



Joint Committee of
The Trial Lawyers Section of The Florida Bar
and Conferences of Circuit
and County Court Judges

2007
HANDBOOK
ON DISCOVERY
PRACTICE

PREFACE

In 1994, the Trial Lawyers Section of The Florida Bar, the Conference of Circuit Court 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. Although sometimes hard to define, we all know it when we see it.

This handbook is the end result of the committee's work on that subject. 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. The first edition of this handbook was prepared in the Fall of 1995; this 2007 (twelfth) edition updates the handbook through January 2008.

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CHAPTER ONE

THE TRIAL JUDGE HAS THE WEAPONS TO COMBAT DISCOVERY ABUSE - IT'S ONLY A MATTER OF WHEN AND HOW TO USE THEM

Discovery abuses are a recurring problem in civil practice. Questionable litigation tactics and outright contempt of court pervade our justice system. Many practitioners are frustrated by the ostensible reluctance of trial courts to sanction parties for discovery abuse. This reluctance probably stems from the trial courts' failure to fully appreciate their broad powers, including a failure to appreciate the limited scope of appellate review of procedurally correct sanctions orders.

However, the reality is that the trial court has the power to end discovery abuses. The appellate courts will sustain the trial court's authority if it is exercised in a procedurally correct manner with thorough findings of fact. The party moving for sanctions can make the trial court's job easier by fully advising the court of the law and proper procedure. Working together, counsel moving for sanctions and the trial courts can end discovery abuses.

EXPENSES OF MOTION TO COMPEL:

Fla. R.Civ. P. 1.380 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. 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 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.
Id. (emphasis added).

Therefore, it is required that the court *shall* award expenses unless the court finds the opposition was justified. The trial court should in *every case*, therefore, award expenses which may include attorney fees where there is no justified opposition. 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 deny expenses to 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.¹ The punishment should fit the fault.² The trial courts are regularly sustained on awards of attorney fees for discovery abuse.³ The same holds for award of costs and expenses.⁴

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

INHERENT POWER:

Historically, Florida courts had to rely on inherent power in order to award attorney's fees and costs against parties who filed frivolous motions.⁵ There was no state law equivalent of Rule 11 of the Federal Rules of Civil Procedure.

In October 1999, amendments to Fla. Stat. §57.1 05 became law. The amendments

¹Ford Motor Co. v. Garrison, 415 So.2d 843 (Fla. 1st DCA 1982).

²Eastern Airlines, Inc. v. Dixon, 310 So.2d 336 (Fla. 3d DCA 1975).

³First & 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).

⁴Summit 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).

⁵Patsy v. Patsy, 666 So.2d 1045 (Fla. 4th DCA 1996) (upholding an award of attorney's fees after finding motion was frivolous). As for inherent power to strike pleadings and enter a default judgment, see discussion *infra* of Tramel v. Bass, 672 So.2d 78 (Fla. 1st DCA 1996); *rev. denied*, 680 So.2d 426 (Fla. 1996).

authorized courts to award sanctions against parties who raised claims and defenses not supported by material facts.⁶ The pertinent portions of §57.105 state:

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee 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.

However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply 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.

(3) 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.

Fees can be awarded if a specific claim or defense is baseless, even against a party who prevails in the case as a whole.⁷

Section 57.105(6) provides that the sanctions and remedies in the section supplement,

⁶Previously, a fee award was only permissible when there was no justiciable issue regarding claims and defenses. Fee awards were relatively rare under this high standard.

⁷*Bridgestone/Firestone v. Herron*, 828 So. 2d 414 (Fla. 1st DCA 2002).

rather than replace, other types of sanctions and remedies. Furthermore, §57.105(3) specifically applies to discovery demands. Therefore, §57.105, as well the more familiar Rule 1.380, can be used to sanction inappropriate behavior in the discovery process.

A party was not entitled to conduct discovery to support a motion under the prior version of §57.105. Instead, under the prior statute, the frivolous nature of the cause of action had to be apparent “on a bare inspection of the record without argument or research.”⁸

In 2002, the legislature amended §57.105 to include a “safe harbor” provision. The provision, which now appears as Section 57.105(4), provides:

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.

This provision is designed to give the guilty party a chance to withdraw their bogus claim or defense, or otherwise take corrective action, before the §57.105 motion can be filed with the court or heard. The mandatory language of the provision (“must be served” and “may not be filed with or presented to the court”) suggests that if the moving party fails to adhere to this procedure, no sanctions will be available. However, the Fourth District has held that a motion for §57.105 attorney’s fees directed at a prior pleading is sufficient to support a fee award where the newer pleading contains the identical frivolous allegations.⁹

Section 57.105 was also amended in 2003 to make it applicable to administrative proceedings. See §57.105(5).

⁸ Jackson v. York Hannover Nursing Centers, Inc., 853 So.2d 598, 602 (Fla. 5th DCA 2003).

⁹ Maxwell Building Corp. v. Euro Concepts, LLC, 874 So.2d 709, 711-12 (Fla. 4th DCA 2004)/

CONTEMPT:

Generally, disobedience of any lawful order of the court constitutes a contempt of the court's authority.¹⁰ If the court imposes a fine for discovery abuses, the fine must be based on a finding of contempt.¹¹

This general principle is codified under the Rules of Civil Procedure which provides that if a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of the court. Fla.R.Civ.P. 1.380(b)(1). This Rule is applicable to any deponent, whether or not a party, and is the sole provision providing for sanctions against non-parties. When a party disobeys a prior order of the court, various sanctions may be imposed by the court, including contempt and sanctions.

OBJECTIVE OF SANCTIONS:

Sanctions under the discovery rules are neither punitive nor penal, and their objective is to compel compliance with discovery.¹²

STATUTORILY ENUMERATED ORDERS FOR FAILURE TO OBEY 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. 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 certain matters in

¹⁰See Fla.Jur.2d Contempt (1st Ed., '24).

¹¹Stewart v. Jones, 728 So.2d 1233 (Fla. 4th DCA 1999); Hoffman v. Hoffman, 718 So.2d 371 (Fla. 4th DCA 1998).

¹²Leatherbee Ins. Co. v. Jones, 332 So.2d 139 (Fla. 3d DCA 1976).

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 a 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.¹³ For example, it is an abuse of discretion to strike a party's pleadings based on a non-party's refusal to comply with discovery requests.¹⁴

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 findings do, however, remain essential.

¹³Zanathv v. Beach Harbor Club Assoc., 343 So.2d 625 (Fla. 2d DCA 1977).

¹⁴Haverfield Corp. v. Franzen, 694 So2d 162 (Fla. 3d DCA 1997).

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.¹⁵ By the same token, striking a party's pleadings before the deadline for compliance with discovery requires reversal.¹⁶

If the trial court dismisses an action because of discovery violations, a finding that the violations were willful or deliberate must be made.¹⁷ If the order does not contain such findings, it will be reversed.¹⁸

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.¹⁹

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.²⁰

If a party destroyed relevant and material information (and that information is so essential to the opponents defense that it cannot proceed) then striking of pleadings may be warranted.²¹

¹⁵Joseph 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).

¹⁶Stern v. Stein, 694 So.2d 851 (Fla. 4th DCA 1997).

¹⁷Rose v. Clinton, 575 So.2d 751 (Fla. 3d DCA 1991); Zaccaria v. Russell, 700 So.2d 187 (Fla. 4th DCA 1997).

¹⁸Zaccaria v. Russell, 700 So.2d 187 (Fla. 4th DCA 1997).

¹⁹Medina v. Florida East Coast Rwy., 866 So.2d 89 (Fla. 3d DCA 2004).

²⁰Hagopian v. Publix Supermarkets, Inc., 788 So.2d 1088, 1091 (Fla. 4th DCA 2001).

²¹New 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).

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

In Tramel v. Bass, 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:

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.
Id. at 84 (citations and footnotes omitted).

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.²² A finding of bad faith is not imperative.²³ Conversely, in cases where evidence is destroyed unintentionally and the prejudice is not fatal to the other party, lesser sanctions should usually be applied.²⁴

In Figgie International, Inc. v. Alderman, 698 So.2d563 (Fla. 3d DCA 1997), *rev. dismissed*, 703 So.2d 476 (Fla. 1997), a trial court entered a default judgment against a defendant for numerous discovery violations, including destruction of relevant documents.

²²Sponco Manufacturing, supra.

²³Id.

²⁴Aldrich v. Roche Biomedical Laboratories, Inc., 737 So. 2d 1124 (Fla. 5th DCA 1999).

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. Therefore, it found that the most severe sanction—entry of a default judgment—was justified.

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. Sauro Miller & Webner, P.A., 710 So.2d 156 (Fla. 3d DCA 1998). 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.²⁵ 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.²⁶ 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 forego surgery and preserve the damaged disc for examination.²⁷ The court suggested, however, that a personal injury litigant might be guilty of spoliation if he or she had surgery while a request

²⁵Id. at 157.

²⁶St. Mary’s Hospital, Inc. v. Brinson, 685 So.2d 33, 35 (Fla. 4th DCA 1996).

²⁷Vega v. CSCS International, N.V., 795 So.2d 164, 167 (Fla. 3d DCA 2001).

for a defense medical examination was pending.

Worker's compensation immunity does not bar an employee's action against an employer for spoliation.²⁸ 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.²⁹

The Florida Supreme Court recently clarified the application of spoliation law to parties and non-parties. In Martino v. Wal-Mart Stores, Inc.,³⁰ the Court held that the remedy for spoliation against a first party defendant is not an independent case 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.³¹

ABILITY TO DEFEND:

Hernandez v. Pino, 482 So.2d 450 (Fla. 3d DCA 1986), involved the unintentional misplacement of dental x-rays by plaintiff's counsel. The court held that summary judgment was inappropriate in that 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.³²

SEVERITY OF SANCTIONS:

Discovery sanctions should be "commensurate with the offense."³³ It has been held that striking of pleadings and/or dismissal with prejudice for noncompliance with an order of the court is the most severe of all sanctions.

²⁸Townsend v. Conshor, 832 So. 2d 166 (Fla. 2d DCA 2002).

²⁹Id.

³⁰908 So.2d 342.

³¹Id. at 345 n. 2.

³²Aldrich v. RocheBiomedical Laboratories, Inc., *supra*.

³³Drakeford 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).

Therefore, it is only appropriate to strike a party's pleadings when the party willfully fails to comply with discovery orders.³⁴ A single failure to comply is usually insufficient unless the opposing party is grossly prejudiced.³⁵

The Fifth District has commented that dismissal is unjustified unless the offending party displays a "contemptuous attitude" toward a court order.³⁶ Less brutal sanctions should be imposed unless the offending party is defiant.³⁷

This distinction is illustrated by Sinatra v. Ikaros Aviation, Inc.³⁸ In Sinatra, there were three defendants. The trial court entered an order against all three defendants striking their pleadings and entering a default on liability against them.

On appeal, the Third District upheld the sanctions against two of the defendants. The court did so because those two defendants had violated several discovery orders before the court entered the sanctions order.³⁹

However, as to the third defendant, the court reversed. The Third District ruled that the sanctions order could not stand against him because he had not previously violated any discovery orders. In fact, no discovery orders had been entered against him before the court imposed sanctions. Therefore, the Third District reversed the default judgment on liability and ordered his pleadings reinstated.⁴⁰

Striking pleadings or entering a default is also proper when a party engages in willful misconduct.⁴¹

³⁴Hoffman v. Hoffman, supra; Davis Garden Estates v. American Investment Realty, 670 So.2d 1180 (Fla. 3d DCA 1996); U.S. Fire Insurance Co. v. C&C Beauty Sales, Inc., 674 So.2d 169 (Fla. 3d DCA 1996).

³⁵Farrow v. Perry Police Department, 744 So.2d 1263,1264 (Fla. 1st DCA 1999).

³⁶Stilwell v. Stilwell Southern Walls, Inc., 711 So.2d 103, 104 (Fla. 5th DCA 1998).

³⁷Swidzinska v. Ceias, 702 So.2d 630, 631 (Fla. 5th DCA 1997) (reversing dismissal and commenting that "[a]bsent a showing of deliberate, wilful refusal to provide discovery, the judge should use less stringent methods of persuasion or punishment").

³⁸723 So.2d 358 (Fla. 3d DCA 1998).

³⁹Id. at 359.

⁴⁰Id.

⁴¹Hoffman v. Hoffman, supra; Mack v. National Constructors, 666 So.2d 244 (Fla. 3d DCA 1996); Syrowik v. Bilmar Hotel Inc., 666 So.2d 554 (Fla. 2d DCA 1995).

The standards for dismissal based on attorney misconduct were articulated by the Florida Supreme Court in the 1993 case of *Koxel v. Ostendorf*.⁴²

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 noncompliance; 6) whether the delay created significant problems of judicial administration.⁴³

The Court added that "if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative."⁴⁴

Until recently, the Florida courts were split on whether the party (as opposed to the lawyer) must be involved in the misconduct triggering dismissal. The Second, Third and Fourth Districts have held that the willful misconduct required for striking of pleadings or dismissal must come from the party, not the party's lawyer.⁴⁵ The First District, however, held that an action may be dismissed without misconduct by the litigant.⁴⁶

In *Ham v. Dunmire*,⁴⁷ the Florida Supreme Court held that fault by the litigant is not absolutely necessary for dismissal. Relying on its prior decision in *Koxel v. Ostendorf*,⁴⁸ the court held that several factors 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 *Koxel* Court

⁴²629 So.2d 817 (Fla. 1993).

⁴³*Id.* at 818.

⁴⁴*Id.*

⁴⁵*Elder v. Norton*, 711 So.2d 586 (Fla. 2d DCA 1998); *Marin v. Batista*, 639 So.2d 630 (Fla. 3d DCA 1994); *Schilt v. Currier*, 763 So.2d 491 (Fla. 4th DCA 2000).

⁴⁶*Ham v. Dunmire*, 855 So.2d 1238 (Fla. 1st DCA 2003) (affirming dismissal for, among other things, failing to furnish a witness list, despite the lack of evidence that the plaintiff was personally at fault).

⁴⁷891 So.2d 492 (FLA. 2004).

⁴⁸Cited *supra*.

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 level of misconduct involved did not justify dismissal under the Kozel test.

When there is no prejudice to the opposing party, striking of pleadings and entry of a default judgment is not an appropriate remedy.⁴⁹ In that situation, less severe sanctions should be ordered.

