



**2010  
HANDBOOK  
ON DISCOVERY  
PRACTICE**

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## **PREFACE**

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

The original handbook and the later editions are the result of the continued joint efforts of the Trial Lawyers Section, the Conference of Circuit Judges, and the Conference of County Court Judges. It is intended to be a quick reference for lawyers and judges on many recurring discovery problems. It does not profess to be the dispositive legal authority on any particular issue. It is designed to help busy lawyers and judges quickly access legal authority for the covered topics. The ultimate objective is to help curtail perceived abuses in discovery so that the search for truth is not thwarted by the discovery process itself. The reader still should do his or her own research, to include a review of local administrative orders and rules. The first edition of this handbook was prepared in the fall of 1995. This 2010 (thirteenth) edition updates the handbook through August 2010, and includes two new chapters, one on electronic discovery and the other on discovery of lawyer-client privileged communications.

# CHAPTER ONE

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## **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 for the possibility of court imposed sanctions occur all too frequently. On many occasions, trial courts are reluctant to impose sanctions for discovery abuse, in spite of the courts’ broad powers to do so. When utilized, there is a relatively limited scope of appellate review of procedurally correct sanctions orders.

Trial courts have 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 appropriate findings of fact. The party moving for sanctions can make the trial court’s job easier by fully briefing the law and appropriate procedure. Working together, moving counsel and the trial courts can end, or at least markedly reduce discovery abuses.

### **EXPENSES OF MOTION TO COMPEL:**

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

**Award of Expenses of Motion.** If the motion [to compel] is granted and after opportunity for hearing, the court shall require the party or deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may

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

As set forth in the Rule, it is required that the court *shall* award expenses unless the court finds the opposition was justified or an award would be unjust. The trial court should *in every case*, therefore, award expenses which may include attorney fees where there is no justified opposition, as it would seem that the absence of a justifiable position should, "by definition," render a sanction just. The party against whom the motion is filed is protected in that the Rule provides that the moving party shall pay the opposing party's expenses if the motion is denied. If the court finds that the motion was substantially justified, then it can 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.<sup>1</sup> The punish-

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

ment should fit the fault.<sup>2</sup> Trial courts are regularly sustained on awards of attorney fees for discovery abuse.<sup>3</sup> The same holds for award of costs and expenses.<sup>4</sup>

Expenses, including fees, can be awarded without a finding of bad faith or willful conduct.<sup>5</sup> The only requirement under Fla. R. Civ. P. 1.380 is that the motion to compel be granted and that opposition was not justified.<sup>6</sup>

### **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.<sup>7</sup> There was no state law equivalent of Rule 11 of the Federal Rules of Civil Procedure.

In October 1999, amendments to Fla. Stat. §57.105 became law. The amendments authorized courts to award sanctions against parties who raised claims and defenses not supported by material facts.<sup>8</sup> The pertinent portions of §57.105, as amended July 1, 2010, state: Attorney's fee; sanctions for raising

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

<sup>3</sup> *First & Mid-South Advisorv Co. v. Alexander/Davis Properties, Inc.*, 400 So.2d 113 (Fla. 4th DCA 1981); *St. Petersburg Sheraton Corp. v. Stuart*, 242 So.2d 185 (Fla. 2d DCA 1970).

<sup>4</sup> *Summit Chase Condominium Ass'n Inc. v. Protean Investors, Inc.*, 421 So.2d 562 (Fla. 3d DCA 1982); *Rankin v. Rankin*, 284 So.2d 487 (Fla. 3d DCA 1973); *Goldstein v. Great Atlantic and Pacific Tea Co.*, 118 So.2d 253 (Fla. 3d DCA 1960).

<sup>5</sup> Where the attorney, and not the client, is responsible for noncompliance with a discovery order, a different set of factors must be applied in determining sanctions. *Sonson v. Hearn*, 17 So.3d 745 (Fla. 4th DCA 2009).

<sup>6</sup> *But see Chmura v. Sam Rodgers Properties, Inc.*, 2 So.3d 984 (Fla. 2d DCA 2008) (where a party has never been instructed by the court to comply with any discovery request, sanctions for noncompliance are inappropriate); *Thomas v. Chase Manhattan Bank*, 875 So.2d 758 (Fla. 4th DCA 2004).

<sup>7</sup> *Patsy v. Patsy*, 666 So.2d 1045 (Fla. 4th DCA 1996) (upholding an award of attorney's fees after finding motion was frivolous); *see Rosenberg v. Gaballa*, 1 So.3d 1149 (Fla. 4th DCA 2009) ("inequitable conduct doctrine," allowing a court to use its inherent authority to impose attorney fees against an attorney for bad faith conduct, is not rendered obsolete by statute governing award of attorney fees as a sanction.) As for inherent power to strike pleadings and enter a default judgment, *see discussion infra of Tramel v. Bass*, 672 So.2d 78 (Fla. 1st DCA 1996).

<sup>8</sup> Previously, a fee award was only permissible when there was no justifiable issue regarding claims and defenses. Fee awards were relatively rare under this high standard.

unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation.

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

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

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

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

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

(a) Under paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

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

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

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

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

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

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

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

The amendments effective July 1, 2010, amended §57.105 to provide an exception to the imposition of sanctions against a represented party, and limited the authority of the court to impose sanctions on its own motion. As amended, represented parties are not subject to monetary sanctions for claims or defenses that could not be supported by the application of then existing law to the material

facts. As amended, the court may only award monetary sanctions on its own initiative if the sanction is ordered before a voluntary dismissal or settlement of the claims by the party to be sanctioned.

Fees can be awarded if a specific claim or defense is baseless, even against a party who prevails in the case as a whole.<sup>9</sup>

Section 57.105(6) provides that the sanctions and remedies in the section supplement, rather than replace, other types of sanctions and remedies. Furthermore, §57.105(3) specifically applies to discovery demands.<sup>10</sup> Therefore, §57.105, as well the more familiar Rule 1.380, can be used to sanction inappropriate behavior in the discovery process.

### **CONTEMPT:**

Generally, disobedience of any lawful order of the court constitutes contempt of the court's authority.<sup>11</sup> If the court imposes a fine for discovery abuses, the fine must be based on a finding of contempt.<sup>12</sup>

This general principle is codified under the Rules of Civil Procedure which provide 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 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

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<sup>9</sup> *Barthlow v. Jett*, 930 So.2d 739 (Fla. 1st DCA 2006); *Bridgestone/Firestone v. Herron*, 828 So.2d 414 (Fla. 1st DCA 2002).

<sup>10</sup> *But see Rosenberg v. Gaballa*, 1 So.3d 1149 (Fla. 4th DCA 2009) (§57.105 limited to claims or defenses and does not apply to not providing discovery requested).

<sup>11</sup> *See Fla.Jur.2d Contempt* (1st Ed., '24).

<sup>12</sup> *Stewart v. Jones*, 728 So.2d 1233 (Fla. 4th DCA 1999); *Hoffman v. Hoffman*, 718 So.2d 371 (Fla. 4th DCA 1998).

nonparties. 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 supposed to be neither punitive nor penal, as their objective is to compel compliance with discovery.<sup>13</sup>

**SANCTIONS 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. As an example, not a limitation, Fla. R. Civ. P. 1.380(b)(2) lays out specifically permissible sanction orders including:

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

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

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

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

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

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<sup>13</sup> *Leatherby Ins. Co. v. Jones*, 332 So.2d 139 (Fla. 3d DCA 1976).

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

Such sanctions may be imposed only where the failure to comply with the court's order is attributable to the party. If the failure is that of another party or of a third person whose conduct is not chargeable to the party, no such sanction may be imposed.<sup>14</sup> For example, it is an abuse of discretion to strike a party's pleadings based on a nonparty's refusal to comply with discovery requests.<sup>15</sup>

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

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

The trial court must hold a hearing and give the disobedient party the opportunity to be heard. Therefore, it is reversible error to award sanctions before the hearing on the motion to compel takes place.<sup>16</sup> By the same token, striking a

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<sup>14</sup> *Zanathy v. Beach Harbor Club Assoc.*, 343 So.2d 625 (Fla. 2d DCA 1977).

<sup>15</sup> *Haverfield Corp. v. Franzen*, 694 So.2d 162 (Fla. 3d DCA 1997).

<sup>16</sup> *Joseph S. Arrigo Motor Co., Inc. v. Lasserre*, 678 So.2d 396, 397 (Fla. 1st DCA 1996) (reversing an award of \$250 in sanctions where the award was entered before the motion hearing).

party's pleadings before the deadline for compliance with discovery requires reversal.<sup>17</sup>

If the trial court dismisses an action because of discovery violations, a finding that the violations were willful or deliberate must be made.<sup>18</sup> If the order does not contain such findings, it will be reversed.<sup>19</sup>

It is reversible error to dismiss a case for discovery violations without first granting the disobedient party's request for an evidentiary hearing. The party should be given a chance to explain the discovery violations.<sup>20</sup>

### **DESTRUCTION OF EVIDENCE:**

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

1. existence of a potential civil action,
2. a legal or contractual duty to preserve evidence which is relevant to the potential civil action,
3. destruction of that evidence,
4. significant impairment in the ability to prove the lawsuit,
5. a causal relationship between the evidence destruction and the inability to prove the lawsuit, and
6. damages.<sup>21</sup>

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<sup>17</sup> *Stern v. Stein*, 694 So.2d 851 (Fla. 4th DCA 1997).

<sup>18</sup> *Rose v. Clinton*, 575 So.2d 751 (Fla. 3d DCA 1991); *Zaccaria v. Russell*, 700 So.2d 187 (Fla. 4th DCA 1997).

<sup>19</sup> *Zaccaria v. Russell*, 700 So.2d 187 (Fla. 4th DCA 1997).

<sup>20</sup> *Medina v. Florida East Coast Rwy.*, 866 So.2d 89 (Fla. 3d DCA 2004).

<sup>21</sup> *Hagopian v. Publix Supermarkets, Inc.*, 788 So.2d 1088, 1091 (Fla. 4th DCA 2001); *see also Sullivan v. Dry Lake Dairy, Inc.*, 898 So.2d 174 (Fla. 4th DCA 2005).

If a party destroyed relevant and material information (and that information is so essential to the opponent's defense that it cannot proceed) then striking of pleadings may be warranted.<sup>22</sup>

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

In *Tramel v. Bass*,<sup>23</sup> the trial court struck a defendant's answer and affirmative defenses and entered a default judgment after finding that the defendant had altered critical videotape evidence. The First District upheld the trial court's action, stating:

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. 672 So. 2d 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.<sup>24</sup> A finding of bad faith is not imperative.<sup>25</sup> Conversely, in

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<sup>22</sup> *New Hampshire Ins. Co. v. Royal Ins. Co.*, 559 So.2d 102 (Fla. 4th DCA 1990); *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3d DCA 1995); *rev. dismissed*, 679 So.2d 771 (Fla. 1996).

<sup>23</sup> *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996).

<sup>24</sup> *Sponco Manufacturing, supra*.

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

cases where evidence is destroyed unintentionally and the prejudice is not fatal to the other party, lesser sanctions should usually be applied.<sup>26</sup>

In *Figgie International, Inc. v. Alderman*,<sup>27</sup> a trial court entered a default judgment against a defendant for numerous discovery violations, including destruction of relevant documents. On appeal, the Third District Court of Appeal affirmed. It agreed with the trial court that defendant violated the discovery rules willfully and in bad faith. 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. Baur 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

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<sup>26</sup> *Aldrich v. Roche Biomedical Laboratories, Inc.*, 737 So.2d 1124 (Fla. 5th DCA 1999).

<sup>27</sup> *Figgie International, Inc. v. Alderman*, 698 So.2d 563 (Fla. 3d DCA 1997).

opinion explained that consent to the deposition was required under the applicable German law.<sup>28</sup> Apparently, German law would have otherwise made the discussions between the plaintiff and the witness privileged.

The Fourth District Court of Appeal has recognized an independent cause of action for spoliation of evidence.<sup>29</sup> In doing so, it followed the lead of the Third District Court of Appeal, which had previously recognized this cause of action.

For purposes of spoliation, “evidence” does not include the injured part of a litigant’s body. Thus, a plaintiff who suffered a herniated disc was not obligated to forego surgery and preserve the damaged disc for examination.<sup>30</sup> The court suggested, however, that a personal injury litigant might be guilty of spoliation if he or she had surgery while a request for a defense medical examination was pending.

Worker’s compensation immunity does not bar an employee’s action against an employer for spoliation.<sup>31</sup> The issue is unrelated to worker’s compensation, because spoliation is an independent cause of action. Furthermore, the employer’s spoliation might harm the employee’s causes of action against third parties, rather than the employer itself.<sup>32</sup>

The Florida Supreme Court clarified the application of spoliation law to parties and nonparties. In *Martino v. Wal-Mart Stores, Inc.*,<sup>33</sup> the Court held that the remedy for spoliation against a first party defendant is not an independent

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<sup>28</sup> *Id.* at 157.

<sup>29</sup> *St. Mary’s Hospital, Inc. v. Brinson*, 685 So.2d 33, 35 (Fla. 4th DCA 1996).

<sup>30</sup> *Vega v. CSCS International, N.V.*, 795 So.2d 164, 167 (Fla. 3d DCA 2001).

<sup>31</sup> *Townsend v. Conshor*, 832 So.2d 166 (Fla. 2d DCA 2002).

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

<sup>33</sup> 908 So.2d 342 (2005).

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.<sup>34</sup>

**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.<sup>35</sup>

**CLARITY OF ORDER; ISSUANCE AND SERVICE:**

Important and fundamental aspects of discovery abuse and efforts to sanction or correct it, are that the underlying court order (compelling a discovery response) or process (e.g., a subpoena, whether issued by the court or an attorney "for the court"), must be clear and unambiguous, properly issued, and properly served. A court can only enforce an order compelling conduct (e.g., providing discovery or enjoining one to or not to do something) when the order is clear, because otherwise, the concept of violating it (which requires a specific intent to violate the order/process) becomes far too murky to meet due process requirements. See generally, *Powerline Components, Inc. v. Mil-Spec Components, Inc.*, 720 So.2d 546, 548 (Fla. 4th DCA 1998); *Edlund v. Seagull Townhomes Condominium Assoc., Inc.*, 928 So.2d 405 (Fla. 3d DCA 2006);

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<sup>34</sup> *Id.* at 345 n. 2.

