. v. Cox*, 974 So. 2d 462, 466 (Fla. 3d DCA 2008).

within the trial court's discretion under *McKenney v. Airport Rent-A-Car, Inc.*<sup>4</sup> Rule 1.360 is based on Fed. R. Civ. P. 35, which has been interpreted as permitting the trial court to order the plaintiff to be examined where the trial will be held because this was the venue selected by the plaintiff and it would make it convenient for the physician to testify. In *McKenney*, an examination of the plaintiff in the county in which the trial was to be held was not an abuse of discretion, even though the plaintiff resided in a different county. In *Tsutras v. Duhe*,<sup>5</sup> it was held that the examination of a nonresident plaintiff, who already had come to Florida at his expense for his deposition, should either be at a location that had the appropriate medical specialties convenient to the nonresident plaintiff, or the defense should be required to cover all expenses of the plaintiff's return trip to Florida for examination. In *Goeddel v. Davis, M.D.*<sup>6</sup> a trial court did not abuse its discretion by compelling the patient, who resided in another state, to submit to a compulsory medical examination in the forum state where the compulsory medical examination was to be conducted during the same trip as a deposition the patient was ordered to attend, and the defendants were ordered to contribute to the cost of the patient's trip. In *Blagrove v. Smith*,<sup>7</sup> a Hernando County trial court did not abuse its discretion by permitting a medical examination in neighboring Hillsborough County because of the geographical proximity of the two counties. However, a trial court did abuse its discretion where the court sanctioned a plaintiff with dismissal after finding the plaintiff willfully violated a court order in failing to attend a second IME

---

<sup>4</sup> 686 So. 2d 771 (Fla. 4th DCA 1997). See also *Leinhart v. Jurkovich* 882 So. 2d 456 (Fla. 4th DCA 2004) where request for IME 10 days before trial was denied and upheld on appeal as being within Trial Court's discretion.

<sup>5</sup> 685 So. 2d 979 (Fla. 5th DCA 1997).

<sup>6</sup> 993 So. 2d 99, 100 (Fla. 5th DCA 2008).

<sup>7</sup> 701 So. 2d 584 (Fla. 5th DCA 1997).

despite the fact that the plaintiff had moved to a foreign state, advised counsel two days prior that he was financially unable to attend, and filed a motion for protective order with an affidavit detailing his finances and stating he had no available funds or credit to travel to Florida. *Littlefield v. J. Pat Torrence*.<sup>8</sup>

The discovery of the examination report and deposition of the examiner for use at trial is permissible under Rule 1.360, even though the examination was prepared in anticipation of litigation by an expert who was not expected to be called at trial. *Dimeglio v. Briggs-Mugrauer*<sup>9</sup> involved a claim for uninsured motorist benefits. The insurance contract provided that the claimant would consent to an examination by the insurer's chosen physician if a claim was filed. Before initiation of the lawsuit, the insurer scheduled a medical examination that was attended by the claimant, and the examiner confirmed that the claimant had suffered injury. After suit was filed, the plaintiff sought to take the videotape deposition of the examiner for use at trial. The insurer filed a motion for a protective order, claiming that the examination and report were protected as work product, and the trial court agreed. The *Dimeglio* court reversed, holding that although the examination was prepared in anticipation of litigation, Rule 1.360 applied, and the insurer could not claim a work product privilege for a physician examination of the plaintiff by the insurance company's chosen physician.

---

<sup>8</sup> See *Littlefield v. J. Pat Torrence* 778 So. 2d 368 (Fla. 2d DCA 2001). See also *Wapnick v. State Farm Mutual Automobile Insurance Co.*, 54 So. 3d 1065 (Fla. 4<sup>th</sup> DCA 2011) (requiring plaintiff to travel approximately 100 miles from county of residence where defendant offered to reimburse travel expenses, although reversing denial of coverage).

<sup>9</sup> 708 So. 2d 637 (Fla. 2d DCA 1998).

### **Issue 1:**

The plaintiff objects to the doctor selected by the defendant to examine the plaintiff.

### **Resolution:**

Judges generally will allow the medical examination to be conducted by the doctor of the defendant's choice. The rationale sometimes given is that the plaintiff's examining and treating physicians have been selected by the plaintiff.<sup>10</sup> However, whether to permit a defendant's request for examination under Rule 1.360 is a matter of judicial discretion. Furthermore, Rule 1.360(a)(3) permits a trial court to establish protective rules for the compulsory examination. Thus, a defendant does not have an absolute right to select the expert to perform the examination.<sup>11</sup>

### **Issue 2:**

Who may accompany the examinee to a compulsory examination, and may the examination be videotaped, audiotaped, or recorded by a court reporter?

### **Resolution:**

Rule 1.360(a)(3) permits the trial court, at the request of either party, to establish protective rules for compulsory examinations. The general rule is that attendance of a third party at a court-ordered medical examination is a matter within the sound discretion of the trial judge.<sup>12</sup> A plaintiff may request that a third party attend an examination to (1) accurately record events at the examination; (2) "assist" in providing a medical history or a description of an accident; and (3) validate or dispute

---

<sup>10</sup> *Toucet v. Big Bend Moving & Storage* 581 So. 2d 952 (Fla. 1st DCA 1991).

<sup>11</sup> *See State Farm Mutual Auto Insurance Company v. Shepard*, 644 So. 2d 111 (Fla. 2d DCA 1994).

<sup>12</sup> *Bartell v. McCarrick*, 498 So. 2d 1378 (Fla. 4th DCA 1986).

the examining doctor's findings and conclusions.<sup>13</sup> The burden of proof and persuasion rests with the party opposing the attendance to show why the court should deny the examinee's right to have present counsel, a physician, or another representative.<sup>14</sup>

Without a valid reason to prohibit the third party's presence, the examinee's representative should be allowed.<sup>15</sup> In making the decision about third-party attendance at the examination, the trial court should consider the nature of the examination, the function that the requested third party will serve at the examination, and the reason that the doctor objects to the presence of the third party. A doctor must provide case-specific justification to support a claim in an affidavit that the presence at the examination of a third party will be disruptive.<sup>16</sup> Once this test is satisfied, the defendant must prove at an evidentiary hearing that no other qualified physician can be located in the area who would be willing to perform the examination with a court reporter (or attorney) present.<sup>17</sup> This criteria applies to compulsory examinations for physical injuries and psychiatric examinations.<sup>18</sup>

The rationale for permitting the presence of the examinee's attorney is to protect the examinee from improper questions unrelated to the examination.<sup>19</sup>

---

<sup>13</sup> *Wilkins v. Palumbo*, 617 So. 2d 850 (Fla. 2d DCA 1993).

<sup>14</sup> *Broyles v. Reilly*, 695 So. 2d 832 (Fla. 2d DCA 1997); *Wilkins*; *Stakely v. Allstate Ins. Co.*, 547 So. 2d 275 (Fla. 2d DCA 1989).

<sup>15</sup> See *Broyles* (videographer and attorney); *Palank v. CSX Transportation, Inc.*, 657 So. 2d 48 (Fla. 4th DCA 1995) (in wrongful death case, mother of minor plaintiffs, counsel, and means of recording); *Wilkins* (court reporter); *McCorkle v. Fast*, 599 So. 2d 277 (Fla. 2d DCA 1992) (attorney); *Collins v. Skinner*, 576 So. 2d 1377 (Fla. 2d DCA 1991) (court reporter); *Stakely* (court reporter); *Bartell* (representative from attorney's office); *Gibson v. Gibson*, 456 So. 2d 1320 (Fla. 4th DCA 1984) (court reporter).

<sup>16</sup> *Wilkins*.

<sup>17</sup> *Broyles*.

<sup>18</sup> *Freeman v. Latherow*, 722 So. 2d 885 (Fla. 2d DCA 1998); *Stephens v. State of Florida*, 932 So. 2d 563 (Fla. 1st DCA 2006) (the DCA held that the trial court did not deviate from the law when it denied plaintiff's request that his expert witness be permitted to accompany him on a neuropsychological exam by a state-selected medical professional).

<sup>19</sup> See *Toucet*.

Furthermore, the examinee has a right to preserve by objective means the precise communications that occurred during the examination. Without a record, the examinee will be compelled to challenge the credibility of the examiner should a dispute arise later. “Both the examiner and examinee should benefit by the objective recording of the proceedings, and the integrity and value of the examination as evidence in the judicial proceedings should be enhanced.”<sup>20</sup> The rationale for permitting a third party’s presence or recording the examination is based on the examinee’s right of privacy rather than the needs of the examiner. If the examinee is compelled to have his or her privacy disturbed in the form of a compulsory examination, the examinee is entitled to limit the intrusion to the purpose of the examination and an accurate preservation of the record.

Courts may recognize situations in which a third party’s presence should not be allowed. Those situations may include the existence of a language barrier, the inability to engage any medical examiner who will perform the examination in the presence of a third party, the particular psychological or physical needs of the examinee, or the customs and practices in the area of the bar and medical profession.<sup>21</sup> However, in the absence of truly extraordinary circumstances, a defendant will not be able to satisfy its burden of proof and persuasion to prevent the attendance of a passive observer.<sup>22</sup> It has been held that a court reporter’s potential interference with the examination or inability to transcribe the physician’s tone or facial expressions are

---

<sup>20</sup> *Gibson v. Gibson*, 456 So. 2d at 1320, 1321 (Fla. 4th DCA 1984).

<sup>21</sup> *Bartell*.

<sup>22</sup> *Broyles; Wilkins*.

invalid reasons.<sup>23</sup> The examiner's refusal to perform the examination in the presence of third parties also is an insufficient ground for a court to find that a third party's presence would be disruptive.<sup>24</sup> Excluding a court reporter because of a claimed chilling effect on physicians and the diminishing number of physicians available to conduct examinations also is insufficient.<sup>25</sup> However, it would take an exceptional circumstance to permit anyone other than a videographer or court reporter and the plaintiff's attorney to be present on behalf of the plaintiff at a Rule 1.360 compulsory examination.<sup>26</sup> For example, defendants in a personal injury lawsuit were not entitled to have a videographer record the examination even if the examinee had her own videographer present. *Prince v. Mallari*.<sup>27</sup>

In most circumstances, the examinee's desire to have the examination videotaped should be approved. There is no reason that the presence at an examination of a videographer should be treated differently from that of a court reporter. A trial court order that prohibits videotaping a compulsory examination without any evidence of valid, case-specific objections from the complaining party may result in irreparable harm to the requesting party and serve to justify extraordinary relief.<sup>28</sup> Similarly, an audiotape may be substituted to ensure that the examiner is not asking impermissible questions and that an accurate record of the examination is preserved.<sup>29</sup> Video or audio tape of the CME obtained by the examinee's attorney should be

---

<sup>23</sup> *Collins*.

<sup>24</sup> *McCorkle; Toucet*.

<sup>25</sup> *Truesdale v. Landau*, 573 So. 2d 429 (Fla. 5th DCA 1991). See also *Broyles*.

<sup>26</sup> *Broyles*.

<sup>27</sup> 36 So. 3d 128 (Fla. 5<sup>th</sup> DCA 2010).

<sup>28</sup> *Lunceford v. Florida Central Railroad Co., Inc.*, 728 So. 2d 1239 (Fla. 5th DCA 1999).

<sup>29</sup> See *Medrano v. BEC Const. Corp.*, 588 So. 2d 1056 (Fla. 3d DCA 1991).

considered work product as long as the recording is not being used for impeachment or use at trial. See *McGarrah v. Bayfront Medical Center*.<sup>30</sup>

In *McClennan v. American Building Maintenance*,<sup>31</sup> the court applied the rationale in *Toucet, supra*, and *Bartell, supra*, to workers' compensation disputes, and held that third parties, including attorneys, could attend an independent medical examination given under F.S. §440.13(2)(b).

In *U.S. Security Ins. Co. v. Cimino*,<sup>32</sup> the Florida Supreme Court held that, for a medical examination conducted under F.S. §627.736(7) for personal injury protection benefits, "the insured should be afforded the same protections as are afforded to plaintiffs for Rule 1.360 and workers' compensation examinations."

There are limitations on discovery of an examiner performing a CME. For example, an examiner will not be compelled to disclose CME reports of other non-party examinees or to testify about findings contained in those reports.<sup>33</sup> However, in *Allstate Insurance Co. v. Boecher*,<sup>34</sup> the Supreme Court held that neither *Elkins v. Syken*<sup>35</sup> nor Rule 1.280(b)(4)(A) prevents discovery of a party's relationship with a particular expert when the discovery is propounded directly to the party. In *Boecher*, the court held that the jury was entitled to know the extent of the financial connection between the party and the expert witness. Accordingly, the jury's right to assess the potential bias of the

---

<sup>30</sup> See *McGarrah v. Bayfront Medical Center*, 889 So. 2d 923 (Fla. 2d DCA 2004).

<sup>31</sup> 648 So. 2d 1214 (Fla. 1st DCA 1995).

<sup>32</sup> 754 So. 2d 697, 701 (Fla. 2000).

<sup>33</sup> *Crowley v. Lamming*, 66 So. 3d 355 (Fla. 2d DCA 2011); *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla. 4<sup>th</sup> DCA 2012) (sustaining objections to interrogatories directed to the examiner's "opinions and basis of the opinions" of other non-party examinees as same constituted an intrusion into those non-parties' privacy rights).

<sup>34</sup> 733 So. 2d 993 (Fla. 1999).

<sup>35</sup> 672 So. 2d 517 (Fla. 1996).

expert witness outweighed any of the competing interests expressed in *Elkins*. See also *Price v. Hannahs*<sup>36</sup>; *Katzman v. Rediron Fabrication*.<sup>37</sup>

---

<sup>36</sup> 954 So. 2d 97 (Fla. 2d DCA 2007) (quashing order requiring production of documents substantiating percentage of expert work for patients involved in automobile collisions which would require production of non-existent records).

<sup>37</sup> 76 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2011) (requiring non-party treating physician to disclose collections for a controversial surgical procedure in litigation and non-litigation cases).

# CHAPTER TEN

---

## OBTAINING PSYCHOLOGICAL RECORDS WHEN PAIN AND SUFFERING ARE AT ISSUE

Chapter 90, Florida Statutes, codifies the psychotherapist-patient privilege<sup>1</sup> and provides in pertinent part:

(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.<sup>2</sup>

\* \* \*

(4) There is no privilege under this section:

\* \* \*

(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.<sup>3</sup>

---

<sup>1</sup> A psychotherapist is defined by section 90.503(1), Florida Statutes (2012) and includes any person authorized to practice medicine or reasonably believed by the patient so to be, that is "engaged in the diagnosis or treatment of a mental or emotional condition." A medical doctor is a psychotherapist for purposes of the statute if he or she is engaged in treating or diagnosing a mental condition, however, other health care professionals, such as psychologists, are only considered psychotherapists if they are "engaged *primarily* in the diagnosis or treatment of a mental or emotional condition..." Compare § 90.503(1)(a)1., with §90.503(1)(a)2., Fla. Stat. (emphasis added). In 2006, the Legislature amended section 90.503(1)(a), Florida Statutes, to include advanced registered nurse practitioners within the ambit of the statute. See § 90.503(1)(a)5., Fla. Stat. (2006) (effective July 1, 2006).

<sup>2</sup> § 90.503(2), Fla. Stat. (2012).

<sup>3</sup> § 90.503(4)(c), Fla. Stat.(2012).

Moreover, pursuant to section 394.4615, Florida Statutes (2012), clinical records maintained by psychotherapists are shielded by a broad cloak of confidentiality; the statute carves out specific instances wherein disclosure of information from patient records shall or may be released. The intent behind the enactment of the psychotherapist-patient privilege is to encourage individuals suffering from mental, emotional, or behavioral disorders to seek out and obtain treatment without fearing public scrutiny and enable those individuals experiencing such problems to obtain proper care and assistance.<sup>4</sup>

Section 90.503(4)(c), Florida Statutes (2012), one of the statutory exceptions to the privilege, stems from the notion that a party should be barred from using the privilege as both a sword and a shield, that is, seeking to recover for mental and or emotional damages on the one hand, while hiding behind the privilege on the other.<sup>5</sup> For example, when a plaintiff seeks recovery for mental anguish or emotional distress, Florida courts generally hold that the plaintiff has caused his or her mental condition to be at issue and the psychotherapist privilege is therefore, waived.<sup>6</sup> The statutory

---

<sup>4</sup> *Segarra v. Segarra*, 932 So. 2d 1159, 1161 (Fla 3d DCA 2006) (citing *Cedars Healthcare Group, Ltd. v. Freeman*, 829 So. 2d 390, 391 (Fla. 3d DCA 2002)); *Attorney Ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 305-306 (Fla. 4th DCA 2001); *Carson v. Jackson*, 466 So. 2d 1188, 1191 (Fla. 4th DCA 1985); see also *Jaffee v. Redmond*, 518 U.S. 1, 10-12 (1996) (In 1996, the United States Supreme Court held that the psychotherapist privilege serves the public interest and, if the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled.).

<sup>5</sup> *Nelson v. Womble*, 657 So. 2d 1221, 1222 (Fla. 5th DCA 1995) (citing *Sykes v. St. Andrews Sch.*, 619 So. 2d 467, 469 (Fla. 4th DCA 1993)).

<sup>6</sup> See *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1476 (11th Cir. 1984) (applying Florida law to a claim for mental anguish due to medical malpractice); *Belmont v. North Broward Hosp. Dist.*, 727 So. 2d 992, 994 (Fla. 4th DCA 1999) (no privilege after patient's death in proceeding in which party relies upon condition as element of claim or defense); *Nelson*, 657 So. 2d at 1222 (psychotherapist-patient privilege did not preclude discovery in personal injury action seeking loss of consortium and infliction of mental anguish); *Scheff v. Mayo*, 645 So. 2d 181, 182 (Fla. 3d DCA 1994) (mental anguish from rear-end motor vehicle accident); *Sykes v. St. Andrews Sch.*, 619 So. 2d 467, 468 (Fla. 4th DCA 1993) (emotional distress from sexual battery); *F.M. v. Old Cutler Presbyterian Church, Inc.*, 595 So. 2d 201, 202 (Fla. 3d DCA 1992) (allegations of sexual, physical and emotional abuse of a minor placed her mental state at issue and waived her right to confidentiality concerning her mental condition); *Arzola v. Reigosa*, 534 So. 2d 883 (Fla. 3d DCA 1988) (post-accident mental anguish damages arising out of an automobile/bicycle collision barred the plaintiff from invoking the psychotherapist-patient privilege). Compare *Nelson*, 657 So. 2d at 1222 (determining loss of enjoyment of life as a claim for loss of consortium) with *Partner-Brown v. Bornstein, D.P.M.*, 734 So. 2d 555, 556 (Fla. 5th DCA 1999) ("The allusion to loss of enjoyment of life, without more, does not place the mental or emotional condition of the plaintiff at issue so to waive the protection of section 90.503.").

privilege is also deemed waived where a party relies on his or her post-accident mental or emotional condition as an element of a claim or defense.<sup>7</sup> Failure to timely assert the privilege does not constitute waiver, so long as the information already produced does not amount to a significant part of the matter or communication for which the privilege is being asserted.<sup>8</sup> The waiver provision contained in section 90.507, Florida Statutes (2012) will apply, however, when information previously produced in discovery is considered a substantial part of the patient's claim of privilege.<sup>9</sup> Limited voluntary disclosure of some aspects of the psychotherapist-patient privileged matters or communications will not constitute a waiver.<sup>10</sup>

Conversely, where a patient's symptoms accompanying a physical injury are of a type which might arguably be associated with some separate mental or emotional condition, the privilege will be upheld.<sup>11</sup> In addition, a claim for loss of enjoyment of life,

---

<sup>7</sup> *Arzola*, 534 So. 2d 883; *Connell v. Guardianship of Connell*, 476 So. 2d 1381 (Fla. 1st DCA 1985); *Helmick v. McKinnon*, 657 So. 2d 1279, 1280 (Fla. 5th DCA 1995) (In the context of personal injury actions, pre-accident psychological and psychiatric records are relevant to determine whether the condition existed before the accident).