Naturally, the question under these cases is what constitutes prejudice. Prejudice should be determined by the trial court as a matter of equity, *ie.*, whether the conduct has harmed the party so that it might affect or delay that party's judicial relief.

Not surprisingly, dismissal with prejudice is the appropriate sanction for a party guilty of fraud. In fact, a trial court "has a duty and obligation" to dismiss a cause of action based on fraud.⁵⁰

In Metropolitan Dade County v. Martinsen,⁵¹ the Third District reversed a jury verdict for the plaintiff and remanded with instructions to dismiss her case with prejudice. The court's decision was based on its finding that Martinsen, a personal injury claimant, had given false and misleading answers about her prior injuries.⁵²

⁴⁹Ad Miller Associates, Inc. v. Glvnn, 736 So.2d 798,799-800 (Fla. 2d DCA 1999); Dollar Wise Travel, Inc.; Clark v. Lake City Police Department, *supra*, Garlock, Inc. v. Harriman, 665 So.2d 1116, 1118-19 (Fla. 3d DCA 1995); Owens v. Howard, 662 So.2d 1325 (Fla. 2d DCA 1995); Atala v. Kpeelowitz, 664 So.2d 1156 (Fla. 3d DCA 1995).

⁵⁰Long v. Swofford, 805 So. 2d 882 (Fla. 3d DCA 2001).

⁵¹736 So.2d 794 (Fla. 3d DCA 1999).

⁵²Id. at 795; *see also* Babe Elias Builders, Inc. v. Pernick, 765 So.2d 119 (Fla. 3d DCA 2000) (default entered against defendant who presented false invoices, testified falsely, and suborned perjury); Hanono v. Murphy, 723 So.2d 892 (Fla. 3d DCA 1998) (case brought by party convicted of perjury dismissed with prejudice).

The cases suggest the lies told by a party must be material to issues in the case.⁵³ Lies about non-material matters alone, while obviously improper, probably cannot trigger dismissal or other severe sanctions.

While a court may dismiss a claim when it finds fraud or misconduct, it should take care not to dismiss other claims in the case. In Rosenthal v. Rodriguez,⁵⁴ a court dismissed Rosenthal's personal injury claim after finding she committed perjury. The court also dismissed the loss of consortium claim brought by Rosenthal's husband because it was derivative from her personal injury claim.⁵⁵

The Third District Court of Appeal affirmed dismissal of Rosenthal's claim, but found error in dismissal of her husband's claim for property damage. The court considered dismissal inappropriate because the property damage claim was separate from Rosenthal's personal injury claim. Furthermore, there was no indication that Rosenthal's husband had committed any perjury himself.

As mentioned above, the trial court in Tramel v. Bass struck a defendant's answer and affirmative defenses and entered a default judgment. The First District affirmed, finding that "a trial court has the inherent authority to impose severe sanctions when fraud has been perpetrated on the court."⁵⁶

In more recent cases where fraud on the court was raised, the courts have arguably receded. In Jacob v. Henderson,⁵⁷ 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.

⁵³Desimone v. Old Dominion Insurance Company, 740 So.2d 1233 (Fla. 4th DCA 1999) (dismissal is proper when plaintiff lied about matters having a direct bearing on his damages).; Rosenthal v. Rodriguez, 750 So.2d 703 (Fla. 3d DCA 2000) (same result where lies were "central to" plaintiff's personal injuries).

⁵⁴750 So.2d 703 (Fla. 3d DCA 2000).

⁵⁵Id. at 704. See also Hogan v. Dollar Rent A Car Systems, Inc., 783 So.2d 1211 (Fla. 4th DCA 2001).

⁵⁶Id. at 83.

⁵⁷840 So.2d 1167 (Fla. 2d DCA 2003).

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 case in which [the plaintiff] suffered no injury," the court wrote. "The question is the severity of her injuries."⁵⁸ While the court found that the surveillance could hurt the plaintiff's credibility, it considered dismissal too harsh a sanction.⁵⁹

Similarly, in Amato v. Intindola,⁶⁰ 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,⁶¹ (reversing dismissal because factual inconsistencies and even false statements "are well managed through the use of impeachment and traditional discovery sanctions")

Dismissal is also not appropriate when a party testified inaccurately based on a mistaken belief. In Arzuman v. Saud,⁶² 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.⁶³

⁵⁸Id. at 1169-70.

⁵⁹See also Laschke v. R.J. Reynolds Tobacco Co., 872 So.2d 344 (Fla. 2nd DCA 2004) (also reversing a dismissal for fraud on the court); Rios v. Moore, 902 So.2d 181 (Fla. 3rd DCA 2005); Cross v. Pumpco, Inc., 910 So.2d 324 (Fla. 4th DCA 2005).

⁶⁰854 So.2d 812 (Fla. 4th DCA 2003).

⁶¹859 So.2d 574 (Fla. 5th DCA 2003).

⁶²843 So.2d 950 (Fla. 4th DCA 2003).

⁶³Id. at 953.

DAMAGES:

Some courts have allowed the award of nominal (and even punitive) damages after default discovery abuses.⁶⁴

APPELLATE REVIEW:

The standard of appellate review for discovery sanctions is abuse of discretion.⁶⁵ Therefore, review is not governed by whether the appellate court “might have imposed a greater or lesser sanction, but whether reasonable persons could differ as to the propriety of the sanction imposed by the trial court.”⁶⁶ Thus the trial court will be affirmed (even if imposing a default judgment) with the proper findings and record of bad faith.

For example, in McCormick v. Lomar Industries, Inc., 612 So.2d 707 (Fla. 4th DCA 1993), plaintiff’s counsel was held in “deliberate and contumacious” disregard of the court’s authority. Plaintiff’s counsel ignored multiple production deadlines, two court orders for production and did not even appear at a hearing on the motion for sanctions. The District Court of Appeals held that the trial court did not abuse its discretion in striking all of plaintiff’s pleadings.⁶⁷

Without a solid record foundation (indicating willful or bad faith conduct) the trial court may be outside its discretionary limits and risk reversal.⁶⁸ The appellate courts will reverse when bad faith conduct is not apparent from the trial court’s order or the record.⁶⁹

⁶⁴Far Out Music, Inc. v. Jordan, 502 So.2d 523 (Fla. 3d DCA 1987); Rose v. Clinton, *supra*.

⁶⁵Mercer v. Raine, 443 So.2d 944 (Fla. 1983).

⁶⁶First Healthcare Corporation v. Hamilton, 740 So. 2d 1189 (Fla. 4th DCA 1999) (citing Mercer).

⁶⁷Bailev v. Woodlands Co., Inc., 696 So.2d 450 (Fla. 1st DCA 1997) (dismissal of counterclaim and third-party complaint proper because defendant guilty of repeated discovery violations); Figgie International, *supra*; Paranzino v. Barnett Bank of South Florida, N.A., 690 So.2d 725, 729 (Fla. 4th DCA 1997) (dismissal of plaintiff’s case with prejudice appropriate for willful and knowing violation of mediation privilege); St. Mary’s Hospital, *supra*, at 35-36 (order striking hospital’s pleadings upheld where hospital refused to produce investigative reports despite repeated orders from trial court to do so).

⁶⁸Davis v. Freeman, 405 So.2d 441 (Fla. 1st DCA 1981).

⁶⁹Earp v. Winters, 693 So.2d 621, 623 (Fla. 2d DCA 1997) (reversing dismissal of plaintiff’s case because attorney’s failure to file witness list on time “was neither willful nor deliberate”); Stern v. Stein, 694 So. 2d 851 (FlaAth DCA 1997) (reversing trial court’s order striking plaintiff’s pleadings because order was entered before time for discovery compliance had expired); Jam v. Merkurj Com., 683 So.2d 161 (Fla. 3d DCA 1996) (dismissal of complaint improper for first-time discovery violation when there were other lesser sanctions available); Williams v. Udell, *supra*.

On appeal, a trial court's decision imposing sanctions will be presumed correct if no transcript of the proceedings is filed.⁷⁰

The Fourth District Court of Appeal has held that an order awarding sanctions for discovery violations is non-final. Therefore, it dismissed an appeal from such an order.⁷¹ State Farm had unsuccessfully argued that the order requiring it to pay attorney's fees was immediately appealable as a civil contempt order.

EXCLUSION OF EXPERT WITNESS OPINIONS:

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

Generally, such last-minute testimony should not be admissible at trial. Failure to exclude such testimony prejudices the opposing party and constitutes reversible error.⁷² A party who fails to disclose a substantial reversal in an expert's opinion does so at their peril.⁷³

Inevitably, the party which seeks to introduce new expert opinions claims 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 for 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,

⁷⁰Poling v. Palm Coast Abstract and Title, Inc., *supra*

⁷¹State Farm Auto Ins. Co. v. Bravender, 700 So.2d 796 (Fla. 4th DCA 1997).

⁷²Belmont 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), *rev. denied*, 666 So.2d 146 (Fla. 1995); Grau v. Branham, 626 So.2d 1059 (Fla. 4th DCA 1993); Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981); Office Depo v. Miller, 584 So.2d 587 (Fla. 4th DCA 1991); Florida Marine Enterprises v. Bailev, 632 So.2d 249 (Fla. 4th DCA 1994), *rev. denied*, 641 So.2d 1345 (Fla. 1994).

⁷³Gouveia v. F. Leigh Phillips, M.D., 823 So.2d 815, 822 (Fla. 4th DCA 2002).

much less one that is a complete reversal of the opinion it has been provided.”⁷⁴

An orderly trial is most likely when the judge enforces discovery and pretrial orders strictly and requires each party to make full and proper disclosure before trial. 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.⁷⁵

Under many circumstances, barring the expert from testifying will be too harsh.⁷⁶ 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.⁷⁷

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.⁷⁸ The same rule applies to an expert who could offer key rebuttal evidence.⁷⁹ 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.⁸⁰

Discovery disputes sometimes arise over the role of experts retained by a party. In Carrero v. Engle Homes, Inc., 667 So.2d 1011 (Fla. 4th DCA 1996), a trial court ordered disclosure of the names of experts a party had *consulted* for trial.

⁷⁴Id. at 994.

⁷⁵LoBue v. Travelers Insurance Company, 388 So.2d 1349, 1351 (Fla. 4th DCA 1980).

⁷⁶Id.; *see also* Jean v. Theodorsen, 736 So.2d 1240 (Fla. 4th DCA 1999).

⁷⁷Keller Industries, *supra*, at 1203.

⁷⁸Keller Industries; LoBue.

⁷⁹Griefer v. DiPietro, 708 So.2d 666, 672 (Fla. 4th DCA 1998).

⁸⁰Gonzalez 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).

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.⁸¹ 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.⁸²

CONCLUSION:

In summary, the trial courts in Florida are on solid footing and have full authority and discretion to enter orders sanctioning disobedient parties. Expenses, including costs and fees, on motions to compel are within the discretion of the court and easily supportable.

Expenses on motions to compel should be awarded in most cases. Counsel moving for severe sanctions for failure to obey prior court orders should, however, make the proper record so that the appellate court will have sufficient information to sustain the trial judge.

⁸¹Carrero at 1012.

⁸²Id.

CHAPTER TWO

AVAILABLE REMEDIES FOR FAILURE TO COMPLY WITH DISCOVERY REQUESTS

In General:

Borrowing from Bob Dylan, one Florida judge, weary of arbitrating so-called “protesting motions” filed by one lawyer to compel another lawyer to abide by the rules of procedure, sadly observed: “ ‘The Times They Are A-Changing.’ ”¹ The case law on sanctions for failure to make discovery confirms the proliferation of bad discovery practice and the need for court intervention.

The Fourth Judicial Circuit has directed in an administrative order what should be standard operating procedure for all lawyers: “Before filing a motion to compel . . . or a motion for a protective order, . . . counsel for the moving party shall confer with counsel for opposing party in a good-faith effort to resolve by agreement the issues raised,” and shall so certify to the court. Other circuits have adopted similar rules. In the United States District Court for the Middle District of Florida, the court suggests that a telephone call is appropriate before taking action that might be avoided by agreement of counsel. Because this common sense and professional approach unfortunately does not always work, the Florida Supreme Court has promulgated *Fla.R.Civ.P.* 1.380, detailing how to proceed for sanctions against a party or counsel who fail to “abide by the rules.”²

In 2005, the Florida Supreme Court adopted suggested amendments to the Florida Rules of Civil Procedure to include the language of the federal rule which requires that an attorney certify to the court that he or she has attempted to informally resolve the discovery dispute with opposing counsel prior to filing any motion to compel. A motion

¹ *Roache v. Amerifirst Bank*, 596 So.2d 1240, 1243 (Fla. 4th DCA 1992) (Glickstein, C.J., dissenting).

² Rule 37 of the Federal Rules of Civil Procedure is the primary rule addressing sanctions in federal court. Thereunder, a broad array of sanctions, familiar to those under Fla.R.Civ.P. 1.380, are available. See e.g., *Levin & Associate, P.A. v. Rogers*, 156 F.3d 1135 (11th Cir. 1998). Rule 11 of the Federal Rules of Civil Procedure also provides for sanctions in federal court.

to compel now must include a certification that the movant, in good faith, has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information without court action. (Rule 1.380(2).) Additionally, a party will not be awarded fees or expenses on a motion to compel if the movant failed to certify in the motion that a good faith effort was made to obtain the discovery without court action. (Rule 1.380(4).) The 2005 changes to the Florida Rules bring Florida in line with the federal rule, and will hopefully diminish the need for court intervention on discovery matters.

The first level of recourse is the simple motion to compel. Take note that “an evasive or incomplete answer [to an interrogatory] shall be treated as failure to answer.”³ The losing party of this initial skirmish may be tagged with “reasonable expenses incurred,” including attorneys’ fees, in obtaining an order compelling discovery or successfully opposing the motion.⁴

The heavy sanctions may be given for failure to comply with a court order.⁵ The rule sets out possible alternative sanctions: taking as established facts the matters about which the recalcitrant party refuses to respond; prohibiting the disobedient party from supporting or opposing designated claims or defenses;⁶ prohibiting the introduction of

³ Rule 1.380(a)(3).

⁴ Rule 1.380(a)(4).

⁵ Rule 1.380(b).