<sup>35</sup> *Aldrich v. RocheBiomedical Laboratories, Inc.*, *supra*.

*American Pioneer Casualty Insurance Co. v. Henrion*, 523 So.2d 776 (Fla. 4th DCA 1988); *Tubero v. Ellis*, 472 So.2d 548, 550 (Fla. 4th DCA 1985). Further, issuance and service of the court order/process must be proper, for otherwise, that paper is nothing more than an invitation, as only through properly issued and served process does the court obtain jurisdiction over the person from whom action is sought (and without jurisdiction there can be no “enforcement”).

### **SEVERITY OF SANCTIONS:**

Discovery sanctions should be “commensurate with the offense.”<sup>36</sup> It has been held that the striking of pleadings for discovery misconduct is the most severe of penalties and must be employed only in extreme circumstances.<sup>37</sup> The Fourth District further found in *Fisher*:

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

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

*Kozel v. Ostendorf*, 629 So.2d 817, 818 (Fla. 1993). The emphasis should be on the prejudice suffered by the opposing party. See *Ham v. Dunmire*, 891 So.2d 492, 502 (Fla. 2004). After considering these factors, if a sanction less severe than the striking of a party’s

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<sup>36</sup> *Drakeford v. Barnett Bank of Tampa*, 694 So.2d 822, 824 (Fla. 2d DCA 1997); *Cape Cave Corporation v. Charlotte Asphalt, Inc.*, 384 So.2d 1300, 1301 (Fla. 2d DCA 1980).

<sup>37</sup> *Fisher v. Prof'l. Adver. Dirs. Co., Inc.*, 955 So.2d 78 (Fla. 4th DCA 2007).

pleadings is “a viable alternative,” then the trial court should utilize such alternatives. *Kozel*, 629 So.2d at 818. “The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation” and “[t]his purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal” or the striking of a party’s pleadings. *Id.*

*Fisher*, 955 So.2d at 79-80.

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

In *Ham v. Dunmire*,<sup>38</sup> the Florida Supreme Court held that participation of the litigant in the misconduct is not required to justify the sanction of dismissal. Relying on its prior decision in *Kozel v. Ostendorf*,<sup>39</sup> the court held that the litigant’s participation, while “extremely important,” is only one of several factors which must be weighed:

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

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<sup>38</sup> 891 So.2d 492 (Fla. 2004).

<sup>39</sup> Cited *supra*.

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

A trial court has the inherent authority to dismiss an action as a sanction when the plaintiff has perpetuated a fraud on the court. However, this power should be exercised cautiously, sparingly, and only upon a clear showing of fraud on the court. *Ramey v. Haverty Furniture Cos.*, 993 So.2d 1014, 1018 (Fla. 2d DCA 2008). Fraud on the court occurs where there is clear and convincing evidence "that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense," 993 So.2d at 1018.

A trial court's decision on whether to dismiss a case for fraud on the court is reviewed under a narrow abuse of discretion standard. See *Cherubino v. Fenstersheib & Fox, P.A.* 925 So.2d 1066 (Fla. 4th DCA 2006). For the trial court to properly exercise its discretion, there must be an evidentiary basis to dismiss the case. See *Ramey*, 993 So.2d at 1018.

In more recent cases where fraud upon the court was raised, it appears Florida appellate courts have arguably receded from holdings in earlier cases. In *Jacob v. Henderson*,<sup>40</sup> a personal injury plaintiff denied being able to perform certain household activities and chores in deposition. However, surveillance taken earlier showed her performing those same tasks. The trial court found fraud on the court and dismissed the case with prejudice.

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<sup>40</sup> 840 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."<sup>41</sup> While the court found that the surveillance could hurt the plaintiff's credibility, it considered dismissal too harsh a sanction.<sup>42</sup>

Similarly, in *Amato v. Intindola*,<sup>43</sup> a trial court dismissed a claim after finding apparent contradictions between deposition testimony and a plaintiff's activities on surveillance films. The Fourth District Court of Appeal reversed, citing *Jacob v. Henderson*. "In most cases of personal injury," the court wrote, "there is a disparity between what the plaintiff believes are the limitations caused by the injuries and what the defense thinks." It acknowledged that surveillance may reveal discrepancies, but did not consider those discrepancies alone to justify dismissal. See also *Ruiz v. City of Orlando*,<sup>44</sup> (reversing dismissal because factual inconsistencies and even false statements "are well managed through the use of impeachment and traditional discovery sanctions").

In *Ibarra v. Izaguirre*, 985 So.2d 1117 (Fla.3d DCA 2008), the court held that the movant must prove the existence of fraud by clear and convincing evidence before dismissal is warranted. Such a burden will almost always require an evidentiary hearing.

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<sup>41</sup> *Id.* at 1169-70.

<sup>42</sup> See also *Rios v. Moore*, 902 So.2d 181 (Fla. 3d DCA 2005); *Cross v. Pumpco, Inc.*, 910 So.2d 324 (Fla. 4th DCA 2005).

<sup>43</sup> 854 So.2d 812 (Fla. 4th DCA 2003).

<sup>44</sup> 859 So.2d 574 (Fla. 5th DCA 2003).

The trial court must be careful to ensure that the sanction imposed is tailored to meet the nature of the fraudulent conduct and the extent to which it affects the claims presented. In *Hair v. Morton*, 36 So.3d 766 (Fla. 3d DCA 2010), the trial court dismissed with prejudice plaintiff's personal injury claim upon proof that she had provided false answers to interrogatories and deposition testimony regarding back problems and treatment prior to the accident in question. In reversing the dismissal, the Third District held:

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

*Id.*

Dismissal is also not appropriate when a party testified inaccurately based on a mistaken belief. In *Arzuman v. Saud*,<sup>45</sup> a plaintiff testified that he owned stock in a corporation, but also testified that the defendant was the sole owner of that corporation. The Fourth District declined to dismiss the case. The court found that the statements revealed a "lack of understanding of corporate structure," not an attempt at fraud.<sup>46</sup> See chart of additional cases at the end of this chapter, compiled by retired circuit judge Ralph Artigliere.

### **DAMAGES:**

Some courts have allowed the award of nominal (and even punitive) damages after discovery abuses.<sup>47</sup>

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<sup>45</sup> 843 So.2d 950 (Fla. 4th DCA 2003).

<sup>46</sup> *Id.* at 953

<sup>47</sup> *Far Out Music, Inc. v. Jordan*, 502 So.2d 523 (Fla. 3d DCA 1987); *Rose v. Clinton*, *supra*.

## **APPELLATE REVIEW:**

The standard of appellate review for discovery sanctions is abuse of discretion.<sup>48</sup> 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.”<sup>49</sup> 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), the actions of plaintiff’s counsel were found to constitute “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.<sup>50</sup>

Without a solid record foundation (indicating willful or bad faith conduct) the trial court may be outside its discretionary limits and risk reversal.<sup>51</sup> The

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<sup>48</sup> *Mercer v. Raine*, 443 So.2d 944 (Fla. 1983); *Chmura v. Sam Rodgers Prop., Inc.*, 2 So.3d 984 (Fla. 2d DCA 2008).

<sup>49</sup> *First Healthcare Corporation v. Hamilton*, 740 So.2d 1189 (Fla. 4th DCA 1999) (citing *Mercer*).

<sup>50</sup> *Bailey v. Woodlands Co., Inc.*, 696 So.2d 459 (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).

<sup>51</sup> *Davis v. Freeman*, 405 So.2d 241 (Fla. 1st DCA 1981).

appellate courts will reverse when bad faith conduct is not apparent from the trial court's order or the record.<sup>52</sup>

On appeal, a trial court's decision imposing sanctions will be presumed correct if no transcript of the proceedings is filed.<sup>53</sup>

The Fourth District Court of Appeal has held that an order imposing sanctions for discovery violations is non-final. Therefore, it dismissed an appeal from such an order.<sup>54</sup> 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 or different opinions on the eve of trial or during trial, prejudice inevitably follows.

Generally, such last-minute testimony should not be admissible at trial. Failure to exclude such testimony prejudices the opposing party and constitutes

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<sup>52</sup> *Earp 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 (Fla. 4th DCA 1997) (reversing trial court's order striking plaintiff's pleadings because order was entered before time for discovery compliance had expired); *Jalil v. Mercury 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*.

<sup>53</sup> *Poling v. Palm Coast Abstract and Title, Inc.*, *supra*.

<sup>54</sup> *State Farm Auto Ins. Co. v. Bravender*, 700 So.2d 796 (Fla. 4th DCA 1997).

reversible error.<sup>55</sup> A party who fails to disclose a substantial reversal in an expert's opinion does so at his peril.<sup>56</sup>

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

However, the trial court should scrutinize a claim of newly discovered evidence with some suspicion to determine if it is just a pretext for an ambush on the other party. Otherwise, the trial becomes a free-for-all, and the discovery and pretrial deadlines become meaningless. As the Fourth District said in *Office Depot*, “[a] party can hardly prepare for an opinion that it doesn’t know about, much less one that is a complete reversal of the opinion it has been provided.”<sup>57</sup>

An orderly trial is most likely to occur 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.<sup>58</sup>

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<sup>55</sup> *Belmont v. North Broward Hospital District*, 727 So.2d 992, 994 (Fla. 4th DCA 1999); *Garcia v. Emerson Electric Co.*, 677 So.2d 20 (Fla. 3d DCA 1996); *Auto Owners Insurance Co. v. Clark*, 676 So.2d 3 (Fla. 4th DCA 1996); *Keller Industries v. Volk*, 657 So.2d 1200 (Fla. 4th DCA 1995); *Grau v. Branham*, 626 So.2d 1059 (Fla. 4th DCA 1993); *Binger v. King Pest Control*, 401 So.2d 1310 (Fla. 1981); *Office Depot v. Miller*, 584 So.2d 587 (Fla. 4th DCA 1991); *Florida Marine Enterprises v. Bailey*, 632 So.2d 649 (Fla. 4th DCA 1994).

<sup>56</sup> *Gouveia v. F. Leigh Phillips, M.D.*, 823 So.2d 215, 222 (Fla. 4th DCA 2002).

<sup>57</sup> *Id.* at 994.

<sup>58</sup> *LoBue v. Travelers Insurance Company*, 388 So.2d 1349, 1351 (Fla. 4th DCA 1980).

Under many circumstances, barring the expert from testifying will be too harsh.<sup>59</sup> In cases where an expert claims to have a new opinion, for example, it is probably best to bar the new opinion rather than the expert's entire testimony.<sup>60</sup>

When an expert is the only witness a party has to establish a key element in the case, courts should be particularly hesitant to strike the expert's testimony.<sup>61</sup> The same rule applies to an expert who could offer key rebuttal evidence.<sup>62</sup> Finally, where a plaintiff's expert has already testified to new opinions, it is proper to allow the defense expert to give new opinions in order to respond.<sup>63</sup>

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. The Fourth District Court of Appeal reversed. In doing so, it followed the well-settled rule that the names of consulting experts need not be disclosed.<sup>64</sup> The court held, however, that a trial court has "ample authority" to strike experts if a party unreasonably delays disclosing the names of trial (as opposed to consulting) experts.<sup>65</sup>

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<sup>59</sup> *Id.*; see also *Jean v. Theodorsen*, 736 So.2d 1240 (Fla. 4th DCA 1999); *Kaye v. State Farm Mut. Auto Ins. Co.*, 985 So.2d 675 (Fla. 4th DCA 2008) (striking a witness for violation of discovery orders is a drastic remedy which should be utilized only under the most compelling circumstances).

<sup>60</sup> *Keller Industries, supra*, at 1203.

<sup>61</sup> *Keller Industries; LoBue*.

<sup>62</sup> *Griefer v. DiPietro*, 708 So.2d 666, 672 (Fla. 4th DCA 1998).

<sup>63</sup> *Gonzalez v. Largen*, 790 So.2d 497, 500 (Fla. 5th DCA 2001). See also *Midtown Enterprises, Inc. v. Local Contractors Inc.*, 785 So.2d 578 (Fla. 3d DCA 2001) (same ruling where lay rather than expert testimony involved).

<sup>64</sup> *Carrero* at 1012.

<sup>65</sup> *Id.*

**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.

**SELECTED CASES ON DISMISSAL FOR FRAUD ON THE COURT**

<b>CASE</b>	<b>RULING</b>	<b>UPHELD?</b>	<b>NOTES</b>
<i>First DCA</i>			
<i>Jesse v. Commercial Diving Acad.</i> , 963 So.2d 308 (Fla. 1 <sup>st</sup> DCA 2007)	Dismissal	Affirmed	Record disclosed that appellant intentionally falsified testimony on material issues. No abuse of discretion with sanction of dismissal.
<i>Johnson v. Swerdzewski</i> , 935 So.2d 57 (Fla. 1 <sup>st</sup> DCA 2006)	JNOV after verdict	REVERSED	Dental malpractice case in which Defendant moved for directed verdict based on fraudulent answers to pretrial discovery that were uncovered during cross-examination; court deferred ruling until after verdict and granted JNOV for fraud on court; REVERSED because review of dismissal for fraud prior to trial (abuse of discretion) is not equivalent to standard of review for JNOV; review is far less deferential to trial judge once jury verdict is entered.
<i>Hutchinson v. Plantation Bay Apartments, LLC</i> , 931 So.2d 957 (Fla.1 <sup>st</sup> DCA 2006)	Dismissal	Affirmed	Failure to disclose past attack by dog and pre-existing symptoms rose to level of effort to stymie discovery on central issue amounting to fraud.
<i>Distefano v. State Farm Mut. Auto. Ins. Co.</i> , 846 So.2d 572 (Fla. 1 <sup>st</sup> DCA 2003)	Dismissal	Affirmed	Plaintiff gave false deposition testimony by not disclosing <i>subsequent</i> accident, and prior treatment and symptoms that were central to case; faulty memory not an excuse under these facts; this case has been cited in later cases.
<i>Baker v. Myers Tractor Services, Inc.</i> , 765 So.2d 149 (Fla. 1 <sup>st</sup> DCA 2000)	Dismissal	Affirmed	Trial judge found that plaintiff intentionally omitted prior knee injury and treatment which was central to case; appellate court noted that court could have fashioned a lesser sanction, but “while this court might have imposed a lesser sanction, the question in this case is close enough that we cannot declare the lower court to have abused its discretion.”