<sup>8</sup> *See Palm Beach County Sch. Bd. v. Morrison*, 621 So. 2d 464, 469 (Fla. 4th DCA 1993) (rejecting the argument that the plaintiff waived the psychotherapist-patient privilege because it was not timely asserted and reasoning that because it was asserted before there was an actual disclosure of the information for which the patient claimed the privilege, section 90.507, Florida Statutes was not applicable).

<sup>9</sup> *Id.*; *Garbacik v. Wal-Mart Transp., LLC*, 932 So. 2d 500, 503-504 (Fla. 5th DCA 2006) (citing *Sykes v. St. Andrews Sch.*, 619 So. 2d 467, 469 (Fla. 4th DCA 1993)).

<sup>10</sup> *Commercial Carrier Corp. v. Kelley*, 903 So. 2d 240, 241 (Fla. 5th DCA 2005) (no waiver of privilege recognized, even though patient voluntarily disclosed some aspects of the privileged matters or communications during her deposition by admitting that she had been prescribed anti-depressants for her post-traumatic stress disorder following the horrific traffic crash at issue, since the plaintiff never placed her mental state a material element of any claim or defense); *Olson v. Blasco*, 676 So. 2d 481, 482 (Fla. 4th DCA 1996) (A defendant's listing of therapists' names in response to a criminal discovery request does not waive the privilege in a wrongful death action stemming from the same facts when there is no showing that there will be a defense based on a mental condition.); *see also Bandorf v. Volusia County Dept. of Corrections*, 939 So. 2d 249, 250 (Fla. 1st DCA 2006) (worker's compensation plaintiff claiming fatigue and neurological symptoms from physical injuries does not place emotional or mental condition at issue); *Segarra v. Segarra*, 932 So. 2d 1159, 1160 (Fla. 3d DCA 2006) (The psychotherapist-patient privilege is not waived in joint counseling sessions).

<sup>11</sup> *Bandorf*, 939 So. 2d at 251 (upholding the privilege in a worker's compensation action involving an employees' repetitive exposure to mold, toxic substances and chemicals in the workplace which led the employee to suffer fatigue and neurological symptoms).

“without more, does not place the mental or emotional condition of the plaintiff at issue so as to waive the protection of section 90.503.”<sup>12</sup>

The party seeking to depose a psychotherapist or obtain psychological records bears the burden of showing that the patient’s mental or emotional condition has been introduced as an issue in the case.<sup>13</sup> What is more, if a plaintiff has not placed his or her mental condition at issue, the defendant’s sole contention that the plaintiff’s mental stability is at issue will not overcome the privilege.<sup>14</sup>

The privilege does not protect from discovery any relevant medical records of a psychiatrist or other medical provider made for the purpose of diagnosis or treatment of a condition other than mental or emotional ailments.<sup>15</sup> Thus, relevant medical records that do not pertain to the diagnosis or treatment of a mental, emotional or behavioral disorder are not privileged and should be produced even if they are maintained by a psychiatrist. On the other hand, records made for the purpose of diagnosis or treatment of a mental, emotional or behavioral conditions that may contain other medical information, such as physical examinations, remain privileged and are not subject to disclosure.<sup>16</sup>

Florida law recognizes that a plaintiff who has incurred a physical injury may allege and prove physical pain and suffering as an element of a claim for monetary

---

<sup>12</sup> *Byxbee v. Reyes*, 850 So. 2d 595, 596 (Fla. 4th DCA 2003) (quoting *Partner-Brown v. Bornstein*, 734 So. 2d 555, 556 (Fla. 5th DCA 1999)).

<sup>13</sup> *Garbacik*, 932 So. 2d at 503; *Morrison*, 621 So. 2d at 468; *Yoho v. Lindsley*, 248 So. 2d 187, 192 (Fla. 4th DCA 1971).

<sup>14</sup> *Weinstock v. Groth*, 659 So. 2d 713, 715 (Fla. 5th DCA 1995) (plaintiff able to assert privilege because she had not placed her mental condition at issue in her defamation action); *Cruz-Govin v. Torres*, 29 So. 3d 393, 396 (Fla. 3d DCA 2010) (“The statutory exception applies when the patient, not the opposing party who seeks the privileged information, places his mental health at issue.”).

<sup>15</sup> *Oswald v. Diamond*, 576 So. 2d 909, 910 (Fla. 1st DCA 1991) (reversing in part a trial order granting a motion to compel discovery of medical records to the extent that medical testimony and reports not pertaining to the diagnosis and treatment of a mental or emotional disorder may exist).

<sup>16</sup> *Byxbee*, 850 So. 2d at 596.

damages.<sup>17</sup> The term “pain and suffering” has not been judicially defined, however, Florida courts have provided a number of factors that may be considered by the trier of fact in awarding damages for pain and suffering.<sup>18</sup> These factors recognize that pain and suffering has a mental as well as a physical component.<sup>19</sup> Thus, an issue arises concerning whether a plaintiff has put his or her mental condition at issue by virtue of pleading pain and suffering.

Accordingly, a discovery order compelling disclosure of information otherwise protected by the psychotherapist-patient privilege is reviewable by certiorari.<sup>20</sup>

### **Issue 1:**

The plaintiff files a complaint seeking damages for bodily injury and resulting “pain and suffering,” but does not specifically seek damages for “mental anguish” or “emotional harm.” The defendant seeks production of medical records from the plaintiff’s medical providers. The plaintiff objects and files a motion for a protective order, asserting that some of the records were made for the purpose of diagnosis or treatment of a mental or emotional condition.

### **Resolution:**

The court should conduct an *in camera* inspection of the desired records. Section 90.503, Florida Statutes (2012), restricts the discovery of those medical records

---

<sup>17</sup> *Grainger v. Fuller*, 72 So. 462, 463 (Fla. 1916) (allowing recovery of damages for future pain and suffering as a direct effect of a physical injury caused to the plaintiff); *Parrish v. City of Orlando*, 53 So. 3d 1199, 1203 (Fla. 5th DCA 2011) (“[W]here evidence is undisputed or substantially undisputed that a plaintiff has experienced and will experience pain and suffering as a result of an accident, a zero award for pain and suffering is inadequate as a matter of law.”).

<sup>18</sup> *Tampa Electric Co. v. Bazemore*, 96 So. 297, 302 (Fla. 1923) (In determining the measure of damages, the court embraced various elements when considering pain and suffering, including, physical and mental pain and suffering, resulting from the character or nature of the injury, the inconvenience, humiliation, and embarrassment the plaintiff will suffer on account of the loss of a limb, the diminished capacity for enjoyment of life to which all the limbs and organs of the body with which nature has provided us are so essential, and the plaintiff’s diminished capacity for earning a living.); *Bandorf*, 939 So. 2d at 251 (observing that, “[i]t should be apparent that physical pain and suffering, absent mental anguish, can impair the enjoyment of life”).

<sup>19</sup> *Id.*

<sup>20</sup> *Hill v. State of Florida*, 846 So. 2d 1208, 1211-1212 (Fla 5th DCA 2003).

made for the purpose of diagnosis or treatment of a mental or emotional condition, but not of all medical records.

With regard to medical records that the court determines were made for the purpose of diagnosis or treatment of a mental or emotional condition, the court must determine whether the plaintiff has made a mental, emotional or behavioral condition an element of a claim. To constitute a waiver and to place at issue the plaintiff's mental condition, the plaintiff must seek damages that include an ingredient of psychological harm such as mental anguish, inconvenience, loss of capacity for the enjoyment of life (although a claim for loss of enjoyment of life is not in and of itself dispositive), or other emotional harm. By pleading simply "bodily injury and pain and suffering," the plaintiff may have put mental condition at issue. Based on the allegation, it is not clear what damages the plaintiff is seeking. If the plaintiff chooses to maintain the psychotherapist-patient privilege, the claim for psychological injury should be stricken.

**Issue 2:**

The plaintiff places mental or emotional condition at issue by seeking damages for "mental anguish" or "emotional distress." The defendant seeks production of the plaintiff's psychological records. The plaintiff moves for a protective order and withdraws the claim for mental or emotional condition damages.

**Resolution:**

The motion for a protective order should be granted under *Sykes v. St. Andrews School*<sup>21</sup>. The plaintiff's withdrawal of the claim for emotional harm eliminates any

---

<sup>21</sup> 619 So. 2d 467 (Fla. 4th DCA 1993).

claim that the privilege has been waived.<sup>22</sup> The *Sykes* Court reasoned that the purpose of the exclusionary exemption in section 90.503(4)(c), Florida Statutes, “is to prevent a party from using the privilege as both a sword and a shield.”<sup>23</sup> Once the mental condition has been withdrawn as an issue, the plaintiff has dropped his or her sword.<sup>24</sup> The necessity for the defendant to pierce the shield becomes irrelevant and immaterial to the plaintiff’s claim for damages.<sup>25</sup>

---

<sup>22</sup> *Sykes*, 619 So. 2d 467, cited with approval in *Bolin v. State*, 793 So. 2d 894, 898 (Fla. 2001) (waiver of privilege is revocable); *Garbacik*, 932 So. 2d at 503; see also *Webb v. Dollar Tree Stores, Inc.*, 987 So. 2d 778, 779 (Fla. 3d DCA 2008) (granting certiorari and quashing order requiring discovery of plaintiff’s psychiatric records where plaintiff did not plead and has otherwise unequivocally renounced any claim for mental anguish or mental pain and suffering arising from the accident at issue).

<sup>23</sup> *Sykes*, 619 So. 2d at 469.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

## CHAPTER ELEVEN

---

### **FABRE IDENTIFICATION OF OTHER CULPABLE PARTIES: WHEN AND HOW SHOULD IT BE DONE?**

In negligence cases today, defendants may affirmatively assert a *Fabre* defense<sup>1</sup> that other individuals or entities are at fault for causing the alleged injury. The goal of a *Fabre* defense is to have the jury apportion fault to every nonparty involved in the incident that allegedly caused the injury. The availability of a *Fabre* defense is consistent with Florida's historical decision to abandon contributory negligence and adopt pure comparative negligence.<sup>2</sup> Florida law requires that a defendant adequately plead and provide proof of the liability of the nonparty. Specifically, in *Nash v. Wells Fargo Guard Services, Inc.*, the Florida Supreme Court outlined the following procedure for asserting a *Fabre* defense:

. . . in order to include a nonparty on the verdict form pursuant to *Fabre*, the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty. The defendant may move to amend pleadings to assert the negligence of a nonparty subject to the requirements of Florida Rule of Civil Procedure 1.190. However, notice prior to trial is necessary because the assertion that noneconomic damages should be apportioned against a nonparty may affect both the presentation of the case and the trial court's rulings on evidentiary issues.<sup>3</sup>

Thus, a *Fabre* defense must be asserted "prior to trial" which has typically been interpreted as any time before the pre-trial conference.<sup>4</sup> This interpretation is, of course,

---

<sup>1</sup> *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

<sup>2</sup> *See Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973); *see also* Fla. Stat. § 768.81 (2010).

<sup>3</sup> *Nash v. Wells Fargo Guard Services, Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996).

<sup>4</sup> *Shah v. Bland*, 973 So. 2d 1188, 1191 (Fla. 2d DCA 2008).

in the absence of any specific court order otherwise creating a deadline for the disclosure of *Fabre* defendants. In light of Fla. R. Civ. P. 1.140(b) which requires that all defenses must be raised in the responsive pleading to avoid being waived,<sup>5</sup> most defendants frequently assert a *Fabre* defense which may not sufficiently identify every or any potential nonparty. Pursuant to the *Nash* decision, this pleading deficiency must be remedied prior to trial and in accordance with the Florida Rules of Civil Procedure regarding amendments to the pleadings.<sup>6</sup>

Most challenges to vague *Fabre* defenses occur in the context of a motion to strike, since defenses should be stated with certainty.<sup>7</sup> However, any party seeking to strike an affirmative defense must keep in mind the various rules of civil procedure regarding motions to strike. For example, Rule 1.140(b), provides that the “objection of a failure to state a legal defense in an answer or reply shall be asserted by motion to strike the defense within twenty days after service of the answer or reply.”<sup>8</sup> In contrast, subsection (f) of Rule 1.140 of the Florida Rules of Civil Procedure states that “a party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matters from a pleading at any time.”<sup>9</sup> When moving to strike a pleading, or any portion thereof outside the twenty day time frame, the plaintiff should keep in mind that courts have considered the granting a motion to strike under Rule 1.140(f) a “drastic sanction.” Furthermore, “matters should be stricken as redundant or immaterial

---

<sup>5</sup> Fla. R. Civ. P. 1.140(2012) (stating every defense in law or fact to a claim for relief in a pleading shall be asserted in a responsive pleading).

<sup>6</sup> *Nash*, 678 So. 2d at 1264.

<sup>7</sup> *Zito v. Washington Fed. Savings*, 318 So. 2d 175 (Fla. 3d DCA 1975).

<sup>8</sup> Fla. R. Civ. P. 1.140(b)(2012).

<sup>9</sup> Fla. R. Civ. P. 1.140(f)(2012).

only if it is wholly irrelevant” to the cause of action and “can have no bearing on the equities and no influence at all on the decision.”<sup>10</sup> Similarly, motions to strike based upon Rule 1.150 of the Florida Rules of Civil Procedure should only be directed to sham pleadings. A “pleading is only considered a sham when it is inherently false and clearly known to be false at the time the pleading was made.”<sup>11</sup> In addition, motions to strike based on Rule 1.150 also require verification of the attorney seeking the motion to strike as well as an evidentiary hearing.<sup>12</sup> In many situations, plaintiffs may not want to file a motion to strike a defendant’s answer and defenses for a variety of reasons, e.g. allowing the case to be at issue so a trial date can be obtained. As such, another option to challenge a vague *Fabre* defense (other than filing a motion to strike) is filing a motion for summary judgment regarding the lack of any factual basis for the defendant’s *Fabre* defense.

When preparing a *Fabre* defense, the defendant must consider and follow the comparative fault statute<sup>13</sup> which requires that the non-party be identified “as specifically as practicable,” unless good cause is shown. If the defensive pleading fails to meet this basic requirement and is challenged by an appropriate motion to strike, the *Fabre* defense should be stricken without prejudice providing the defendant with the opportunity to amend before trial. More specifically, the statute requires that:

a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as

---

<sup>10</sup> *Bay Colony Office Bldg. Joint Venture v. Wachovia Mortg. Co.*, 342 So. 2d 1005, 1006 (Fla. 4th DCA 1977)(Emphasis added).

<sup>11</sup> *Cromer v. Mullally*, 861 So. 2d 523, 525 (Fla. 3d DCA 2003).

<sup>12</sup> Fla. R. Civ. P. 1.150(b); *Id.*

<sup>13</sup> Fla. Stat. § 768.81 (2012).

practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure.<sup>14</sup>

While defendants may want to plead a *Fabre* defense in order to preserve it, they should be prepared to fully cooperate with discovery and to file a motion to amend their pleadings prior to trial. However, the court will also consider the plaintiff's prior knowledge of the nonparties' negligence and the plaintiff's knowledge of the potential *Fabre* defense in considering whether to permit an amendment to the pleadings even as late as the morning of trial.<sup>15</sup>

The Florida Rules of Civil Procedure are sufficiently flexible to permit liberal amendment to the pleadings under the requirements of Florida law.<sup>16</sup> Mindful of this, defendants should be required to diligently investigate a case to determine if there are other potentially negligent parties and should be required to state with specificity the identity of these nonparties, if possible, and the negligent acts upon which the defense is based. Similarly, plaintiffs should be required to cooperate by responding appropriately to discovery requests which illuminate the facts and circumstances surrounding the accident as well as identifying all known witnesses so that the defendants can fairly investigate the circumstances surrounding the accident and the alleged injury.

At trial, the defendant has the burden of presenting evidence demonstrating the negligence of the nonparty.<sup>17</sup> The comparative negligence statute articulates the

---

<sup>14</sup> Fla. Stat. § 768.81(3)(a)1.(2012).

<sup>15</sup> *Kay's Custom Drapes, Inc. v. Garrote*, 920 So. 2d 1168 (Fla. 3d DCA 2006).

<sup>16</sup> *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1192-93 (Fla. 2d DCA 2011).

<sup>17</sup> *W.R. Grace & Co. -Conn. v. Dougherty*, 636 So. 2d 746, 747-48 (Fla. 2d DCA 2004).

burden of proof for the presentation of evidence required for a successful *Fabre* defense. Specifically, section 768.81(3)(a) provides:

[i]n order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, *by a preponderance of the evidence*, the fault of the nonparty in causing the plaintiff's injuries.<sup>18</sup>

In other words, there must be sufficient evidence presented to the jury regarding the *Fabre* defense because the jury cannot be asked to speculate regarding the nonparty's negligence<sup>19</sup> and, in some instances, a specific percentage of fault may need to be presented to the jury.<sup>20</sup> Similarly, if summary judgment or directed verdict is entered in favor of the nonparty, then "the *Fabre* defendant is exonerated because there is no evidence of fault" as a matter of law.<sup>21</sup> However, if the nonparty is immune from suit, the jury may still consider the comparative negligence of the nonparty. For example, even though an employer was entitled to statutory immunity under Florida's Workers' Compensation law, the Florida Supreme Court determined that it was appropriate for the jury to consider the nonparty employer's negligence and apportion fault accordingly.<sup>22</sup> In addition, intentional torts and criminal conduct are an insufficient basis to support a *Fabre* defense because the availability of this defense is premised on the concept of comparative negligence among joint tortfeasors.<sup>23</sup> Similarly, vicarious liability alone is insufficient to support a *Fabre* defense, rather, it is the negligent conduct of the

---

<sup>18</sup> Fla. Stat. § 768.81(3)(a)2.(2012).

<sup>19</sup> 636 So. 2d at 747-48.

<sup>20</sup> *Lagueux v. Union Carbide Corp.*, 861 So. 2d 87, 89 (Fla. 4th DCA 2003).

<sup>21</sup> *Southern Bell Tel. & Tel. Co. v. Florida Dept. of Transp.*, 668 So. 2d 1039, 1041 (Fla. 3d DCA 1996).

<sup>22</sup> *Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180, 1182 (Fla. 1993).