⁶ *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).

certain evidence;⁷ striking pleadings, which could result in a dismissal of the action or a default judgment;⁸ contempt of court; and assessing reasonable expenses or attorney's fees.⁹ The courts have crafted a few additional possibilities: fines;¹⁰ grant of a new trial;¹¹ and, in the case of lost or destroyed evidence, creation of an evidentiary inference¹² or a rebuttable presumption.¹³ The court may rely on its inherent authority to impose drastic sanctions when a discovery-related fraud has been perpetrated on the court.¹⁴

⁷ 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); Florida Marine Enterprises v. Bailey, 632 So.2d 649, 652 (Fla. 4th DCA 1994) (striking witness "listed" by name only three days after court's deadline when plaintiff had no independent knowledge of who witness was or where witness could be located for discovery purposes); Sayad v. Alley, 508 So.2d 485 (Fla. 3d DCA 1987) (restricting expert's testimony to subject matter timely revealed in discovery and precluding opinion concerning area that had not been disclosed). *But see* Griener v. DiPietro, 708 So.2d 666 (Fla. 4th DCA 1998) (trial court erred in excluding testimony of human factors expert; late-answered interrogatories and deposition were made available two weeks before trial and no evidence of prejudice to defendant); Walters v. Keebler Co., 652 So.2d 976 (Fla. 1st DCA 1995) (permitting coworker to testify to rebut defense, even though coworker not listed as witness); Zales Corp. v. Clark, 643 So.2d 108 (Fla. 1st DCA 1994) (appellant permitted to amend witness list to add witness when appellee had independent knowledge of witness and had means to ameliorate prejudice); Phillips v. Ficarra, 618 So.2d 312 (Fla. 4th DCA 1993) (physician not listed on witness list permitted to testify for defendant; physician had examined plaintiff and defendant had listed physician's report). Whether undisclosed witnesses may testify on rebuttal depends on the specific circumstances. Compare Costanzo v. Pik N'Run No. 4, 654 So.2d 588 (Fla. 1st DCA 1995) (testimony of undisclosed witness not properly admitted in rebuttal because testimony not introduced to meet new facts) and Rose v. Madden & McClure Grove Service, 629 So.2d 234 (Fla. 1st DCA 1993) (admission on rebuttal of undisclosed witness's testimony reversible error when testimony did not constitute rebuttal) *with* Walters, 652 So.2d 976.

⁸ Mercer v. Raine, 443 So.2d 944 (Fla. 1983) (affirming trial court's striking of defendant's answer, entering default judgment against defendant, and ordering defendant to pay costs and fees occasioned by failure to comply with discovery order); Figgie International, Inc. v. Alderman, 698 So.2d 563 (Fla. 3d DCA 1997) (affirming striking of defendants' pleadings and entering of default for discovery violations including destruction of documents, presentation of false and evasive testimony, and repeated obstruction of discovery); United States Fire Insurance Co. v. C & C Beauty Sales, Inc., 674 So.2d 169 (Fla. 3d DCA 1996) (striking pleadings and entering default for withholding documents despite six court orders); Garlock, Inc. v. Harriman, 665 So.2d 1116 (Fla. 3d DCA 1996) (striking pleadings and entering default for failure to answer interrogatories, contrary to three court orders); Levine v. Del American Properties, Inc., 642 So.2d 32 (Fla. 5th DCA 1994) (striking defendant's pleadings for repeated failure to appear at deposition following court orders to do so); Sabates v. Padron, 777 So.2d 1148 (Fla. 3d DCA 2001) (reversing vacation of dismissal for failure to respond to discovery, failure to timely comply with order to secure new counsel and failure to diligently participate in the proceedings).

⁹ 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).

¹⁰ Evangelos v. Dachiell, 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).

¹¹ 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).

¹² 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).

¹³ 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).

¹⁴ Tramel v. Bass, 672 So.2d 78 (Fla. 1st DCA 1996) (affirming default against sheriff for intentionally omitting portion of videotape of automobile pursuit).

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.¹⁵ Accordingly, before seeking sanctions against a nonparty for failure to provide discovery, a motion to 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. Remember to provide the nonparty with notice of the hearing on the motion for contempt. It may be a good idea to subpoena the nonparty to attend the 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.¹⁶ Different sanction options are available against parties and nonparties.¹⁷

The case law interpreting *Rule* 1.380 is full of litigation horror stories. Incredibly, they all involve counsel who have "failed to comply with," (that is, *ignored*) court orders. The seminal case setting forth the guidelines governing whether the ultimate sanction of dismissal or default should be imposed is *Mercer v. Raine*,¹⁸ in which the court affirmed the striking of the defendant's answer and entering a default judgment against the defendant plus costs and fees occasioned by refusal to comply with the discovery order. Justifying the imposition of "the most severe of all sanctions which should be employed only in

¹⁵ In *Cooper v. Lewis*, 719 So.2d 944 (Fla. 5th 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. 4th DCA 1995).

¹⁶ *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).

¹⁷ *Cooper*, 719 So.2d at 946.

¹⁸ 443 So.2d 944; *Swidzinska v. Cejas*, 702 So.2d 630 (Fla. 5th DCA 1997); *Williams v. Udell*, 690 So.2d 732 (Fla. 4th DCA 1997).

extreme circumstances,” the court said that the defendant’s noncompliance was “willful.”¹⁹ Furthermore, the court held: “A deliberate and contumacious disregard of the court’s authority will justify application of this severest of sanctions . . . as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness.”²⁰ Before the ultimate sanction of dismissal or default can be entered, a party must be given notice and an opportunity to be heard, including the opportunity to present evidence of mitigating circumstances that may explain the failure to comply with discovery requirements.²¹ The trial court must “make an explicit finding of willful noncompliance” before dismissing a claim with prejudice as a discovery sanction and such claim must be supported by specific facts present at the time of the dismissal.²²

As a general rule, absent evidence of a willful failure to comply or extensive prejudice to the proposition, the granting of such an order constitutes an abuse of discretion.²³ Although some district courts of appeal have found willful conduct and have affirmed the trial courts’ striking of pleadings and dismissal or entry of default for failure

¹⁹ Cooper, 719 So.2d at 946. “Unlike the imposition of a fine, which requires a contempt finding, the striking of pleadings need only be based on willful noncompliance.” Hoffman, 718 So.2d at 372. *See* Akiyama Corp. v. Smith, 710 So.2d 1383 (Fla. 4th DCA 1998) (reverse dismissal with prejudice as discovery sanction for failure to comply with court order because trial court failed to make finding that conduct was willful and deliberate violation of discovery order); Chappell v. Affordable Air, Inc., 705 So.2d 1029 (Fla. 2d DCA 1998); Zaccaria v. Russell, 700 So.2d 187 (Fla. 4th DCA 1997). An order striking a pleading as a discovery sanction must contain an express finding of willfulness. The court may conduct an evidentiary hearing for the limited purpose of allowing the disobedient party to present evidence of any mitigating or extenuating circumstances to show that noncompliance was not deliberate or willful. Harper-Elder v. Elder, 701 So.2d 1230 (Fla. 4th DCA 1997). *See also* Commonwealth Federal Savings & Loan Association v. Tubero, 569 So.2d 1271 (Fla. 1990).

²⁰ Cooper, 719 So.2d at 946.

²¹ Franchi v. Shapiro, 650 So.2d 161 (Fla. 3d DCA 1995); Wildwood Properties, Inc. v. Archer of Vero Beach, Inc., 621 So.2d 691 (Fla. 4th DCA 1993); Neder v. Greyhound Financial Corp., 592 So.2d 1218 (Fla. 1st DCA 1992). *Cf.* Westley v. Hub Cycles, Inc., 681 So.2d 719 (Fla. 2d DCA 1996) (error to impose sanctions on counsel for failure to timely comply with discovery request when record does not sufficiently establish counsel had or was dilatory in obtaining relevant document).

²² Zaccaria, 700 So.2d at 188. A conflict currently exists between the First District and the Third District regarding whether the party (as opposed to counsel) must be found at fault in failing to respond to discovery prior to dismissal. *See*, Ham v. Dunmire and All America Termite and Pest Control, 28 FLW D2389 (1st DCA, October 14, 2003) and Marin v. Batista, 639 So.2d 630 (Fla. 3d DCA 1994).

²³ Surf Tech Int’l, Inc. v. Rutter, 785 So.2d 1280 (Fla. 5th DCA 2001).

to answer interrogatories,²⁴ failure to produce documents,²⁵ or other bad faith discovery practices,²⁶ most courts opt for less severe sanctions.²⁷ The Supreme Court recently reaffirmed the standard laid out in *Mercer v. Raine*, and further held that a reviewing court should limit itself to consideration of the *Mercer* criteria when determining the propriety of sanctions imposed on an offending party.²⁸

Interrogatories:

“Substantial compliance” with discovery requests²⁹ or a finding of no “willful abuse”³⁰ will preclude the sanction of dismissal or default, even when a party incorrectly or falsely has answered an interrogatory.³¹ However, repeated fraud and lying by a party

²⁴ *AVD Enterprises, Inc. v. Network Security Acceptance Corp.*, 555 So.2d 401 (Fla. 3d DCA 1989) (wholly inadequate answers to interrogatories received day after motion for default filed, following failure to appear for numerous depositions, failure to provide bookkeepers for deposition or to provide their addresses, failure to provide company books and records, and failure to answer interrogatories); *Gomez v. Pujols*, 546 So.2d 734 (Fla. 3d DCA 1989) (failure to answer interrogatories after many opportunities and failure to provide reason for doing so); *Dominguez v. Wolfe*, 524 So.2d 1101 (Fla. 3d DCA 1988) (dismissal of plaintiff’s medical malpractice complaint for failure to disclose expert after more than four years of litigation).

²⁵ *J.T.R., Inc. v. Hadri*, 632 So.2d 241 (Fla. 3d DCA 1994) (striking pleadings and entering default as sanction for failure to comply with two court orders and deliberate misrepresentations to court concerning location of documents); *McCormick v. Lomar Industries, Inc.*, 612 So.2d 707 (Fla. 4th DCA 1993) (multiple deadlines for production of documents ignored, two court orders disregarded, and at least one no-show at hearing over period of four months results in striking plaintiff’s pleadings); *Kranz v. Levan*, 602 So.2d 668 (Fla. 3d DCA 1992) (striking plaintiff’s pleadings and entering judgment for defendants when plaintiff ignored seven court orders to produce documents; trial court referred matter to state attorney’s office for investigation); *Mahmoud v. International Islamic Trading, Ltd.*, 572 So.2d 979 (Fla. 1st DCA 1990) (failure to provide documents, answer interrogatories, and appear at deposition for seven months; client, not counsel, instigated discovery delay); *Rockwell International Corp. v. Menzies*, 561 So.2d 677 (Fla. 3d DCA 1990) (manufacturer’s intentional destruction of evidence justified striking defendant’s pleadings and entering default); *HZJ, Inc. v. Wysocki*, 511 So.2d 1088 (Fla. 3d DCA 1987) (bad faith games playing); *DePuy, Inc. v. Eckes*, 427 So.2d 306 (Fla. 3d DCA 1983) (default in favor of plaintiff on liability was appropriate sanction when defective portion of prosthesis was not returned by defendant and plaintiff was unable to establish liability without critical piece of evidence, notwithstanding defendant’s intent).

²⁶ *Lent v. Baur, Miller & Webner, P.A.*, 710 So.2d 156 (Fla. 3d DCA 1998) (affirming striking of pleadings and dismissal because plaintiff and plaintiff’s attorney willfully disregarded court order compelling deposition of key witness, and for bad faith for intimidating key defense witness by threatening legal action against witness); *Hanono v. Murphy*, 723 So.2d 892 (Fla. 3d DCA 1998) (trial court abused its discretion in granting new trial rather than dismissing case in which plaintiff admitted lying in his deposition).

²⁷ See *Kilstein v. Enclave Resort, Inc.*, 715 So.2d 1165, 1169 (Fla. 5th DCA 1998) (reversing dismissal of plaintiff’s lawsuit as sanction for “foot dragging,” because plaintiff had partially complied with one court order, discovery had just begun, case was far from being set for trial); *Elder v. Norton*, 711 So.2d 586 (Fla. 2d DCA 1998) (reversing dismissal of action as sanction for four years of discovery abuse because plaintiff was faultless although plaintiff’s attorney was responsible); *Stilwell v. Stilwell-Southern Walls, Inc.*, 711 So.2d 103 (Fla. 5th DCA 1998) (error to strike plaintiff’s pleadings for failure to comply with discovery order because initial attorney had withdrawn, plaintiff was elderly and had undergone surgery plus wife’s illness and death, no prior discovery violations, and order of continuance was ambiguous concerning discovery deadline); *Jalil v. Mercury Corp.*, 683 So.2d 161 (Fla. 3d DCA 1996) (sanction of dismissing complaint too severe for first discovery violation).

²⁸ *Robinson v. Nationwide Mutual Fire Insurance*, 887 So.2d 328 (Fla. 2004) A reviewing court should also determine whether the party (as opposed to his counsel) is responsible for any discovery violation before entering the sanction of dismissal. see *Jiminez v. Simon*, 879 So.2d 13 (Fla. 2nd DCA 2004). See also *Ham v. Dunmire*, 891 So.2d 492 (Fla. 2004); *Kozel v. Ostendorf*, 629 So.2d 817 (Fla. 1993). Both the *Ham* decision and the *Kozel* decision address the sticky problem of how a court deals with dismissal when counsel (as opposed to a party litigant) is responsible for the discovery abuse.

²⁹ *Steele*, 552 So.2d at 209.

³⁰ *Bernaad v. Hints*, 530 So.2d 1055 (Fla. 4th DCA 1988).