<b>Second DCA</b>			
<i>Ramey v. Haverty Furniture Cos. Inc.</i> , 993 So.2d 1014 (Fla. 2d DCA 2008)	Dismissal	Affirmed	The court stated that the evidence concerning Mr. Ramey's conduct "demonstrated clearly and convincingly that the plaintiff sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate this matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." The court further stated that "the injuries that were lied about are the nexus of the case." App ct found that The trial court properly exercised its discretion in imposing the severe sanction of dismissal for the clearly established severe misconduct of fraud on the court.
<i>Kubel v. San Marco Floor &amp; Wall, Inc.</i> , 967 So.2d 1063 (Fla. 2d DCA 2007)	Dismissal	REVERSED	Plaintiff's husband got report from treater with info inconsistent with wife's testimony and gave it to his lawyer; report by treating doctor was then changed at request of plaintiffs. Defendant failed to produce clear and convincing evidence of fraud; issue best managed on cross at trial.
<i>Miller v. Nelms</i> , 966 So.2d 437 (Fla. 2d DCA 2007)	Dismissal	REVERSED	Complaint was dismissed as sham pleading; App ct found that trial court lacked evidentiary basis for dismissal.
<i>Howard v. Risch</i> , 959 So.2d 308 (Fla. 2d DCA 2007)	Dismissal	REVERSED	Trial judge dismissed for failure to disclose criminal history and full medical history; app ct found that trial ct did not have evidence to support findings of fact based on heightened clear and convincing standard and no showing criminal record had anything to do with issues in trial and medical omissions involved minor incidents.

<i>Myrick v. Direct General Ins. Co.</i> , 932 So.2d 392, (Fla. 2d DCA 2006)	Dismissal	REVERSED	Trial judge took no evidence at dismissal hearing, so appellate court had same cold record as the trial judge and found that finding of fraud was an abuse of discretion; stringent standard for extreme sanction not met.
<i>Laschke v. R. J. Reynolds Tobacco Co.</i> , 872 So.2d 344, (Fla. 2d DCA 2004)	Dismissal	REVERSED	Plaintiff in tobacco case asked oncologist to put in records that smoking caused her cancer then denied doing so on deposition; dismissal too stringent, as this thwarted effort would not hamper defense.
<i>Jacob v. Henderson</i> , 840 So.2d 1167 (Fla. 2d DCA 2003)	Dismissal	REVERSED	Plaintiff stated under oath that she could not do several things that surveillance video demonstrated that she was capable of doing; trial judge dismissed for fraud; DCA reviewed the same surveillance tape and deposition as trial judge, so less deference is given; when degree of injury as opposed to fact of injury is involved, it is a credibility issue for jury and not a calculated scheme to impede the defense.
<i>Morgan v. Campbell</i> , 816 So.2d 251 (Fla. 2d DCA 2002)	Dismissal	Affirmed	Plaintiff claimed no prior back treatment when she had been treated 16 times; at evidentiary hearing, judge weighed credibility of plaintiff (deference given); Plaintiff's disclosure of some treatment does not constitute "truthful disclosure"
<b>Third DCA</b>			
<i>Ibarra v. Izaguirre</i> , 985 So.2d 1117 (Fla. 3d DCA 2008)	Dismissal	REVERSED	Discovery response did not reveal prior slip and fall in which there was no attorney and no case filed; could be misinterpretation not fraud.
<i>Papadopoulos v. Cruise Ventures</i> , 974 So.2d 418 (Fla. 3d DCA 2007)	Dismissal	Affirmed	Plaintiff made material representations about medical and litigation history that were established in the record.
<i>Austin v. Liquid Distributors, Inc.</i> , 928 So.2d 521 (Fla. 3d DCA 2006)	Dismissal	Affirmed	Judge's order recited extensive discrepancies in discovery that go to the heart of the claim and are so extensive that they belie the claim plaintiff was confused or forgot.

<i>Medina v. Florida East Coast Ry., L.L.C.</i> , 921 So.2d 767 (Fla. 3d DCA 2006)	Dismissal	REVERSED	We reverse for a jury trial because it is clear the alleged misconduct did not rise to the level of egregiousness required to merit the extreme sanction of dismissal.
<i>Canaveras v. Continental Group, Ltd.</i> , 896 So.2d 855 (Fla. 3d DCA 2005)	Dismissal	REVERSED	Plaintiff informed opposing counsel of the prior incident and the treatment he received as a consequence early on and medical history stemming from that incident was known and investigated by the defendants; fact that prior injury was not fully admitted in deposition does not warrant dismissal.
<i>Rios v. Moore</i> , 902 So.2d 181 (Fla. 3d DCA 2005)	Dismissal	REVERSED	Although plaintiff did not accurately describe her injuries in a prior accident, inconsistencies did not rise to level of fraud.
<i>Bertrand v. Belhomme</i> , 892 So.2d 1150, (Fla. 3d DCA 2005)	Dismissal	REVERSED	Plaintiff claimed defendant took inconsistent position re ownership of funds in dispute in prior bankruptcy and divorce case; judge dismissed for fraud; DCA held that plaintiff will not be denied day in court, there was no concealment in this case; inconsistencies can be used to impeach.
<i>Metropolitan Dade County v. Martinsen</i> , 736 So.2d 794 (Fla. 3d DCA 1999)	Denial of Motion to Dismiss	REVERSED and case dismissed	DCA: Plaintiff's misrepresentations and omissions about her accident and medical history in interrogatories and in deposition went to the heart of her claim and subverted the integrity of the action. The extensive nature of plaintiff's history belie her contention that she had forgotten about the incidents, injuries and treatment; "[t]he integrity of the civil litigation process depends on truthful disclosure of facts."
<i>Hanono v. Murphy</i> , 723 So.2d 892 (Fla. 3d DCA 1998)	Denial of Motion to Dismiss	REVERSED and case dismissed	Plaintiff found guilty of perjury for testimony in the very case in which dismissal was sought; trial judge ruled that case should go before jury; DCA reversed because of fraudulent attempts to subvert the process.

<b>Fourth DCA</b>			
<i>Bass v. City of Pembroke Pines</i> , 991 So.2d 1008 (Fla. 4 <sup>th</sup> DCA 2008).	Dismissal	Affirmed	Patient's unexplained inconsistencies in discovery answers about prior medical problems and having been in a prior case (albeit a divorce) meant that reasonable minds could differ on the remedy, so trial judge affirmed.
<i>Sunex Intern Inc. v. Colson</i> , 964 So.2d 780 (Fla. 4 <sup>th</sup> DCA 2007)	Dismissal on Motion to Strike	REVERSED	Trial judge dismissed claim on Motion to Strike as sham pleading but app ct reversed on grounds that the fact that trial ct perceived little chance of success on merits is not grounds for dismissal as sham. Hearing on such a motion is not to try issues but instead to determine whether there are any issues to try.
<i>Gray v. Sunburst Sanitation Corp.</i> , 932 So.2d 439 (Fla. 4 <sup>th</sup> DCA 2006)	Dismissal	Affirmed	Judge's order sets out proper standard and analysis; PCA.
<i>Cherubino v. Fenstersheib and Fox, P.A.</i> , 925 So.2d 1066 (Fla. 4 <sup>th</sup> DCA 2006)	Dismissal	REVERSED	Legal malpractice case in which most of the inconsistencies attributed to plaintiffs occurred in the underlying automobile action; not clear and convincing evidence of scheme to defraud in the malpractice case.
<i>Cross v. Pumpco, Inc.</i> , 910 So.2d 324, (Fla. 4 <sup>th</sup> DCA 2005)	Dismissal	REVERSED	Plaintiff who failed to recall neck injury from five years prior to accident argued that he did not intentionally withhold information from the defense, but rather, was confused as to the date of the prior accident and did not recall the full extent of his injuries; that this was not a scheme calculated to interfere with ability to impartially adjudicate; that extent of his injuries related to present accident is a question for the jury.

<i>McKnight v. Evancheck</i> , 907 So.2d 699 (Fla. 4 <sup>th</sup> DCA 2005)	Dismissal	Affirmed	Extent of misrepresentation and concealment of prior injuries set forth in prison records justified dismissal.
<i>Piunno v. R. F. Concrete Const., Inc.</i> , 904 So.2d 658 (Fla. 4 <sup>th</sup> DCA 2005)	Dismissal	Affirmed	Extent of misrepresentation and concealment of prior injuries relating to same damages alleged in instant case justified dismissal.
<i>Bob Montgomery Real Estate v. Djokic</i> , 858 So.2d 371 (Fla. 4 <sup>th</sup> DCA 2003)	Dismissal	REVERSED	Real estate broker's attachment of a forged and an altered document to complaint did not warrant sanction of dismissal in action against real estate agents for tortious interference with contractual relationships, where source of additions to documents remained open to speculation, and there was no evidence that broker submitted documents with intent to deceive.
<i>Amato v. Intindola</i> , 854 So.2d 812 (Fla 4 <sup>th</sup> DCA 2003)	Dismissal	REVERSED	Court compared testimony to surveillance video and dismissed for fraud; DCA reviewed same record and REVERSED based on <i>Jacob, supra</i> .
<i>Arzuman v. Saud</i> , 843 So.2d 950 (Fla. 4 <sup>th</sup> DCA 2003)	Dismissal	REVERSED	Contract action in which trial judge dismissed due to conflicting testimony on ownership of a corporation; this testimony was not intended to deceive but was the result of Arzuman's ignorance of corporate structure.
<i>Savino v. Florida Drive In Theatre Management, Inc.</i> , 697 So.2d 1011 (Fla 4 <sup>th</sup> DCA 1997)	Dismissal	Affirmed	Plaintiff in PI case shown to have lied about pre-accident mental abilities; produced a false diploma for a college degree; and lied about not working post-accident; fraud permeated the case.

<b>Fifth DCA</b>			
<i>Bologna v. Schlanger</i> , 33 Fla. L. Weekly D 1626 (Fla. 2008)	Dismissal	REVERSED	Dismissal in Plaintiff PI case (alleged fraud re lack of disclosure of prior treatment) reversed because there could have been confusion due to broad questioning, plaintiff's interrogatory answers led the defense to the truth, and the judge did not hold an evidentiary hearing. Did not meet <i>Cox v. Burke</i> test (see <i>Cox</i> case below).
<i>Villasenor v. Martinez</i> , 991 So.2d 433 (Fla. 5 <sup>th</sup> DCA 2008)	Dismissal	REVERSED	Question of whether inconsistencies argued intentional fraudulent conduct, forgetfulness, result of a limited command of the English language, or efforts to unlawfully live and work in the country, trial court erred in dismissing with prejudice without evidentiary hearing.
<i>Granados v. Zehr</i> , 979 So.2d 1155 (Fla. 5 <sup>th</sup> DCA 2008)	Dismissal	REVERSED	Plaintiff in PI case misrepresented prior condition but revealed names of treating physicians who revealed true problems so defense not hampered.
<i>Saenz v. Patco Trans. Inc.</i> , 969 So. 2d 1145 (Fla. 5 <sup>th</sup> DCA 2007)	Dismissal	Affirmed	Whether dismissal was an appropriate sanction for concealment of prior medical issues presented a close question for DCA, but they affirmed the sanction as being in sound discretion of trial judge.
<i>Gehrmann v. City of Orlando</i> , 962 So.2d 1059 (Fla. 5 <sup>th</sup> DCA 2007)	Dismissal	REVERSED	Discrepancies between testimony of PI plaintiff and defense investigation not sufficiently tested at hearing to show requisite intent to defraud and that discrepancies were sufficient for dismissal.
<i>Brown v. Allstate Ins. Co.</i> , 838 So.2d 1264 (Fla. 5 <sup>th</sup> DCA 2003)	Dismissal	Affirmed	Plaintiff in PI case knowingly and intentionally concealed his lack of employment at the time of the accident; misrepresentation was central to the issue of lost wages and that issue was an integral part of his claim.

<p><i>Ruiz v. City of Orlando</i>, 859 So.2d 574 (Fla. 5th DCA 2003)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>Except in the most extreme cases, where it appears that the process of trial has itself been subverted, factual inconsistencies, even false statements are well managed through the use of impeachment and traditional discovery sanctions; record in this case does not demonstrate clearly and convincingly a knowing and unreasonable scheme to interfere with the judicial system's ability to impartially adjudicate the claim.</p>
<p><i>Cox v. Burke</i>, 706 So.2d 43 (Fla. 5<sup>th</sup> DCA 1998)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>“In this case, there is a good deal that Burke and Gordon put forth as “fraud” that is either not fraud or is unproven... . Cox clearly gave many false or misleading answers in sworn discovery that either appear calculated to evade or stymy discovery on issues central to her case. The integrity of the civil litigation process depends on truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way. Although Cox insists on her constitutional right to have her case heard, she can, by her own conduct, forfeit that right. This is an area where the trial court is and should be vested with discretion to fashion the apt remedy. While this court might have imposed a lesser sanction, the question in this case is close enough that we cannot declare the lower court to have abused its discretion.”</p>

## CHAPTER TWO

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### 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.’ ”<sup>1</sup> The case law on sanctions for failure to make discovery confirms the proliferation of bad discovery practice and the need for court intervention.