<sup>23</sup> *Hennis v. City Tropics Bistro, Inc.*, 1 So. 3d 1152, 1155 (Fla. 5th DCA 2009).

active tortfeasors, who have not been named in a lawsuit, who constitute appropriate *Fabre* defendants.<sup>24</sup>

Once the pleading and proof requirements have been met, the court should instruct the jury regarding the negligence of the nonparty and the verdict form should include the *Fabre* defendants.<sup>25</sup> When handling *Fabre* issues, the courts should be vigilant in preventing gamesmanship by either side of the case which would delay the defendant's ability to determine whether there are other liable nonparties or delay the plaintiff's right to have every nonparty identified. The court's dilemma is to balance the plaintiff's right to have the case decided by a jury as expeditiously as possible, on the merits and without surprise or ambush, against the defendant's right to have the case justly decided on all the facts, including a determination of any fault attributable to a nonparty.

---

<sup>24</sup> *Nash*, 678 So. 2d at 1264.

<sup>25</sup> *Id.*

## CHAPTER TWELVE

---

### ELECTRONIC DISCOVERY

Florida litigators increasingly confront discovery involving electronic documents and other types of electronically stored information (“ESI”)<sup>1</sup> and the hardware and media on which ESI is created, transferred, communicated, and stored. Because far more than 95% of today’s documents are created, transferred, or maintained electronically, and because computers, phones, and other electronic devices pervade our culture, e-discovery can crop up in almost any case from a simple negligence case to commercial litigation. The fundamental issues regarding ESI involve (1) disclosure and protection of client ESI and hardware, (2) preservation of ESI by the client and the opposing parties and third parties, (3) access to ESI of opposing parties and third parties, (4) maintaining privacy and privilege, (5) costs of discovery, and (6) application of Florida’s existing discovery rules and common law in an arena that changes virtually every day as technology advances.

Competent representation of the client requires the legal skill, knowledge, thoroughness, and preparation necessary for the representation.<sup>2</sup> Competence in ESI discovery is essential to successfully manage such discovery in an effective, economical, efficient, and balanced fashion. Since the law lags behind emerging and changing technology and because of the increasing availability of discoverable ESI, it

---

<sup>1</sup> Electronically stored information, “ESI,” is the nomenclature adopted in the Florida and federal rules to refer to computer files of all kinds. See Fla. R. Civ. P. 1.280(b)(3); Rule 34, *Federal Rules of Civil Procedure*. The term ESI is not defined in the Florida and federal rules on purpose because of the ever-changing nature of such information. The *Comments* to the Federal Rules explain that the term ESI should be construed expansively “to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.”

<sup>2</sup> Rule 4-1.1, Florida Rules of Professional Conduct. See also ABA Model Rules of Professional Conduct, Rule 1.1 Competence—Comment, Para. (8) found at <http://bit.ly/NZsya6>.

is incumbent on lawyers and judges to make special efforts to become competent and stay current on ESI fundamentals and discovery.

One of the foremost challenges is protection of the client's private and privileged matters. This requires counsel to ensure that client information is protected and is disclosed only to the extent required by law or reasonably necessary to serve the client's interest.<sup>3</sup> Court recordkeeping and filing is now done in electronic format in Florida courts. This makes unfettered third party electronic access to court records, including client information in the record, far easier than ever before. Accordingly, counsel should only put in the record that which is required or reasonably necessary to serve the client's interest. If necessary, invoke the process of sealing private or sensitive information before the record becomes available as a public record.<sup>4</sup> In anticipation of electronic recordkeeping and the need for protection of privacy interests of parties and non-parties, the Florida Supreme Court enacted rules requiring lawyers to analyze and screen information for certain confidential information before it is placed in the court record.<sup>5</sup> At a minimum, pursuant to Fla. R. Civ. P. 1.280(g), information should not be filed with the court absent *good cause*, which is satisfied only when the filing of the information is allowed or required by another applicable rule of procedure or by court order.<sup>6</sup>

---

<sup>3</sup> Rule 4-1.6, Florida Rules of Professional Conduct. See also Fla. Prof. Ethics Op. 10-2 (obligation of lawyers with regard to confidentiality of client information when employing devices with hard drives and other media); 06-2 (responsibility for confidentiality and other obligations regarding metadata).

<sup>4</sup> Fla. R. Jud. Admin. 2.420.

<sup>5</sup> Fla. R. Civ. P. 1.280(g); 1.310(f)(3); 1.340(e); 1.350(d); and Fla. R. Jud. Admin 2.420; 2.425.

<sup>6</sup> Rule 1.280(g) provides: "Information obtained during discovery shall not be filed with the court until such time as it is filed for good cause. The requirement of good cause is satisfied only where the filing of the information is allowed or required by another applicable rule of procedure or by court order. All filings of discovery documents shall comply with Florida Rule of Judicial Administration 2.425. The court shall have authority to impose sanctions for violation of this rule."

The lawyer is obligated to know enough about the client's ESI and the locations it may be found to fully comply with discovery without making unnecessary disclosures. The client's equipment, data, and software should be protected from damage or destruction. The client should also be fully informed on the extent, if any, of the obligation to preserve information. At the same time, the client's business processes and handling of data should be protected from unnecessary intrusion from perceived court-related obligations. Finally, counsel and the court should be sufficiently informed of the ESI technology systems likely to contain relevant information in order to assist counsel to obtain permitted discovery of ESI from the opposing party and third parties.

Rulemaking for electronic discovery nationwide and in Florida has lagged behind the technology of how data is created, stored, and communicated. Nonetheless, Florida Civil Procedure and Judicial Administration Rules now expressly address issues caused by the use of digital technology in Florida Courts<sup>7</sup> and discovery of ESI.<sup>8</sup> Effective September 1, 2012, the Florida Supreme Court adopted several amendments to the Florida Rules of Civil Procedure<sup>9</sup> largely modeled on the 2006 Amendments to the Federal Rules of Civil Procedure.<sup>10</sup> Compatibility with federal rules enables use of

---

<sup>7</sup> *Id.*

<sup>8</sup> See *In re Amendments to the Florida Rules of Civil Procedure -- Electronic Discovery*, \_\_\_ So. 3d \_\_\_, 2012 Fla. LEXIS 1318 (Fla. July 5, 2012). See also Fla. R. Civ. P. 1.285 (inadvertent disclosure of privileged material). In addition, Florida's 9<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, and 17<sup>th</sup> Circuits have business or commercial litigation sections with special local administrative rules and processes for more complicated cases. These local rules include special handling of electronically stored information. Refer to local rules and comply with all requirements when handling cases assigned to a special commercial or business court.

<sup>9</sup> *Id.*

<sup>10</sup> Fed. R. Civ. P. 16, 26, 33, 34, 37 and 45.

federal decisions on electronic discovery as persuasive authority<sup>11</sup> in the absence of Florida cases and ensures harmony of e-discovery law between cases in Florida state courts and cases in federal court and other states. The Florida electronic discovery rules contain some improvements and adjustments from their federal counterparts that arguably make the rules better suited to the broader range of state court jurisdiction in size and subject matter. A chart comparing the Florida electronic rules and the federal rules is attached to this chapter as Appendix A.

There are many good reasons for specialized rules for ESI discovery. ESI is ephemeral; sometimes easily hidden, mislabeled, or destroyed; available from multiple sources in a variety of forms; capable of electronic search, analysis and compilation; sometimes accompanied by information or availability not apparent to the creator or user, such as metadata; and frequently misunderstood by persons lacking in expertise. ESI also exists in incredibly large quantities. Five hundred gigabyte computer hard-drives are now standard issue on most computers, whereas a single gigabyte of information is equivalent to a truckload of paper documents. Many people today receive hundreds of e-mails and text messages a day and they may store them indefinitely. It is not uncommon in business today for management personnel to each keep hundreds of thousands of emails and attachments. Large enterprises commonly store billions of emails and attachments, and in many cases may have to search through millions of emails to try to locate relevant evidence. There are often accessibility problems for some of the ESI stored, including email. The places on which ESI can be stored or located are manifold and ever

---

<sup>11</sup> Federal courts have generated copious numbers of cases under the federal e-discovery rules since 2007, because federal district judges and magistrates regularly enter published discovery opinions and orders, which creates a body of useful written law that is largely absent in Florida state court.

changing, and include the over one-trillion websites that now exist on the Internet. ESI may sometimes be easier and cheaper to search than the same quantity of paper documents, but it is often much more difficult to locate and retrieve relevant ESI. Again, that is largely because of the high volume of total ESI maintained on a multiplicity of systems that may contain relevant information. The problem is compounded by the need to review most of the material for privilege, privacy, and trade secrets before it is disclosed. For these reasons it is today far more difficult and more expensive to access, search, categorize, compile, and produce ESI than in the past when most records were only in paper form, were easily organized and accessed in centralized locations, and were far, far fewer in number and type.

Issues related to the spiraling cost issues of e-discovery contribute to the special treatment for ESI provided in the new rules and case law. Florida rules expressly provide that ESI is discoverable,<sup>12</sup> but they also require proportionality of expense.<sup>13</sup> Florida rules help maintain cost proportionality by providing an express framework for dealing with issues of preservation, production, and protection for hard-to-find and retrieve ESI and the media and equipment that hold ESI.<sup>14</sup> A person may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of burden or cost. The person from whom discovery is sought has the initial burden of showing that the information sought or the format requested is not reasonably accessible because of undue burden or cost. If that

---

<sup>12</sup> Fla. R. Civ. P. 1.280(b)(3) ("A party may obtain discovery of electronically stored information in accordance with these rules).

<sup>13</sup> Fla. R. Civ. P. 1.280(d)(2)(ii) ("the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that... the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.")

<sup>14</sup> Fla. R. Civ. P. 1.280(d)(2)(ii)

showing is made, the court may nonetheless order the discovery upon a showing of good cause. The court may specify conditions of the discovery, including ordering that some or all of the expenses incurred by the person from whom discovery is sought be paid by the party seeking the discovery.<sup>15</sup>

Florida rules also provide additional protection for confidential and privileged information not discoverable that may be inadvertently produced with discoverable material.<sup>16</sup> Rule 1.285, Florida Rules of Civil Procedure, establishes a process by which a party, person, or entity may retroactively assert privilege as to inadvertently disclosed materials, regardless of whether the inadvertent disclosure was made pursuant to “formal demand or informal request.”<sup>17</sup> The privilege must be asserted within ten days of actual discovery of the inadvertent disclosure by serving a prescribed written notice of the assertion of privilege on the party to whom the materials were disclosed.<sup>18</sup> A party receiving notice under Fla. R. Civ. P. 1.285(a) must promptly (1) return, sequester, or destroy the materials and any copies of the materials, (2) notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of the rule, and (3) take reasonable steps to retrieve the materials disclosed.<sup>19</sup> Rule 1.285 prescribes the manner in which a

---

<sup>15</sup> *Id.*

<sup>16</sup> Fla. R. Civ. P. 1.285.

<sup>17</sup> Fla. R. Civ. P. 1.285(a).

<sup>18</sup> *Id.* The notice must include specifics on the materials in question, the nature of the privilege asserted, and the date on which inadvertent disclosure was discovered. The process applies to any privilege cognizable at law, including the attorney-client, work product, and the several other types of privileges recognized in the Florida Evidence Code. See Fla. Stat. § 90.501–.510 (journalist, lawyer-client, psychotherapist-patient, sexual assault counselor-victim, domestic violence advocate-victim, husband-wife, clergy, accountant-client, and trade secret privileges). *Id.*

<sup>19</sup> Fla. R. Civ. P. 1.285(b). Nothing in Rule 1.285 diminishes or limits any ethical obligation with regard to receipt of privileged materials pursuant to Fla. R. Prof. Conduct 4-4.4(b). *Id.*

receiving party may challenge the assertion of privilege<sup>20</sup> and the effect of a court determination that privilege applies.<sup>21</sup>

Because ESI and the modern equipment that creates, holds, communicates, or manipulates it are complex and constantly evolving, sometimes expert assistance is needed by clients, counsel, or the court to search and prepare ESI for production. Such expert assistance may involve legal as well as technical issues and tasks.

The developing principles for electronic discovery and the Committee Notes to the Florida Rules of Civil Procedure encourage cooperation and transparency by the parties during meetings between counsel early in a case to try to agree on the scope of preservation and discovery and methods of production.<sup>22</sup> Counsel are encouraged to bring any areas of disagreement to the courts for resolution early in a case. These issues may also be addressed in a Rule 1.200 or Rule 1.201 case management conference.<sup>23</sup> Specific mention of case management for electronically stored information is found in Rule 1.200, Fla. R. Civ. P.<sup>24</sup> and in Rule 1.201 for cases that are declared complex.<sup>25</sup> In resolving these disputes courts must balance the need for legitimate discovery with principles of proportionality and the just, speedy and efficient resolution of the case.<sup>26</sup>

---

<sup>20</sup> Fla. R. Civ. P. 1.285(c).

<sup>21</sup> Fla. R. Civ. P. 1.285(d).

<sup>22</sup> See Fla. R. Civ. P. 1.280, 2012 Committee Notes ("The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information.")

<sup>23</sup> See Fla. R. Civ. P. 1.280, 2012 Committee Notes.

<sup>24</sup> Fla. R. Civ. P. 1.200(a)(5)-(7).

<sup>25</sup> Fla. R. Civ. P. 1.201(b)(1)(J).

<sup>26</sup> Fla. R. Civ. P. 1.010; 1.280(d).

## **LAW, POLICY, AND PRINCIPLES OF ELECTRONIC DISCOVERY:**

The complexity in application of discovery rules and policies to ESI and hardware and media is creating a burgeoning body of common law, primarily in federal court.<sup>27</sup> Case law in Florida on this subject is currently limited, but useful.<sup>28</sup> Most importantly, current Florida civil procedure rules for e-discovery were developed by selecting the best of the federal rules and distilling Florida common law authority into practical and balanced rules appropriate for the wide array of types and size of cases in Florida state courts that apply the civil rules.<sup>29</sup> The rules provide a useful framework for anticipating and addressing prominent e-discovery issues. Based on the similarity between Florida and federal rules, Florida trial courts are likely to refer to federal courts and the extensive body of case law in the federal system<sup>30</sup> as well as cases arising in states with rules similar to Florida and federal rules. State court judges are also likely to be influenced by the publications of *The Sedona Conference*®,<sup>31</sup> a private research group of lawyers, judges and e-discovery vendors

---

<sup>27</sup> This chapter focuses on Florida state court e-discovery. Discussion of federal law herein is undertaken only because of the availability of federal law for guidance in state court cases and is not intended to provide practitioners with a manual for discovery in federal court cases. See *supra* n. 11.

<sup>28</sup> See, e.g., *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So.3d 389, 2012 (Fla. 2d DCA 2012) (preservation obligations before case is filed are explained in this case); *Holland v. Barfield*, 35 So. 3d 2010 Fla. App. LEXIS 6293; 35 Fla. L. Weekly D 1018 (Fla. 5th DCA May 7, 2010) (order granting opposing expert in wrongful death case unrestricted access to review petitioner's hard drive and SIM card quashed as violative of privacy); *Menke v. Broward County School Board*, 916 So. 2d 8 (4th DCA 2005) (establishing basis and limits on access to opposing party's hardware in order to search for discoverable information); Strasser II: *Strasser v. Yalamanchi*, 783 So. 2d 1087 (Fla. 4th DCA 2001) (spoliation of electronic records); Strasser I: *Strasser v. Yalamanchi, supra*, n. 5 (designating Florida procedural rules giving rise to discovery of ESI and the equipment that holds them and setting limits on scope of such discovery); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.* 2005 WL 674885, (Fla. Cir. Ct., 2005) (one of the best known e-discovery opinions in the country, primarily because the sanctions for ESI spoliation resulted in a default judgment for \$1.5 Billion. The judgment was reversed on other grounds).

<sup>29</sup> See In re Amendments to the Florida Rules of Civil Procedure -- Electronic Discovery, *supra* n. 8.

<sup>30</sup> See the following Federal Rules of Civil Procedure and accompanying rule commentary pertaining to the 2006 amendment: Rule 16(b), 26(a)(1)(B), 26(b)(2)(B), 26(f), 26(b)(5), 33, 34, 37(f) and 45. Also see the large and rapidly growing body of opinions by United States Magistrate Judges and District Court Judges in Florida and elsewhere around the country. Federal law is far more developed than Florida e-discovery law and provides useful guidance for lawyers and judges. That is not likely to change because Florida trial court decisions are seldom published.

<sup>31</sup> The Sedona Conference ® publications are all available online without charge for individual use. See <http://www.thesedonaconference.org/>. As of 2013, judges have exclusive access to special judicial resources developed by The

dedicated to the development of standards and best practices in this evolving field of law and policy. The Sedona Conference® writings have been widely cited in the federal courts, especially its *Sedona Principles*,<sup>32</sup> and *Cooperation Proclamation*.<sup>33</sup> Also especially helpful are its *Glossary*<sup>34</sup> of e-discovery related terms, and its commentaries on *Search and Retrieval Methods*,<sup>35</sup> *Achieving Quality*,<sup>36</sup> and *Litigation Holds*.<sup>37</sup> Many excellent text and trade publications, including free online resources, are also available.<sup>38</sup>

### **FRAMEWORK FOR THE TRIAL LAWYER FACING E-DISCOVERY:**

1. Familiarize yourself with the client's records, including how they are maintained. If the client has a routine destruction policy for hard copies or ESI, address the issue of preservation immediately. Failure to preserve records, including ESI, may result in severe sanctions for the client and possibly counsel.
2. Ensure that written preservation hold notices are provided by the client to any key players within their control that instructs them to preserve any potentially relevant ESI in their custody, and to not alter or destroy

---

Sedona Conference® which are based on the aforementioned Sedona Principles and writings but tailored to the judicial perspective. Accordingly, lawyers who use, conform to, and cite pertinent materials from The Sedona Conference® will hopefully find judges enlightened on relevant policies and principles referenced *infra* notes 32-37.

<sup>32</sup> This can be downloaded after registration at:  
<http://www.thesedonaconference.org/dltForm?did=2007SummaryofSedonaPrinciples2ndEditionAug17assentforWG1.pdf>.

<sup>33</sup> See "[The Sedona Conference® Cooperation Proclamation](#)," 10 Sedona Conf. J. 331 (2009 Supp.).

<sup>34</sup> [http://www.thesedonaconference.org/dltForm?did=TSCGlossary\\_12\\_07.pdf](http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf).

<sup>35</sup> [http://www.thesedonaconference.org/dltForm?did=Best\\_Practices\\_Retrieval\\_Methods\\_revised\\_cover\\_and\\_preface.pdf](http://www.thesedonaconference.org/dltForm?did=Best_Practices_Retrieval_Methods_revised_cover_and_preface.pdf).

<sup>36</sup> [http://www.thesedonaconference.org/dltForm?did=Achieving\\_Quality.pdf](http://www.thesedonaconference.org/dltForm?did=Achieving_Quality.pdf)

<sup>37</sup> [http://www.thesedonaconference.org/dltForm?did=Legal\\_holds.pdf](http://www.thesedonaconference.org/dltForm?did=Legal_holds.pdf).