³¹ *Medical Personnel Pool of Palm Beach, Inc. v. Walsh*, 508 So.2d 453 (Fla. 4th DCA 1987).

on interrogatories or at deposition will result in dismissal or default.³²

Inadequate responses to expert interrogatories frequently are the source of dispute, which may result in exclusion of expert testimony if prejudice is shown.³³ In this context, “prejudice” . . . refers to the surprise in fact of the objecting party [as well as other factors such as bad faith and ability to cure], and is not dependent on the adverse nature of the testimony.”³⁴ Bad faith withholding of an expert’s revised written opinion and surprise at trial may lead to a new trial or mistrial if objected to; without a contemporaneous objection, the trial court lacks discretion to grant a motion for a new trial for an unpreserved error that is not fundamental.³⁵

Another area of dispute arises from *Elkins v. Syken*,³⁶ in which the court set forth criteria and guidelines applicable to discovery of financial information from opposing experts. The *Elkins* rule has spawned litigation relating to the extent to which an expert must disclose prior appearances and fees.³⁷

³² *Savino v. Florida Drive in Theatre Management, Inc.*, 697 So.2d 1011 (Fla. 4th DCA 1997). See also *Cox v. Burke*, 706 So.2d 43 (Fla.5th DCA 1998); *Alderman*, 698 So.2d 563; *Mendez v. Blanco*, 685 So.2d 1149 (Fla.3d DCA 1996); *O’Vahey v. Miller*, 644 So.2d 550 (Fla. 3rd DCA 1994). Compare *Kirby v. Adkins*, 582 So. 2d 1209 (Fla. 5th DCA 1991); *Young v. Curgil*, 358 So.2d 58 (Fla. 3rd DCA 1978); *Parham v.Kohler*, 134 So.2d 274 (Fla. 3rd DCA 1961) (no dismissal when false testimony did not affect plaintiff’s own claim). *Distefano v. State Farm*, 846 So.2d 572 (Fla. 1st DCA, April 28, 2003).

³³ *Dept. of Health & Rehabilitative Services v. J.B.*, 675 So.2d 241 (Fla. 4th DCA 1996) (trial court erred in permitting expert testimony concerning newly formed opinion revealed for first time at trial; permitting deposition of economist after first day of trial did not cure error); *Grau v. Branham*, 626 So.2d 1059 (Fla. 4th DCA 1993) (court erred in allowing plaintiff’s experts to testify regarding their midtrial examination of plaintiff contrary to pretrial order limiting discovery and witnesses; permitting defendants to depose experts during trial insufficient cure); *Brinkerhoff v. Linkous*, 528 So.2d 1318 (Fla. 5th DCA 1988)(testimony of expert witness regarding damages struck for failure to comply with court’s deadlines for procurement of expert and report and availability of expert for depositions); *Sayad*, 508 So.2d 485. But see *Griener v. DiPietro*, 708 So.2d 666 (Fla. 4th DCA 1998) (error to strike expert who was disclosed and deposed); *Klose v. Coastal Emergency Services of Fort Lauderdale, Inc.*, 673 So.2d 81 (Fla. 4th DCA 1996) (error to exclude expert testimony because of confusion over scope of testimony; any prejudice could be cured by adjourning trial for further deposing of expert); *Cedar Hammock Fire Dept. v. Bonami*, 672 So.2d 892 (Fla. 1st DCA 1996) (exclusion of testimony based on late disclosure of witness’s name was abuse of discretion absent any actual prejudice to claimant); *Keller Industries v. Volk*, 657 So.2d 1200 (Fla. 4th DCA 1995) (error to exclude testimony of expert who had no opinion on causation in pretrial deposition but formulated opinion after trial began; proper approach would have been to bar testimony concerning causation); *Louisville Scrap Material Co. v. Petroleum Packers, Inc.*, 566 So.2d 277 (Fla. 2d DCA 1990) (error to strike expert witness despite late disclosure when appellee was able to depose expert before trial and was not otherwise prejudiced).

³⁴ *J.B.*, 675 So.2d at 244.

³⁵ *Celentano v. Banker*, 728 So.2d 244 (Fla. 4th DCA 1998).

³⁶ 672 So.2d 517 (Fla. 1996). See Rule 1.280(b)(4)(A)(iii) (effective January 1, 1997).

³⁷ See *Allstate Ins. Co. v. Boecher*, 733 So.2d 993 (Fla. 1999) (information related to payments to expert by party and relationship between party and its expert was discoverable); *Cooper*, 719 So.2d 944; *Scales v. Swill*, 715 So.2d 1059 (Fla. 5th DCA 1998) (doctor’s failure to identify in interrogatories each case in which he previously had testified because he did not keep records constitutes substantial compliance to rule; expert cannot be compelled to compile or produce nonexistent documents).

Interrogatories answered out of order or merely by attaching a report as an “answer” may result in a sanction such as costs.³⁸ Failure to answer interrogatories despite a court order may result in dismissal or default.³⁹ However, failure to provide properly executed interrogatories⁴⁰ and tardiness in answering interrogatories⁴¹ will not result in dismissal or default. A motion for an extension of time to answer interrogatories must be ruled on before entry of an order to compel answers.⁴² In the context of medical malpractice lawsuits, interrogatories that are “reasonably limited in number and complexity” may be used in informal discovery during the pre-suit period.⁴³ Failure to answer interrogatories does not automatically preclude a case being at issue for trial on completion of the pleading process. “The remedies for failure of a party to comply with discovery requirements are found in Florida Rule of Civil Procedure 1.380.”⁴⁴

Production Of Documents And Things:

Rule 1.350 governs requests for production and is fairly straightforward. Occasionally, a party is accused of intentionally destroying documents or evidence or inadvertently losing key evidence. This commonly is referred to as “spoliation” of evidence. Intentional destruction of documents or evidence, as well as inadvertent loss, may result in a variety of sanctions, including default or dismissal on a showing of prejudice.⁴⁵ In situations

³⁸ *Summit Chase Condominium Association, Inc. v. Protean Investors, Inc.*, 421 So.2d 562, 563 (Fla. 3d DCA 1982) (reverse dismissal as sanction for inadequately, “haphazardly,” and “slothfully,” answering interrogatories, but impose \$250 in costs).

³⁹ *Garlock, Inc.*, 665 So.2d 1116 (failure to answer interrogatories, despite three court orders, results in default judgment).

⁴⁰ *USAA Casualty Insurance Co. v. Bejany*, 717 So.2d 164 (Fla. 4th DCA 1998); *Owens v. Howard*, 662 So.2d 1325 (Fla. 2d DCA 1996).

⁴¹ *Solano v. City of Hialeah*, 578 So.2d 338 (Fla. 3d DCA 1991) (on remand, trial court may consider imposing lesser sanctions); *Pilkington PLC v. Metro Corp.*, 526 So.2d 943 (Fla. 3d DCA 1988); *Strasser*, 492 So.2d 399 (attorneys’ fees and costs).

⁴² *American Casualty Insurance Co. v. Bly Electrical Construction Service, Inc.*, 562 So.2d 825 (Fla. 4th DCA 1990).

⁴³ *Nolan v. Turner*, 737 So.2d 579, 579 (Fla. 4th DCA 1999), *rev. den.* 753 So.2d 565.

⁴⁴ *Kubera v. Fisher*, 483 So.2d 836, 838 (Fla. 2d DCA 1986).

⁴⁵ *DeLong v. A-Top Air Conditioning Co.*, 710 So.2d 706 (Fla. 3d DCA 1998) (affirming dismissal of plaintiff’s claim because plaintiff inadvertently lost or misplaced relevant and material evidence and defendants demonstrated their inability to competently set forth their defense); *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3d DCA 1995) (affirming default when defendant had discarded allegedly defective ladder); *Federal Insurance Co.*, 622 So.2d 1348; *Rockwell International Corp.*, 561 So.2d at 677; *New Hampshire Insurance Co. v. Royal Insurance Co.*, 559 So.2d 102 (Fla. 4th DCA 1990); *Weiss v. Rachlin & Cohen*, 745 So.2d 527 (Fla. 3d DCA 1995) (failure to produce relevant books and records until the week of trial, and other discovery violations, justified award of sanctions).

where the other party is prejudiced by the loss or destruction, a rebuttable presumption of negligence may arise.⁴⁶ The litigant also risks having the late-disclosed evidence excluded from trial on a showing of “actual prejudice” to the opposing party.⁴⁷ Intentional destruction of key evidence may give rise to a separate cause of action for negligent or intentional spoliation of evidence, which then may be consolidated with the underlying claim of negligence resulting in personal injury,⁴⁸ as well as other sanctions.⁴⁹ Such sanctions may even be awardable in the absence of a clear legal duty to preserve the evidence.⁵⁰ Generally, prejudice must be demonstrated for sanctions to be imposed. The appropriate sanctions depend upon the willfulness of the party responsible for the loss of the evidence, the extent of the prejudice and what is required to cure the prejudice.⁵¹ Other sanctionable conduct includes deliberate withholding of documents,⁵² tardy production of documents,⁵³ and improper manner of production (such as place of production).⁵⁴ Although a prompt motion for sanctions for failure to produce documents is preferred, a post-trial motion for discovery sanctions is permitted.⁵⁵

⁴⁶ Valcin, 507 So.2d 596; see also Rockwell Int'l Corp. v. Menzies, 561 So.2d 677, 681 (Fla. 3d DCA 1990). *But see* King v. National Security Fire & Casualty Co., 656 So.2d 1335 (Fla. 4th DCA 1995) disapp'd on other grounds by Murphy v. Int'l Robotics Sys., Inc., 766 So.2d 1010, 1029 n. 21 (Fla. 2000) (error to instruct jury that destruction of documents not in plaintiff's control gives rise to legal presumption that documents would have been unfavorable to person who destroyed them).

⁴⁷ Crawford & Co. v. Barnes, 691 So.2d 1142 (Fla. 1st DCA 1997).

⁴⁸ Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA 1985); Miller v. Allstate Ins. Co., 573 So.2d 24 (Fla. 3d DCA 1990); St. Mary's Hospital, Inc. v. Brinson, 685 So.2d 33 (Fla. 4th DCA 1996).

⁴⁹ Metropolitan Dade County v. Bermudez, 648 So.2d 197 (Fla. 1st DCA 1994) (proper to exclude testimony of defendant's expert based on expert's examination of vehicle when defendant subsequently sold vehicle before plaintiff examined it); Bird v. Hardrives of Delray, Inc., 644 So.2d 89 (Fla. 4th DCA 1994) (reverse dismissal of plaintiff's case for lost MRI and remand to give plaintiff opportunity to show action could proceed with less extreme remedy and, if so, to demonstrate that loss was not in bad faith).

⁵⁰ St. Mary's Hospital, Inc. v. Brinson, 685 So.2d 33 (Fla. 4th DCA 1996); Hagopian v. Publix Supermarkets, Inc., 788 So.2d 1088 (Fla. 4th DCA 2001); Torres v. Matsushita Elec. Corp., 762 So.2d 1014, 1022 (Fla. 5th DCA 2000).

⁵¹ Vega v. CSCS Int'l, N.V., 795 So.2d 164 (Fla. 3rd DCA 2001)

⁵² C & C Beauty Sales, Inc., 674 So.2d 169 (striking pleadings and entering default against defendant who withheld accountant's report despite six court orders); Nordyne, 625 So.2d at 1289 (new trial on amount of punitive damages); LaVillarena, Inc. v. Acosta, 597 So.2d 336 (Fla. 3d DCA 1992) (exclusion of evidence); Smith, 559 So.2d at 397 (new trial); Dean Witter Reynolds, Inc. v. Hammock, 489 So.2d 761 (Fla. 1st DCA 1986) (attorneys' fees and costs).

⁵³ Stimpson Computing Scale Co., A Division of Globe Slicing Machine Co. v. Knuck, 508 So.2d 482 (Fla. 3d DCA 1987) (attorneys' fees and appropriate sanctions).

⁵⁴ Reep v. Reep, 565 So.2d 814 (Fla. 3d DCA 1990) (reverse dismissal as sanction for disorganized and incomplete production); Beck's Transfer, Inc. v. Peairs, 532 So.2d 1136 (Fla. 4th DCA 1988) (trial court order that defendant's documents be moved from Indiana for production in Florida). *But see* Evangelos, 553 So.2d at 246 (production of 30 boxes in warehouse sufficient).

⁵⁵ Amlan, Inc., 651 So.2d 701.

Requests for Admissions:

Rule 1.380 provides that upon a refusal to admit the genuineness of any document or the truth of any matter as requested under Rule 1.370, the court may require the other party to pay the requesting party its reasonable expenses, which may include attorneys' fees, incurred in making such proof at trial. Under Rule 1.380, the court shall order such payment unless the request was objectionable, the admission was of no substantial importance or there was other good reason for the failure to admit.⁵⁶

Work Product. Attorney-Client Privilege. And Trade Secrets:

Fact work product traditionally protects information that relates to the case and is gathered in anticipation of litigation. Opinion work product consists primarily of the attorney's mental impressions, conclusions, opinions, and theories. "Whereas fact work product is subject to discovery upon a showing of 'need' and 'undue hardship,' opinion work product generally remains protected from disclosure."⁵⁷ Documents protected from discovery under the work product privilege are those prepared in anticipation of litigation, which includes either a pending, threatened, or "possible" lawsuit, by or for a party or a party's representative, attorney, consultant, surety, indemnitor, insurer, or agent.⁵⁸ The party asserting a work product objection for material prepared in anticipation of litigation

⁵⁶ *Arena Parking, Inc. v. Lon Worth Crow Ins. Agency*, 768 So.2d 1107, 1113 (Fla. 3d DCA 2000) (awarding fees for failure to admit certain facts later proven at trial by the other party but refusing to award fees for failure to admit a "hotly-contested, central issue.")

⁵⁷ *Southern Bell Telephone & Telegraph Co. v. Deason*, 632 So.2d 1377, 1384 (Fla. 1994); *Smith v. Florida Power & Light Co.*, 632 So.2d 696 (Fla. 3d DCA 1994) (attorney's selection of documents generated by defendant in ordinary course of corporate business protected work product as discrete unit immune from discovery because it would reveal attorney's protected thought process and strategy). See *Prudential Insurance Co. v. Florida Dept. of Insurance*, 694 So.2d 772 (Fla. 2d DCA 1997) (documents generated after insurer's legal staff assumed responsibility for oversight of responses to policyholder complaints were undiscoverable fact work product when Dept. of Insurance failed to demonstrate need or undue hardship); *Intercontinental Properties, Inc. v. Samy*, 685 So.2d 1035 (Fla. 3d DCA 1997) (prior incident reports related to defendant's premises were undiscoverable fact work product; plaintiff had alternative discovery methods to gather same information); *National Car Rental System, Inc. v. Kosakowski*, 659 So.2d 455, 457 (Fla. 4th DCA 1995), quoting *Healthtrust, Inc. v. Saunders*, 651 So.2d 188, 189 (Fla. 4th DCA 1995) ("inconsistencies in testimony and discrepancies are not basis to compel production of work product materials," in this case, statements contained in claim file); *Freshwater v. Freshwater*, 654 So.2d 1271 (Fla. 3d DCA 1995) (wife's diaries kept at attorney's direction in connection with matrimonial litigation are protected work product); *DeBartolo-Aventura, Inc. v. Hernandez*, 638 So.2d 988 (Fla. 3d DCA 1994) (discussing whether prior incident reports are work product and procedure for overcoming privilege). A motion to compel discovery of work product must contain a particularized showing of need and inability to obtain the substantial equivalent without undue hardship. *Inapro, Inc. v. Alex Hofrichter, P.A.*, 665 So.2d 279 (Fla. 3d DCA 1995).