The United States District Courts for the Northern, Middle and Southern Districts of Florida have each adopted local rules requiring counsel, before filing any discovery motion, to certify that they have conferred with opposing counsel in a good faith effort to resolve the issues raised by the motion.<sup>2</sup>

In 2005, the Florida Supreme Court followed the lead of the federal courts and adopted suggested amendments to the Florida Rules of Civil Procedure. A motion to compel discovery must now include a certification that “the movant, in good faith, has conferred or attempted to confer with the person or party failing to make 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(a)(4)). The 2005

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

<sup>2</sup> See Local Rule 7.1(B), USDC, N.D. Fla.; Local Rule 3.01(g), USDC, M.D. Fla.; Local Rule 7.1(A)(3), S.D. Fla. See also Rule 37(a)(1), Fed. R. Civ. P. which requires a party moving to compel discovery to “include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”

changes to the Florida Rules is virtually identical to the language found in Rule 37(a)(1), Federal Rules of Civil Procedure, 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.”<sup>3</sup> 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.<sup>4</sup>

Upon proper showing, the full spectrum of sanctions may be imposed for failure to comply with a court order.<sup>5</sup> 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;<sup>6</sup> prohibiting the introduction of certain evidence;<sup>7</sup> striking pleadings, which could result in a dismissal of the action or a default judgment, including an order for liquidated damages;<sup>8</sup> contempt of court;

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<sup>3</sup> Rule 1.380(a)(3).

<sup>4</sup> Rule 1.380(a)(4).

<sup>5</sup> Rule 1.380(b).

<sup>6</sup> *Steele v. Chapnick*, 552 So.2d 209 (Fla. 4th DCA 1989) (reversing dismissal because plaintiff substantially complied with defendant’s discovery request, but authorizing alternative sanctions of precluding evidence on issues when plaintiff failed to reply to discovery demands, entering findings of fact adverse to plaintiff on those same issues, or imposing fines and fees).

<sup>7</sup> *Binger v. King Pest Control*, 401 So.2d 1310 (Fla. 1981) (trial court may exclude testimony of witness whose name had not been disclosed in accordance with pretrial order).

<sup>8</sup> *DYC Fishing, Ltd. v. Martinez*, 994 So.2d 461, 462 (Fla. 3d DCA 2008) (reversing trial court’s entry of default final judgment awarding unliquidated damages to the plaintiff and stating that in Florida, default judgments only entitle the plaintiff to liquidated damages).

and assessing reasonable expenses or attorney's fees.<sup>9</sup> The courts have crafted a few additional possibilities: fines;<sup>10</sup> granting of a new trial;<sup>11</sup> and, in the case of lost or destroyed evidence, creation of an evidentiary inference<sup>12</sup> or a rebuttable presumption.<sup>13</sup> The court may rely on its inherent authority to impose drastic sanctions when a discovery-related fraud has been perpetrated on the court.<sup>14</sup>

Under Rule 1.380(b)(1), sanctions cannot be imposed on a nonparty for a

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<sup>9</sup> Rule 1.380(b)(2)(A)-(E) and (d). See *Blackford v. Florida Power & Light Co.*, 681 So.2d 795 (Fla. 3d DCA 1996) (reversing summary judgment as sanction for failure to answer interrogatories, but authorizing attorneys' fees and costs); *United Services Automobile Association v. Strasser*, 492 So.2d 399 (Fla. 4th DCA 1986) (affirming attorneys' fees and costs as sanctions for consistently tardy discovery responses, but reversing default).

<sup>10</sup> *Evangelos v. Dachiel* 553 So.2d 245 (Fla. 3d DCA 1989) (\$500 sanction for failure to comply with discovery order, but default reversed); *Steele*, 552 So.2d 209 (imposition of fine and/or attorneys' fees for failure to produce is possible sanction). The imposition of a fine for discovery violations requires a finding of contempt. *Hoffman v. Hoffman*, 718 So.2d 371 (Fla. 4th DCA 1998). *Channel Components, Inc. v. America II Electronics, Inc.*, 915 So.2d 1278 (Fla. 2nd DCA 2005) (ordering over \$79,000 as a sanction for violation of certain discovery orders does not constitute abuse of discretion).

<sup>11</sup> *Binger*, 401 So.2d 1310 (intentional nondisclosure of witness, combined with surprise, disruption, and prejudice, warranted new trial); *Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So.2d 1283 (Fla. 1st DCA 1993) (new trial on punitive damages and attorneys' fees as sanctions for withholding documents that were harmful to manufacturer's case but were within scope of discovery request); *Smith v. University Medical Center, Inc.*, 559 So.2d 393 (Fla. 1st DCA 1990) (plaintiff entitled to new trial because defendant failed to produce map that was requested repeatedly).

<sup>12</sup> *Federal Insurance Co. v. Allister Manufacturing Co.*, 622 So.2d 1348 (Fla. 4th DCA 1993) (manufacturer entitled to inference that evidence, inadvertently lost by plaintiff's expert, was not defective).

<sup>13</sup> *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987) (rebuttable presumption of negligence exists if patient demonstrates that absence of hospital records hinders patient's ability to establish prima facie case); *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So.2d 701 (Fla. 4th DCA 1995) (destruction or unexplained absence of evidence may result in permissible shifting of burden of proof).

<sup>14</sup> *Tramel v. Bass*, 672 So.2d 78 (Fla. 1st DCA 1996) (affirming default against sheriff for intentionally omitting portion of videotape of automobile pursuit). *Coconut Grove Playhouse, Inc. v. Knight-Ridder, Inc.*, 935 So.2d 597 (Fla. 3d DCA 2006) ("In action against defendant seeking inspection of its records under Public Records Act, trial court departed from essential requirements of law in requiring defendant to produce its records as a sanction for its failure to respond to a discovery subpoena").

discovery violation in the absence of a finding of contempt.<sup>15</sup> 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 serve the nonparty by hand with the motion and notice of the hearing on the motion for contempt. It is required, not merely 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.<sup>16</sup> Different sanction options are available against parties and nonparties.<sup>17</sup>

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

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<sup>15</sup> 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).

<sup>16</sup> *Haverfield Corp. v. Frazen*, 694 So.2d 162 (Fla. 3d DCA 1997) (workers' compensation affirmative defense struck because of nonparty insurer's failure to produce documents). But see *Edwards v. Edwards*, 634 So.2d 284 (Fla. 4th DCA 1994) (reversible error to impose sanction that punishes party who bears no responsibility for discovery violation committed by another).

<sup>17</sup> *Cooper*, 719 So.2d at 946.

*Mercer v. Raine*,<sup>18</sup> 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 extreme circumstances," the court said that the defendant's noncompliance was "willful."<sup>19</sup> 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."<sup>20</sup> 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

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<sup>18</sup> 443 So.2d 944 (Fla. 1983); *See also Swidzinska v. Cejas*, 702 So.2d 630 (Fla. 5th DCA 1997); *Williams v. Udell*, 690 So.2d 732 (Fla. 4th DCA 1997); *DYC Fishing, LTD., v. Martinez*, 994 So.2d 461, 462 (Fla. 3d DCA 2008). The appellate court held that the trial court had not abused its power by striking the defendant's answer and affirmative defenses as sanctions where the trial court found evidence of the defendant's willful and deliberate disregard of several court orders requiring the production of documents directly relating to the plaintiff's claim for damages.

<sup>19</sup> *See also 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; *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); *Commonwealth Federal Savings & Loan Association v. Tubero*, 569 So.2d 1271 (Fla. 1990).

<sup>20</sup> *See also Cooper*, 719 So.2d at 946; *Austin v. Liquid Distributors, Inc.*, 928 So.2d 521 (Fla. 3d DCA 2006).

requirements.<sup>21</sup> 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.<sup>22</sup>

As a general rule, absent evidence of a willful failure to comply or extensive prejudice to the opposing party, the granting of such an order constitutes an abuse of discretion.<sup>23</sup> Although some district courts of appeal have found willful conduct and affirmed the trial courts’ striking of pleadings and dismissal or entry of default for failure to answer interrogatories,<sup>24</sup> failure to

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<sup>21</sup> *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).

<sup>22</sup> *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. *Ham v. Dunmire*, 891 So.2d 492, 496 (Fla. 2004) (No “magic words” are required, but “the trial court must make a ‘finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard.’”). *Kinney v. R.H. Halt Associates, Inc.*, 927 So.2d 920 (Fla. 2d DCA 2006). *Staback v. Tropical Breeze Estates, Inc.*, 925 So.2d 1104 (Fla. 4th DCA 2006).

<sup>23</sup> *Surf Tech International, Inc. v. Rutter*, 785 So.2d 1280 (Fla. 5th DCA 2001).

<sup>24</sup> *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); *Domínguez 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).

produce documents,<sup>25</sup> or other bad faith discovery practices,<sup>26</sup> based upon a finding of willful conduct, most courts have held that less severe sanctions are appropriate.<sup>27</sup> The Supreme Court recently re-affirmed 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

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<sup>25</sup> *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); *HZI, 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).

<sup>26</sup> *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).

<sup>27</sup> 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, and case was far from being set for trial); *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).

imposed on an offending party.<sup>28</sup>

### **INTERROGATORIES:**

“Substantial compliance” with discovery requests<sup>29</sup> or the absence of “willful abuse”<sup>30</sup> will preclude the sanction of dismissal or default, even when a party has incorrectly or falsely answered an interrogatory.<sup>31</sup> However, repeated fraud and lying by a party on interrogatories or at deposition can under some circumstances justify dismissal or default.<sup>32</sup>

Inadequate responses to expert interrogatories frequently are the source of dispute, which may result in exclusion of expert testimony if prejudice is

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<sup>28</sup> *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. *Michalak v. Ryder Truck Rental, Inc.*, 923 So.2d 1277 (Fla. 4th DCA 2006)(“error to dismiss complaint with prejudice as sanction for failure to comply with court ordered discovery without considering all of the factors set out by the Florida Supreme Court in *Kozel*).

<sup>29</sup> *Steele*, 552 So.2d at 209.

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

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

<sup>32</sup> *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); *Figgie International*, 698 So.2d 563; *Mendez v. Blanco*, 665 So.2d 1149 (Fla.3d DCA 1996); *O’Vahey v. Miller*, 644 So.2d 550 (Fla. 3d DCA 1994). Compare *Hair v. Morton*, 36 So.3d 766 (Fla. 3d DCA 2010) (dismissal not warranted where plaintiff’s false statements did not address issue of liability or all of her claimed damages); Compare *Kirby v. Adkins*, 582 So.2d 1209 (Fla. 5th DCA 1991); *Young v. Curgil*, 358 So.2d 58 (Fla. 3d 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).

shown.<sup>33</sup> 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.”<sup>34</sup> In other words, the focus is on procedural prejudice -- how the objecting party has been affected in its investigation, preparation and presentation of evidence. 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 error is not preserved and the trial court may grant a motion for new trial only if the movant can establish fundamental error.<sup>35</sup>

Another area of dispute arises from *Elkins v. Syken*,<sup>36</sup> 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

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<sup>33</sup> *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 mid-trial 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 Grier 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).

<sup>34</sup> *Department of Health and Rehabilitative Services v. J.B. By and Through Spivak*, 675 So.2d at 244.

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

<sup>36</sup> 672 So.2d 517 (Fla. 1996). *See* Fla. R. Civ. P. 1.280(b)(4)(A)(iii).

extent to which an expert must disclose prior appearances and fees.<sup>37</sup>

Interrogatories answered out of order or merely by attaching a report as an “answer” may result in a sanction such as costs.<sup>38</sup> Failure to answer interrogatories despite a court order may result in dismissal or default.<sup>39</sup> However, failure to provide properly executed interrogatories<sup>40</sup> and tardiness in answering interrogatories<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> Failure to answer interrogatories does not automatically preclude a case being at issue for trial upon close of the pleadings. “The remedies for failure of a party to comply with discovery requirements are found in Fla. R. Civ. P. 1.380.”<sup>44</sup>

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<sup>37</sup> 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).

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

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

<sup>40</sup> *USAA Casualty Insurance Co. v. Bejany*, 717 So.2d 164 (Fla. 4th DCA 1998); *Owens v. Howard*, 662 So.2d 1325 (Fla. 2d DCA 1995).

<sup>41</sup> *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).

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

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

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

## **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.<sup>45</sup> In situations where the other party is hindered in its ability to establish a prima facie case, a rebuttable presumption of negligence may arise.<sup>46</sup> The litigant also risks having the late-disclosed evidence excluded from trial on a showing of “actual prejudice” to the opposing

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<sup>45</sup> *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 1999) (failure to produce relevant books and records until the week of trial, and other discovery violations, justified award of sanctions). *Reed v. Alpha Professional Tools*, 975 So.2d 1202, 1204-05 (Fla. 5th DCA 2008) (reversing dismissal of plaintiff’s claim with prejudice because a trial court may not dismiss a claim with prejudice as a remedy for spoliation of evidence).

<sup>46</sup> *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).

party.<sup>47</sup> The Supreme Court has held that there is no independent cause of action against a first-party defendant for spoliation of evidence.<sup>48</sup> The available remedies are discovery sanctions and a rebuttable presumption under *Public Health Trust of Dade County v. Valcin*.<sup>49</sup> However, intentional destruction of key evidence by a person or entity who is not a party to the action may give rise to a separate cause of action for negligent or intentional spoliation of evidence. Such sanctions may even be awardable in the absence of a clear legal duty to preserve the evidence.<sup>50</sup> 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.<sup>51</sup> Other sanctionable conduct includes

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<sup>47</sup> *Crawford & Co. v. Barnes*, 691 So.2d 1142 (Fla. 1st DCA 1997). *J.S.L. Construction Company v. Levy*, 994 So.2d 394, 399-400 (Fla. 3d DCA 2008) (reversing judgment for plaintiff due to the violation of discovery rules. “[F]ailure to disclose the subject of witness testimony and documents that will be introduced into evidence in violation of discovery rules and court orders amounts to “trial by ambush,” another way of saying a denial of due process.” *Health Options, Inc. v. Palmetto Pathology Services, P.A.*, 983 So.2d 608, 616 (Fla. 3d DCA 2008) (A witness’s testimony may be excluded if the objecting party establishes that it was “surprised in fact” by the undisclosed witness or testimony. “The court must determine whether the objecting party will be prejudiced by the testimony. The court’s determination of this prejudicial effect should not only focus on the nature of the adverse testimony, but also whether: (1) the objecting party has the opportunity to cure the prejudice or has independent knowledge of the testimony; (2) whether the calling party is acting in bad faith; and (3) whether the testimony causes a disruption of the trial.”

<sup>48</sup> *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005).

<sup>49</sup> 507 So.2d 596 (Fla. 1987).