<sup>38</sup> See e.g.: Ralph Losey's weekly blog: *e-discoveryteam* found at <http://www.e-discoveryteam.com> and his several books and law review articles on electronic discovery that are referenced there. Also see Losey's list of useful reference webs in this area found at <http://floridalawfirm.com/links.html>.

potentially relevant ESI pending the conclusion of the lawsuit. Counsel should follow-up on these written notices by prompt personal communications with key players, and then periodic reminder notices thereafter. Caution should be exercised is relying upon key players to locate or collect potentially relevant ESI. Mistakes are easily made and counsel has a duty to supervise the preservation, search and collection of potentially relevant ESI.

3. Inform the client of all obligations for discovery by both sides and develop a plan to protect privileged or private information. Again, counsel should be actively involved in client's ESI preservation and collection efforts.
4. Work with the client and IT experts, if required, to develop a plan to collect and review ESI for possible production, including a review for private, privileged, or trade secret information that may be entitled to protection from open disclosure. Determinations of responsiveness, relevance, or qualification for confidentiality or privilege protections should not be delegated to the client, IT expert, or vendor as these are uniquely legal determinations for which counsel is responsible.
5. Determine the preferred format to make and receive production of ESI, typically either in the original native format, or some type of flat-file type PDF or TIFF format, and whether any types of "Metadata" (hidden information on how, by whom, and when the document was created, altered, communicated, or saved) may be relevant to the case, and if so, make a specific request for production of such metadata.

6. Determine whether expert legal or technical assistance, or both, may be needed to sort out legal or practical issues involving ESI and its media or equipment. Reach out to opposing counsel early to attempt to coordinate and cooperate on technical issues and set up lines of communication and cooperation between the IT technicians that may be retained by both sides to assist in the e-discovery efforts.
7. Find out what information may be discoverable from the opponent and seek disclosure of their preservation efforts and intended production formats, and what ESI they will seek discovery of, including their metadata demands, if any.
8. Evaluate the reasonability and suitability of the opponent's preservation, collection, and production plans, including any metadata issues, and attempt early resolution of any disputes. This should be accomplished *before* any large productions are actually made so as to avoid expensive do-overs. Beware of preservation, collection, and search based on keyword matching alone. This approach is frequently ineffective and far better technological solutions are now available.<sup>39</sup>
9. Determine whether discoverable ESI is available from multiple sources, including third parties. Frequently ESI documents, such as e-mail or draft contracts that have been communicated to or handled by multiple parties will contain useful additional or even conflicting information. Some sources

---

<sup>39</sup> William A. Gross *Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009); Losey, R. *Adventures in Electronic Discovery*, Chapter *Child's Game of "Go Fish" is a Poor Model for e-Discovery Search*, (West Thomson Reuters, 2011); *Da Silva Moore v. Publicis Groupe*, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).

of information are more accessible than others, meaning they are easier or less costly to access. Upon a proper showing under the rules, parties must be required to obtain information from the least burdensome source, and the court must limit unreasonably cumulative or duplicative discovery.<sup>40</sup>

10. Weigh the cost of ESI discovery and determine whether costs may be shifted to protect the client or whether the cost of discovery outweighs the potential benefit.<sup>41</sup>
11. Electronic discovery is typically conducted in phases wherein the most easily accessible and likely relevant ESI are searched and produced first, and then the necessity for further discovery is evaluated. Limiting factors for the first pass include accessibility, date range, custodians, and secondary ESI storage.
12. Ensure to the extent possible that the value of the discovery sought and produced is proportional in the context of the case at hand.<sup>42</sup>
13. If any of the foregoing steps require expert consultation or assistance, find a suitable expert and involve the expert early enough in the process that preservation obligations for the client and opponent are timely invoked.<sup>43</sup>

---

<sup>40</sup> Fla. R. Civ. P. 1.280(d) (the court **must** limit the frequency or extent of discovery otherwise allowed by these rules if it determines that the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive).

<sup>41</sup> Fla. R. Civ. P. 1.280(d)(1); (d)(2).

<sup>42</sup> Fla. R. Civ. P. 1.280(d)(2)(ii).

<sup>43</sup> For preservation triggers, see *Osmulski*, *supra* note 28; *Gayer v. Fine Line Constr. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007).

## **DUTIES OF ATTORNEY AND CLIENT REGARDING PRESERVATION OF ESI:**

Electronically stored information is by its very nature ephemeral and easily transportable, so it can be instantaneously lost, altered, destroyed, or hidden. Understanding the duties regarding *preservation* of evidence is vital to those who possess or control evidence and those who seek to use it in litigation.<sup>44</sup> The Florida state court common law of preservation is unique<sup>45</sup> and somewhat unsettled, increasing the challenge for lawyers advising their clients on preservation duty. In general, a duty to preserve in Florida can arise from many sources, including court orders, subpoenas, government regulations, statutes, contracts, discovery requests, and common law. Some Florida courts have held that a duty to preserve evidence is triggered by contract, by statute, or by a properly served discovery request once a lawsuit has already been filed.<sup>46</sup> In fact, a number of Florida cases have expressly held that, absent a contractual or statutory duty, there is no duty to preserve evidence before litigation commences.<sup>47</sup> However, a few Florida cases somewhat inconsistently appear to recognize a pre-suit obligation to preserve evidence where the party controlling evidence can reasonably foresee a claim and the relevance of the evidence.<sup>48</sup> For counsel advising clients on

---

<sup>44</sup> Loss of evidence can be devastating to the party whose case would benefit from lost evidence; but a person or party holding relevant evidence make likewise suffer through sanctions if the evidence is lost or destroyed.

<sup>45</sup> Florida law on triggering of the duty to preserve is unlike federal court law and virtually every other state court jurisdiction. In federal court, and in many other jurisdictions, a party in control of relevant evidence is obligated to preserve it if there is reasonable anticipation of litigation.

<sup>46</sup> See, e.g., *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (4th DCA 2004).

<sup>47</sup> *Id.* (holding that "we find Royal's argument that there was a common law duty to preserve the evidence in anticipation of litigation to be without merit"); *Gayer v. Fine Line Constr. & Electric, Inc.*, supra n. 43 at 426 (Fla. 4th DCA 2007)(holding that "[b]ecause a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request"); *In re: Electric Machinery Enterprises, Inc.*, 416 B.R. 801, 873 (M.D. Fla. 2009)("The majority of Florida courts have held that there is no common law duty to preserve evidence *before* litigation has commenced").

<sup>48</sup> See *Osmulski v. Oldsmar Fine Wine, Inc.*, supra note 28 at \*8 (Fla. 2d DCA 2012), citing *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005)(where a defendant has evidence within its control, it can "be charged with a duty to preserve evidence where it could reasonably have foreseen the [plaintiff's] claim.").

preservation duty, notwithstanding these conflicts, or perhaps because of them, it makes sense to advise the client to preserve rather than dispose of relevant evidence, even if suit has not been filed. First, some cases may be filed in either state or federal court, and reliance on a perceived lack of pre-suit duty to preserve under Florida law will not succeed in federal court where the duty to preserve is triggered when litigation is reasonably anticipated. Second, there may be a statutory or contractual obligation to preserve that is not apparent at the time advice is rendered. Third, a finding of spoliation against client or counsel is indeed a serious outcome and may have ramifications beyond the case at issue.

A common e-discovery issue for parties and counsel is the “scope” of evidence that must be preserved. Virtually all cases involve decision-making on the time frame for preservation, the substantive content which determines whether documents are relevant, and the breadth of places in which relevant evidence may be found. In large cases, parties may delineate preservation by persons who are likely to have relevant information, often called “custodians” for lack of a better description.

The very breadth of reasonably required preservation may raise issues of burden and cost. However, in applying proportionality to limit discovery duties, counsel must be careful to distinguish between *scope of preservation* versus *scope of production*. Preservation occurs at a point in time in which potential issues may not be crystallized and the relevance of certain documents may be fuzzy or indeterminable. Counsel and parties should usually err on the side of preservation, at least until the relevance picture sufficiently clarifies to safely distinguish that which must be preserved and produced. While some federal cases have expressed the principle that scope of preservation

efforts may be guided by reasonableness and proportionality,<sup>49</sup> other federal courts disagree.<sup>50</sup> In any event, counsel should advise a client to put a litigation hold in place and undertake reasonable efforts to identify and preserve evidence that is relevant by discovery standards.<sup>51</sup>

As for counsel's duties with regard to preservation of evidence, the seminal federal case was written by Manhattan District Court Judge, Shira Scheindlin. It is actually a series of opinions written in the same case, collectively known as *Zubulake*, after the plaintiff, Laura Zubulake. There are four key opinions in this series.<sup>52</sup> These decisions are widely known by both federal and state judges and practitioners around the country.

Judge Scheindlin's last opinion, *Zubulake V*, has had the greatest impact upon federal courts and is also starting to have an impact on state courts, including Florida. In *Zubulake V*, Judge Scheindlin held that *outside legal counsel* has a duty to make certain that their client's ESI is identified and placed on hold. This new duty on attorneys was created because of the unusual nature and characteristics of ESI and

---

<sup>49</sup> See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. Sep. 9, 2010); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done--or not done--was *proportional* to that case and consistent with clearly established applicable standards").

<sup>50</sup> *Orbit One Communications, Inc. v. Ronsen*, 271 F.R.D. 429; 2010 U.S. Dist. LEXIS 123633 (S.D. N.Y. 2010) ("Although some cases have suggested that the definition of what must be preserved should be guided by principles of 'reasonableness and proportionality,' [citations to *Victor Stanley* and *Rimkus* omitted], this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.").

<sup>51</sup> Information on preservation advice and litigation holds in Florida state court litigation is found in Ch. 5, Initial Procedures in E-Discovery and Preservation of Evidence in Florida State Court, Artigliere & Hamilton, **LexisNexis Practice Guide Florida E-Discovery and Evidence**, LexisNexis/Matthew Bender (2012) available from LexisNexis and from The Florida Bar.

<sup>52</sup> *Zubulake v UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).

information technology systems in which ESI is stored. Unlike paper documents, ESI can be easily modified or deleted, both intentionally and unintentionally. In many IT systems, especially those employed by medium to large size enterprises, ESI is automatically and routinely deleted and purged from the IT systems. Special actions must be taken by the client with such IT systems to suspend these normal ESI deletion procedures after litigation is reasonably anticipated.

Here are the words of Judge Scheindlin in *Zubulake V* that have frequently been relied upon to sanction attorneys who either unwittingly, or sometimes on purpose, failed to take any affirmative steps to advise and supervise their clients to stop the automatic destruction of ESI:

Counsel must become fully familiar with their client's documents retention policies as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system wide back up procedures in the actual (as opposed to theoretical) implementation of the firm's recycling policy it will also involve communicating with the key players in the litigation, in order to understand how they store information.<sup>53</sup>

Of course, a party to litigation has a duty to preserve evidence in all forms, paper or ESI, and the bad faith failure to do so may constitute actionable spoliation. This is nothing new.<sup>54</sup> But the extension of this duty to the litigants' outside legal counsel in *Zubulake V*, which is sometimes called the "Zubulake Duty," is fairly new and controversial.<sup>55</sup> Although the "Zubulake Duty" has been accepted by many federal

---

<sup>53</sup> *Zubulake V*, *supra* n. 52 at 432.

<sup>54</sup> See *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005); *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006).

<sup>55</sup> See *Metro. Opera Ass'n Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 212 F.R.D. 178, 218-219 (S.D.N.Y. 2003); but see Thomas Allman, *Deterring E-Discovery Misconduct By Counsel Sanctions: The Unintended Consequences of Qualcomm v. Broadcom*, 118 Yale L.J. Pocket Part 161 (2009).

judges in Florida and elsewhere, it is unknown whether Florida state court judges will also impose such a duty upon attorneys. However, in view of the popularity in the federal system of placing this burden on the counsel of record, a prudent state court practitioner should also assume that they have such a duty.<sup>56</sup> Outside legal counsel should be proactive in communicating with their client and otherwise taking steps to see to it that the client institutes a litigation hold. Obviously, Judge Scheindlin does not intend to convert attorneys into guarantors of their client's conduct. She also notes in *Zubulake V* that if attorneys are diligent, and they properly investigate and communicate, they should not be held responsible for their client's failures:

A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve.<sup>57</sup>

However, counsel is obligated to have sufficient knowledge of client's IT systems to allow counsel to competently supervise the client's evidence preservation efforts, or lacking such knowledge and competence, should retain experts who do.

The duty to preserve of client and counsel requires a corporate client in most circumstances to provide a written litigation hold notice to its employees who may be involved in the lawsuit, or who may otherwise have custody or control of computers and other ESI storage devices with information relevant to the lawsuit. The notice should instruct them not to alter or destroy such ESI. The potential witnesses to the case should be instructed to construe their duty to preserve ESI broadly and reminded that

---

<sup>56</sup> Like their federal counterparts, Florida judges have statutory, rule-based, and inherent authority to sanction parties and their counsel for discovery violations and for spoliation. Judges are taught to seek out the source of the problem and administer a measured sanction that remedies the wrong committed. If the party is not the culprit, it makes little sense to administer the sanction against an innocent participant. See *Ham v. Dunmire*, 891 So. 2d 492, (Fla. 2004)(dismissal based solely on an attorney's neglect in a manner that unduly punishes a litigant espouses a policy that the Supreme Court of Florida does not wish to promote). Florida courts are not averse to applying appropriate sanctions to counsel. *Id.* at 498 (a trial court "unquestionably has power to discipline counsel" for discovery violations).

<sup>57</sup> *Zubulake V*, *supra* n. 52 at 433.

the ESI may be located in many different computers and ESI storage systems, including for instance, desktop computers, laptops, server storage, CDs, DVDs, flash drives, home computers, iPods, iPads, iPhones, blackberries, Internet storage webs (cloud computing), Internet e-mail accounts, voice mail, etc. The client's IT department or outside company should also be notified and instructed to modify certain auto-deletion features of the IT system that could otherwise delete potentially relevant evidence. In some cases, it may also be necessary to preserve backup tapes, but this is generally not required if the relevant information on the tapes is just duplicative.<sup>58</sup>

There should be reasonable follow-up to the written notice, including conferences with the key players and IT personnel.

Judge Scheindlin wrote another opinion on the subject of litigation holds and ESI spoliation, which she refers to as her sequel to *Zubulake*.<sup>59</sup> *Pension Committee* provides further guidance to federal and state courts on preservation issues, and the related issues of sanctions. Judge Scheindlin holds that the following failures to preserve evidence constitute gross negligence and thus should often result in sanctions of some kind:

After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold, to identify the key players and to ensure that their electronic and paper records are preserved, to cease the deletion of email or to preserve the records of former employees that are in

---

<sup>58</sup> *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (*Zubulake IV*); also see Rule 37(e) *Federal Rules of Civil Procedure*.

<sup>59</sup> *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.*, 2010 WL 184312, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010).

a party's possession, custody, or control, and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Judge Scheindlin goes on to hold that “parties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions.”<sup>60</sup> Counsel should document their efforts to prove reasonableness in the event mistakes are made and relevant ESI deleted, despite best efforts. In any large ESI preservation, collection and production, some errors are inevitable, and Judge Scheindlin notes this on several occasions in *Pension Committee*, including the opening paragraph where she observes:

In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection.

This is an important point to remember. The volume and complexity of ESI makes perfection impossible and mistakes commonplace. All that Judge Scheindlin and other jurors and scholars in this field expect from the parties to litigation and their attorneys are good faith, diligent, and reasonable efforts. In *Pension Committee*, Judge Scheindlin found that the parties did not make reasonable diligent efforts, and so entered sanctions against them with the words:

While litigants are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation. All of the plaintiffs in this motion failed to do so and have been sanctioned accordingly.

---

<sup>60</sup> *Id.*

The opinion of Judge Scheindlin in *Zubulake V* and the *Pension Committee* cases provide a road map to practitioners on what needs to be done in order to preserve ESI from destruction, either intentional or accidental, and so avoid sanctions for spoliation. These and hundreds of other cases like it in the federal system are quite likely to be referred to and cited in state court proceedings. Although none of these federal cases are binding upon state court system, many judges find them persuasive, and the federal cases will often at least provide a starting point for further argument.

**Florida’s “Safe Harbor” Provision:** Many organizations have standard policies and procedures by which outdated and unnecessary electronically stored information is routinely deleted for purposes of economy, efficiency, security, or other valid business or organizational purposes. Florida followed the lead of the federal rules<sup>61</sup> by adopting a safe harbor provision to clarify that a party should not be sanctioned for the loss of electronic evidence due to the routine, good-faith operation of an electronic information system.<sup>62</sup> The existence of a “good faith” component prevents a party from exploiting the routine operation of an information system to thwart discovery obligations by allowing that operation to destroy information that party is required to preserve or produce. In determining good faith, the court may consider any steps taken by the party to comply with court orders, party agreements, or requests to preserve such information.<sup>63</sup>

---

<sup>61</sup> Fed. R. Civ. P. 37(e). The Florida and federal rules are now identical in this respect.

<sup>62</sup> Fla. R. Civ. P. 1.380(e).

<sup>63</sup> Fla. R. Civ. P. 1.380 Committee Notes, 2012 Amendment.

## **COLLECTION AND REVIEW OF ESI:**

After counsel and litigants are satisfied the ESI has been preserved from destruction, and often as part of those efforts, the potentially relevant ESI should then be carefully collected. This requires copying of the computer files in a manner that does not alter or delete relevant information, which may include the metadata in or associated with the ESI. Self-collection by the custodians themselves may be a dangerous practice in some circumstances due to their technical limitations and increased risk of accidental or intentional deletion of electronic evidence.<sup>64</sup> They are, for instance, quite likely to unintentionally change a computer file's metadata since opening a file, or simple copying of a file, will usually change many metadata fields. These altered metadata fields may prove of importance to the case. Also, as mentioned, keyword search based collection can also be hazardous, and may not be appropriate in many cases.<sup>65</sup>

After collection, the ESI is typically processed to eliminate redundant duplicates and prepare the ESI for viewing. The ESI is then searched for relevancy, and the smaller subset of potentially relevant ESI is then reviewed for final relevancy determinations as well as for privilege and confidentiality. Only after this review is production made to the requesting party.

---

<sup>64</sup> *National Day Laborer Organizing Network et al. v. United States Immigration and Customs Enforcement Agency, et al.*, 2012 U.S. Dist. Lexis 97863 (SDNY, July 13, 2012) (J. Scheindlin).

<sup>65</sup> See n. 39 *supra*.

## **CONFERRING WITH OPPOSING COUNSEL:**

Counsel are well advised to speak with each other at the commencement of the case concerning the preferred methods and format of production,<sup>66</sup> including topics as to what metadata fields are desired by the requesting party and the proposed preservation, culling, and search methods. Counsel should also discuss confidentiality concerns and attempt to reach agreement on these issues, as well as the related issues concerning the consequences of the inadvertent disclosure of privileged information. It is now common in the federal system for parties to enter into “Claw-Back” agreements protecting both sides from waiver from unintentional disclosure.<sup>67</sup> Florida now has a nearly identical rule that went into effect on January 1, 2011, in the form of Rule 1.285, Florida Rules of Civil Procedure (Inadvertent Disclosure of Privileged Materials). Clawback Agreements under the Florida Rule are anticipated and should be encouraged by courts and strengthened by court order. Since these agreements and protections are completely reciprocal, it is difficult to foresee legitimate grounds for opposition to this important safety net.