⁵⁸ *Barnett Bank of Polk County v. Dottie-G Development Corp.*, 645 So.2d 573 (Fla. 2d DCA 1994); but see *Allstate Indemnity Co. v. Ruiz*, 780 So.2d 239 (Fla. 4th DCA 2001) (discussing the conflicting case law on this issue and holding that the key inquiry is whether the probability of litigation is substantial and imminent. A mere likelihood of litigation is not sufficient to protect an insurer's claim investigation file from disclosure):

must demonstrate that the materials requested are work product.⁵⁹ “Blanket assertions of privilege are insufficient to satisfy this burden.”⁶⁰ Incident reports and other materials “prepared in anticipation of litigation” are not protected from discovery unless their status as work product is demonstrated to the court. 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 recently ruled 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.⁶¹

Although the attorney-client privilege will protect from discovery client communications with counsel, the privilege falls to the so-called “crime-fraud” exception.⁶² The party seeking to overcome the privilege bears the initial burden of producing evidence,⁶³ and then the burden shifts to the party asserting the privilege to give a reasonable explanation. An adversarial hearing should be held on the matter, but the preponderance of the evidence standard applies to the court’s determination of whether the privilege or the exception prevails. “To minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny.”⁶⁴

The most expeditious procedure for handling a work product, attorney-client, or trade secret objection may be a request for the court to conduct an in camera review.⁶⁵

⁵⁹ Wal-Mart Stores, Inc. v. Weeks, 696 So.2d 855 (Fla. 2d DCA 1997).

⁶⁰ Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 593 (W.D.N.Y. 1996).

⁶¹ See, Northrup v. Howard W. Acken, M.D., 29 FLW S37 (Fla., January 29, 2004).

⁶² F.S. 90.502(4)(a); First Union National Bank of Florida, Inc. v. Whitener, 715 So.2d 979 (Fla. 5th DCA 1998) (no fraud that would abrogate privilege, although evidence might support conflict of interest and breach of fiduciary duty); American Tobacco Co. v. State, 697 So.2d 1249 (Fla. 4th DCA 1997).

⁶³ Whitener, 715 So.2d 979.

⁶⁴ Deason, 632 So.2d at 1383.

⁶⁵ See Beck v. Dumas, 709 So.2d 601 (Fla. 4th DCA 1998) (trial court departed from essential requirements of law in ordering disclosure of trade secrets; procedure for determining trade secret privilege set forth); Zanardi v. Zanardi, 647 So.2d 298 (Fla. 3d DCA 1994) (trial court required to conduct in camera review of information contained in computer diskettes to determine validity of party’s assertion of attorney-client privilege); Allstate Insurance Co. v. Walker, 583 So.2d 356 (Fla. 4th DCA 1991) (when work product or attorney-client privilege is asserted, court must hold in camera inspection of discovery material at issue to rule on applicability of privilege).

An order requiring disclosure of “trade secrets”⁶⁶ must specify what trade secrets exist and set forth findings of fact supporting a conclusion that disclosure of the trade secrets is reasonably necessary to resolve the issues in dispute.⁶⁷

Tardiness in responding to discovery requests will result in a waiver of objections that could have been, but were not, made. However, failure to assert the attorney-client privilege at the earliest time will not foreclose a tardy assertion of the privilege; failure to timely assert the privilege “will not prevent the trial court’s in camera examination of the tape to determine if privilege exists.”⁶⁸ A pattern of delay and recalcitrance in providing requested discovery will not necessarily result in stripping of the attorney-client privilege.⁶⁹ However, it has been held that the failure to timely produce a privilege log containing the information required by Rule 1.280 (B)(5) can result in a waiver of the attorney-client privilege.⁷⁰

Conclusion:

In conclusion, “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.”⁷¹

⁶⁶ See generally *Evidence in Florida* §4.53 (Fla. Bar CLE 5th ed. 1997, 1999 Supp.)

⁶⁷ *Virginia Electronics & Lighting Corp. v. Koester*, 714 So.2d 1164 (Fla. 1st DCA 1998).

⁶⁸ *Gross v. Security Trust Co.*, 462 So.2d 580, 581 (Fla. 4th DCA 1985). See *Austin v. Barnett Bank of South Florida, N.A.*, 472 So.2d 830, 830 (Fla. 4th DCA 1985) (“[R]ule 1.380(d) does not require timely objection to privileged matters.”) See also *Old Holdings, Ltd. v. Taplin, Howard, Shaw & Miller, P.A.*, 584 So.2d 1128 (Fla. 4th DCA 1991) (attorney-client privilege not waived although not asserted until motion for rehearing); *Truly Nolen Exterminating, Inc. v. Thomasson*, 554 So.2d 5, 5B6 (Fla. 3d DCA 1989) (“A failure to assert a work-product privilege at the earliest opportunity . . . does not constitute a wavier of the privilege so long as the privilege is asserted by a pleading to the trial court before there has been an actual disclosure of the information alleged to be protected.”); *Insurance Co. of North America v. Noya*, 398 So.2d 836, 838 (“Failure to take such timely action waives . . . objections, but it does not bar a party from asserting a privilege or exemption for matters outside the scope of permissible discovery.”). Compare *American Funding, Ltd. v. Hill*, 402 So.2d 1369 (Fla. 1st DCA 1981) (compelling production of documents when objection based on work product and attorney-client privileges was late).

⁶⁹ *Eastern Airlines, Inc. v. United States Aviation Underwriters, Inc.*, 716 So.2d 340 (Fla. 3d DCA 1998) (reviewing trial court order stripping attorney-client privilege for, among other things, fours years of pattern or delay by party).

⁷⁰ *TIG Insurance Corp. of America v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA Oct. 17, 2001).

⁷¹ *Cox*, 706 So.2d at 47.

The openness of modern discovery is recognized to the point where the discovery process is for the most part self-executing. The superintendence of trial judges should be resorted to only with respect to whether information should be disgorged and the sequence or timing of its proliferation. It is inherent in the present rules of discovery that lawyers, out of respect for the adversary system, should make good faith efforts to comply with one another's reasonable discovery requests without constant recourse to the trial courts.⁷²

The recent amendments to the rules of civil procedure now require verification by attorneys that reasonable efforts have been made to work out discovery issues prior to inviting court intervention. The changes will hopefully lead to court intervention in only the most egregious and contested circumstances.

⁷² Summit Chase Condominium Association, Inc., 421 So.2d at 564.

CHAPTER THREE

EFFECT ON PENDING DISCOVERY OF A MOTION FOR A PROTECTIVE ORDER

Issue:

Whether a motion for a protective order automatically stays a pending proceeding.

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.

Rule 1.280(c) does not provide that a deposition or other pending discovery matter necessarily is stayed on the *filing* of a motion for a protective order. Rather, the rule states

that, on motion *and* for good cause shown, the court may order that the discovery not be had. By implication, the rule requires a hearing for the moving party to make a showing of good cause. Merely filing a motion for a protective order is nothing more than “a paper without a punch.”

Federal decisions interpreting federal rules similar to the Florida Rules of Civil Procedure are persuasive.¹ Under Fed.R.Civ.P. 30(b) and *Pioche Mines Consolidated, Inc. v. Dolman*,² the burden is on the proponent of the motion for a protective order to obtain a court order excusing the party from appearing at a deposition or bear the consequences for failing to appear. In other words, federal law places the burden on the proponent to get an order first, rather than just filing a motion. The *Pioche Mines* opinion further states that the proponent of the motion for a protective order can at least petition the court for an order postponing the time of a deposition until the court can hear the motion for a protective order. Alternatively, the aggrieved party can appear at the time of the deposition and seek adjournment until an order can be obtained. Despite the preceding, until the proponent has obtained a court order postponing or dispensing with the deponent’s duty to appear, the duty still exists.

The *Pioche Mines* rule is followed in the Eleventh Circuit under the authority of *Hepperle v. Johnston*.³ Precedent of the Fifth U. S. Circuit Court of Appeals predating October 1, 1981, is binding in the Eleventh Circuit.⁴

2. Florida Case Law:

In *Canella v. Bryant*,⁵ the attorney sought to postpone a deposition when he learned on the afternoon before the scheduled deposition that it would conflict with a hearing

¹See *Dominique v. Yellow Freight System, Inc.*, 642 So.2d 594 (Fla. 4th DCA 1994).

²333 F.2d 257 (9th Cir. 1964).

³590 F.2d 609 (5th Cir. 1979).

⁴*Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981) (en banc). See also *Federal Aviation Administration v. Landy*, 705 F. 2d 624 (2d Cir. 1983).

⁵235 So.2d 328 (Fla. 4th DCA 1970).

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. Even though there is no Florida case similar to *Pioche Mines*, common sense and professional courtesy would seem to mandate having a motion for a protective order heard and an order entered sufficiently in advance of the pending proceeding at issue.

In *Momenah v. Ammache*,⁶ the plaintiff/appellant 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 defendant, the appellee in this case, 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

⁶16 So. 2d 121 (Fla. 2d DCA 1993).

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.)⁷

Another Florida case on point is *Stables v. Rivers*.⁸ Although this is a workers' compensation case, *Stables*, like *Momenah*, stands for the proposition that the filing of a motion for a protective order does *not* act as an automatic stay of a scheduled deposition.⁹

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.¹⁰

⁷616 So.2d at 124.

⁸559 So.2d 440 (Fla. 1st DCA 1990).

⁹See also *Don Mott Agency, Inc. v. Pullum*, 352 So. 2d 107 (Fla. 2d DCA 1977).

¹⁰*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).

Conclusion:

Based on Florida and federal law, a party who seeks protection from discovery must make every reasonable effort to have a motion heard before a scheduled deposition or other discovery. 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 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 file objections and motions for protective orders can be sanctioned if the nonmovant is prejudiced.¹¹

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.

¹¹Fla.R.Civ.P. 1.380(a)(4).

CHAPTER FOUR

“SPEAKING OBJECTIONS” AND INFLAMMATORY STATEMENTS AT A DEPOSITION

Speaking objections to deposition questions are 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 to make in the presence of a judge routinely are made at a deposition. 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.”

Previously, no rule specifically prohibited speaking objections. *Fla.R.Civ.P.* 1.310(c) provided only that examination of a witness at a deposition “may proceed as permitted at the trial.” In 1996, the Florida Supreme Court amended *Rule* 1.310(c) in an apparent attempt to curb the practice of “speaking objections” during depositions.¹ *Rule* 1.310(c) now includes language requiring “any objection during a deposition to be stated concisely and in a non-argumentative and non-suggestive manner.” This is the same language that was added to *Fed.R.Civ.P.* 30(d)(1) in 1993. “One purpose of the 1993 Amendments to *Fed.R.Civ.P.* 30 was to curtail the prior practice of unduly prolonging and unfairly frustrating the deposition process by lengthy objections and colloquy often including suggested responses to deponent.”²

¹ In re Amendments to Florida Rules of Civil Procedure, 682 So.2d 105 (Fla. 1996).

² See *State Farm Mutual Automobile Insurance Co. v. Dowdy*, 445 F.Supp.2d 1289, 1292 (N.D. Okl. 2006).

Until the Florida amendment receives definitive interpretation, cases interpreting the federal rule, which hold that speaking objections are not permissible, can be cited as persuasive authority.³ The Florida Supreme Court 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.⁴

Case Law Under Fed.R.Civ.P. 30(d)(1):

1. On a motion to direct counsel to cease obstructionist deposition tactics, in *Damaj v. Farmers Insurance Co.*,⁵ the court entered an order requiring in part that:

Deposing counsel shall instruct the witness to ask deposition counsel, rather than the witness’s own counsel, for clarification, definition, or explanation of any words, questions or documents presented during the course of the deposition. . . . Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel’s statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more. If the form of the question is objectionable, counsel should say nothing more than “object to the form of the question.”⁶

2. In *Armstrong v. Hussmann Corp.*,⁷ the court granted a motion to compel and ordered the payment of attorney fees, stating:

Rule 30(d)(1) also provides that, “Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner.” Plaintiff’s attorneys consistently failed to heed this directive. Their objections often suggested answers to their client. . . . Because attorneys are prohibited from making any comments, either on or off the record, in the presence of a judicial officer, which might suggest or limit a witness’s answer to an unobjectionable question, such behavior is likewise prohibited at depositions.”⁸

³ See *Gleneagle Ship Management Co. v. Leondakos*, 602 So.2d 1282 (Fla. 1992).

⁴ 682 So.2d at 117.

⁵ 164 F.R.D. 559 (N.D. Okla. 1995), opinion withdrawn and superseded on rehearing by 132 F.3d 42 (10th Cir. Okla.) 1997.

⁶ *Id.* at 561.

⁷ 163 F.R.D. 299 (E.D. Mo. 1995).

⁸ *Id.* at 302-303.

3. In granting a motion to compel and for sanctions, the court in *Frazier v. Southeastern Pennsylvania Transportation Authority*⁹ interpreted Rule 30(d)(1) to mean that “lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness’s answer to an unobjectionable question.”¹⁰

4. In *Hall v. Clifton Precision, A Division of Litton Systems, Inc.*,¹¹ the court stated:

The witness comes to the deposition to testify, not to indulge in a parody of Charles McCarthy, with lawyers coaching or bending the witness’s words to mold a legally convenient record. It is the witness — not the lawyer — who is the witness. . . . The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions.¹²

Rule 1.310(d) continuously has provided courts the power to terminate or limit the scope of a deposition “on motion of a party” if the court found that the deposition was being conducted in “bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.” All phases of the examination have been subject to the control of the court, which has discretion to make any orders necessary to prevent abuse of the discovery and deposition process.¹³

Other Case Law:

1. The court in *Paramount Communications Inc. v. QVC Network Inc.*¹⁴ held:

One particular instance of misconduct during a deposition in this case demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future — a lesson of conduct not to be tolerated or repeated. . . . To illustrate, a few excerpts from the latter stages of the [defendant’s] deposition follow: . . . Don’t “Joe” me, asshole. . . . You could gag a maggot off a meat wagon. . . . You have

⁹ 161 F.R.D. 309 (E.D. Pa. 1995). Distinguished by *Odone v. Croda Int’s PCL*, 170 F.R.D. 66, 68 (D.D.C. 1997).