<sup>50</sup> *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).

<sup>51</sup> *Vega v. CSCS Int’l, N.V.*, 795 So.2d 164 (Fla. 3d DCA 2001).

deliberate withholding of documents,<sup>52</sup> tardy production of documents,<sup>53</sup> and improper manner of production (such as place of production).<sup>54</sup> Although a prompt motion for sanctions for failure to produce documents is preferred, a post-trial motion for discovery sanctions is permitted.<sup>55</sup>

### **REQUEST 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.<sup>56</sup>

### **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

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<sup>52</sup> *U.S. Fire Inc. v. C & C Beauty Sales, Inc.*, 674 So.2d 169 (Fla. 3d DCA 1996) (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).

<sup>53</sup> *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).

<sup>54</sup> *Reep v. Reep*, 565 So.2d 814 (Fla. 3d DCA 1990) (reversing 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).

<sup>55</sup> *Amlan, Inc.*, 651 So.2d 701.

<sup>56</sup> *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.")

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.”<sup>57</sup> 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.<sup>58</sup> The party asserting a work product objection for material prepared in anticipation of litigation must present evidence in support of their claim that the materials requested are work product.<sup>59</sup> “Blanket assertions of privilege are insufficient to satisfy this burden.”<sup>60</sup> Incident reports and other materials “prepared in anticipation of litigation” are not protected from discovery unless their status as

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<sup>57</sup> *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).

<sup>58</sup> *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*, 899 So.2d 1121, 1131 (Fla. 2005) (The work product protection that applies to documents prepared in anticipation of litigation in an underlying insurance coverage dispute does not automatically protect those documents from discovery in an ensuing, or accompanying, bad faith action).

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

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

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 has held that the attorney work product doctrine and work product privilege is specifically bounded and limited to materials not intended for use as evidence or as an exhibit at trial, including rebuttal.<sup>61</sup>

Although the attorney-client privilege will protect from discovery client communications with counsel, the privilege falls to the so-called “crime-fraud” exception.<sup>62</sup> The party seeking to overcome the privilege bears the initial burden of producing evidence that the client sought advice of counsel to procure or perpetrate a fraud.<sup>63</sup> The burden then shifts to the party asserting the privilege to provide a reasonable explanation for the conduct or communication.<sup>64</sup> “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.”<sup>65</sup>

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*

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<sup>61</sup> See, *Northup v. Howard W. Acken, M.D.*, 865 So.2d 1267 (Fla. 2004).

<sup>62</sup> *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).

<sup>63</sup> *Whitener*, 715 So.2d 979.

<sup>64</sup> *BNP Paribus v. Wynne*, 967 So.2d 1065 (Fla. 4th DCA 2007). The Court generally must conduct an evidentiary hearing to determine whether the crime-fraud exception applies. A preponderance standard applies to such a determination.

<sup>65</sup> *Deason*, 632 So.2d at 1383.

camera review.<sup>66</sup> An order requiring disclosure of “trade secrets” 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.<sup>67</sup>

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.”<sup>68</sup> A pattern of delay and recalcitrance in providing requested discovery will not necessarily result in stripping of the attorney-client privilege.<sup>69</sup> However, it has been held that the failure to timely produce a privilege log containing the

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<sup>66</sup> 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).

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

<sup>68</sup> *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 waiver 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 (Fla. 5th DCA 1981) (“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).

<sup>69</sup> *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, four years of pattern or delay by party).

information required by Rule 1.280 (B)(5) can result in a waiver of the attorney-client privilege.<sup>70</sup>

### **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.”<sup>71</sup>

The openness of modern discovery is recognized to the point where the discovery process is for the most part self-executing. The intervention of trial judges should generally be sought only with respect to whether information should be disclosed and the sequence or timing of its production. 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.<sup>72</sup>

The recent amendments to the rules of civil procedure now require “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 or material without court action.”<sup>73</sup>

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<sup>70</sup> *TIG Insurance Corp. of America v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA Oct. 17, 2001). *But see Bankers Sec. Ins. Co. v. Symons*, 889 So.2d 93 (Fla. 5th DCA 2004).

<sup>71</sup> *Cox*, 706 So.2d at 47.

<sup>72</sup> *Summit Chase Condominium Association, Inc.*, 421 So.2d at 564.

<sup>73</sup> Fla. R. Civ. P. 1.380(a)(2). If movant fails to include such a certification in its motion, the court may deny movant’s request for attorney’s fees even if movant prevails on the merits of the motion. Fla. R. Civ. P. 1.380(a)(4).

## CHAPTER THREE

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### 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.<sup>1</sup> Under Fed. R. Civ. P. 30(b) and *Pioche Mines Consolidated, Inc. v. Dolman*,<sup>2</sup> 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 obtain an order first, rather than simply filing a motion and, in effect, “granting” it as well. 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*.<sup>3</sup> Precedent of the Fifth U. S. Circuit Court of Appeals predating October 1, 1981, is binding in the Eleventh Circuit.<sup>4</sup>

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

<sup>2</sup> 333 F.2d 257 (9th Cir. 1964).

<sup>3</sup> 590 F.2d 609 (5th Cir. 1979).

<sup>4</sup> *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).

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

In *Canella v. Bryant*,<sup>5</sup> the attorney sought to postpone a deposition when he learned on the afternoon before the scheduled deposition that it would conflict with a hearing scheduled for that same day. He had irreconcilable conflicts preventing his appearance at the deposition. The attorney exerted every possible effort to obtain a court order to prevent the deposition from going forward, including calling opposing counsel and filing a motion for a protective order. The attorney also tried to arrange for the court to hear his motion for a protective order and offered to have the deposition taken at another time. Despite these efforts, nothing could be done to prevent the deposition from occurring. The trial court entered a default for the party seeking protection when the party failed to appear for deposition. On appeal, the default was set aside.

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

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<sup>5</sup> 235 So.2d 328 (Fla. 4th DCA 1970).

In *Momenah v. Ammache*,<sup>6</sup> the plaintiff violated two court orders. The first order concerned discovery cutoff and indicated that the trial court would strictly enforce all discovery deadlines. Additionally, the trial court entered an order commanding the plaintiff, a resident of Saudi Arabia, to appear for deposition when a newly added defendant served a notice of taking the plaintiff's deposition only nine days in advance of the date he was scheduled to appear in Naples, Florida. The plaintiff failed to appear for his deposition and the trial court entered an order commanding him to appear within 30 days for deposition in Collier County. The court advised that it would dismiss the action if the plaintiff failed to appear. Thereafter, the plaintiff's newly hired attorneys filed a motion for a protective order, seeking to postpone the plaintiff's deposition because of his health or to accommodate him in some other manner. Apparently, the trial court originally granted the motion, but reversed its ruling on rehearing, denied the motion, and struck the appellant's pleadings. The plaintiff attempted to have the motion for a protective order heard *before* he was scheduled to appear, and a congested calendar was the only thing preventing him from being heard.

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

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

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<sup>6</sup> 616 So.2d 121 (Fla. 2d DCA 1993).

opportunity to appear before striking his pleadings and dismissing his action. (Emphasis added.)<sup>7</sup>

Another Florida case on point is *Stables v. Rivers*.<sup>8</sup> 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.<sup>9</sup>

The failure to file timely a motion for a protective order or to limit discovery may result in a waiver. However, it does not bar a party from asserting privilege or exemption from matters outside the scope of permissible discovery.<sup>10</sup>

### **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.<sup>11</sup>

In sum, a motion or a protective order does not automatically stay pending discovery. Rather, the movant must file the motion as soon as the need for

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<sup>7</sup> 616 So.2d at 124.

<sup>8</sup> 559 So.2d 440 (Fla. 1st DCA 1990).

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

<sup>10</sup> *Liberty Mutual Insurance Co. v. Lease America, Inc.*, 735 So.2d 560 (Fla. 4th DCA 1999); *Insurance Company of North America v. Noya*, 398 So.2d 836 (Fla. 5th DCA 1981). See also: *Berman, Florida Civil Procedure* §280.4[1][b] (2005 Edition).

<sup>11</sup> Fla. R. Civ. P. 1.380(a)(4).

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.

## CHAPTER FOUR

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### “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 make in the presence of a judge 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.<sup>1</sup> 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

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<sup>1</sup>In re Amendments to Fla. R. Civ. P., 682 So.2d 105 (Fla. 1996).

frustrating the deposition process by lengthy objections and colloquy often including suggested responses to deponent.”<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> Many judges permit counsel to telephone the court for a brief hearing if irreconcilable issues arise at deposition. Counsel should exhaust all efforts to resolve a dispute that threatens the ability to proceed with deposition. Failing agreement, counsel may want to telephone the judge and request a brief telephonic hearing to resolve the matter. This is especially true if the deposition is out-of-state and costly to reschedule. It helps to know the judge’s preferences in this regard, but this opportunity is taught to judges in judicial education to attempt to resolve matters before they develop into costly and more complex proceedings after the fact.

**CASE LAW UNDER FED.R.CIV.P. 30(d)(1):**

1. On a motion to direct counsel to cease obstructionist deposition tactics, in

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

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

<sup>4</sup> 682 So.2d at 117.

*Damaj v. Farmers Insurance Co.*,<sup>5</sup> 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."<sup>6</sup>

2. In *Armstrong v. Hussmann Corp.*,<sup>7</sup> 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."<sup>8</sup>

3. In granting a motion to compel and for sanctions, the court in *Frazier v. Southeastern Pennsylvania Transportation Authority*<sup>9</sup> 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."<sup>10</sup>

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

<sup>6</sup>*Id.* at 561.

<sup>7</sup>163 F.R.D. 299 (E.D. Mo. 1995).

<sup>8</sup>*Id.* at 302-303.

<sup>9</sup>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).

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

4. In *Hall v. Clifton Precision, A Division of Litton Systems, Inc.*,<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

#### **OTHER CASE LAW:**

1. The court in *Paramount Communications Inc. v. QVC Network Inc.*<sup>14</sup> 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 no concept of what you're doing. . . . You fee makers think you can come here and sit in

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

<sup>12</sup> *Id.* at 528-530.

<sup>13</sup> See 8 Wright & Miller, Federal Practice and Procedure §§2113 (2010).

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

somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.<sup>15</sup>

This conduct was found by the court to be "outrageous and unacceptable."<sup>16</sup> 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.*,<sup>17</sup> 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."<sup>18</sup> 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*,<sup>19</sup> 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

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<sup>15</sup> *Id.* at 52–53.

<sup>16</sup> *Id.* at 55.

<sup>17</sup> 938 F.2d 776 (7th Cir. 1991).

<sup>18</sup> *Id.* at 777.

<sup>19</sup> 152 F.R.D. 179 (S.D. Iowa 1993).

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.<sup>20</sup>

4. In *Stengel v. Kawasaki Heavy Industries, Ltd.*,<sup>21</sup> at a break in the deposition, a court reporter overheard the lawyers for the defendant say that it was their game plan to "jerk [plaintiff's counsel] around."<sup>22</sup> 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."<sup>23</sup>

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."<sup>24</sup> 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*<sup>25</sup> 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

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<sup>20</sup> *Id.* at 180–181.

<sup>21</sup> 116 F.R.D. 263 (N.D.Tex., 1987).

<sup>22</sup> *Id.* at 266.

<sup>23</sup> *Id.* at 267–268.

<sup>24</sup> *Id.* at 268.

<sup>25</sup> 115 F.R.D. 292 (S.D.N.Y. 1987).

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).<sup>26</sup>

6. In *Kelly v. GAF Corp.*,<sup>27</sup> 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.”<sup>28</sup> The court chastised 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.<sup>29</sup>

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.*<sup>30</sup> 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.

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<sup>26</sup> *Id.* at 292–293.

<sup>27</sup> 115 F.R.D. 257 (E.D. Pa. 1987).

<sup>28</sup> *Id.* at 257.

<sup>29</sup> *Id.* at 258.

<sup>30</sup> 95 F.R.D. 386 (N.D. Ga. 1982).

8. Costs and fees for redeposing witnesses were charged personally against counsel in *United States v. Kattar*,<sup>31</sup> 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*.<sup>32</sup>

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<sup>31</sup> 191 F.R.D. 33 (D.N.H. 1999).

<sup>32</sup> 22 J. Legal. Prof. 103 (Spring 1998).

## CHAPTER FIVE

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### 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.<sup>1</sup> At a deposition, the “evidence objected to shall be taken subject to the objections.”<sup>2</sup> 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*,<sup>3</sup> 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. Again, as stated in Chapter Four, if opposing counsel instructs the

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<sup>1</sup> Fla.R.Civ.P. 1.280(b)(1).

<sup>2</sup> Rule 1.310(c).

<sup>3</sup> 682 So.2d 105 (Fla. 1996).

deponent not to answer questions in apparent violation of Rule 1.310(c), counsel should consider telephoning the judge to request a brief telephonic hearing to resolve the matter.

**1. *Smith v. Gardy*.<sup>4</sup>**

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:

“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.<sup>5</sup>

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. Fabiano Shoe Company, Inc.*<sup>6</sup>**

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

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<sup>4</sup> 569 So.2d 504 (Fla. 4th DCA 1990).

<sup>5</sup> *Id.* at 507.

<sup>6</sup> 201 F.R.D. 33 (D. Mass. 2001).

[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 lengthy colloquies on the record, and made *ad hominem* attacks against opposing counsel.<sup>7</sup>

**3. *Quantachrome Corp. v. Micromeritics Instrument Corp.*<sup>8</sup>**

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 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 Corporation*<sup>9</sup>**

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

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<sup>7</sup> *Id.* at 39.

<sup>8</sup> 189 F.R.D. 697 (S.D. Fla. 1999).

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

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.*<sup>10</sup>**

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

**6. *Leiching v. Consolidated Rail Corporation*<sup>11</sup>**

The District Court for the Northern District of New York, recommended that defense counsel be personally assessed \$2,500.00 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

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

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

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*:<sup>12</sup>**

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).<sup>13</sup>

**8. *Marcum v. Wellman Funeral Home, Inc.*<sup>14</sup>**

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

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<sup>12</sup> 158 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).

<sup>13</sup> *Id.* at 557-558 (citations omitted).