## **INSPECTION OF CLIENT COMPUTERS AND EQUIPMENT:**

One important issue in e-discovery concerning the limits on forensic examinations of a party’s computers has already been addressed in Florida.<sup>68</sup> It follows without discussion, or much mention, a large body of federal and foreign state case law on the subject. *Menke* holds consistent with this law and protects a responding party

---

<sup>66</sup> See Rule 34(b)(2), *Federal Rules of Civil Procedure*, governing form of production. This essentially requires production of ESI in its original native format, or in another “reasonably useable” format, at the producer’s choice, unless the request specifies the form.

<sup>67</sup> See Rule 26(b)(5)(B), *Federal Rules of Civil Procedure*, and Rule 502, *Federal Rules of Evidence*.

<sup>68</sup> *Menke v. Broward County School Board*, 916 So. 2d 8 (Fla. 4th DCA 2005).

from over-intrusive inspections of its computer systems by the requesting party.<sup>69</sup> The law generally requires a showing of good cause before such an inspection is allowed. The rules, both state and federal, only intend for parties, or third-parties, to make production of the ESI stored on electronic devices, not the devices themselves. This is a common novice mistake. The actual devices are only subject to inspection in unusual cases where you can prove that the party's search and production has not been reasonably or honestly performed or other even more rare circumstances.<sup>70</sup> The background and reasoning for this law are set out well in *Menke*:

Today, instead of filing cabinets filled with paper documents, computers store bytes of information in an "electronic filing cabinet." Information from that cabinet can be extracted, just as one would look in the filing cabinet for the correct file containing the information being sought. In fact, even more information can be extracted, such as what internet sites an individual might access as well as the time spent in internet chat rooms. In civil litigation, we have never heard of a discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation. Requests for production ask the party to produce copies of the relevant information in those filing cabinets for the adversary.

Menke contends that the respondent's representative's wholesale access to his personal computer will expose confidential communications and matters entirely extraneous to the present litigation, such as banking records. Additionally,

---

<sup>69</sup> See: *Peskoff v. Faber*, 2008 WL 2649506 (D.D.C. July 7, 2008); *Bro-Tech Corp. v. Thermax, Inc.*, 2008 WL 724627 (E.D. Pa. March 17, 2008); *Sterle v. Elizabeth Arden, Inc.*, 2008 WL 961216 (D. Conn. Apr. 9, 2008); *Xpel Technologies Corp. v. Am. Filter Film Distribs*; 2008 WL 744837 (W.D. Tex. Mar. 17, 2008); *Henry v. Quicken Loans, Inc.*, 2008 WL 474127 (E.D. Mich. Feb. 15, 2008); *In re Honza*, 2007 WL 4591917 (Tex. App. Dec. 28, 2007); *Coburn v. PN II, Inc.*, 2008 WL 879746 (D. Nev. Mar. 28, 2008); *Ferron v. Search Cactus, LLC*, 2008 WL 1902499 (S.D. Ohio Apr. 28, 2008); *Johnson v. Wells Fargo Home Mortgage, Inc.*, 2008 WL 2142219 (D. Nev. May 16, 2008); *Anadarko Petroleum Corp. v. Davis*, 2006 WL 3837518 (S.D. Tex., Dec. 28, 2006); *Hedenburg v. Aramark American Food Services*, 2007 U.S. Dist. LEXIS 3443 (W.D. Wash. Jan. 17, 2007); *In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir. 2003); *Ameriwood v. Liberman*, 2006 WL 3825291, 2006 U.S. Dist. LEXIS 93380 (E.D. Mo., Dec. 27, 2006).

<sup>70</sup> *Menke supra* n. 68 at 12.

privileged communications, such as those between Menke and his attorney concerning the very issues in the underlying proceeding, may be exposed. Furthermore, Menke contends that his privacy is invaded by such an inspection, and his Fifth Amendment right may also be implicated by such an intrusive review by the opposing expert.<sup>71</sup>

The appeals court agreed with Menke and granted *certiorari* to quash the administrative law judge's order requiring production of Menke's computers. The court held that production and search of a computer is to be conducted by the producing party so as to protect their confidential information. *Menke* suggests that the production of the computer itself is a last resort only justified "in situations where evidence of intentional deletion of data was present."<sup>72</sup> The *Menke* court concluded with these words, which also seem a good note on which to end this article:

Because the order of the administrative law judge allowed the respondent's expert access to literally everything on the petitioner's computers, it did not protect against disclosure of confidential and privileged information. It therefore caused irreparable harm, and we grant the writ and quash the discovery order under review. We do not deny the Board the right to request that the petitioner produce relevant, non-privileged, information; we simply deny it unfettered access to the petitioner's computers in the first instance. Requests should conform to discovery methods and manners provided within the Rules of Civil Procedure.

Disclosure of confidential information is not the only potential harm when a party is permitted access to the opposing party's computers. Another consideration relating to a request for access to the client's computers, equipment, or software is the potential of harm to the client's hardware, software, and data. Any foray permitted by

---

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.* at 8.

the court must balance the need for the level of access sought versus the potential harm to the party producing access. This is another reason for using neutral, qualified experts to assist in discovery.

### **REQUESTING PRODUCTION AND MAKING PRODUCTION OF ESI:**

Effective September 1, 2012, the Florida Rules of Civil Procedure establish a workable framework for production of electronically stored information. The most prominent issue for production of ESI involves the **form of production**, which can implicate the completeness and utility of the ESI produced as well of the cost of production if the ESI must be translated or converted into the requested form. Fortunately, the rules contemplate these issues as will be discussed below. Nonetheless, the most prudent course for counsel on both sides is to confer and cooperate on the form of production beforehand to avoid disappointment, non-productive effort, and needless cost of repeated production.

A request for electronically stored information may specify the form or forms in which electronically stored information is to be produced.<sup>73</sup> The form should usually be specified. The requesting party should take into account the reasons for specifying a given form, such as: (1) Will the document's associated metadata be needed? (2) Will the requested document need to be searchable? (3) Will the native form<sup>74</sup> of the document be needed in order to determine the context in which the document was created or stored? (4) What are the format requirements of the software that the requesting party plans to use to review the production?

---

<sup>73</sup> Fla. R. Civ. P. 1.350(b).

<sup>74</sup> Native format is a copy of the original electronic file. For example, e-mail from an Outlook e-mail program would be produced in a \*.pst file. Native format files include the metadata of the original file. Native format files also are easy to modify. This presents difficulties in ensuring that the data has not altered after being produced. Cooperation of counsel and well-documented procedures are required to allow effective use of native format evidence at depositions and trial.

If the responding party objects to a requested form, or if no form is specified in the request, the responding party must state the form or forms it intends to use.<sup>75</sup> This is a quite sensible provision that essentially directs the parties to address any issues in the form of production. For example, if a responding party specifies a form of production and the requesting party fails to object to the form of production, the court has a meaningful record on which to determine whether production in another format will be required and which party should be required to pay the cost of the additional production. If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.<sup>76</sup> Again, this is a sensible process that tells the producing party that they are not permitted to degrade or convert the electronic documents to a less useful format for production.<sup>77</sup>

The form of production may also be an issue when exercising the option to produce records in lieu of answering interrogatories, so the amendments to the civil rules effective September 1, 2012, (1) specifically authorize the production of electronically stored information in lieu of answers to interrogatories, and (2) set out the procedure for determining the form in which to produce the ESI.<sup>78</sup> If the records to be produced consist of electronically stored information, the records must be produced in a

---

<sup>75</sup> Fla. R. Civ. P. 1.350(b).

<sup>76</sup> *Id.* ESI is usually “ordinarily maintained” in its native format, meaning the format used by the software in which the ESI was created.

<sup>77</sup> Such an effort would be equivalent to the unsavory practice of shuffling unnumbered pages or removing file labels from folders before producing paper discovery to the opponent.

<sup>78</sup> Fla. R. Civ. P. 1.340(c).

form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.<sup>79</sup>

### **PRODUCTION OF ESI PURSUANT TO SUBPOENA:**

Production of electronically stored information pursuant to subpoena potentially raises the now familiar issues of form of production, undue burden, and who pays the cost of production. Fortunately, effective September 1, 2012, the civil procedure rules specifically address these issues and provide a pathway for counsel and judges to negotiate these issues.

The issue of form of production in response to a subpoena is much the same as the issues implicated in a Fla. R. Civ. P. 1.350 request for production, and amended Rule 1.410 addresses the issues in similar fashion. It makes abundant sense for the party issuing the subpoena to specify the preferred form of production. However, if a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.<sup>80</sup>

Persons responding to a subpoena may object to discovery of ESI from sources that are not reasonably accessible because of undue costs or burden.<sup>81</sup> On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought or the form requested is not reasonably accessible because of undue costs or burden. Once that showing is made, the court may order that the discovery not be had or may nonetheless order discovery limited to such sources or in such forms if the requesting party shows good cause, considering the limitations set out

---

<sup>79</sup>

*Id.*

<sup>80</sup>

Fla. R. Civ. P. 1.410(c).

<sup>81</sup>

*Id.*

in Fla. R. Civ. P. 1.280(d)(2). The court may specify conditions of the discovery, including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery.<sup>82</sup> The court will undoubtedly take into account whether the subpoena is directed to a party or a person or organization controlled by or closely identified with a party, or to a person or entity totally unrelated to and disinterested in the case. Subpoenas to non-parties have become a major issue in discovery of ESI because an enormous amount of ESI is sent, stored, shared, or created on systems owned or controlled by third parties, including internet accessible sites

**CONCLUSION:**

Discovery of ESI is potentially complicated, ever-changing, and extremely important in many cases. Counsel must be conversant enough with the terminology, law, rules, and technology to identify issues and fully advise the client on electronic discovery issues.

---

<sup>82</sup> *Id.*

**Appendix A: COMPARISON OF FLORIDA AND FEDERAL RULES OF E-DISCOVERY**

**Florida Rules of Civil Procedure**

**Federal Rules of Civil Procedure**

**RULE 1.200. PRETRIAL PROCEDURE**

(a) Case Management Conference. At any time after responsive pleadings or motions are due, the court may order, or a party by serving a notice may convene, a case management conference. The matter to be considered shall be specified in the order or notice setting the conference. At such a conference the court may:

- (1) schedule or reschedule the service of motions, pleadings, and other papers;
- (2) set or reset the time of trials, subject to rule 1.440(c);
- (3) coordinate the progress of the action if the complex litigation factors contained in rule 1.201(a)(2)(A)-(a)(2)(H) are present;
- (4) limit, schedule, order, or expedite discovery;
- (5) *consider the possibility of obtaining admissions of fact and voluntary exchange of documents and electronically stored information, and stipulations regarding authenticity of documents and electronically stored information;*
- (6) *consider the need for advance rulings from the court on the admissibility of documents and electronically stored information;*
- (7) *discuss as to electronically stored information, the possibility of agreements from the parties regarding the extent to which such evidence should be preserved, the form in which such evidence should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources;*
- (8) schedule disclosure of expert witnesses and the discovery of facts known and opinions held by such experts;
- (9) schedule or hear motions in limine;
- (10) pursue the possibilities of settlement;
- (11) require filing of preliminary stipulations if issues can be narrowed;
- (12) consider referring issues to a magistrate for findings of fact; and
- (13) schedule other conferences or determine other matters that may aid in the disposition of the action.

(b) Pretrial Conference. --After the action is at issue the court itself may or shall on the timely motion of any party require the parties to appear for a conference to consider and determine:

- (1) the simplification of the issues;
- (2) the necessity or desirability of amendments to the pleadings;
- (3) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof;
- (4) the limitation of the number of expert witnesses;
- (5) the potential use of juror notebooks; and

**RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT**

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.

(b) Scheduling.

(1) *Scheduling Order*. Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

- (A) after receiving the parties’ report under Rule 26(f); or
- (B) after consulting with the parties’ attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) *Time to Issue*. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) *Contents of the Order*.

(A) *Required Contents*. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents*. The scheduling order may:

- (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
- (ii) modify the extent of discovery;
- (iii) *provide for disclosure or discovery of*

<p>(6) any matters permitted under subdivision (a) of this rule.</p> <p>(c) Notice. --Reasonable notice shall be given for a case management conference, and 20 days' notice shall be given for a pretrial conference. On failure of a party to attend a conference, the court may dismiss the action, strike the pleadings, limit proof or witnesses, or take any other appropriate action. Any documents that the court requires for any conference shall be specified in the order. Orders setting pretrial conferences shall be uniform throughout the territorial jurisdiction of the court.</p> <p>(d) Pretrial Order. --The court shall make an order reciting the action taken at a conference and any stipulations made. The order shall control the subsequent course of the action unless modified to prevent injustice.</p>	<p><b><i>electronically stored information;</i></b></p> <p>(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;</p> <p>(v) set dates for pretrial conferences and for trial; and</p> <p>(vi) include other appropriate matters.</p> <p>(4) <i>Modifying a Schedule.</i> A schedule may be modified only for good cause and with the judge's consent.</p> <p>(c) Attendance and Matters for Consideration at a Pretrial Conference.</p> <p>(1) <i>Attendance.</i> A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.</p> <p>(2) <i>Matters for Consideration.</i> At any pretrial conference, the court may consider and take appropriate action on the following matters:  (A)-(P) OMITTED</p> <p>(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.</p> <p>(e)-(f) OMITTED (2) <i>Imposing Fees and Costs.</i> Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.</p>
---	--

**RULE 1.201. COMPLEX LITIGATION – NEW**

(a) OMITTED

(b) Initial Case Management Report and Conference.  
The court shall hold an initial case management conference within 60 days from the date of the order declaring the action complex.

(1) At least 20 days prior to the date of the initial case management conference, attorneys for the parties as well as any parties appearing pro se shall confer and prepare a joint statement, which shall be filed with the clerk of the court no later than 14 days before the conference, outlining a discovery plan and stating:

(A) a brief factual statement of the action, which includes the claims and defenses;

(B) a brief statement on the theory of damages by any party seeking affirmative relief;

(C) the likelihood of settlement;

(D) the likelihood of appearance in the action of additional parties and identification of any non-parties to whom any of the parties will seek to allocate fault;

(E) the proposed limits on the time: (i) to join other parties and to amend the pleadings, (ii) to file and hear motions, (iii) to identify any non-parties whose identity is known, or otherwise describe as specifically as practicable any non-parties whose identity is not known, (iv) to disclose expert witnesses, and (v) to complete discovery;

(F) the names of the attorneys responsible for handling the action;

(G) the necessity for a protective order to facilitate discovery;

(H) proposals for the formulation and simplification of issues, including the elimination of frivolous claims or defenses, and the number and timing of motions for summary judgment or partial summary judgment;

(I) the possibility of obtaining admissions of fact and voluntary exchange of documents and electronically stored information, stipulations regarding authenticity of documents, electronically stored information, and the need for advance rulings from the court on admissibility of evidence;

***(J) the possibility of obtaining agreements among the parties regarding the extent to which such electronically stored information should be preserved, the form in which such information should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources;***

[Remainder of Rule OMITTED ]

***THERE IS NO FEDERAL COUNTERPART TO FLORIDA’S COMPLEX LITIGATION PROCEDURAL RULES.***

**Note:** *In some respects, the requirements for the Initial Case Management Report and Conference in Fla. R. Civ. P. 1.201(b) resemble the purposes of a Federal Rule 26(f) “meet and confer” requirement. (See Fed. R. Civ. P. 26 below). However, the Federal Rule 26(f) meet and confer requirement is mandatory in every case, and only state court cases that are declared complex under Fla. R. Civ. P. 1.201 automatically include the Rule 1.201(b)(1)(J) requirements.*

**RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY**

(a) Discovery Methods.

[OMITTED ]

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. --Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (2) Indemnity Agreements. --A party may obtain discovery of the existence and contents of any agreement under which any person may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or to reimburse a party for payments made to satisfy the judgment. Information concerning the agreement is not admissible in evidence at trial by reason of disclosure.

**(3) Electronically Stored Information. A party may obtain discovery of electronically stored information in accordance with these rules.**

\*\*\* [(4)-(8) OMITTED]

**(d) Limitations on Discovery of Electronically Stored Information.**

**(1) A person may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of burden or cost. On motion to compel discovery or for a protective order, the person from whom discovery is sought must show that the information sought or the format requested is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order the discovery from such sources or in such formats if the requesting party shows good cause. The court may specify conditions of the discovery, including ordering that some or all of the expenses incurred by the person from whom discovery is sought be paid by the party seeking the discovery.**

**(2) In determining any motion involving discovery of electronically stored information, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or**

**RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY**

(A) REQUIRED DISCLOSURES. [OMITTED]

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample

*less expensive; or*  
*(ii) the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.*

\*\*\* [(e)-(g) OMITTED]

Note: Florida Rules of Procedure do not have a universal requirement comparable to the Federal Rule 26(f) meet and confer. However, such measures may be ordered by the Court on a case-by-case basis as a matter of case management under Fla. R. Civ. P. 1.200 and 1.201 or by the court's inherent case management authority.

*opportunity to obtain the information by discovery in the action; or*

*(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.*

(3)- (5) OMITTED

(c) –(e) OMITTED

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

(1) *Conference Timing.* OMITTED.

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

***(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;***

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

\*\*\* Remainder of Rule *OMITTED*

**RULE 1.340. INTERROGATORIES TO PARTIES**

(a)-(b) OMITTED

(c) Option to Produce Records. When the answer to an interrogatory may be derived or ascertained from the records (*including electronically stored information*) of the party to whom the interrogatory is directed or from an examination, audit, or inspection of the records or from a compilation, abstract, or summary based on the records and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party to whom it is directed, an answer to the interrogatory specifying the records from which the answer may be derived or ascertained and offering to give the party serving the interrogatory a reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries is a sufficient answer. An answer shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party interrogated, the records from which the answer may be derived or ascertained, or shall identify a person or persons representing the interrogated party who will be available to assist the interrogating party in locating and identifying the records at the time they are produced. *If the records to be produced consist of electronically stored information, the records shall be produced in a form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.*

(d) Effect on Co-Party. --OMITTED

(e) Service and Filing. OMITTED

**RULE 33. INTERROGATORIES TO PARTIES**

(a)-(c) OMITTED

(c) Use. An answer to an interrogatory may be used to the extent allowed by the [Federal Rules of Evidence](#).

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (**including electronically stored information**), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

**RULE 1.350. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES**

(a) Request; Scope. Any party may request any other party (1) to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy *any designated documents, including electronically stored information, writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the party to whom the request is directed through detection devices into reasonably usable form*, that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; (2) to inspect and copy, test, or sample any tangible things that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; or (3) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for

**RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLE THINGS, OR ENTERING ONTO LAND, FOR INSPECTION AND OTHER PURPOSES**

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) *any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;* or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding

the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on it within the scope of rule 1.280(b).