¹⁰ *Id.* at 315, citing *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993).

¹¹ 150 F.R.D. 525 (E.D. Pa. 1993). Some jurisdictions have declined to follow the primary holding concerning attorney-witness conferences.

¹² *Id.* at 528–530.

¹³ See 8 Wright & Miller, *Federal Practice and Procedure* §§2113 (1971). There are many cases on point.

¹⁴ 637 A.2d 34 (Del. 1994). Case holding regarding ownership interest has been distinguished by some jurisdictions.

no concept of what you're doing. . . . You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.¹⁵

This conduct was found by the court to be “outrageous and unacceptable.”¹⁶ The appellate court stated that trial courts can consider protective orders and sanctions for discovery violations, including, excluding the obstreperous attorney from the deposition, appointing a special master, or assessing fees and costs.

2. In *Castillo v. St. Paul Fire & Marine Insurance Co.*,¹⁷ the trial judge called the conduct of the plaintiff and his counsel at the plaintiff's deposition, “the most outrageous example of evasion and obfuscation that I have seen in years [and] a deliberate frustration of defendants' attempt to secure discovery.”¹⁸ Such conduct included the counsel interfering with deposition questions and directing the deponent not to answer questions. The dismissal of the plaintiff's case and over \$5,000 in fees as a sanction were affirmed.

3. The court imposed sanctions against the plaintiff in *Van Pilsum v. Iowa State University of Science & Technology*,¹⁹ including payment for half of the deposition costs and for use of a special master at a subsequent deposition because:

[Plaintiff's counsel] repeatedly took it upon himself to restate Defendants' counsel's questions in order to “clarify” them for the Plaintiff. [Plaintiff's counsel] consistently interrupted [Defendants' counsel] and the witness, interposing “objections” which were thinly veiled instructions to the witness, who would then incorporate [Plaintiff's counsel's] language into her answer. . . . The style adopted by [Plaintiff's counsel] has become known as “Rambo Litigation.” It does not promote the “just, speedy and inexpensive determination of every action,” as is required by Fed.R.Civ.P. 1. This style, which may prove effective out of the presence of the court, and may be impressive to clients as well as ego-gratifying to those who practice it, will not be tolerated by this court.²⁰

4. In *Stengel v. Kawasaki Heavy Industries, Ltd.*,²¹ at a break in the deposition, a

¹⁵ *Id.* at 52–53.

¹⁶ *Id.* at 55.

¹⁷ 938 F.2d 776 (7th Cir. 1991).

¹⁸ *Id.* at 777.

¹⁹ 152 F.R.D. 179 (S.D. Iowa 1993).

²⁰ *Id.* at 180–181.

²¹ 116 F.R.D. 263 (N.D.Tex., 1987).

court reporter overheard the lawyers for the defendant say that it was their game plan to “jerk [plaintiff’s counsel] around.”²² Unreasonable objections to terminology were made as well as other comments such as:

“Waste of time, ” referring to the deposing attorney’s question; “If you don’t know how to produce evidence and ask a witness questions about something that is admissible form, either for impeachment or for some other purpose, then you can’t blame Kawasaki for stonewalling to cover up your own inadequacies.”; “Big deal.”; “Your (sic) not any more skillful in asking the question than the other lawyer was in asking the question.”²³

These efforts were intended to “frustrate the taking of that deposition and to evidently prevent any meaningful testimony being taken on behalf of the Plaintiff.”²⁴ The court imposed sanctions equal to 50 hours of time at \$100 per hour for the motion to compel and 5.5 hours at \$150 per hour for court time.

5. The court in *Unique Concepts, Inc. v. Brown*²⁵ imposed sanctions of \$693.25 for the cost of the deposition transcript and a \$250 fine for counsel’s conduct, saying:

[Counsel’s] constant interruptions continue throughout the transcript; his silencing of the witness and obstructive demands for explanations from the examiner rendered the deposition worthless and an exercise in futility. . . . They include the following remarks by [counsel] directed at the examiner:

“You are being an obnoxious little twit. Keep your mouth shut.” (Tr. 23). “You are a very rude and impertinent young man.” (Tr. 114). . . . “If you want to go down to [the judge] and ask for sanctions because of that, go ahead. I would almost agree to make a contribution of cash to you if you would promise to use it to take a course in how to ask questions in a deposition.” (Tr. 34).²⁶

6. In *Kelly v. GAF Corp.*,²⁷ defense counsel “made inconsequential objections and so hindered the process that [the witness’] deposition, when finally presented in court, was a hodgepodge, completely lacking in direction and continuity.”²⁸ The court chastised

²² *Id.* at 266.

²³ *Id.* at 267–268.

²⁴ *Id.* at 268.

²⁵ 115 F.R.D. 292 (S.D.N.Y. 1987).

²⁶ *Id.* at 292–293.

²⁷ 115 F.R.D. 257 (E.D. Pa. 1987).

²⁸ *Id.* at 257.

counsel as follows:

An irresponsible attorney can make any number of objections, ranging from frivolous to spurious. The more he makes, the better things are in his favor. . . . Frivolous objections such as these destroyed the effectiveness of [the witness'] testimony.²⁹

Plaintiff's motion for a new trial was granted.

7. Repetitive objections and colloquy effectively denied counsel a fair opportunity to take a meaningful deposition in *Langston Corp. v. Standard Register Co.*³⁰ The court ordered that the deposition be retaken and that the offending party pay the expenses, and imposed sanctions consisting of the expense of retaking the deposition plus those incurred in obtaining the order.

8. Costs and fees for redeposing witnesses were charged personally against counsel in *United States v. Kattar*,³¹ for argumentative questioning, unscheduled interruptions, and other improper conduct.

9. For further discussion of improper deposition conduct, see Kerper & Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*.³²

Endnotes

²⁹ *Id.* at 258.

³⁰ 95 F.R.D. 386 (N.D. Ga. 1982).

³¹ 191 F.R.D. 33 (D.N.H. 1999).

³² 22 J. Legal. Prof. 103 (Spring 1998).

CHAPTER FIVE

INSTRUCTING A WITNESS NOT TO ANSWER QUESTIONS AT A DEPOSITION

The general rule is that a party may obtain discovery regarding any nonprivileged matter that is relevant to the pending action.¹ At a deposition, the “evidence objected to shall be taken subject to the objections.”² Only objections to the form of the question need be made at the deposition to preserve the right to object at the trial. All other objections are preserved until the trial. The Florida Supreme Court, in *In re Amendments to Florida Rules of Civil Procedure*,³ adopted certain amendments to Rule 1.310(c), allowing attorneys to instruct a deponent not to answer questions only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under Rule 1.310(d). This change is derived from Federal Rule of Civil Procedure 30(d), as amended in 1993. The Florida Supreme Court 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). It follows from the amendments that the provisions of Rule 1.380(a) apply to award expenses incurred with the filing of such a motion. Although some of the federal cases cited below interpret the Federal Rules of Civil Procedure that existed before the 1993 amendment, the following cases should assist the practitioner in interpreting Rules 1.310 and 1.380, Florida Rules of Civil Procedure.

1. ***Smith v. Gardy***:⁴

This is the seminal Florida case which is a must read for all practitioners when the subject issue arises. Citing Rule 1.280(b)(1) of the Florida Rules of Civil Procedure, the court stated:

¹Fla.R.Civ.P. 1.280(b)(1).

²Rule 1.310(c).

³682 So.2d 105 (Fla. 1996).

⁴569 So.2d 504 (Fla. 4th DCA 1990).

“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.”

....

Dr. Freeman indeed should have answered, and the arrogance of the defense attorney in instructing the witness not to answer is without legal justification.

....

There was no proper basis for objection here. The questions should have been answered because they were within the scope of subject matter on which that expert was expected to testify. Nor was there a work product privilege. The apparent reason that the witness was instructed not to answer was simply because the defense attorney did not want to reveal adverse information.⁵

In commenting on the diminished level of conduct by attorneys in depositions, the court also discussed the importance of maintaining professionalism as well as lawyers' responsibility of seeking truth and justice, with the sense of honor and fair dealing.

2. *Calzaturificio S.C.A.R.P.A. v. Faviano Shoe Company, Inc.*⁶

The District Court for the District of Massachusetts held that the following behavior by counsel was improper:

[The counsel] conferred with the deponents during questioning, left the room with a deponent while a question was pending, conferred with deponents while questions were pending, instructed deponents not to finish answers, suggested to the deponents how they should answer questions, rephrased opposing counsel's questions, instructed witnesses not to answer on grounds other than privilege grounds, asserted the “asked and answered” questions 81 times, engaged in length colloquies on the record, and made *ad hominem* attacks against opposing counsel.⁷

3. *Quantachrome Corp. v. Micromeritics Instrument Corp.*⁸

In this case, the plaintiff filed a motion to compel and for sanctions alleging that the defense counsel improperly and repeatedly instructed deponents not to answer questions based on relevancy or form objections. The defendant responded by stating

⁵*Id.* at 507.

⁶ 201 F.R.D. 33 (D. Mass. 2001).

⁷ *Id.* at 39.

⁸189 F.R.D. 697 (S.D. Fla. 1999).

that it refused to answer questions that were not reasonably calculated to lead to the discovery of admissible evidence. Citing the current version of Rule 30(d)(1), the District Court for the Southern District of Florida held that it was improper to instruct a witness not to answer a question based on form and relevancy objections.

4. EEOC v. General Motors Corporation⁹

In this case, GMC's counsel instructed a witness not to answer the questions posed by counsel for the EEOC. The court, citing the current version of Rule 30(d)(1), Federal Rules of Civil Procedure, held that the counsel's concerns regarding his client's potential civil liability was not a basis for instructing a witness to refrain from answering questions propounded during a deposition. The court further held that the counsel's concern was unfounded since witnesses are absolutely immune from civil suits arising from their testimony in judicial proceedings, even perjured testimony.

5. Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc.¹⁰

In this case, the defendants moved to compel two witnesses, to respond to deposition questions that were objected to on grounds other than privilege. The plaintiff had objected to a variety of questions, asserting primarily that the questions were not relevant. The court, in granting the motion to compel, cited the current version of Rule 30(d)(1), Federal Rules of Civil Procedure, and stated, "Absent a claim of privilege, instructions not to answer questions at a deposition are generally improper." The court therefore directed that the witnesses answer all questions relating to the current action, except for those which he or she is directed not to answer on grounds of attorney-client privilege or trade secret. The court further stated, "When a witness is so directed, a statement will be placed on the record indicating the time of the allegedly privileged

⁹ 1997 U.S. Dist. LEXIS 17279 (E.D. Mo. Aug. 6, 1997).

¹⁰ 1997 U.S. Dist. LEXIS 1272; 1997 WL 53184 (S.D.N.Y. Feb. 10, 1997).

communication, the parties to the communication, and a general statement of the subject matter of the communication.”

6. Leiching v. Consolidated Rail Corporation¹¹

The District Court for the Northern District of New York, recommended that defense counsel be personally assessed \$2500.00 of sanctions for abusive and obstructive discovery practices, including, interposing 1072 objections in the course of 15 depositions, instructing a witness not to answer questions based on “totally unjustified” claim of privilege, instructing a witness not to bring a claims file with him, despite its having been required by the deposition notice and accusations of unethical conduct directed to opposing counsel.

7. Riddell Sports, Inc. v. Brooks:¹²

The District Court for the Southern District of New York, stated that the conduct of attorneys directing deponents not to answer certain questions was generally inappropriate and further stated:

Counsel may direct the witness not to answer a deposition question only under the following circumstances: (1) “when necessary to preserve a privilege,” (2) “to enforce a limitation on evidence directed by the court,” or (3) to protect a witness from an examination “being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.” Fed. R. Civ.P. 30(d)(1) & (3).

. . . [T]he party resisting discovery has the burden of supporting its position and an award of reasonable expenses, including attorneys fees, is available to the party that prevails on the motion if his adversary position was not substantially justified. See Fed.R.Civ.P. 37(a)(4)(sanctions on motion to compel); Fed.R.Civ.P. 30(d)(3) (making some sanctions applicable to motion for protective order at deposition).¹³

¹¹ 1996 U.S. Dist. LEXIS 20796 (N.D.N.Y. Oct. 24, 1996).

¹²158 F.R.D. 555 (S.D. N.Y. 1984). See *Fondren v. Republic American Life Insurance Co.*, 190 F.R.D. 597 (N.D. Okla. 1999).

¹³*Id.* at 557-558 (citations omitted).

8. **Marcum v. Wellman Funeral Home, Inc.**¹⁴

In this case, during the deposition of the defendant's vice-president, the defendant's counsel instructed him not to answer. At the conclusion of the deposition, the parties agreed that the deposition would be continued until the following week and concluded at that time. When the vice-president and the defendant's counsel appeared at the appointed time for the continued deposition, the defendant's counsel indicated that he would permit the vice president to answer the questions which counsel earlier had instructed him not to answer. The plaintiffs' counsel then refused to continue the deposition, and instead filed a motion to compel answers to deposition questions and to impose sanctions.

The U.S. Court of Appeals for the Sixth Circuit, affirmed the district court's judgment and explained the district court's finding as follows:

The district court found that the defendant's counsel had improperly instructed his client not to answer the questions at issue, and sanctioned counsel for that action. However, the district court also found, and that finding is not clearly erroneous, that one week after the deposition in which the unjustified instruction was given, defendant's counsel made the defendant available for additional questioning, specifically for the purpose of answering the previously unanswered questions and resolving the dispute about them, and that plaintiffs' counsel refused to question defendant further. Plaintiffs' counsel instead proceeded to file a motion to compel answers and for sanctions. The district court ruled that plaintiffs' counsel had prolonged the dispute by refusing to continue with the defendant's deposition and that under the circumstances the motion to compel and for sanctions was denied and that plaintiffs would not be permitted to further depose the defendant.¹⁵

As to the issue of plaintiffs' requested sanctions, the Sixth Circuit stated:

Plaintiffs offer no authority to support their contention that the failure of an opposing party to answer questions the first time around causes irreparable harm to the party propounding the questions because, once the answering party has had time to think about the questions, his answers will not be truthful. We have found no authority for that proposition, and we reject it.¹⁶

¹⁴ 30 F.3d 134 (6th Cir. 1994) (Note: opinion not designated for publication).