<sup>14</sup> 30 F.3d 134 (6th Cir. 1994) (unpublished opinion).

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.<sup>15</sup>

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.<sup>16</sup>

#### **9. *Wilson v. Martin County Hospital District*<sup>17</sup>**

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

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<sup>15</sup> *Id.* at 2.

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

<sup>17</sup> 149 F.R.D. 553 (W.D. Tx 1993).

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.<sup>18</sup>

**10. *Nutmeg Insurance Co. v. Atwell, Vogel & Sterling, A Division of Equifax Services, Inc.***<sup>19</sup>

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.<sup>20</sup>

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<sup>18</sup> *Id.* at 555.

<sup>19</sup> 120 F.R.D. 504 (W.D. La. 1988).

<sup>20</sup> *Id.* at 508 (emphasis original).

**11. *Paparelli v. Prudential Insurance Co. of America*:<sup>21</sup>**

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.<sup>22</sup>

**12. *American Hangar Inc. v. Basic Line, Inc.*:<sup>23</sup>**

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), Fla. 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

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<sup>21</sup> 108 F.R.D. 727 (D. Mass. 1985).

<sup>22</sup> *Id.* at 731.

<sup>23</sup> 105 F.R.D. 173 (D. Mass. 1985).

entered pursuant to Rule 37(a), Fla. 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.<sup>24</sup>

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

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

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), Fed. 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.<sup>26</sup>

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

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

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<sup>24</sup> *Id.* at 175.

<sup>25</sup> 657 F.2d 890 (7th Cir. 1981).

<sup>26</sup> *Id.* at 903.

<sup>27</sup> 91 F.R.D. 277 (D.D.C. 1981).

Rule 30(c) should not mandate disclosure of trade secrets of 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.<sup>28</sup>

**15. *Coates v. Johnson & Johnson*:<sup>29</sup>**

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 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.<sup>30</sup>

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<sup>28</sup> *Id.* at 279-280.

<sup>29</sup> 85 F.R.D. 731 (N.D. Ill. 1980).

<sup>30</sup> *Id.* at 733 (citations omitted).

**16. *Lloyd v. Cessna Aircraft Co.*:<sup>31</sup>**

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.<sup>32</sup>

**17. *Ralston Purina Co. v. McFarland*:<sup>33</sup>**

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:

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<sup>31</sup> 74 F.R.D. 518 (E.D. Tenn. 1977).

<sup>32</sup> *Id.* at 520.

<sup>33</sup> 550 F.2d 967 (4th Cir. 1977).

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).<sup>34</sup>

**18. *Preyer v. United States Lines, Inc.*:<sup>35</sup>**

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.<sup>36</sup>

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<sup>34</sup> *Id.* at 973.

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

<sup>36</sup> *Id.* at 431.

## CHAPTER SIX

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### 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.<sup>1</sup>

The subpoena must be identical to the copy attached to the notice and must *specify* that no testimony is to be taken and only the production of the

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

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 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

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### COMPULSORY MEDICAL EXAMINATIONS AND DISCOVERY OF EXAMINER BIAS

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

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

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

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

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

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

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

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

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

a Hernando County trial court did not abuse its discretion by permitting a medical examination in neighboring Hillsborough County, because of the geographical proximity of the two counties. However, a trial court did abuse its discretion where the court sanctioned a plaintiff with dismissal after finding the plaintiff willfully violated a court order in failing to attend a second IME 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 a motion for protective order with an affidavit detailing his finances and stating he had no available funds or credit to travel to Florida. See *Littelfield v. J. Pat Torrence*.<sup>8</sup>

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

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<sup>8</sup> 778 So. 2d 368 (Fla. 2d DCA 2001).

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

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*.<sup>10</sup> However, whether to permit a defendant's request for examination under Rule 1.360 is a matter of judicial discretion. Furthermore, Rule 1.360(a)(3) permits a trial court to establish protective rules for the compulsory examination. Thus, a defendant does not have an absolute right to select the expert to perform the examination.<sup>11</sup>

**Issue 2:**

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

**Resolution:**

Rule 1.360(a)(3) permits the trial court, at the request of either party, to establish protective rules for compulsory examinations. The general rule is that attendance of a third party at a court-ordered medical examination is a matter

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<sup>10</sup> 581 So.2d 952 (Fla. 1st DCA 1991).

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

within the sound discretion of the trial judge.<sup>12</sup> A plaintiff may request that a third party attend an examination to (1) accurately record events at the examination; (2) “assist” in providing a medical history or a description of an accident; and (3) validate or dispute the examining doctor’s findings and conclusions.<sup>13</sup> The burden of proof and persuasion rests with the party opposing the attendance to show why the court should deny the examinee’s right to have present counsel, a physician, or another representative.<sup>14</sup>

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

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

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

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

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

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

attorney) present.<sup>17</sup> This criteria applies to compulsory examinations for physical injuries and psychiatric examinations.<sup>18</sup>

The rationale for permitting the presence of the examinee's attorney is to protect the examinee from improper questions unrelated to the examination.<sup>19</sup> Furthermore, the examinee has a right to preserve by objective means the precise communications that occurred during the examination. Without a record, the examinee will be compelled to challenge the credibility of the examiner should a dispute arise later. "Both the examiner and examinee should benefit by the objective recording of the proceedings, and the integrity and value of the examination as evidence in the judicial proceedings should be enhanced."<sup>20</sup> The rationale for permitting a third party's presence or recording the examination is based on the examinee's right of privacy rather than the needs of the examiner. If the examinee is compelled to have his or her privacy disturbed in the form of a compulsory examination, the examinee is entitled to limit the intrusion to the purpose of the examination and an accurate preservation of the record.

Courts may recognize situations in which a third party's presence should not be allowed. Those situations may include the existence of a language barrier, the inability to engage any medical examiner who will perform the examination in the presence of a third party, the particular psychological or physical needs of the examinee, or the customs and practices in the area of the bar and medical

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

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

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

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

profession.<sup>21</sup> However, in the absence of truly extraordinary circumstances, a defendant will not be able to satisfy its burden of proof and persuasion to prevent the attendance of a passive observer.<sup>22</sup> It has been held that a court reporter's potential interference with the examination or inability to transcribe the physician's tone or facial expressions are invalid reasons.<sup>23</sup> The examiner's refusal to perform the examination in the presence of third parties also is an insufficient ground for a court to find that a third party's presence would be disruptive.<sup>24</sup> Excluding a court reporter because of a claimed chilling effect on physicians and the diminishing number of physicians available to conduct examinations also is insufficient.<sup>25</sup> However, it would take an exceptional circumstance to permit anyone other than a videographer or court reporter and the plaintiff's attorney to be present on behalf of the plaintiff at a Rule 1.360 compulsory examination.<sup>26</sup>

In most circumstances, the examinee's desire to have the examination videotaped should be approved. There is no reason that the presence at an examination of a videographer should be treated differently from that of a court reporter. A trial court order that prohibits videotaping a compulsory examination without any evidence of valid, case-specific objections from the complaining party may result in irreparable harm to the requesting party and serve to justify extraordinary relief.<sup>27</sup> Similarly, an audiotape may be substituted to ensure that

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

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

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

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

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

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

<sup>27</sup> *Lunceford v. Florida Central Railroad Co., Inc.*, 728 So.2d 1239 (Fla. 5th DCA 1999).

the examiner is not asking impermissible questions and that an accurate record of the examination is preserved.<sup>28</sup> 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*.<sup>29</sup>

In *McClennan v. American Building Maintenance*,<sup>30</sup> the court applied the rationale in *Toucet, supra*, and *Bartell, supra*, to workers' compensation disputes, and held that third parties, including attorneys, could attend an independent medical examination given under *F.S. 440.13(2)(b)*.

In *U.S. Security Ins. Co. v. Cimino*,<sup>31</sup> the Florida Supreme Court held that, for a medical examination conducted under *F.S. 627.736(7)* for personal injury protection benefits, "the insured should be afforded the same protections as are afforded to plaintiffs for Rule 1.360 and workers' compensation examinations."

### **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*,<sup>32</sup> 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.

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<sup>28</sup> See *Medrano v. BEC Const. Corp.*, 588 So.2d 1056 (Fla. 3d DCA 1991).

<sup>29</sup> See *McGarrah v. Bayfront Medical Center*, 889 So.2d 923 (Fla. 2d DCA 2004).

<sup>30</sup> 648 So.2d 1214 (Fla. 1st DCA 1995).

<sup>31</sup> 754 So.2d 697, 701 (Fla. 2000).

<sup>32</sup> 672 So.2d 517 (Fla. 1996).

The Supreme Court adopted the decision expressed in *Syken v. Elkins*,<sup>33</sup> and disapproved the conflicting decisions.<sup>34</sup> 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 expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.
3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.
4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

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<sup>33</sup> 644 So.2d 539 (Fla. 3d DCA 1994).

<sup>34</sup> The 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).

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.<sup>35</sup>

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.”<sup>36</sup> 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.”<sup>37</sup>

However, in *Allstate Insurance Co. v. Boecher*,<sup>38</sup> 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*. See also, *Price v. Hannahs*, 954 So.2d 97 (Fla. 2d DCA 2007).

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<sup>35</sup> In re *Amendment* to Fla. R. Civ. P., 682 So.2d 105 (Fla. 1996).

<sup>36</sup> 672 So.2d at 522.

<sup>37</sup> 682 So.2d at 116.

<sup>38</sup> 733 So.2d 993 (Fla. 1999).

## CHAPTER EIGHT

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

Chapter 90, Florida Statutes, codifies the psychotherapist<sup>1</sup>-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.

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(4) There is no privilege under this section:

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(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.<sup>2</sup>

In addition, Section 394.4615, Florida Statutes, envelopes the records of a psychotherapist with a broad cloak of confidentiality. The intent of the

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<sup>1</sup> Psychotherapist 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).

<sup>2</sup>§ 90.503, Fla. Stat.

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.<sup>3</sup> The United States Supreme Court has noted that the psychotherapist privilege serves the public interest and, if the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> Failure to timely assert the privilege does not constitute waiver, but it is waived for information already produced.<sup>8</sup> A defendant’s listing of therapists’ names in

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

<sup>4</sup> *Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>5</sup> See *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”).

<sup>6</sup> *Arzola*, 534 So.2d 883.

<sup>7</sup> *Connell v. Guardianship of Connell*, 476 So.2d 1381 (Fla. 1st DCA 1985).

<sup>8</sup> *Garbacik 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).

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.<sup>9</sup> A party does not waive confidentiality and make his or her mental health an element of the claim by simply requesting custody.<sup>10</sup> The privilege is not waived in joint counseling sessions.<sup>11</sup>

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.<sup>12</sup> When a plaintiff has not placed mental condition at issue, a defendant's own allegations that mental stability is at issue cannot overcome the privilege.<sup>13</sup>

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.<sup>14</sup> 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

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<sup>9</sup> *Olson v. Blasco*, 676 So.2d 481 (Fla. 4th DCA 1996).

<sup>10</sup> *Loughlin v. Loughlin*, 935 So.2d 82 (Fla. 5th DCA 2006); *Flood v. Stumm*, 989 So.2d 1240 (Fla. 4th DCA 2008) (A party's mental condition does not become an element of his or her claim simply because the party is seeking child custody, such that the party would lose the protections of the psychotherapist-patient privilege). 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).

<sup>11</sup> *Segarra v. Segarra*, 932 So.2d 1159 (Fla. 3d DCA 2006).

<sup>12</sup> *Garbacik; Morrison; Yoho v. Lindsley*, 248 So. 2d 187 (Fla. 4th DCA 1971).

<sup>13</sup> *Weinstock v. Groth*, 659 So.2d 713 (Fla. 5th DCA 1995).

<sup>14</sup> *Oswald v. Diamond*, 576 So.2d 909 (Fla. 1st DCA 1991).

or treatment of a mental or emotional condition remain privileged even if they contain information pertaining to physical examinations.<sup>15</sup>

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.<sup>16</sup>

Florida law recognizes that a plaintiff who has incurred a physical injury may allege and prove physical pain and suffering as an element of a claim for money damages.<sup>17</sup> The term “pain and suffering” has not been judicially defined. However, Florida courts have provided a number of factors that may be considered by the trier of fact in awarding damages for pain and suffering. These factors recognize that pain and suffering has a mental as well as a physical aspect.<sup>18</sup> 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.<sup>19</sup>

**Issue 1:**

The plaintiff files a complaint seeking damages for bodily injury and resulting “pain and suffering,” but does not specifically seek damages for “mental anguish” or “emotional harm.” The defendant seeks production of medical records from the plaintiff’s medical providers. The plaintiff objects and files a

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<sup>15</sup> *Byxbee v. Reyes*, 850 So.2d 595, 596 (Fla. 4th DCA 2003).

<sup>16</sup> *Helmick v. McKinnon*, 657 So.2d 1279 (Fla. 5th DCA 1995).

<sup>17</sup> *Warner v. Ware*, 182 So. 605 (Fla. 1938).

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

<sup>19</sup> *Hill v. State*, 846 So.2d 1208 (Fla 5th DCA 2003).

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 stricken.

**Issue 2:**

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

protective order and withdraws the claim for mental or emotional condition damages.

**Resolution:**

The motion for a protective order should be granted under *Sykes v. St. Andrews School*, 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.<sup>20</sup> 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."<sup>21</sup> 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.

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

<sup>21</sup> *Sykes*, 619 So.2d at 469.

## CHAPTER NINE

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

In negligence cases today, defendants may affirmatively assert the *Fabre*<sup>1</sup> 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 named 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 defense<sup>2</sup> 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,<sup>3</sup> courts are constantly facing the question of when the defendant must 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. 3d DCA 1975), the court stated:

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

<sup>2</sup> *W.R. Grace & Co. – Conn. v. Dougherty*, 636 So.2d 746 (Fla. 2d DCA 1994).

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

‘ . . . 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 comparative fault statute (which incorporates concepts of the *Fabre* defense), itself requires that the nonparty be identified “as specifically as practicable” unless good cause is shown otherwise. F.S. 768.81(3)(a)(2007). 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 “nonparty” defense in order to preserve it, they should be prepared to fully cooperate in discovery regarding identification of “nonparties.”