(b) Procedure. Without leave of court the request may be served on the plaintiff after commencement of the action and on any other party with or after service of the process and initial pleading on that party. The request shall set forth the items to be inspected, either by individual item or category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection or performing the related acts. The party to whom the request is directed shall serve a written response within 30 days after service of the request, except that a defendant may serve a response within 45 days after service of the process and initial pleading on that defendant. The court may allow a shorter or longer time. For each item or category the response shall state that inspection and related activities will be permitted as requested unless the request is objected to, in which event the reasons for the objection shall be stated. If an objection is made to part of an item or category, the part shall be specified. When producing documents, the producing party shall either produce them as they are kept in the usual course of business or shall identify them to correspond with the categories in the request. ***A request for electronically stored information may specify the form or forms in which electronically stored information is to be produced. If the responding party objects to a requested form, or if no form is specified in the request, the responding party must state the form or forms it intends to use. If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.*** The party submitting the request may move for an order under rule 1.380 concerning any objection, failure to respond to the request, or any part of it, or failure to permit the inspection as requested.

(c)-(d) OMITTED

party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) *Contents of the Request.* The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest.

(D) ***Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.***

(E) ***Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:***

(i) ***A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;***

(ii) ***If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and***

(iii) ***A party need not produce the same electronically stored information in more than one form.***

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

**RULE 1.380. FAILURE TO MAKE DISCOVERY; SANCTIONS**

(a)-(d) OMITTED

*(e) Electronically Stored Information; Sanctions for Failure to Preserve. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.*

**RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS**

(a)-(d) OMITTED

*(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.*

(f) OMITTED

**RULE 1.410. SUBPOENA**

(a)-(b) OMITTED

(c) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents (*including electronically stored information*), or tangible things designated therein, but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. *If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A person responding to a subpoena may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue costs or burden. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought or the form requested is not reasonably accessible because of undue costs or burden. If that showing is made, the court may nonetheless order discovery from such sources or in such forms if the requesting party shows good cause, considering the limitations set out in rule 1.280(d)(2). The court may specify conditions of the discovery, including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery.* A party seeking a production of evidence at trial which would be subject to a subpoena may compel such production by serving a notice to produce

**RULE 45 SUBPOENA**

(c) Protecting a Person Subject to a Subpoena. (1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply. (2) *Command to Produce Materials or Permit Inspection.* (A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial. (B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be

such evidence on an adverse party as provided in rule 1.080. Such notice shall have the same effect and be subject to the same limitations as a subpoena served on the party.

(d)-(h) OMITTED

served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) OMITTED

**(d) Duties in Responding to a Subpoena.**

**(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:**

**(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.**

**(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.**

**(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.**

**(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not**

	<p><b>reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.</b></p> <p>Remainder of Rule 45 OMITTED</p>
--	--

<p><b>RULE 1.285. INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS</b></p> <p>(a) Assertion of Privilege as to Inadvertently Disclosed Materials. Any party, person, or entity, after inadvertent disclosure of any materials pursuant to these rules, may thereafter assert any privilege recognized by law as to those materials. This right exists without regard to whether the disclosure was made pursuant to formal demand or informal request. In order to assert the privilege, the party, person, or entity, shall, within 10 days of actually discovering the inadvertent disclosure, serve written notice of the assertion of privilege on the party to whom the materials were disclosed. The notice shall specify with particularity the materials as to which the privilege is asserted, the nature of the privilege asserted, and the date on which the inadvertent disclosure was actually discovered.</p> <p>(b) Duty of the Party Receiving Notice of an Assertion of Privilege. A party receiving notice of an assertion of privilege under subdivision (a) shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material. The party receiving the notice shall also promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule. That party shall also take reasonable steps to retrieve the materials disclosed. Nothing herein affects any obligation pursuant to R. Regulating Fla. Bar 4-4.4(b).</p> <p>(c) Right to Challenge Assertion of Privilege.</p>	<p><b>FED. R. EVID. 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER</b></p> <p>The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.</p> <p>(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:</p> <ol style="list-style-type: none"> <li>(1) the waiver is intentional;</li> <li>(2) the disclosed and undisclosed communications or information concern the same subject matter; and</li> <li>(3) they ought in fairness to be considered together.</li> </ol> <p>(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:</p> <ol style="list-style-type: none"> <li>(1) the disclosure is inadvertent;</li> <li>(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and</li> <li>(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).</li> </ol> <p>(c) Disclosure Made in a State Proceeding.</p>
--	---

<p>Any party receiving a notice made under subdivision (a) has the right to challenge the assertion of privilege. The grounds for the challenge may include, but are not limited to, the following:</p> <p>(1) The materials in question are not privileged.</p> <p>(2) The disclosing party, person, or entity lacks standing to assert the privilege.</p> <p>(3) The disclosing party, person, or entity has failed to serve timely notice under this rule.</p> <p>(4) The circumstances surrounding the production or disclosure of the materials warrant a finding that the disclosing party, person, or entity has waived its assertion that the material is protected by a privilege.</p> <p>Any party seeking to challenge the assertion of privilege shall do so by serving notice of its challenge on the party, person, or entity asserting the privilege. Notice of the challenge shall be served within 20 days of service of the original notice given by the disclosing party, person, or entity. The notice of the recipient’s challenge shall specify the grounds for the challenge. Failure to serve timely notice of challenge is a waiver of the right to challenge.</p> <p>(d) Effect of Determination that Privilege Applies. When an order is entered determining that materials are privileged or that the right to challenge the privilege has been waived, the court shall direct what shall be done with the materials and any copies so as to preserve all rights of appellate review. The recipient of the materials shall also give prompt notice of the court’s determination to any other party, person, or entity to whom it had disclosed the materials.</p>	<p>When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:</p> <p>(1) would not be a waiver under this rule if it had been made in a federal proceeding; or</p> <p>(2) is not a waiver under the law of the state where the disclosure occurred.</p> <p>(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.</p> <p>(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.</p> <p>(f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.</p> <p>(g) Definitions. In this rule:</p> <p>(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and</p> <p>(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.</p>
---	---

## **Committee Notes to Florida's 2012 e-Discovery Rules Amendments**

### **1.200 Committee Notes**

**2012 Amendment.** Subdivisions (a)(5) to (a)(7) are added to address issues involving electronically stored information.

### **1.201 Committee Notes**

**2012 Amendment.** Subdivision (b)(1)(J) is added to address issues involving electronically stored information.

### **1.280 Committee Notes**

**2012 Amendment.** Subdivisions (b)(3) and (d) are added to address discovery of electronically stored information. The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information. These issues may also be addressed by means of a rule 1.200 or rule 1.201 case management conference.

Under the good cause test in subdivision (d)(1), the court should balance the costs and burden of the requested discovery, including the potential for disruption of operations or corruption of the electronic devices or systems from which discovery is sought, against the relevance of the information and the requesting party's need for that information. Under the proportionality and reasonableness - 13 -

factors set out in subdivision (d)(2), the court must limit the frequency or extent of discovery if it determines that the discovery sought is excessive in relation to the factors listed. In evaluating the good cause or proportionality tests, the court may find its task complicated if the parties know little about what information the sources at issue contain, whether the information sought is relevant, or how valuable it may be to the litigation. If appropriate, the court may direct the parties to develop the record further by engaging in focused discovery, including sampling of the sources, to learn more about what electronically stored information may be contained in those sources, what costs and burdens are involved in retrieving, reviewing, and producing the information, and how valuable the information sought may be to the litigation in light of the availability of information from other sources or methods of discovery, and in light of the parties' resources and the issues at stake in the litigation.

### **1.340 Committee Notes**

**2012 Amendment.** Subdivision (c) is amended to provide for the production of electronically stored information in answer to interrogatories and to set out a procedure for determining the form in which to produce electronically stored information.

### **1.350 Committee Notes**

**2012 Amendment.** Subdivision (a) is amended to address the production of electronically stored information. Subdivision (b) is amended to set out a procedure for determining the form to be used in producing electronically stored information.

### **1.380 Committee Notes**

**2012 Amendment.** Subdivision (e) is added to make clear that a party should not be sanctioned for the loss of electronic evidence due to the good-faith operation of an electronic information system; the language mirrors that of Federal Rule of Civil Procedure 37(e). Nevertheless, the

good-faith requirement contained in subdivision (e) should prevent a party from exploiting the routine operation of an information system to thwart discovery obligations by allowing that operation to destroy information that party is required to preserve or produce. In determining good faith, the court may consider any steps taken by the party to comply with court orders, party agreements, or requests to preserve such information.

**1.410 Committee Notes**

**2012 Amendment.** Subdivision (c) is amended to address the production of electronically stored information pursuant to a subpoena. The procedures for dealing with disputes concerning the accessibility of the information sought or the form for its production are intended to correspond to those set out in Rule 1.280(d).

## CHAPTER THIRTEEN

---

### DISCOVERY OF LAWYER-CLIENT PRIVILEGED COMMUNICATIONS

Confidential lawyer-client communications are, by statute, privileged, and therefore not discoverable.<sup>1</sup> A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services to the client, and those reasonably necessary for the transmission of the communication.<sup>2</sup> However, the privilege can be waived, intentionally or unintentionally, thus subjecting the communication to discovery. A waiver by the client of part of the privileged communications, serves as a waiver as to the remainder of the communications about the same subject.<sup>3</sup>

In *Southern Bell Tel. & Tel. Co. v. Deason*,<sup>4</sup> the Florida Supreme Court set forth the following criteria to judge whether a corporation’s communications are protected by the attorney-client privilege:

- (1) the communication would not have been made but for the contemplation of legal services;
- (2) the employee making the communication did so at the direction of his or her corporate superior;
- (3) the superior made the request of the employee as part of the corporation’s effort to secure legal advice or services;

---

<sup>1</sup> Fla. Stat. § 90.502; Fla. R. Civ. P. 1.280(b)(1).

<sup>2</sup> Fla. Stat. § 90.502

<sup>3</sup> *International Tel. & Tel. Corp v. United Tel. Co. of Florida*, 60 F.R.D. 177 (M.D. Fla. 1973)

<sup>4</sup> 632 So. 2d 1377 (Fla. 1994).

- (4) the content of the communication relates to the legal services being rendered, within the scope of the employee's duties; and
- (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

**PRIVILEGE LOGS:**

Fla. R. Civ. P. 1.280(b)(5) provides, in part, that a party withholding information from discovery claiming that it is privileged shall make the claim expressly, and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protections. It has been suggested that the privilege log should include at a minimum (for documents), sender, recipients, title or type, date and subject matter.<sup>5</sup>

The U.S. District Court for the Southern District of Florida has promulgated a Local Rule for the content required in a privilege log.<sup>6</sup> In at least one instance, that Local Rule has served as guidance for a Florida court.<sup>7</sup> Guidance for the content required in a privilege log in the Middle District of Florida can be found in *Arthrex, Inc. v. Parcus Medical, LLC*, M.D. Fla. 2012 (2012 WL 3778981).

The failure to file a privilege log can result in a waiver of the attorney-client privilege.<sup>8</sup> However, that is not a common sanction, and Florida courts generally recognize that such a sanction should be resorted to only when the violation is

---

<sup>5</sup> *Bankers Sec. Ins. Co. v. Symons*, 889 So. 2d 93 (Fla. 5th DCA 2004).

<sup>6</sup> U.S. District Court, Southern District of Florida, Local Rule 26.1 G. 3.

<sup>7</sup> *TIG Ins. Corp. of America v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001).

<sup>8</sup> *Id.*

serious.<sup>9</sup> The failure to submit a privilege log at the same time as a discovery response is served, does not waive the privilege. Fla. R. Civ. P. 1.280(b)(5) does not detail the procedure to follow for service of privilege logs and does not specifically address the appropriate sanction to be imposed if a party is tardy in filing a privilege log. If a party does not submit a privilege log within a reasonable time before a hearing on the motion to compel, then the trial court can be justified in finding a waiver because there would be no basis on which to assess the privilege claim.<sup>10</sup>

A privilege log is not required until such time as broader, preliminary objections have been addressed. “A party is required to file a [privilege] log only if the information is otherwise discoverable. Where the party claims that the production of documents is burdensome and harassing . . . the scope of discovery is at issue. Until the court rules on the request, the party responding to discovery does not know what will fall into the category of discoverable documents . . .”<sup>11</sup> Waiver does not apply where assertion of the privilege is not document-specific, but category specific, and the category itself is plainly protected.<sup>12</sup>

### **INADVERTENT DISCLOSURE:**

As communications technology advances (facsimile, e-mail, text, etc.), the opportunities for inadvertent disclosure of lawyer-client privileged communications increase. Inadvertent disclosure of lawyer-client privileged communications, and the

---

<sup>9</sup> *Gosman v. Luzinski*, 937 So. 2d 293 (Fla. 4th DCA 2006) (“Attorney-client privilege and work-product immunity are important protections in the adversarial legal system, and any breach of these privileges can give one party an undue advantage over the other party. Florida’s courts generally recognize that an implicit waiver of an important privilege as a sanction for a discovery violation should not be favored, but resorted to only when the violation is serious.”).

<sup>10</sup> *Bankers Sec. Ins. Co. v. Symons*, 889 So. 2d 93 (Fla. 5th DCA 2004).

<sup>11</sup> *Gosman*.

<sup>12</sup> *Nevin v. Palm Beach County School Board*, 958 So. 2d 1003 (Fla. 1st DCA 2007); citing: *Matlock v. Day*, 907 So. 2d 577 (Fla. 5th DCA 2005).

resultant issues of waiver and disqualification have been addressed by Florida courts more frequently in recent years, and in 2010, Fla. R. Civ. P. 1.285 was enacted, governing the inadvertent disclosure of privileged materials. The new rule took effect January 1, 2011.<sup>13</sup> The rule is self-explanatory. To preserve the privileges recognized by law, the party must serve written notice of the assertion of privilege on the party to whom the materials were disclosed, within 10 days of actually discovering the inadvertent disclosure.<sup>14</sup> The rule sets forth the duty of the party receiving such notice;<sup>15</sup> the right to challenge the assertion of the privilege;<sup>16</sup> and, the effect of a determination that the privilege applies.<sup>17</sup>

Florida law has always required the recipient of inadvertently disclosed attorney-client privileged communications to act appropriately, or risk being disqualified from the case.<sup>18</sup> An attorney who promptly notifies the sender and immediately returns the inadvertently produced materials without exercising any unfair advantage will, generally, not be subject to disqualification.<sup>19</sup>

The recipient still has the right to challenge the claimed privilege on the basis of waiver.<sup>20</sup> The rule does not set forth any specific test to determine whether a waiver occurred, however, the courts have addressed this issue in the past. To determine

---

<sup>13</sup> Fla. R. Civ. P. 1.285 Inadvertent Disclosure of Privileged Materials

<sup>14</sup> Fla. R. Civ. P. 1.285(a)

<sup>15</sup> Fla. R. Civ. P. 1.285(b)

<sup>16</sup> Fla. R. Civ. P. 1.285(c)

<sup>17</sup> Fla. R. Civ. P. 1.285(d)

<sup>18</sup> See: *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117 (Fla. 3d DCA 2008).

<sup>19</sup> *Abamar Housing & Development, Inc. v. Lisa Daly Lady Decor*, 724 So. 2d 572 (Fla. 3d DCA 1998); citing Fla. Bar Comm. On Professional Ethics, OP. 93-3.

<sup>20</sup> Fla. R. Civ. P. 1.285(c)(4)

whether the privilege has been waived due to inadvertent disclosure, Florida courts will apply the “relevant circumstances” test. The test involves a factual determination, thus requiring an evidentiary hearing. The court must consider:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production;
- (2) the number of inadvertent disclosures;
- (3) the extent of disclosure;
- (4) any delay and measures taken to rectify the disclosures; and
- (5) whether the overriding interests of justice would be served by relieving a party of its error.<sup>21</sup>

One should note the court’s consideration of the “precautions taken to prevent inadvertent disclosure.” As communications are more commonly transmitted by facsimile/e-mail, the prudent lawyer should carefully consider the protections in place (or not in place) at the recipient’s location. For example, many facsimile terminals are used by large groups of people, and may not provide the necessary privacy for the transmission of privileged communications. Facsimile and e-mail communications should, at the very least, always include a lawyer-client privilege notice.<sup>22</sup>

Attorneys should also remember that they have ethical duties when they send and receive electronic documents in the course of representing their clients. These ethical responsibilities are now issues in the practice of law where lawyers may be able to “mine” metadata from electronic documents. Lawyers may also receive electronic documents that reveal metadata without any effort on the part of the receiving attorney. Metadata is information about information and has been defined as information describing the history, tracking, or management of an electronic document.

---

<sup>21</sup> *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

<sup>22</sup> See: *Nova Southeastern University, Inc. v. Jacobson*, 25 So. 3d 82 (Fla. 4th DCA 2009).

Metadata can contain information about the author of a document, and can show, among other things, the changes made to a document during its drafting, including what was deleted from or added to the final version of the document, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed.

In response, The Florida Bar issued Ethics Opinion 06-2 (September 15, 2006), which provides as follows:

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

Inadvertent disclosure does not always involve disclosure to the opposing party. Privileged materials may be inadvertently disclosed to a party's own expert. In that circumstance, a party does not automatically waive the privilege simply by furnishing protected or privileged material. The court will consider whether the expert relied upon the material in forming his or her opinion.<sup>23</sup>

---

<sup>23</sup> *Mullins v. Tompkins*, 15 So. 3d 798 (Fla. 1st DCA 2009).

### **THIRD PARTY BAD FAITH ACTIONS:**

The lawyer-client privilege between an insurer, the insured and insured's counsel is not waived in a third party bad faith action. Since the insured is not the party bringing the action, it does not waive the privilege.<sup>24</sup>

### **EXAMINATION UNDER OATH:**

The lawyer-client privilege has been held to apply to an examination under oath ("EUO"), conducted by an insurer with its insured. The statements made during the examination were not discoverable in a subsequent criminal case involving the insured, and, the presence of criminal defense counsel at the EUO did not waive the privilege.<sup>25</sup>

### **REVIEW OF PRIVILEGED DOCUMENTS FOR DEPOSITION:**

Documents used to refresh testimony prior to testifying are discoverable unless otherwise privileged. Therefore, the use of lawyer-client privileged documents to refresh testimony prior to testifying does not waive the privilege. However, the privilege would be waived if the same documents were used to refresh testimony while testifying.<sup>26</sup>

---

<sup>24</sup> *Progressive v. Scoma*, 975 So. 2d 461 (Fla. 2d DCA 2007) ("Few evidentiary privileges are as jealously guarded as the attorney-client privilege. Permitting a third party who brings a bad faith claim to abrogate the attorney-client privilege previously held by the insured and insurer would seem to undermine the policy reasons for having such a privilege, such as encouraging open and unguarded discussions between counsel and client as they prepare for litigation.").

<sup>25</sup> *Reynolds v. State*, 963 So. 2d 908 (Fla. 2d DCA 2007) ("The examination is part of the insurer's fact gathering for the dual purposes of (1) defending the insured, and (2) determining whether the policy covers the incident giving rise to the claim against the insured.").

<sup>26</sup> *Proskauer Rose v. Boca Airport, Inc.*, 987 So. 2d 116 (Fla. 4th DCA 2008).