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 2.

9. Wilson v. Martin County Hospital District¹⁷

The District Court for the Western District of Texas, granted a motion to compel in a Title VII case wherein the defense attorney instructed the deponent not to answer, on the basis of preserving matters which are confidential and privileged. The court granted the motion to compel in part, as to the evidence asserted as confidential, and denied it in part, as to the evidence asserted as privileged. In making its holding, the Court stated that despite the type of objections raised by the defense attorney, “[I]t is the duty of the attorney instructing the witness not to answer to immediately seek a protective order,” and pointed out that the defense attorney in the case failed to seek a protective order and left it to the plaintiff to bring the matter before the court in the form of a motion to compel.¹⁸

10. Nutmeg Insurance Co. v. Atwell, Vogel & Sterling, A Division of Equifax Services, Inc.¹⁹

The District Court for the Western District of Louisiana, imposed sanctions and costs in connection with a Motion to Compel, arising from the termination of the Rule 30(b)(6) discovery deposition of a Nutmeg representative, by Counsel for Nutmeg Insurance Co. After citing the general rule that instructions not to answer questions at a deposition are improper, the court stated:

Even in the case of an instruction not to answer based on privilege, the party who instructs the witness not to answer should *immediately* seek a protective order.

Counsel for Nutmeg did not file a motion pursuant to Rule 30(d), either in the district where the deposition was being taken or in the court where the action is pending. Rather counsel unilaterally directed the witness not to answer and left it to defendant Equifax to bring the matter before the court in the form of a motion for sanctions. This course of conduct was improper and in violation of the Federal Rules of Civil Procedure.²⁰

¹⁷ 149 F.R.D. 553 (W.D. Tx 1993).

¹⁸ *Id.* at 555

¹⁹ 120 F.R.D. 504 (W.D. La. 1988).

²⁰ *Id.* at 508 (emphasis original).

11. *Paparelli v. Prudential Insurance Co. of America*:²¹

The District Court for the District of Massachusetts, held that (1) party which employs the procedures of Rule 30(b)(6) to depose the representative of a corporation must confine the examination to the matters stated “with reasonable particularity” which are contained in the Notice of Deposition; but (2) counsel for other party could not properly instruct witness not to answer questions on the ground that they went beyond the subject matter listed in the notice of deposition. The court held that the remedy for questions that go beyond the subject matter listed in the notice of deposition is to file a motion to limit the scope or manner of taking the deposition under Rule 30(d). The court also held that even upon a “proper” instruction not to answer, *to wit*: to protect trade secrets or privileged information, the party should immediately seek a protective order.²²

12. *American Hangar Inc. v. Basic Line, Inc.*:²³

The Massachusetts District Court awarded to the plaintiff, attorney’s fees and costs incurred in filing a motion to compel, when the defendant’s counsel instructed defense witnesses not to answer plaintiff’s counsel’s questions. The court also distinguished the type of expenses that could be awarded when there is a refusal to answer at a deposition:

[W]hen faced with a refusal to answer questions at a deposition, the examining party may seek an order compelling answers pursuant to Rule 37(a), F.R.Civ. P. In this connection, any award of expenses to the examining party is limited to the expenses incurred “in obtaining the order.” There is no power to include in such award the costs associated with taking the deposition at which the refusal to answer occurred. It is only after an order compelling answers is entered pursuant to Rule 37(a), F.R.Civ.P., and after a party has persisted in a refusal to answer can a party obtain expenses in connection with the deposition and then, only in connection with the deposition at which the refusal to answer was in violation of the Rule 37(a) order.²⁴

This opinion provides guidance in interpreting similar rules, Rules 1.380(a)(2) and 1.380(a)(4), Florida Rules of Civil Procedure.

²¹108 F.R.D. 727 (D. Mass. 1985).

²²*Id.* at 731.

²³105 F.R.D. 173 (D. Mass. 1985).

²⁴*Id.* at 175.

13. *Eggleston v. Chicago Journeyman Plumbers Local Union No. 130, U.A.*:²⁵

The U.S. Court of Appeals, Seventh Circuit, stated as follows regarding irrelevant questions at depositions and circumstances that warrant resorting to courts:

Rule 30(c), Fe. R.Civ.P., says the evidence should be taken subject to the objections. Some questions of doubt relevancy may be innocuous and nothing is lost in answering, subject to objection, except time. That is the general rule. Other irrelevant questions, however, may necessarily touch sensitive areas or go beyond reasonable limits as did some of the race questions propounded to Eggleston. In such an event, refusing to answer may be justified. . . . There is no more need for a deponent to seek a protective order for every question when a dispute arises than there is a need to seek to compel an answer for each unanswered question. If a particular question is important or opens up a whole area of questionable relevance, or other serious problems develop which counsel cannot solve themselves, then resorting to the court may be justified or necessary.²⁶

14. *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. Westinghouse Electric Corp.*:²⁷

In this case, a deponent refused to answer the defendant's counsel's questions, based upon instruction from the plaintiffs' counsel not to do so, on the basis of objections to the relevancy of the questions. Although recognizing that Rule 30(c) should not mandate disclosure of trade secrets or privileged information merely because such information is sought through a question asked on deposition, the court stated that ordinarily, objections based merely on an assertion of irrelevance, will not be exempted from the provision of the rule.²⁸

15. *Coates v. Johnson & Johnson*:²⁹

In this case, during a deposition noticed by the defendants, the plaintiff's counsel instructed his client not to answer certain questions. Defendants then filed a

²⁵657 F.2d 890 (7th Cir. 1981).

²⁶*Id.* at 903.

²⁷91 F.R.D. 277 (D.D.C. 1981).

²⁸*Id.* at 279-280.

²⁹85 F.R.D. 731 (N.D. Ill. 1980).

motion to compel and the plaintiff filed a motion for a protective order. The Magistrate granted the defendants' motion, denied the plaintiff's motion and, finding that plaintiff's motion was "completely unnecessary and without a legal basis," granted defendants costs, including attorney's fees, attendant to its opposition of the latter motion. Plaintiff appealed the Magistrate's denial and award of costs and attorney's fees, arguing that it is not improper to instruct a client not to answer questions counsel deems offensive. The District Court for the Northern District of Illinois, affirmed the Magistrate's decision, stating:

Despite plaintiff's protestations to the contrary, the general rule in this district is that, absent a claim of privilege, it is improper for counsel at a deposition to instruct a client to not answer. If counsel objects to a question, he should state his objection for the record and then allow the question to be answered subject to his objection . . . It is not the prerogative of counsel, but the court to rule on objection.³⁰

16. *Lloyd v. Cessna Aircraft Co.*:³¹

In this case, during the depositions of the employees of the Federal Aviation Administration, the deponents refused to answer certain questions propounded by the third-party plaintiff. In those instances, the attorney representing the government objected to the form of the questions and directed the witnesses not to answer. The District Court for the Eastern District of Tennessee held that the government's conduct was wholly improper and stated as follows, citing Wright, *Law of Federal Courts* (3d ed. 1976), 420:

At the taking of a deposition, the witness will be examined and cross examined by counsel for the parties in the same fashion as at trial, with one important exception. If there is an objection to a question, the reporter will simply note the objection in the transcript and the witness will answer the question despite the objection. The court can consider the objection if the deposition is offered at the trial, and at that time will refuse to allow reading of the answer to any question which was properly objectionable. If the witness refuses to answer a question put at a deposition, the examination may be adjourned, or completed on other matters, and application then made to the court to compel an answer. This is undesirable, since it delays the deposition and brings the court into a process which is intended to work largely without judicial supervision.³²

³⁰*Id.* at 733 (citations omitted).

³¹74 F.R.D. 518 (E.D. Tenn. 1977).

³²*Id.* at 520.

17. *Ralston Purina Co. v. McFarland*:³³

In this case, the defendant's counsel deposed the principal witness for the plaintiff, in an effort to discover information pertaining to the defendant's defense relating to usage of trade under the UCC. During that deposition, the plaintiff's counsel instructed the witness not to answer certain questions. The U.S. Court of Appeals for the Fourth Circuit held:

The action of plaintiff's counsel in directing the [deponent] not to answer the questions posed to him was indefensible and utterly at variance with the discovery provisions of the Federal Rules of Civil Procedure. . . . The questions put to [deponent] were germane to the subject matter of the pending action and therefore properly within the scope of discovery. They should have been answered and, in any event, the action of plaintiff's counsel in directing the deponent not to answer was highly improper. The Rule itself says "Evidence objected to shall be taken subject to the objections", and Professor Wright says it means what it says, citing *Shapiro v. Freeman*, D.C.N.Y. 1965, 38 F.R.D. 308, for the doctrine: "Counsel for party had no right to impose silence or instruct witnesses not to answer and if he believed questions to be without scope of orders he should have done nothing more than state his objections." Wright & Miller, *Federal Practice and Procedure: Civil* s. 2113 at 419, n. 22 (1970).³⁴

18. *Preyer v. United States Lines, Inc.*:³⁵

The District Court for the Eastern District of Pennsylvania stated:

Rule 30(c) provides that "Evidence objected to shall be taken subject to the objections." When the objection involves a claim of privilege, a strict application of this rule would undermine the values thereby protected. But in this case, although plaintiff's attorney complained that the questions were asked in an 'incriminatory context', . . . there is no real claim of privilege. Where, as here, the objection is merely based on assertions of irrelevance, the rule should be strictly applied.³⁶

³³550 F.2d 967 (4th Cir. 1977).

³⁴*Id.* at 973.

³⁵ 64 F.R.D. 430 (E.D.Pa. 1973), *aff'd* 546 F.2d 418.

³⁶*Id.* at 431.

CHAPTER SIX

REMEDY FOR PRODUCTION OF DOCUMENTS BY A NONPARTY IN RESPONSE TO COPY OF UNISSUED 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. 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 only recourse after an objection is 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; 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.¹

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.

Rule 1.351(d) provides that there will be a hearing on any objections to production

¹Rule 1.351(c).

under this rule and that relief is to be obtained solely through *Rule* 1.310.

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* 1.310. 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.

CHAPTER SEVEN

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.¹ 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.² Although the examination may include invasive tests, the party to be examined is entitled to know the extent of the tests to seek the protection of the court in providing for reasonable measures so that the testing will not cause injury.

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 within the trial court's discretion under *McKenney v. Airport Rent-A-Car, Inc.*³ *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 at the place 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

¹Russenberger v. Russenberger, 639 So.2d 963 (Fla. 1994); Olges v. Dougherty, 856 So.2d 6 (Fla. 1st DCA, August 29, 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. 2nd DCA 2004)

²Schagrin v. Nacht, 683 So.2d 1173 (Fla. 4th DCA 1996).

³686 So.2d 771 (Fla. 4th DCA 1997). See also Leinhart v. Jurkovich 882 So.2d (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.

to be held was not an abuse of discretion, even though the plaintiff resided in a different county. In *Tsutras v. Duhe*,⁴ 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 *Blagrove v. Smith*,⁵ 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. 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 second IME despite the fact that the plaintiff had moved to a foreign state, advised counsel 2 days prior that he was financially unable to attend, and filed motion for protective order with affidavit detailing his finances and stating he had no available funds or credit to travel to Florida. See *Littelfield v. J. Pat Torrence*.⁶

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*⁷ 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

⁴685 So.2d 979 (Fla. 5th DCA 1997).

⁵701 So.2d 584 (Fla. 5th DCA 1997).

⁶778 So. 2d 368 (Fla. 2d DCA 2001).

⁷708 So.2d 637 (Fla. 2d DCA 1998).

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.

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. *Toucet v. Big Bend Moving & Storage*.⁸ 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.⁹

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

⁸581 So.2d 952 (Fla. 1st DCA 1991).

⁹See *State Farm Mutual Auto Insurance Company v. Shepard*, 644 So.2d 111 (Fla. 2d DCA 1994).

of the trial judge.¹⁰ 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 the examining doctor’s findings and conclusions.¹¹ 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.¹²

Without a valid reason to prohibit the third party’s presence, the examinee’s representative should be allowed.¹³ 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.¹⁴ 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.¹⁵ This criteria applies to compulsory examinations for physical injuries and psychiatric examinations.¹⁶

The rationale for permitting the presence of the examinee’s attorney is to protect the examinee from improper questions unrelated to the examination.¹⁷ Furthermore, the examinee has a right to preserve by objective means the precise communications that

¹⁰Bartell v. McCarrick, 498 So.2d 1378 (Fla. 4th DCA 1986).

¹¹Wilkins v. Palumbo, 617 So.2d 850 (Fla. 2d DCA 1993).

¹²Broyles v. Reilly, 695 So.2d 832 (Fla. 2d DCA 1997); Wilkins; Stakely v. Allstate Ins. Co., 547 So.2d 275 (Fla. 2d DCA 1989).

¹³See 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).

¹⁴Wilkins.

¹⁵Broyles.

¹⁶Freeman v. Latherow, 722 So.2d 885 (Fla. 2d DCA 1998). Bacallao v. Dauphin, 32 FLW D1394 (3rd DCA, May 30, 2007) (appellate court upheld right to have third party present because other doctors in the area would allow third persons to be there). Stephens v. State of Florida, 31 FLW D1772 (1st DCA, June 29, 2006) (the DCA held that the trial court did not deviate from the law with it denied plaintiff’s request that his expert witness be permitted to accompany him on a neuropsychological exam by a state-selected medical professional).

¹⁷See Toucet.

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.”¹⁸ 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.¹⁹ 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.²⁰ 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 invalid reasons.²¹ 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.²² 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.²³ However, it would

¹⁸456 So.2d at 1321.

¹⁹Bartell.

²⁰Broyles; Wilkins

²¹Collins.

²²McCorkle; Toucet.

²³Truesdale v. Landau, 573 So.2d 429 (Fla. 5th DCA 1991). *See also* Broyles.

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.²⁴

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.²⁵ 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.²⁶ Video or audio tape of the IME obtained by the examinee's attorney should be considered work product, as long as the recording is not being used for impeachment or use at trial. See *McGarrah v. Bayfront Medical Center*.²⁷

In *McClennan v. American Building Maintenance*,²⁸ 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*,²⁹ 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

²⁴Broyles.

²⁵*Lunceford v. Florida Central Railroad Co., Inc.*, 728 So.2d 1239 (Fla. 5th DCA 1999).

²⁶See *Medrano v. BEC Const. Corp.*, 588 So.2d 1056 (Fla. 3d DCA 1991).