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 their 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 bases the defense on.

It should also be noted that potential *Fabre* defendants who have committed intentional torts may not be included on the verdict form.<sup>4</sup> In *Hennis v. City Tropics Bistro, Inc.*, the court stated that “liability should not be apportioned between a negligent party and a criminal.”<sup>5</sup>

The *Fabre* defense may be raised 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 properly move their cases. 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

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<sup>4</sup> *Hennis v. City Tropics Bistro, Inc.*, 1 So.3d 1152, 1156 (Fla. 5th DCA 2009).

<sup>5</sup> 1 So.3d 1152 (Fla. 5th DCA 2009). (See *Stellas v. Alamo Rent-A-Car, Inc.*, 702 So.2d 232, 233-34 (Fla. 1997).

delay the plaintiff's right to have the nonparties identified and their culpable acts specified. The main issue is to balance the plaintiff's right to have the case decided by a jury as expeditiously as possible, on the merits and without surprise or ambush, against the defendant's right to have the case justly decided on all the 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 must be 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 may be tried on its merits in a timely fashion.

## CHAPTER TEN

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### ELECTRONIC DISCOVERY

Florida litigators increasingly confront discovery involving electronic documents and other types of electronically stored information (“ESI”)<sup>1</sup> and the hardware and media on which ESI is created, transferred, communicated, and stored. Because far more than 90% of today’s documents are created, transferred, or maintained electronically, and because computers, phones, and other electronic devices pervade our culture, e-discovery can crop up in almost any case from a simple negligence case to commercial litigation. The fundamental issues regarding ESI involve (1) disclosure and protection of client ESI and hardware, (2) preservation of ESI by the client and the opposing parties and third parties, (3) access to ESI of opposing parties and third parties, (4) maintaining privacy and privilege, (5) costs of discovery, and (6) application of Florida’s existing discovery rules in an arena that changes virtually every day as technology advances. Since the rules are lagging behind technology and because of the increasing availability of discoverable ESI, it is incumbent on lawyers and judges to become competent in ESI fundamentals and discovery of ESI. Competence in ESI discovery is essential to successfully manage such discovery in an economical, efficient, and balanced fashion to keep costs in line and still get the job done.

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<sup>1</sup> Electronically stored information, “ESI,” is the nomenclature adopted in the federal rules to refer to computer files of all kinds. *See e.g.* Rule 34, *Federal Rules of Civil Procedure*. The term ESI is not defined in the federal rules on purpose because of the ever-changing nature of such information. The *Comments* explain that the term ESI should be construed expansively “to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.” Florida courts have adopted the term “ESI.” *See, e.g.*, In re Amendments to the Florida Rules of Civil Procedure-Management, 15 So.3d 558 (Fla. 2009)(creating Fla. R. Civ. P. 1.201 regarding management of complex litigation and referring in Rule 1.201(b)(1)(1) to “electronically stored information); *Menke v. Broward County School Board*, 916 So.2d 8 (Fla. 4th DCA 2009).

Competent representation of the client requires the legal skill, knowledge, thoroughness, and preparation necessary for the representation.<sup>2</sup> The nature, complexity, and evolving culture of ESI and its hardware and media present an increasing challenge for practitioners involving obligations of preserving, protecting, disclosing, or discovering ESI. One of the foremost challenges is protection of the client's private and privileged matters, which requires counsel to ensure that client information is disclosed only to the extent reasonably necessary to serve the client's interest.<sup>3</sup> Court recordkeeping is evolving to electronic databases, and access to court records and any client information that makes it into the record may be far broader and easier than ever before. This means that counsel should only put in the record that which is required or reasonably necessary to serve the client's interest. If necessary, invoke the process of sealing private or sensitive information before the record becomes available as a public record.

The lawyer is obligated to know enough about the client's ESI and the locations it may be found to fully comply with discovery without disclosing too much. The client's equipment, data, and software must be protected from destruction. The client must be fully informed on the extent, if any, of the obligation to preserve information. At the same time, the client's business processes and handling of data must be protected from unwelcome, unnecessary intrusion from perceived court-related obligations. Finally, counsel and the court must be informed enough to successfully assist counsel in obtaining permitted discovery of

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<sup>2</sup> Rule 4-1.1, Rules of Professional Conduct.

<sup>3</sup> Rule 4-1.6, Rules of Professional Conduct.

ESI from the opposing party and any third parties reachable through proper process.

Rulemaking for electronic discovery has lagged behind the technology of how data is created, kept, and communicated. In Florida, Civil Procedure and Judicial Administration Rules have not significantly addressed discovery of ESI. Instead, judges apply traditional discovery law to ESI tempered by a small amount of Florida case law and principles and perspectives emerging in federal courts and other states. Why is it necessary for courts to take a different approach to ESI discovery? ESI is ephemeral; sometimes easily hidden, mislabeled, or destroyed; available from multiple sources in a variety of forms; capable of electronic search and compilation; sometimes accompanied by information or availability not apparent to the creator or user; and frequently misunderstood by persons lacking in expertise. ESI also exists in unbelievably large quantities. Five hundred gigabyte computer hard-drives are now standard issue on most computers, whereas a single gigabyte of information is equivalent to a truckload of paper documents. Many people today receive hundreds of e-mails and text messages a day and they may store them indefinitely. The places on which ESI can be stored or located are also manifold and ever changing, and include the over one trillion websites that now exist on the Internet. ESI may sometimes be significantly easier and cheaper to search, but at the same time it is often much more difficult to locate and retrieve relevant ESI from the high volume of total ESI maintained on various systems used by witnesses and custodians of relevant information, especially because the material will need to be screened for privilege, privacy, and trade secrets before it

is disclosed. For this reason it is often far more difficult and more expensive to search, categorize, and compile ESI than traditional paper records, depending on the circumstances.

Potential spiraling cost issues contribute to special treatment for ESI. Existing Florida rules as interpreted by case law clearly provide that ESI is discoverable, but they also require proportionality of expense. Special rules in federal court help maintain cost proportionality by providing an express framework for dealing with issues of preservation, production, and protection for hard-to-find and retrieve ESI and the media and equipment that hold ESI. Federal rules also provide additional protection of confidential and privileged information not discoverable that may inadvertently be produced with discoverable material. The extent to which such principles extend to Florida cases is essentially resolved on a case by case basis.

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

The developing principles for electronic discovery encourage cooperation and transparency by the parties during meetings between counsel early in a case to try to agree on the scope and methods of production. Counsel are encouraged to bring any areas of disagreement to the courts for resolution early in a case. In resolving these disputes courts should balance the need for legitimate discovery

with principles of proportionality and the just, speedy and efficient resolution of the case.

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

The complexity in application of discovery rules to ESI and hardware and media is creating a burgeoning body of law, primarily in federal court.<sup>4</sup> Although Rule 1.350, Fla. R. Civ. P. has long been construed to permit the discovery of electronic documents and other types of electronically stored information (“ESI”),<sup>5</sup> there are currently no special rules in Florida governing the discovery of ESI. This situation is likely to change soon, but for the time being, courts must rely upon application of current rules of procedure and case law addressing electronic discovery (“e-discovery”). Case law in Florida on this subject is currently limited, but useful.<sup>6</sup> Pending further development of the law, Florida trial courts are likely to refer to law developing in other jurisdictions and especially the special rules enacted in December 2006 for federal courts and the extensive body of case law in

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<sup>4</sup> This chapter focuses on Florida state court e-discovery. Discussion of federal law herein is undertaken only because of the availability of federal law for guidance in state court cases and is not intended to provide practitioners with a manual for discovery in federal court cases. See note 8 below.

<sup>5</sup> See *Strasser v. Yalamanchi*, 669 So.2d 1142 (Fla. 4th DCA 1996).

<sup>6</sup> See e.g. *Holland v. Barfield*, So.3d 2010 Fla. App. LEXIS 6293;35 Fla. L. Weekly D 1018 (Fla. 5th DCA May 7, 2010) (order granting opposing expert in wrongful death case unrestricted access to review petitioner’s hard drive and SIM card quashed as violative of privacy); *Menke v. Broward County School Board*, 916 So.2d 8 (4th DCA 2005) (establishing basis and limits on access to opposing party’s hardware in order to search for discoverable information); Strasser II: *Strasser v. Yalamanchi*, 783 So.2d 1087 (Fla. 4th DCA 2001) (spoliation of electronic records); Strasser I: *Strasser v. Yalamanchi*, *supra*, n. 5 (designating Florida procedural rules giving rise to discovery of ESI and the equipment that holds them and setting limits on scope of such discovery); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.* 2005 WL 674885 (Fla. Cir. Ct., 2005) (one of the best known e-discovery opinions in the country, primarily because the sanctions for ESI spoliation resulted in a default judgment for \$1.5 Billion. The judgment was reversed on appeal on other grounds).

the federal system on these new rules and e-discovery in general.<sup>7</sup> State courts are also likely to be influenced by the publications of *The Sedona Conference*,<sup>8</sup> a private research group of lawyers, judges and e-discovery vendors dedicated to the development of standards and best practices in this new field. The Sedona Conference writings have been widely cited in the federal courts, especially its *Sedona Principles*<sup>9</sup>, and *Cooperation Proclamation*.<sup>10</sup> Also especially helpful are its *Glossary*<sup>11</sup> of e-discovery related terms, and its commentaries on *Search and Retrieval Methods*,<sup>12</sup> *Achieving Quality*,<sup>13</sup> and *Litigation Holds*.<sup>14</sup> Many excellent text and trade publications, including free online resources, are also available.<sup>15</sup>

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

1. Familiarize yourself with the client's records, including how they are maintained. If the client has a routine destruction policy for hard copies or ESI, address the issue of preservation immediately. Failure to preserve

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<sup>7</sup> See the following Federal Rules of Civil Procedure and accompanying rule commentary pertaining to the 2006 amendment: Rule 16(b), 26(a)(1)(B), 26(b)(2)(B), 26(f), 26(b)(5), 33, 34, 37(f) and 45. Also see the large and rapidly growing body of opinions by United States Magistrate Judges and District Court Judges in Florida and elsewhere around the country. While federal law is far more developed than Florida e-discovery law and provides useful guidance for lawyers and judges, there is one cautionary consideration. Unlike circumstances in which judges turn to federal cases because federal and state rules contain identical or similar language, there are no specific Florida rules of procedure to compare with the federal rules. Thus, the extent to which a Florida trial judge turns to federal law will be broadly discretionary pending adoption of Florida rules. As of the date of this publication, the Civil Procedure Rules Committee is working on potential specific e-discovery rules, but none have been proposed to the Supreme Court for adoption.

<sup>8</sup> Its publications are all available online without charge for individual use. See:

<http://www.thesedonaconference.org/>

<sup>9</sup> This can be downloaded after registration at:

<http://www.thesedonaconference.org/dltForm?did=2007SummaryofSedonaPrinciples2ndEditionAug17assentforWG1.pdf>

<sup>10</sup> See: *"The Sedona Conference® Cooperation Proclamation,"* 10 Sedona Conf. J. 331 (2009 Supp.)

<sup>11</sup> [http://www.thesedonaconference.org/dltForm?did=TSCGlossary\\_12\\_07.pdf](http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf)

<sup>12</sup> <http://www.thesedonaconference.org/dltForm?did=BestPracticesRetrievalMethodsrevisedcoverandpreface.pdf>

<sup>13</sup> <http://www.thesedonaconference.org/dltForm?did=AchievingQuality.pdf>

<sup>14</sup> <http://www.thesedonaconference.org/dltForm?did=Legalholds.pdf>

<sup>15</sup> See e.g.: Ralph Losey's weekly blog: *e-discoveryteam* found at <http://www.e-discoveryteam.com> and his several books and law review articles on electronic discovery that are referenced there. Also see Losey's list of useful reference webs in this area found at <http://floridalawfirm.com/links.html>

records, including ESI, may result in severe sanctions for the client and possibly counsel.

2. Ensure that written preservation hold notices are provided by the client to any key players within their control that instructs them to preserve any potentially relevant ESI in their custody, and to not alter or destroy potentially relevant ESI pending the conclusion of the lawsuit. Counsel should follow-up on these written notices by prompt personal communications with key players, and then periodic reminder notices thereafter.
3. Inform the client of all obligations for discovery by both sides and develop a plan to protect privileged or private information.
4. Work with the client and IT experts, if required, to develop a plan to collect and review ESI for possible production, including a review for private, privileged, or trade secret information that may be entitled to protection from open disclosure.
5. Determine the preferred format to make and receive production of ESI, typically either in the original native format, or some type of flat-file type PDF or TIFF format, and whether any types of “Metadata” (hidden information on how, by whom, and when the document was created, altered, communicated, or saved) may be relevant to the case, and if so, make a specific request for production of such metadata.
6. Determine whether expert assistance may be needed to sort out legal or practical issues involving ESI and its media or equipment. Reach out to

- opposing counsel early to attempt to coordinate and cooperate on technical issues and set up lines of communication and cooperation between the IT technicians that may be retained by both sides to assist in the e-discovery efforts.
7. Find out what information may be discoverable from the opponent and seek disclosure of their preservation efforts and intended production formats, and what ESI they will seek discovery of, including their metadata demands, if any.
  8. Evaluate the reasonability and suitability of the opponent's preservation, collection, and production plans, including any metadata issues, and attempt early resolution of any disputes. This should be accomplished *before* any large productions are actually made so as to avoid expensive do-overs.
  9. Determine whether discoverable ESI is available from multiple sources, including third parties. Frequently ESI documents, such as e-mail or draft contracts that have been communicated to or handled by multiple parties will contain useful additional or even conflicting information.
  10. Weigh the cost of ESI discovery and determine whether costs may be shifted to protect the client or whether the cost of discovery outweighs the potential benefit.
  11. Ensure to the extent possible that the value of the discovery sought and produced is proportional in the context of the case at hand.

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

The seminal federal case in electronic discovery was written by Manhattan District Court Judge, Shira Scheindlin. It is actually a series of opinions written in the same case, collectively known as *Zubulake*, after the plaintiff, Laura Zubulake. The key opinions in this series are: *Zubulake v UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*). These decisions are widely known by both federal and state judges and practitioners around the country.