## CITATION INDEX

### 5

*5500 North Corp. v. Willis*, 729 So. 2d 508, 514 (Fla. 5th DCA 1999), 53

### A

*Abamar Housing & Development, Inc. v. Lisa Daly Lady Decor*, 724 So. 2d 572 (Fla. 3d DCA 1998), 123  
*Aldrich v. Roche Biomedical Laboratories, Inc.*, 737 So. 2d 1124 (Fla. 5th DCA 1999), 17, 20  
*Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180, 1182 (Fla. 1993), 77  
*Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1129-30 (Fla. 2005), 44  
*Allstate Insurance Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999), 64  
*Amato v. Intindola*, 854 So. 2d 812 (Fla. 4th DCA 2003), 22, 32  
*American Pioneer Casualty Insurance Co. v. Henrion*, 523 So. 2d 776 (Fla. 4th DCA 1988), 13  
*Ameriwood v. Liberman*, 2006 WL 3825291, 2006 U.S. Dist. LEXIS 93380 (E.D. Mo., Dec. 27, 2006), 101  
*Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701 (Fla. 4th DCA 1995), 2  
*Anadarko Petroleum Corp. v. Davis*, 2006 WL 3837518 (S.D. Tex., Dec. 28, 2006), 101  
*Anchor Nat'l Fin. Servs., Inc. v. Smeltz*, 546 So. 2d 760, 761 (Fla. 2d DCA 1989), 40  
*Arthrex, Inc. v. Parcus Medical, LLC, M.D. Fla.* 2012 (2012 WL 3778981), 121  
*Arzola v. Reigosa*, 534 So. 2d 883 (Fla. 3d DCA 1988), 67, 68  
*Arzuman v. Saud*, 843 So. 2d 950 (Fla. 4th DCA 2003), 23, 32  
*Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117 (Fla. 3d DCA 2008), 123  
*Attorney Ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 305-306 (Fla. 4th DCA 2001), 67  
*Austin v. Liquid Distributors, Inc.*, 928 So. 2d 521 (Fla. 3d DCA 2006), 29  
*Auto Owners Insurance Co. v. Clark*, 676 So. 2d 3 (Fla. 4th DCA 1996), 5

### B

*Baker v. Myers Tractor Services, Inc.*, 765 So. 2d 149 (Fla. 1st DCA 2000), 25  
*Bandorf v. Volusia County Dept. of Corrections*, 939 So. 2d 249, 250 (Fla. 1st DCA 2006), 68, 70  
*Bank One, N.A. v. Harrod*, 873 So. 2d 519, 521 (Fla. 4th DCA 2004), 14

*Bankers Sec. Ins. Co. v. Symons*, 889 So. 2d 93 (Fla. 5th DCA 2004), 121, 122  
*Barnett Bank v. Dottie-G. Dev. Corp.*, 645 So. 2d 573 (Fla. 2d DCA 1994), 40  
*Barnett v. Barnett*, 718 So. 2d 302, 304 (Fla. 2d DCA 1998), 14  
*Bartell v. McCarrick*, 498 So. 2d 1378 (Fla. 4th DCA 1986), 60, 61, 62, 64  
*Barthlow v. Jett*, 930 So. 2d 739 (Fla. 1st DCA 2006), 10  
*Bass v. City of Pembroke Pines*, 991 So. 2d 1008 (Fla. 4th DCA 2008), 30  
*Bay Colony Office Bldg. Joint Venture v. Wachovia Mortg. Co.*, 342 So. 2d 1005, 1006 (Fla. 4th DCA 1977), 75  
*Belmont v. North Broward Hosp. Dist.*, 727 So. 2d 992, 994 (Fla. 4th DCA 1999), 5, 67  
*Berman, Florida Civil Procedure §280.4[1][b]* (2005 Edition), 48  
*Bertrand v. Belhomme*, 892 So. 2d 1150 (Fla. 3d DCA 2005), 2, 29  
*Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981), 2, 5, 7  
*Blackford v. Florida Power & Light Co.*, 681 So. 2d 795 (Fla. 3d DCA 1996), 2  
*Blagrove v. Smith*, 701 So. 2d 584 (Fla. 5th DCA 1997), 58  
*Bob Montgomery Real Estate v. Djokic*, 858 So. 2d 371 (Fla. 4th DCA 2003), 31  
*Bologna v. Schlanger*, 995 So. 2d 526 (Fla. 5th DCA 2008), 32  
*Bridgestone/Firestone v. Herron*, 828 So. 2d 414 (Fla. 1st DCA 2002), 10  
*Bro-Tech Corp. v. Thermax, Inc.*, 2008 WL 724627 (E.D. Pa. March 17, 2008), 101  
*Brown v. Allstate Ins. Co.*, 838 So. 2d 1264 (Fla. 5th DCA 2003), 33  
*Broyles v. Reilly*, 695 So. 2d 832 (Fla. 2d DCA 1997), 61, 62, 63  
*Byxbee v. Reyes*, 850 So. 2d 595, 596 (Fla. 4th DCA 2003), 69

### C

*Canaveras v. Continental Group, Ltd.*, 896 So. 2d 855 (Fla. 3d DCA 2005), 29  
*Canella v. Bryant*, 235 So. 2d 328 (Fla. 4th DCA 1970), 46  
*Cape Cave Corporation v. Charlotte Asphalt, Inc.*, 384 So. 2d 1300, 1301 (Fla. 2d DCA 1980), 13  
*Carr v. Reese*, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001), 14  
*Carrero v. Engle Homes, Inc.*, 667 So. 2d 1011 (Fla. 4th DCA 1996), 7  
*Carson v. Jackson*, 466 So. 2d 1188, 1191 (Fla. 4th DCA 1985), 67

*Central Square Tarragon LLC v. Great Divide Insurance Company*, 82 So. 3d 911 (Fla. 4th DCA 2001), 6

*Chacha v. Transp. USA, Inc.*, 78 So. 3d 727 (Fla. 4th DCA 2012), 30

*Channel Components, Inc. v. America II Electronics, Inc.*, 915 So. 2d 1278 (Fla. 2nd DCA 2005), 2

*Cherubino v. Fenstersheib & Fox, P.A.*, 925 So. 2d 1066 (Fla. 4th DCA 2006), 21, 31

*Chmura v. Sam Rodgers Properties, Inc.*, 2 So. 3d 984 (Fla. 2d DCA 2008), 4

*Coburn v. PN II, Inc.*, 2008 WL 879746 (D. Nev. Mar. 28, 2008), 101

*Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 674885, (Fla. Cir. Ct., 2005), 86

*Collins v. Skinner*, 576 So. 2d 1377 (Fla. 2d DCA 1991), 61, 63

*Commercial Carrier Corp. v. Kelley*, 903 So. 2d 240, 241 (Fla. 5th DCA 2005), 68

*Connell v. Guardianship of Connell*, 476 So. 2d 1381 (Fla. 1st DCA 1985), 68

*Cooper v. Lewis*, 719 So. 2d 944 (Fla. 5th DCA 1998), 38

*Coopersmith v. Perrine*, 91 So. 3d 246 (Fla. 4th DCA 2012), 64

*Cotton States Mutual Insurance Co., v. Turtle Reef Associates, Inc.*, 444 So. 2d 595 (Fla. 4th DCA 1984), 40

*Cox v. Burke*, 706 So. 2d 43 (Fla. 5th DCA 1998), 34

*Cromer v. Mullally*, 861 So. 2d 523, 525 (Fla. 3d DCA 2003), 75

*Cross v. Pumpco, Inc.*, 910 So. 2d 324 (Fla. 4th DCA 2005), 22, 31

*Crowley v. Lammings*, 66 So. 3d 355 (Fla. 2d DCA 2011), 64

*Cruz-Govin v. Torres*, 29 So. 3d 393, 396 (Fla. 3d DCA 2010), 69

## D

*Da Silva Moore v. Publicis Groupe*, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012), 89

*DeBartolo Aventura, Inc. v. Hernandez*, 638 So. 2d 988 (Fla. App. 3d Dist. 1994), 41

*Dimeglio v. Briggs-Mugrauer*, 708 So. 2d 637 (Fla. 2d DCA 1998), 59

*Distefano v. State Farm Mut. Auto. Ins. Co.*, 846 So. 2d 572 (Fla. 1st DCA 2003), 25

*District Board of Trustees of Miami-Dade County College v. Chao*, 739 So. 2d 105 (Fla. 3d DCA 1999), 43

*Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980), 44

*Don Mott Agency, Inc. v. Pullum*, 352 So. 2d 107 (Fla. 2d DCA 1977), 48

*Drakeford v. Barnett Bank of Tampa*, 694 So. 2d 822, 824 (Fla. 2d DCA 1997), 13

*DYC Fishing, Ltd. v. Martinez*, 994 So. 2d 461, 462 (Fla. 3d DCA 2008), 2

## E

*Eastern Airlines, Inc. v. Dixon*, 310 So. 2d 336 (Fla. 3d DCA 1975), 4

*Edlund v. Seagull Townhomes Condominium Assoc., Inc.*, 928 So. 2d 405 (Fla. 3d DCA 2006), 13

*Edwards v. Edwards*, 634 So. 2d 284 (Fla. 4th DCA 1994), 39

*Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996), 64, 65

*Empire World Towers, LLC v. Cdr Créances*, 89 So. 3d 1034 (Fla. 3d DCA 2012), 27

*Evangelos v. Dachiel*, 553 So. 2d 245 (Fla. 3d DCA 1989), 2

## F

*F.M. v. Old Cutler Presbyterian Church, Inc.*, 595 So. 2d 201, 202 (Fla. 3d DCA 1992), 67

*Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), 73

*Federal Express Corp. v. Cantway*, 778 So. 2d 1052, 1053 (Fla. 4th DCA 2001), 43

*Federal Insurance Co. v. Allister Manufacturing Co.*, 622 So. 2d 1348 (Fla. 4th DCA 1993), 2

*Ferron v. Search Cactus, LLC*, 2008 WL 1902499 (S.D. Ohio Apr. 28, 2008), 101

*Figgie International, Inc. v. Alderman*, 698 So. 2d 563 (Fla. 3d DCA 1997), 17, 18

*First & Mid-South Advisorv Co. v. Alexander/Davis Properties, Inc.*, 400 So. 2d 113 (Fla. 4th DCA 1981), 4

*Fisher v. Prof'l. Adver. Dirs. Co., Inc.*, 955 So. 2d 78 (Fla. 4th DCA 2007), 14

*Florida Marine Enterprises v. Bailey*, 632 So. 2d 649 (Fla. 4th DCA 1994), 5

*Ford Motor Co. v. Garrison*, 415 So. 2d 843 (Fla. 1st DCA 1982), 4

*Freeman v. Latherow*, 722 So. 2d 885 (Fla. 2d DCA 1998), 61

## G

*Garbacik v. Wal-Mart Transp., LLC*, 932 So. 2d 500, 503-504 (Fla. 5th DCA 2006), 68, 69, 72

*Garcia v. Emerson Electric Co.*, 677 So. 2d 20 (Fla. 3d DCA 1996), 5

*Gayer v. Fine Line Constr. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007), 90, 91

*Gehrmann v. City of Orlando*, 962 So. 2d 1059 (Fla. 5th DCA 2007), 33

*Gibson v. Gibson*, 456 So. 2d 1320 (Fla. 4th DCA 1984), 61, 62

*Gilbert v. Eckerd Corp. of Fla, Inc.*, 34 So. 3d 773 (Fla. 3d DCA 2010), 28

*Goeddel v. Davis, M.D.*, 993 So. 2d 99 (Fla. 5th DCA 2008) 58

*Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006), 94

*Goldstein v. Great Atlantic and Pacific Tea Co.*, 118 So. 2d 253 (Fla. 3d DCA 1960), 4

*Gonzalez v. Largen*, 790 So. 2d 497, 500 (Fla. 5th DCA 2001), 6  
*Gosman v. Luzinski*, 937 So. 2d 293 (Fla. 4th DCA 2006), 122  
*Gouveia v. F. Leigh Phillips, M.D.*, 823 So. 2d 215, 222 (Fla. 4th DCA 2002), 5  
*Grainger v. Fuller*, 72 So. 462, 463 (Fla. 1916), 70  
*Granados v. Zehr*, 979 So. 2d 1155 (Fla. 5th DCA 2008), 33  
*Grand Union Co., v. Patrick*, 247 So. 2d 474 (Fla. 3d DCA 1971), 43  
*Grau v. Branham*, 626 So. 2d 1059 (Fla. 4th DCA 1993), 5  
*Gray v. Sunburst Sanitation Corp.*, 932 So. 2d 439 (Fla. 4th DCA 2006), 31  
*Griener v. DiPietro*, 708 So. 2d 666, 672 (Fla. 4th DCA 1998), 6

## H

*Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1091 (Fla. 4th DCA 2001), 16  
*Hair v. Morton*, 36 So. 3d 766 (Fla. 3d DCA 2010), 22, 28  
*Ham v. Dunmire*, 891 So. 2d 492, (Fla. 2004), 14, 15, 95  
*Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1476 (11th Cir. 1984), 67  
*Hanono v. Murphy*, 732 So. 2d 892 (Fla. 3d DCA 1998), 30  
*Hastings v. Rigsbee*, 875 So. 2d 772, (Fla. 2d DCA 2004), 57  
*Haverfield Corp. v. Franzen*, 694 So. 2d 162 (Fla. 3d DCA 1997), 12, 39  
*Hedenburg v. Aramark American Food Services*, 2007 U.S. Dist. LEXIS 3443 (W.D. Wash. Jan. 17, 2007), 101  
*Helmick v. McKinnon*, 657 So. 2d 1279, 1280 (Fla. 5th DCA 1995), 68  
*Hennis v. City Tropics Bistro, Inc.*, 1 So. 3d 1152, 1155 (Fla. 5th DCA 2009), 77  
*Henry v. Quicken Loans, Inc.*, 2008 WL 474127 (E.D. Mich. Feb. 15, 2008), 101  
*Hernandez v. Pino*, 482 So. 2d 450 (Fla. 3d DCA 1986), 19  
*Hill v. State of Florida*, 846 So. 2d 1208, 1211-1212 (Fla. 5th DCA 2003), 70  
*Hoffman v. Hoffman*, 718 So. 2d 371 (Fla. 4th DCA 1998), 2  
*Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973), 73  
*Holland v. Barfield*, 35 So. 3d 2010 Fla. App. LEXIS 6293; 35 Fla. L. Weekly D 1018 (Fla. 5th DCA May 7, 2010), 86  
*Honza*, 2007 WL 4591917 (Tex. App. Dec. 28, 2007), 101  
*Howard v. Risch*, 959 So. 2d 308 (Fla. 2d DCA 2007), 26  
*Hutchinson v. Plantation Bay Apartments, LLC*, 931 So. 2d 957 (Fla. 1st DCA 2006), 25

## I

*Ibarra v. Izaguirre*, 985 So. 2d 1117 (Fla. 3d DCA 2008), 22, 29  
*In re: Electric Machinery Enterprises, Inc.*, 416 B.R. 801, 873 (M.D. Fla. 2009), 91  
*In re: Ford Motor Co.*, 345 F. 3d 1315, 1316 (11th Cir. 2003), 101  
*In re: Honza*, 2007 WL 4591917 (Tex. App. Dec. 28, 2007), 101  
*Insurance Company of North America v. Noya*, 398 So. 2d 836 (Fla. 5th DCA 1981), 48  
*International Tel. & Tel. Corp v. United Tel. Co. of Florida*, 60 F.R.D. 177 (M.D. Fla. 1973), 120

## J

*Jacob v. Henderson* 840 So. 2d 1167 (Fla 2d DCA 2003), 21, 22, 27  
*Jaffee v. Redmond*, 518 U.S. 1, 10-12 (1996), 67  
*Jean v. Theodorsen*, 736 So. 2d 1240 (Fla. 4th DCA 1999), 6  
*Jesse v. Commercial Diving Acad.*, 963 So. 2d 308 (Fla. 1st DCA 2007), 24  
*Johnson v. Swerzewski*, 935 So. 2d 57 (Fla. 1st DCA 2006), 25  
*Johnson v. Wells Fargo Home Mortgage, Inc.*, 2008 WL 2142219 (D. Nev. May 16, 2008), 101  
*Jones v. Publix Super Mkts., Inc.*, 2012 Fla. App. LEXIS 12217, 2012 WL 3044250 (Fla. 5th DCA July 27, 2012), 32  
*Joseph S. Arrigo Motor Co., Inc. v. Lasserre*, 678 So. 2d 396, 397 (Fla. 1st DCA 1996), 12

## K

*Katzman v. Ranjana Corp.*, 90 So. 3d 873 (Fla. 4th DCA 2002), 38  
*Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060 (Fla. 4th DCA 2012), 37, 65  
*Kay's Custom Drapes, Inc. v. Garrote*, 920 So. 2d 1168 (Fla. 3d DCA 2006), 76  
*Kaye v. State Farm Mut. Auto Ins. Co.*, 985 So. 2d 675 (Fla. 4th DCA 2008), 6  
*Keller Industries v. Volk*, 657 So. 2d 1200 (Fla. 4th DCA 1995), 5, 6  
*King v. Taylor*, 3 So. 3d 405 (Fla. 2d DCA 2009), 26  
*Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), 7, 12, 14, 15  
*Kubel v. San Marco Floor & Wall, Inc.*, 967 So. 2d 1063 (Fla 2d DCA 2007), 26

## L

*Lagueux v. Union Carbide Corp.*, 861 So. 2d 87, 89 (Fla. 4th DCA 2003), 77  
*Laschke v. R. J. Reynolds Tobacco Co.*, 872 So. 2d 344 (Fla. 2d DCA 2004), 27  
*Laser Spine Institute, LLC v. Makaanast*, 69 So. 3d 1045 (Fla. 2d DCA 2011), 42, 43

*Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1192-93 (Fla. 2d DCA 2011), 76  
*Laurore v. Miami Auto. Retail, Inc.*, 16 So. 3d 862 (Fla. 3d DCA 2009), 28  
*Leinhart v. Jurkovich*, 882 So. 2d 456 (Fla. 4th DCA 2004), 58  
*Lent v. Baur Miller & Webner. P.A.*, 710 So. 2d 156 (Fla. 3d DCA 1998), 18  
*Liberty Mutual Insurance Co. v. Lease America, Inc.*, 735 So. 2d 560 (Fla. 4th DCA 1999), 48  
*Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), 124  
*Littelfield v. J. Pat Torrence*, 778 So. 2d 368 (Fla. 2d DCA 2001), 59  
*LoBue v. Travelers Insurance Company*, 388 So. 2d 1349, 1351 (Fla. 4th DCA 1980), 6  
*Long v. Swofford*, 805 So. 2d 882 (Fla. 3d DCA 2001), 29  
*Lunceford v. Florida Central Railroad Co., Inc.*, 728 So. 2d 1239 (Fla. 5th DCA 1999), 63