²⁷See *McGarrah v. Bayfront Medical Center*, 889 So.2d 923 (Fla. 2nd DCA 2004)

²⁸28648 So.2d 1214 (Fla. 1st DCA 1995).

²⁹754 So.2d 697, 701 (Fla. 2000).

for rule 1.360 and workers' compensation examinations.”

Issue 3:

What financial records of the examiner are subject to disclosure as being reasonably calculated to lead to the discovery of relevant, admissible evidence concerning the physician's bias?

Resolution:

In *Elkins v. Syken*,³⁰ the Supreme Court addressed a split of authority among Florida's district courts of appeal concerning the appropriate scope of discovery necessary to impeach the testimony of an opponent's expert witness. The Supreme Court adopted the decision expressed in *Syken v. Elkins*,³¹ and disapproved the conflicting decisions.³² In doing so, the court expressly approved the criteria governing the discovery of financial information from expert witnesses.

Although the *Syken* decision only addressed discovery from medical experts, it was the basis for amending the rules of civil procedure to apply to discovery from all expert witnesses. The amendment to *Rule* 1.280(b)(4)(A) 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 experts'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.
4. An approximation of the report of the expert's involvement as an

³⁰672 So.2d 517 (Fla. 1996).

³¹644 So.2d 539 (Fla. 3d DCA 1994).

³²The disapproved decisions include *Abdel-Fattah v. Taub*, 617 So.2d 429 (Fla. 4th DCA 1993) (nonparty expert required to compile information regarding defense-required examinations for past year); *Bissel Bros., Inc. v. Fares*, 611 So.2d 620 (Fla. 2d DCA 1993) (IRS Form 1099s subject to discovery); *Young v. Santos*, 611 So.2d 586 (Fla. 4th DCA 1993) (tax returns and independent medical examinations discoverable); *Crandall v. Michaud*, 603 So.2d 637 (Fla. 4th DCA 1992) (1099s are relevant to issue of bias); *McAdoo v. Ogden*, 573 So.2d 1084 (Fla. 4th DCA 1991) (bills for services rendered as defense expert discoverable to show potential bias).

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.³³

In addressing this issue, the *Syken* court reminded the trial courts that it is essential to keep in mind the purpose of discovery. “Pretrial discovery was implemented to simplify the issues in a case, to eliminate the element of surprise, to encourage the settlement of cases, to avoid costly litigation, and to achieve a balanced search for the truth to ensure a fair trial.”³⁴ The amendments to the rules were “intended to avoid annoyance, embarrassment, and undue expense while still permitting the adverse party to obtain relevant information regarding the potential bias or interest of the expert witness.”³⁵

However, in *Allstate Insurance Co. v. Boecher*,³⁶ the Supreme Court held that neither *Elkins* 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 witness. Accordingly, the jury’s right to assess the potential bias of the expert witness outweighed any of the competing interests expressed in *Elkins*.

³³In re Amendment to Florida Rules of Civil Procedure, 682 So.2d 105 (Fla. 1996).

³⁴672 So.2d at 522.

³⁵682 So.2d at 116.

³⁶733 So.2d 993 (Fla. 1999).

CHAPTER EIGHT

OBTAINING PSYCHOLOGICAL RECORDS WHEN PAIN AND SUFFERING ARE AT ISSUE

Chapter 90, Florida Statutes, codifies the psychotherapist¹-patient privilege and provides in pertinent part:

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.

* * *

(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.²

In addition, section 394.4615, Florida Statutes, envelopes the records of a psychotherapist with a broad cloak of confidentiality. The intent of the psychotherapist privilege is to encourage people who need treatment for mental disorders to obtain it by ensuring the confidentiality of communications made for the purpose of treatment.³ The United States Supreme Court has noted that the psychotherapist privilege serves the public interest and, if the privilege were rejected, confidential conversations between

¹Psychotherapist is defined by section 90.503(1)(a), Florida Statutes, and includes any person authorized to practice medicine, or reasonably believed by the patient so to be, "who 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 is **engaged in treating or diagnosing** a mental condition, but other health care professionals, such as psychologists, are considered "psychotherapists" only if they are **engaged primarily in the diagnosis or treatment** of a mental....condition..." Compare § 90.503(1)(a)1., Fla. Stat. with § 90.503(1)(a)2., Fla. Stat. (emphasis added). In 2006, the legislature amended section 90.503(1)(a), Florida Statutes to include certain advanced registered nurse practitioners within the ambit of the statute. See § 90.503(1)(a)5., Fla. Stat. (2006)(effective July 1, 2006).

²§ 90.503, Fla. Stat.

³*Carson v. Jackson*, 466 So. 2d 1188, 1191 (Fla. 4th DCA 1985).

psychotherapists and their patients would surely be chilled.⁴

Florida courts generally have held that, when the plaintiff seeks damages for “mental anguish” or “emotional distress,” the plaintiff’s mental condition is at issue and the psychotherapist privilege is waived.⁵

The statutory privilege is waived if the plaintiff relies on his or her post-accident mental or emotional condition as an element of the claim.⁶ Furthermore, the psychotherapist privilege is waived in any proceeding in which the patient relies on a psychological condition as an element of his or her claim.⁷ Failure to timely assert the privilege does not constitute waiver, but it is waived for information already produced.⁸ 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.⁹ A party does not waive confidentiality and make his or her mental health an element of the claim by simply requesting custody.¹⁰ The privilege is not waived in joint counseling sessions.¹¹

The party seeking to depose a psychotherapist or obtain psychological records bears the burden of showing that the plaintiff’s mental or emotional condition has been introduced as an issue in the case.¹² When a plaintiff has not placed mental condition

⁴Jaffee v. Redmond, 518 U.S. 1 (1996).

⁵See Haney v. Mizell Memorial Hosp., 744 F. 2d 1467 (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 (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 v. Womble, 657 So. 2d 1221 (Fla. 5th DCA 1995)(loss of consortium claim from personal injury); Scheff v. Mayo, 645 So. 2d 181 (Fla. 3d DCA 1994)(mental anguish from rear-end motor vehicle accident); Sykes v. St. Andrews Sch., 619 So. 2d 467 (Fla. 4th DCA 1993)(emotional distress from sexual battery); F.M. v. Old Cutler Presbyterian Church, Inc., 595 So. 2d 201 (Fla. 3d DCA 1992)(sexual, physical and emotional abuse); Arzola v. Reigosa, 534 So. 2d 883 (Fla. 3d DCA 1988) (mental anguish arising from automobile/bicycle collision). Compare Nelson, 657 So. 2d 1221 (determining loss of enjoyment of life was 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”).

⁶Arzola, 534 So.2d 883.

⁷Connell v. Guardianship of Connell, 476 So. 2d 1381 (Fla. 1st DCA 1985).

⁸Garbacik v. Wal-Mart Transp., LLC, 932 So. 2d 500 (Fla. 5th DCA 2006); Palm Beach County Sch. Bd. v. Morrison, 621 So. 2d 464 (Fla. 4th DCA 1993).

⁹Olson v. Blasco, 676 So. 2d 481 (Fla. 4th DCA 1996).

¹⁰Loughlin v. Loughlin, 935 So. 2d 82 (Fla. 5th DCA 2006); see also Bandorf v. Volusia County Dept. of Corrections, 939 So. 2d 249 (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).

¹¹Segarra v. Segarra, 932 So. 2d 1159 (Fla. 3d DCA 2006).

¹²Garbacik, 932 So. 2d 500; Morrison, 621 So. 2d 464; Yoho v. Lindsley, 248 So. 2d 187 (Fla. 4th DCA 1971).

at issue, a defendant's own allegations that mental stability is at issue cannot overcome the privilege.¹³

The privilege does not protect from discovery relevant medical records of a psychiatrist or other medical provider made for the purpose of diagnosis or treatment of a condition that was not mental or emotional.¹⁴ Thus, relevant medical records that do not pertain to the diagnosis or treatment of a mental condition 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 or emotional condition remain privileged even if they contain information pertaining to physical examinations.¹⁵

Pre-accident psychological records are relevant when a plaintiff claims accident-related brain damage and personality disorders, to determine if the condition existed before the accident.¹⁶

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 money damages.¹⁷ 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. These factors recognize that pain and suffering has a mental as well as a physical aspect.¹⁸ Thus, an issue arises concerning whether a plaintiff has put mental condition at issue by pleading pain and suffering.

A discovery order compelling disclosure of information protected by the psychotherapist-patient privilege is reviewable by certiorari.¹⁹

¹³Weinstock v. Groth, 659 So. 2d 713 (Fla. 5th DCA 1995).

¹⁴Oswald v. Diamond, 576 So. 2d 909 (Fla. 1st DCA 1991).

¹⁵Byxbee v. Reyes, 850 So. 2d 595, 596 (Fla. 4th DCA 2003).

¹⁶Helmick v. McKinnon, 657 So. 2d 1279 (Fla. 5th DCA 1995).

¹⁷Warner v. Ware, 182 So. 605 (Fla. 1938).

¹⁸Tampa Electric Co. v. Bazemore, 96 So. 297 (Fla. 1923); Bandorf, 939 So. 2d at 251.

¹⁹Hill v. State, 846 So. 2d 1208 (Fla 5th DCA 2003).

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, restricts the discovery of those medical records made for the purpose of diagnosis or treatment of a mental or emotional condition, but not 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 mental or emotional condition an element of the 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, 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 eliminated.

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*, 619 So. 2d 467 (Fla. 4th DCA 1993). The plaintiff's withdrawal of the claim for emotional harm eliminates any claim that the privilege has been waived.²⁰ The *Sykes* court stated that the purpose of the waiver 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, that is, seeking to recover for damage to the emotions on the one hand while hiding behind the privilege on the other."²¹ Once the mental condition has been withdrawn as an issue, the plaintiff has dropped the sword. The necessity for the defendant to pierce the shield becomes irrelevant and immaterial to the plaintiff's claim for damages.

²⁰*Sykes*, 619 So. 2d 467, cited with approval by *Bolin v. State*, 793 So. 2d 894, 898 (Fla. 2001)(waiver of privilege is revocable); *Garbacik*, 932 So. 2d at 503.

²¹*Sykes*, 619 So. 2d at 469.

CHAPTER NINE

FABRE IDENTIFICATION OF OTHER CULPABLE PARTIES: WHEN SHOULD IT BE DONE?

In negligence cases today, defendants usually affirmatively assert the *Fabre* defense that others are at fault for causing the accident and their fault needs to be apportioned by the jury with the fault, if any, of the defendants. Typically, the affirmative defense pled does not specify who the alleged nonparties are and rarely is any information pled concerning what these allegedly culpable nonparties did wrong. Since the defendant has the burden of proving this defense¹ and must have a prima facie basis to support these two factual elements (identity of nonparty and culpable conduct) before a jury is allowed to consider the liability of nonparties,² courts are constantly facing the question of when must the defendant identify the nonparties and provide specific information about the alleged wrongdoing of the nonparties.

The Rules of Civil Procedure provide an orderly system through which the competing needs and interests of the litigants can be balanced by the courts in answering this question of timing.

The first possible challenge to such a defense is a motion to strike since defenses should be stated with certainty. In *Zito v. Washington Federal Savings and Loan Association of Miami Beach*, 318 So.2d 175 (Fla. 3rd DCA 1975), the court stated:

‘ . . . The pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence. *Id.* at 176.’

Moreover, the *Fabre* statute itself requires that the nonparty be identified “as specifically as practicable” unless good cause is shown otherwise. F.S. 768.81(3)(a)(2007).

¹ *W.R. Grace & Co. – Conn. V. Dougherty*, 636 So.2d 746 (Fla. 2d DCA 1994)

² *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996)

If the defensive pleading fails to meet this basic requirement and is challenged, it should be stricken without prejudice.

More specifically, the statute requires that, “[I]n order to allocate any or all fault to a nonparty, 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 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.” F.S. 768.81(3)(a)(2007). While parties may want to plead the “non-party” defense in order to preserve it, they should be prepared to fully cooperate in discovery regarding identification of “non-parties.”

Plaintiffs may not want to file a motion directed at the Defendant’s answer and defenses for a variety of reasons including allowing the case to be at issue so a trial date can be obtained. Using all available discovery tools, Plaintiffs should therefore diligently attempt to determine the identity of the nonparties and the culpable conduct. Since Rule 2.060(d), Florida Rules of Judicial Administration, provides that a matter should not be pled unless there is good cause to support it, the courts should strike the defense if the answers to such discovery are equivocal or otherwise fail to provide the identity of the nonparties and the specific conduct the defendant basis the defense on.

This defense can be stated later if, after investigation and discovery, the facts and circumstances warrant it. The Florida Rules of Civil Procedure are sufficiently flexible to permit liberal amendment, as necessary, when new evidence is discovered to support such a defense. Mindful of this, courts should proactively require litigants to move their cases properly. Defendants should be required to diligently investigate a case to determine if there are other potential culpable parties and should be required to state with specificity the identity of these nonparties, if possible, and the guilty acts upon which the defense is based. Similarly, Plaintiffs should be required to cooperate by responding appropriately to the standard interrogatories which probe the facts and circumstances surrounding

the accident as well as identifying all known witnesses so that the Defendants can fairly investigate the truth of the accident.

During this discovery phase of the case, 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 culpable nonparties or delay the Plaintiff’s right to have the nonparties identified and their culpable acts specified. The main issue is to balance the plaintiffs right to have the case determined by a jury as expeditiously as possible, on the merits and without surprise or ambush, against the defendants right to have the case justly determined on all the true facts including a determination of any fault of nonparties.

Except for those unusual cases where circumstances warrant allowing such a defense to exist without sufficient evidence to support the claim, courts should strike the defense until specific names and facts are provided which would support the defense. In the exceptional case, courts should, at a minimum set a date certain (perhaps 90 days prior to the close of discovery) by which the identity of the nonparty is revealed and the evidence specified. The Plaintiff must be afforded an opportunity to know the factual basis for the defenses being asserted.

In a similar fashion, another tool for “flushing” out the facts supporting this defense and the identity of the parties is a motion for summary judgment. If a defendant has had sufficient time to investigate a case and perform appropriate discovery, unless the prima facie evidence exists to sustain this defense, summary judgment should be granted.

With the courts providing this orderly process regarding this defense, both sides of the case will have their rights and interests fairly protected so that the case can be tried on its merits in a timely fashion.