## M

*Marshalls of Ma, Inc. v. Minsal*, 932 So. 2d 444 (Fla. App. 3d Dist. 2006), 40  
*Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (2005), 19, 94  
*McClennan v. American Building Maintenance*, 648 So. 2d 1214 (Fla. 1st DCA 1995), 64  
*McCorkle v. Fast*, 599 So. 2d 277 (Fla. 2d DCA 1992), 61, 63  
*McGarrah v. Bayfront Medical Center*, 889 So. 2d 923 (Fla. 2d DCA 2004), 64  
*McKenney v. Airport Rent-A-Car, Inc.*, 686 So. 2d 771 (Fla. 4th DCA 1997), 58  
*McKnight v. Evancheck*, 907 So. 2d 699 (Fla. 4th DCA 2005), 31  
*Medina v. Florida East Coast Ry., L.L.C.*, 921 So. 2d 767 (Fla. 3d DCA 2006), 29  
*Medina v. Florida East Coast Rwy.*, 866 So. 2d 89 (Fla. 3d DCA 2004), 13  
*Medrano v. BEC Const. Corp.*, 588 So. 2d 1056 (Fla. 3d DCA 1991), 63  
*Menke v. Broward County School Board*, 916 So. 2d 8 (4th DCA 2005), 86, 100, 101, 102  
*Metro. Opera Ass'n Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 212 F.R.D. 178, 218-219 (S.D.N.Y. 2003), 94  
*Metropolitan Dade County v. Martinsen*, 736 So. 2d 794 (Fla. 3d DCA 1999), 30  
*Midtown Enterprises, Inc. v. Local Contractors Inc.*, 785 So. 2d 578 (Fla. 3d DCA 2001), 6  
*Miller v. Nelms*, 966 So. 2d 437 (Fla. 2d DCA 2007), 26  
*Momenah v. Ammache*, 616 So. 2d 121 (Fla. 2d DCA 1993), 46, 47  
*Morgan v. Campbell*, 816 So. 2d 251 (Fla. 2d DCA 2002), 27  
*Mullins v. Tompkins*, 15 So. 3d 798 (Fla. 1st DCA 2009), 125

*Myrick v. Direct General Inc. Co.*, 932 So. 2d 392 (Fla. 2d DCA 2006), 27

## N

*N. Broward Hosp. Dist. v. Button*, 592 So. 2d 367 (Fla. 4<sup>th</sup> DCA 1992), 41  
*Nash v. Wells Fargo Guard Services, Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996), 73, 74, 78  
*National Day Laborer Organizing Network et al. v. United States Immigration and Customs Enforcement Agency, et al.*, 2012 U.S. Dist. Lexis 97863 (SDNY, July 13, 2012), 99  
*Neighborhood Health Partnership, Inc. v. Merkle*, 8 So. 3d 1180, 1184-1185 (Fla. 4<sup>th</sup> DCA 2009), 40, 41  
*Nelson v. Womble*, 657 So. 2d 1221, 1222 (Fla. 5th DCA 1995), 67  
*Nevin v. Palm Beach County School Board*, 958 So. 2d 1003 (Fla. 1st DCA 2007), 122  
*New Hampshire Ins. Co. v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990), 16  
*Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283 (Fla. 1st DCA 1993), 2  
*Northup v. Howard W. Acken, M.D.*, 865 So. 2d 1267 (Fla. 2004), 42  
*Nova Southeastern University, Inc. v. Jacobson*, 25 So. 3d 82 (Fla. 4th DCA 2009), 124

## O

*Office Depot v. Miller*, 584 So. 2d 587 (Fla. 4th DCA 1991), 5  
*Olges v. Dougherty*, 856 So. 2d 6 (Fla. 1st DCA 2003), 57  
*Olson v. Blasco*, 676 So. 2d 481, 482 (Fla. 4th DCA 1996), 68  
*Orkin Exterminating Co. v. Knollwood*, 710 So. 2d 697 (Fla. 5th DCA 1998), 36  
*Orbit One Communications, Inc. v. Ronsen*, 271 F.R.D. 429; 2010 U.S. Dist. LEXIS 123633 (S.D. N.Y. 2010), 93  
*Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389 (Fla. 2d DCA 2012), 19, 86, 90, 91  
*Oswald v. Diamond*, 576 So. 2d 909, 910 (Fla. 1st DCA 1991), 69

## P

*Palank v. CSX Transportation, Inc.*, 657 So. 2d 48 (Fla. 4th DCA 1995), 61  
*Palm Beach County Sch. Bd. v. Morrison*, 621 So. 2d 464, 469 (Fla. 4th DCA 1993), 68  
*Papadopoulos v. Cruise Ventures*, 974 So. 2d 418 (Fla. 3d DCA 2007), 29  
*Parrish v. City of Orlando*, 53 So. 3d 1199, 1203 (Fla. 5th DCA 2011), 70  
*Partner-Brown v. Bornstein, D.P.M.*, 734 So. 2d 555, 556 (Fla. 5th DCA 1999), 67  
*Patsy v. Patsy*, 666 So. 2d 1045 (Fla. 4th DCA 1996), 7

*Pena v. Citizens Prop. Ins. Co.*, 88 So. 3d 965 (Fla. 2d DCA 2012), 25  
*Perrine v. Henderson*, 85 So. 3d 1210 (Fla. 5th DCA 2012), 32  
*Peskoff v. Faber*, 2008 WL 2649506 (D.D.C. July 7, 2008), 101  
*Pevsner v. Frederick*, 656 So. 2d 262 (Fla. 4th DCA 1995), 38  
*Piunno v. R. F. Concrete Const., Inc.*, 904 So. 2d 658 (Fla. 4th DCA 2005), 31  
*Powerline Components, Inc. v. Mil-Spec Components, Inc.*, 720 So. 2d 546, 548 (Fla. 4th DCA 1998), 13  
*Price v. Hannahs*, 954 So. 2d 97 (Fla. 2d DCA 2007), 36, 65  
*Prince v. Mallari*, 36 So. 3d 128 (Fla. 5th DCA 2010), 63  
*Progressive v. Scoma*, 975 So. 2d 461 (Fla. 2d DCA 2007), 126  
*Proskauer Rose v. Boca Airport, Inc.*, 987 So. 2d 116 (Fla. 4th DCA 2008), 126  
*Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987), 2

## R

*Ramey v. Haverty Furniture Cos.*, 993 So. 2d 1014, 1018 (Fla. 2d DCA 2008), 21, 26  
*Rankin v. Rankin*, 284 So. 2d 487 (Fla. 3d DCA 1973), 4  
*Reynolds v. State*, 963 So. 2d 908 (Fla. 2d DCA 2007), 126  
*Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010), 93  
*Rios v. Moore*, 902 So. 2d 181 (Fla. 3d DCA 2005), 22, 29  
*Rose v. Clinton*, 575 So. 2d 751 (Fla. 3d DCA 1991), 12  
*Rosenberg v. Gaballa*, 1 So. 3d 1149 (Fla. 4th DCA 2009), 7, 10  
*Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (4th DCA 2004), 91  
*Royal Caribbean Cruises, Ltd. v. Cox*, 974 So. 2d 462, 466 (Fla. 3d DCA 2008), 57  
*Ruiz v. City of Orlando*, 859 So. 2d 574 (Fla. 5th DCA 2003), 22, 33  
*Russenberger v. Russenberger*, 639 So. 2d 963 (Fla. 1994), 57

## S

*Saenz v. Patco Trans. Inc.*, 969 So. 2d 1145 (Fla. 5th DCA 2007), 33  
*Savino v. Florida Drive In Theatre Management, Inc.*, 697 So. 2d 1011 (Fla. 4th DCA 1997), 32  
*Schagrin v. Nacht*, 683 So. 2d 1173 (Fla. 4th DCA 1996), 57  
*Scheff v. Mayo*, 645 So. 2d 181, 182 (Fla. 3d DCA 1994), 67  
*Scottsdale Ins. Co. v. Camara*, 813 So. 2d 250, 251-52 (Fla. 3d DCA 2002), 44

*Sedona Principles*, 86, 87  
*Segarra v. Segarra*, 932 So. 2d 1159 (Fla. 3d DCA 2006), 67, 68  
*Shah v. Bland*, 973 So. 2d 1188, 1191 (Fla. 2d DCA 2008), 73  
*Sky Dev., Inc. v. Vistaview Dev., Inc.*, 41 So. 3d 918 (Fla. 3d DCA 2010), 28  
*Sligar v. Tucker*, 267 So. 2d 54 (Fla. 4th DCA 1972), 43  
*Smith v. Eldred*, 96 So. 3d 1102 (Fla. 4th DCA 2012), 36  
*Smith v. University Medical Center, Inc.*, 559 So. 2d 393 (Fla. 1st DCA 1990), 2  
*Sonson v. Hearn*, 17 So. 3d 745 (Fla. 4th DCA 2009), 4  
*Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994), 43, 120  
*Southern Bell Tel. & Tel. Co. v. Florida Dept. of Transp.*, 668 So. 2d 1039, 1041 (Fla. 3d DCA 1996), 77  
*Sponco Manufacturing, Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995), 16, 17  
*St. Mary's Hospital, Inc. v. Brinson*, 685 So. 2d 33, 35 (Fla. 4th DCA 1996), 18  
*St. Petersburg Sheraton Corp. v. Stuart*, 242 So. 2d 185 (Fla. 2d DCA 1970), 4  
*Stables v. Rivers*, 559 So. 2d 440 (Fla. 1st DCA 1990), 47  
*Stakely v. Allstate Ins. Co.*, 547 So. 2d 275 (Fla. 2d DCA 1989), 61  
*State Farm Mutual Auto Ins. Co. v. H. Rehab, Inc.*, 775 So. 3d 724 (Fla. 3d DCA 2011), 44  
*State Farm Mutual Auto Insurance Company v. Shepard*, 644 So. 2d 111 (Fla. 2d DCA 1994), 60  
*State Farm Mutual Automobile Ins. Co. v. Tranchese*, 49 So. 3d 809, 810 (Fla. 4th DCA 2010), 44  
*Steele v. Chapnick*, 552 So. 2d 209 (Fla. 4th DCA 1989), 2  
*Steinger v. Geico*, No. 4D 11-4162 (Fla. 4th DCA Nov. 21, 2012), 36  
*Stephens v. State of Florida*, 932 So. 2d 563 (Fla. 1st DCA 2006), 61  
*Sterle v. Elizabeth Arden, Inc.*, 2008 WL 961216 (D. Conn. Apr. 9, 2008), 101  
*Stern v. Stein*, 694 So. 2d 851 (Fla. 4th DCA 1997), 12  
*Strasser v. Yalamanchi*, 783 So. 2d 1087 (Fla. 4th DCA 2001), 86  
*Suarez v. Benihana Nat'l of Fla. Corp.*, 88 So. 3d 349 (Fla. 3d DCA 2012), 28  
*Sullivan v. Dry Lake Dairy, Inc.*, 898 So. 2d 174 (Fla. 4th DCA 2005), 16  
*Summit Chase Condominium Ass'n Inc. v. Protean Investors, Inc.*, 421 So. 2d 562 (Fla. 3d DCA 1982), 4  
*Summitbridge Nat'l Invs., v. 1221 Palm Harbor, L.L.C.*, 67 So. 3d 448, 449 (Fla. 2d DCA 2011), 42, 43  
*Sunex Intern Inc. v. Colson*, 964 So. 2d 780 (Fla. 4th DCA 2007), 30  
*Sykes v. St. Andrews Sch.*, 619 So. 2d 467 (Fla. 4th DCA 1993), 67, 71, 72

## T

*Tampa Electric Co. v. Bazemore*, 96 So. 297, 302 (Fla. 1923), 70  
*The Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010), 53  
*The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.*, 2010 WL 184312, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010), 96, 97, 98  
*Thomas v. Chase Manhattan Bank*, 875 So. 2d 758 (Fla. 4th DCA 2004), 4  
*TIG Ins. Corp. of America v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001), 121  
*Time Warner, Inc. v. Gadinsky*, 639 So. 2d 176 (Fla. 3d DCA 1994), 40  
*Toucet v. Big Bend Moving & Storage*, 581 So. 2d 952 (Fla. 1st DCA 1991), 60, 61, 63, 64  
*Townsend v. Conshor*, 832 So. 2d 166 (Fla. 2d DCA 2002), 19  
*Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996), 2, 7, 16, 17  
*Truesdale v. Landau*, 573 So. 2d 429 (Fla. 5th DCA 1991), 63  
*Tsutras v. Duhe*, 685 So. 2d 979 (Fla. 5<sup>th</sup> DCA 1997), 58  
*Tubero v. Ellis*, 472 So. 2d 548, 550 (Fla. 4th DCA 1985), 13

## U

*U.S. Security Ins. Co. v. Cimino*, 754 So. 2d 697, 701 (Fla. 2000), 64  
*United Services Automobile Association v. Strasser*, 492 So. 2d 399 (Fla. 4th DCA 1986), 2

## V

*Vega v. CSCS International. N.V.*, 795 So. 2d 164, 167 (Fla. 3d DCA 2001), 19  
*Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. Sep. 9, 2010), 93  
*Villasenor v. Martinez*, 991 So. 2d 433 (Fla. 5th DCA 2008), 33

## W

*W.R. Grace & Co. -Conn. v. Dougherty*, 636 So. 2d 746, 747-48 (Fla. 2d DCA 2004), 76, 77

*Wal-Mart Stores, Inc. v. Weeks*, 696 So. 2d 855 (Fla. 2d DCA 1997), 41  
*Wapnick v. State Farm Mutual Automobile Insurance Co.*, 54 So. 3d 1065 (Fla. 4th DCA 2011), 59  
*Webb v. Dollar Tree Stores, Inc.*, 987 So. 2d 778, 779 (Fla. 3d DCA 2008), 72  
*Weinstock v. Groth*, 659 So. 2d 713, 715 (Fla. 5th DCA 1995), 69  
*Wells Fargo Bank, N.A. v. Reeves*, 92 So. 3d 249 (Fla. 1st DCA 2012), 24  
*Wenwei Sun v. Aviles*, 53 So. 3d 1075 (Fla. 5th DCA 2010), 32  
*Westco, Inc. v. Scott Lewis' Gardening & Trimming*, 26 So. 3d 620, 622 (Fla. 4th DCA 2009), 42  
*Wilkins v. Palumbo*, 617 So. 2d 850 (Fla. 2d DCA 1993), 61, 62  
*William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009), 89  
*Winn-Dixie Stores v. Nakutis*, 435 So. 2d 307 (Fla. 5th DCA 1983), 43

## X

*Xpel Technologies Corp. v. Am. Filter Film Distribs;* 2008 WL 744837 (W.D. Tex. Mar. 17, 2008), 101

## Y

*Yoho v. Lindsley*, 248 So. 2d 187, 192 (Fla. 4th DCA 1971), 69  
*Young v. Curgil*, 358 So. 2d 58 (Fla. 3d DCA 1978), 30

## Z

*Zaccaria v. Russell*, 700 So. 2d 187 (Fla. 4th DCA 1997), 12, 13  
*Zanathy v. Beach Harbor Club Assoc.*, 343 So. 2d 625 (Fla. 2d DCA 1977), 12  
*Zito v. Washington Fed. Savings*, 318 So. 2d 175 (Fla. 3d DCA 1975), 74  
*Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003), 93,  
*Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003), 93, 96,  
*Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004), 93, 94, 95, 98

## Fla. R. Civ. P.

1.010, 85  
1.080, 55, 115  
1.140(b), 74  
1.140(f), 74  
1.150, 75  
1.150(b), 75  
1.200, 85, 107, 111  
1.200(a)(5)-(7), 85  
1.201, 85, 109, 111  
1.201(a)(2)(A)-(H), 107  
1.201(b), 109  
1.201(b)(1)(J), 85, 109  
1.280, 41, 85, 110  
1.280(b), 112, 113  
1.280(b)(1), 120  
1.280(b)(3), 40, 41, 79, 83  
1.280(b)(4)(A), 35, 64  
1.280(b)(4)(B), 36  
1.280(b)(5), 121, 122  
1.280(b)(5)(A), 35, 36, 37, 38  
1.280(c), 45  
1.280(d), 85, 90  
1.280(d)(1), 90  
1.280(d)(2), 90, 106, 114  
1.280(d)(2)(ii), 83, 90  
1.280(g), 80  
1.285, 81, 84, 100, 116, 123  
1.285 (a), 84, 123  
1.285 (b), 84, 123  
1.285 (c), 85, 123  
1.285 (d), 85, 123  
1.285(c)(4), 123  
1.310, 1, 55, 56  
1.310(b)(6), 1  
1.310(c), 51, 52, 54  
1.310(d), 51, 54  
1.310(f)(3), 80  
1.320, 1  
1.320(a), 1  
1.340, 1, 48, 112  
1.340(c), 104  
1.340(e), 80  
1.350, 1, 41, 48, 105, 112  
1.350(b), 103, 104  
1.350(d), 80  
1.351, 48, 55, 56  
1.351(c), 56  
1.351(d), 55  
1.360, 35, 48, 57, 58, 59, 60, 63, 64  
1.360(a), 1  
1.360(a)(1)(B), 11  
1.360(a)(2), 11  
1.360(a)(3), 4, 60  
1.380, 1, 4, 10, 48, 98, 113, 114  
1.380(a), 48  
1.380(a)(3), 4

1.380(a)(4), 1, 3, 45, 49  
1.380(b), 1  
1.380(b)(1), 38  
1.380(b)(2), 11, 12  
1.380(b)(2)(A)-(E), 2  
1.380(d), 2  
1.380(e), 98  
1.410, 56, 105, 114  
1.410(c), 105  
1.410(d), 55

## Fed. R. Civ. P.

11, 7  
16, 81, 107  
16(b), 86, 111  
16(c), 111  
26, 81, 109, 110  
26(a), 107, 111  
26(a)(1), 107, 111  
26(b), 112  
26(a)(1)(B), 86  
26(b)(2)(B), 86  
26(b)(2)(C), 110, 116  
26(b)(5)(B), 100, 116  
26(b)(5), 86  
26(c), 111  
26(e)(1), 107  
26(f), 86, 107, 109, 111  
29, 113  
30, 110  
33, 81, 86, 112  
34, 79, 81, 86, 112  
34(b)(2), 100  
35, 58  
37, 81, 114  
37(e), 96, 98,  
37(f), 86  
45, 81, 86, 113, 114  
37(e), 98

## Fed. R. Evid.

101, 117  
501, 117  
502, 100, 116  
1101, 117

## Florida Statues

§ 57.105, 7, 10  
§ 57.105(2), 10  
§ 57.105(6), 10  
§ 90.501-510, 84  
§ 90.502, 120  
§ 90.503, 67, 69, 70  
§ 90.503(1), 66  
§ 90.503(1)(a), 66  
§ 90.503(1)(a)1, 66  
§ 90.503(1)(a)2, 66  
§ 90.503(1)(a)5, 66  
§ 90.503(2), 66  
§ 90.503(4)(c), 66, 67, 72  
§ 90.506, 42, 43  
§ 90.507, 68  
§ 394.4615, 67  
§ 440.13(2)(b), 64  
§ 627.736(7), 64  
§ 688.002(4), 42  
§ 768.81, 73, 75  
§ 768.81(3)(a), 77  
§ 768.81(3)(a)1, 76  
§ 768.81(3)(a)2, 77

## Fla. R. Jud. Admin.

2.420, 80  
2.425, 80

## Fla. R. Prof. Conduct

4-1.1, 79  
4-1.6, 80  
4-4.4(b), 84