Judge Scheindlin's last opinion, *Zubulake V*, has had the greatest impact upon federal courts and is also starting to have an impact on state courts, including Florida. In *Zubulake V*, Judge Scheindlin held that *outside legal counsel* has a duty to make certain that their client's ESI is identified and placed on hold. This new duty on attorneys was created because of the unusual nature and characteristics of ESI and information technology systems in which ESI is stored. Unlike paper documents, ESI can be easily modified or deleted, both intentionally and unintentionally. In many IT systems, especially those employed by medium to large size enterprises, ESI is automatically and routinely deleted and purged from the IT systems. Special actions must be taken by the client with such IT systems to suspend these normal ESI deletion procedures after litigation is reasonably anticipated.

Here are the words of Judge Scheindlin in *Zubulake V* that have frequently been relied upon to sanction attorneys who either unwittingly, or sometimes on

purpose, failed to take any affirmative steps to advise and supervise their clients to stop the automatic destruction of ESI:

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

Of course, a party to litigation has a duty to preserve evidence in all forms, paper or ESI, and the bad faith failure to do so may constitute actionable spoliation. This is nothing new.<sup>16</sup> But the extension of this duty to the litigants' outside legal counsel in *Zubulake V*, which is sometimes called the "Zubulake Duty," is fairly new and controversial.<sup>17</sup> Although it has been accepted by many federal judges in Florida and elsewhere, it is unknown whether Florida state court judges will also impose such a duty upon attorneys. However, in view of the popularity in the federal system of placing this burden on the counsel of record, a prudent state court practitioner should also assume that they have such a duty. Outside legal counsel should be proactive in communicating with their client and otherwise taking steps to see to it that the client institutes a litigation hold. Obviously, Judge Scheindlin does not intend to convert attorneys into guarantors of their client's conduct. She also notes in *Zubulake V* that if attorneys are diligent,

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<sup>16</sup> See *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005); *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 781 (Fla. 4th DCA 2006).

<sup>17</sup> See *Metro. Opera Ass'n Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 212 F.R.D. 178, 218-219 (S.D.N.Y. 2003); but see Thomas Allman, *Deterring E-Discovery Misconduct By Counsel Sanctions: The Unintended Consequences of Qualcomm v. Broadcom*, 118 Yale L.J. Pocket Part 161 (2009).

and they properly investigate and communicate, they should not be held responsible for their client's failures:

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

The duty to preserve of client and counsel requires a corporate client to provide a written litigation hold notice to its employees who may be involved in the lawsuit, or who may otherwise have custody or control of computers and other ESI storage devices with information relevant to the lawsuit. The notice should instruct them not to alter or destroy such ESI. The potential witnesses to the case should be instructed to construe their duty to preserve ESI broadly and reminded that the ESI may be located in many different computers and ESI storage systems, including for instance, desktop computers, laptops, server storage, CDs, DVDs, flash drives, home computers, iPods, iPads, iPhones, blackberries, Internet storage webs (cloud computing), Internet e-mail accounts, voice mail, etc. The client's IT department or outside company should also be notified and instructed to modify certain auto-deletion features of the IT system that could otherwise delete potentially relevant evidence. In some cases, it may also be necessary to preserve backup tapes, but this is generally not required if the relevant information on the tapes is just duplicative.<sup>18</sup>

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

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<sup>18</sup> *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (*Zubulake IV*); also see Rule 37(e) *Federal Rules of Civil Procedure*.

Judge Scheindlin wrote another opinion on the subject of litigation holds and ESI spoliation, which she refers to as her sequel to *Zubulake*. *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). *Pension Committee* provides further guidance to federal and state courts on preservation issues, and the related issues of sanctions. Judge Scheindlin holds that the following failures to preserve evidence constitute gross negligence and thus should often result in sanctions of some kind:

After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold, to identify the key players and to ensure that their electronic and paper records are preserved, to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control, and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

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

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

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

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

The documentation of a party's e-discovery diligent efforts should, at a minimum, carefully record exactly what was searched, who did the work, who supervised the work (it should be an expert, or at least a person with substantial knowledge and experience in the tasks, or the efforts may not be considered *reasonable*<sup>19</sup>), what the instructions were, and how the search was performed. Counsel who can document the search efforts, the decisions made and why, will be in a position to defend the search as reasonable. Documentation of reasonable efforts may avoid a finding of negligence, even though evidence was missed, maybe even important evidence.

The opinion of Judge Scheindlin in *Zubulake* and the *Pension Committee* cases provide a road map to federal practitioners on what needs to be done in

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<sup>19</sup> *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 242 F.R.D. 139 (D.D.C. 2007); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251(D. Md. 2008).

order to preserve ESI from destruction, either intentional or accidental, and so avoid sanctions for spoliation. These and hundreds of other cases like it in the federal system are quite likely to be referred to and cited in state court proceedings. Although none of these federal cases are binding upon state court system, many judges find them persuasive, and the federal cases will often at least provide a starting point for further argument.

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

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

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

### **CONFERRING WITH OPPOSING COUNSEL:**

Counsel are well advised to speak with each other at the commencement of the case concerning the preferred methods and format of production,<sup>20</sup> including topics as to what metadata fields are desired by the requesting party and the proposed preservation, culling, and search methods. Counsel should also discuss confidentiality concerns and attempt to reach agreement on these issues, as well as the related issues concerning the consequences of the inadvertent disclosure of privileged information. It is now common in the federal system for parties to enter into “Claw-Back” agreements protecting both sides from waiver from unintentional disclosure.<sup>21</sup> While there is no specific Florida rule or case on “Claw-Back” agreements, this practical safety net is suitable for use in state court by stipulation or agreement.

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

One important issue in e-discovery concerning the limits on forensic examinations of a party’s computers has already been addressed in Florida. *Menke v. Broward County School Board*, 916 So.2d 8 (4th DCA 2005). It follows without discussion, or much mention, a large body of federal and foreign state case law on the subject. *Menke* holds consistent with this law and protects a responding party from over-intrusive inspections of its computer systems by the requesting

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<sup>20</sup> See Rule 34(b)(2), *Federal Rules of Civil Procedure*, governing form of production. This essentially requires production of ESI in its original native format, or in another “reasonably useable” format, at the producer’s choice, unless the request specifies the form.

<sup>21</sup> See Rule 26(b)(5)(B), *Federal Rules of Civil Procedure*, and Rule 502, *Federal Rules of Evidence*.

party.<sup>22</sup> The law generally requires a showing of good cause before such an inspection is allowed. The rules, both state and federal, only intend for parties, or third-parties, to make production of the ESI stored on electronic devices, not the devices themselves. This is a common novice mistake. The actual devices are only subject to inspection in unusual cases where you can prove that the party's search and production has not been reasonably or honestly performed or other even more rare circumstances. *Id.*

The background and reasoning for this law are set out well in *Menke*:

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

Menke contends that the respondent's representative's wholesale access to his personal computer will expose confidential communications and matters entirely extraneous to the present litigation, such as banking records. Additionally, privileged communications, such as those between Menke and his attorney concerning the very issues in the underlying proceeding, may be

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<sup>22</sup> See: *Peskoff v. Faber*, 2008 WL 2649506 (D.D.C. July 7, 2008); *Bro-Tech Corp. v. Thermax, Inc.*, 2008 WL 724627 (E.D. Pa. March 17, 2008); *Sterle v. Elizabeth Arden, Inc.*, 2008 WL 961216 (D. Conn. Apr. 9, 2008); *Xpel Technologies Corp. v. Am. Filter Film Distribs*; 2008 WL 744837 (W.D. Tex. Mar. 17, 2008); *Henry v. Quicken Loans, Inc.*, 2008 WL 474127 (E.D. Mich. Feb. 15, 2008); *In Re Honza*, 2007 WL 4591917 (Tex. App. Dec. 28, 2007); *Coburn v. PN II, Inc.*, 2008 WL 879746 (D. Nev. Mar. 28, 2008); *Ferron v. Search Cactus, LLC*, 2008 WL 1902499 (S.D. Ohio Apr. 28, 2008); *Johnson v. Wells Fargo Home Mortgage, Inc.*, 2008 WL 2142219 (D. Nev. May 16, 2008); *Anadarko Petroleum Corp. v. Davis*, 2006 WL 3837518 (S.D. Tex., Dec. 28, 2006); *Hedenburg v. Aramark American Food Services*, 2007 U.S. Dist. LEXIS 3443 (W.D. Wash. Jan. 17, 2007); *In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir. 2003); *Ameriwood v. Liberman*, 2006 WL 3825291, 2006 U.S. Dist. LEXIS 93380 (E.D. Mo., Dec. 27, 2006).

exposed. Furthermore, Menke contends that his privacy is invaded by such an inspection, and his Fifth Amendment right may also be implicated by such an intrusive review by the opposing expert.

The appeals court agreed with Menke and granted *certiorari* to quash the administrative law judge's order requiring production of Menke's computers. The court held that production and search of a computer is to be conducted by the producing party so as to protect their confidential information. *Menke* suggests that the production of the computer itself is a last resort only justified "in situations where evidence of intentional deletion of data was present. *Id.* at 8. The *Menke* court concluded with these words, which also seem a good note on which to end this article:

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

Disclosure of confidential information is not the only potential harm when a party is permitted access to the opposing party's computers. Another consideration relating to a request for access to the client's computers, equipment, or software is the potential of harm to the client's hardware, software, and data. Any foray permitted by the court must balance the need for the level of access sought versus the potential harm to the party producing access. This is another reason for using neutral, qualified experts to assist in discovery.

**CONCLUSION:**

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

## CHAPTER ELEVEN

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### DISCOVERY OF LAWYER-CLIENT PRIVILEGED COMMUNICATIONS

Lawyer-Client communications are, by statute, privileged, and therefore not discoverable.<sup>1</sup> However, the privilege can be waived, intentionally or unintentionally, thus subjecting the communication to discovery. A waiver by the client of part of the privileged communications, serves as a waiver as to the remainder of the communications about the same subject.<sup>2</sup>

### PRIVILEGE LOGS:

Fla. R. Civ. P. 1.280(B)(5) provides, in part, that a party withholding information from discovery claiming that it is privileged shall make the claim expressly, and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protections. It has been suggested that the privilege log should include at a minimum (for documents), sender, recipients, title or type, date and subject matter.<sup>3</sup>

The U.S. District Court for the Southern District of Florida has promulgated a Local Rule for the content required in a privilege log.<sup>4</sup> In at least one instance, that Local Rule has served as guidance for a Florida court.<sup>5</sup>

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

<sup>2</sup> *Id.* at 185-186.

<sup>3</sup> *Bankers Sec. Ins. Co. v. Symons*, 889 So.2d 93 (Fla. 5th DCA 2004).

<sup>4</sup> U.S. District Court, Southern District of Florida, Local Rule 26.1 G. 3.

<sup>5</sup> *TIG Ins. Corp. of America v. Johnson*, 799 So.2d 339 (Fla. 4th DCA 2001).

The failure to file a privilege log can result in a waiver of the attorney-client privilege.<sup>6</sup> However, that is not a common sanction, and Florida courts generally recognize that such a sanction should be resorted to only when the violation is serious.<sup>7</sup>

A privilege log is not required until such time as broader, preliminary objections have been addressed. “A party is required to file a [privilege] log only if the information is otherwise discoverable. Where the party claims that the production of documents is burdensome and harassing...the scope of discovery is at issue. Until the court rules on the request, the party responding to discovery does not know what will fall into the category of discoverable documents...”<sup>8</sup> Waiver does not apply where assertion of the privilege is not document-specific, but category specific, and the category itself is plainly protected.<sup>9</sup>

### **INADVERTENT DISCLOSURE:**

As communications technology advances (facsimile, e-mail, text, etc...) the opportunities for inadvertent disclosure of lawyer-client privileged communications increase. Inadvertent disclosure of lawyer-client privileged communications, and the resultant issues of waiver and disqualification have been addressed by Florida courts more frequently in recent years.

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<sup>6</sup> *TIG Ins. Corp. of America v. Johnson*, 799 So.2d 339 (Fla. 4th DCA 2001).

<sup>7</sup> *Gosman v. Luzinski*, 937 So.2d 293 (Fla. 4th DCA 2006) (“Attorney-client privilege and work-product immunity are important protections in the adversarial legal system, and any breach of these privileges can give one party an undue advantage over the other party. Florida’s courts generally recognize that an implicit waiver of an important privilege as a sanction for a discovery violation should not be favored, but resorted to only when the violation is serious.”).

<sup>8</sup> *Gosman*.

<sup>9</sup> *Nevin v. Palm Beach County School Board*, 958 So.2d 1003 (Fla. 1st DCA 2007); citing: *Matlock v. Day*, 907 So.2d 577 (Fla. 5th DCA 2005).

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

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production;
- (2) the number of inadvertent disclosures;
- (3) the extent of disclosure;
- (4) any delay and measures taken to rectify the disclosures; and
- (5) whether the overriding interests of justice would be served by relieving a party of its error.<sup>10</sup>

One should note the court’s consideration of the “precautions taken to prevent inadvertent disclosure.” As communications are more commonly transmitted by facsimile/e-mail, the prudent lawyer should carefully consider the protections in place of not in place) at the recipient’s location. For example, many facsimile terminals are used by large groups of people, and may not provide the necessary privacy for the transmission of privileged communications. Facsimile and e-mail communications should, at the very least, always include a lawyer-client privilege notice.<sup>11</sup>

All attorneys should remember that the recipient of inadvertently disclosed attorney-client privileged communications must act appropriately, or risk being disqualified from the case.<sup>12</sup> An attorney who promptly notifies the sender and

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<sup>10</sup> *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007).

<sup>11</sup> See: *Nova Southeastern University, Inc. v. Jacobson*, 25 So.3d 82 (Fla. 4th DCA 2009).

<sup>12</sup> See: *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So.2d 1117 (Fla. 3d DCA 2008).

immediately returns the inadvertently produced materials, without exercising any unfair advantage, will, generally, not be subject to disqualification.<sup>13</sup>

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

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

In response, the ethics committee issued Ethics Opinion 06-2 (September 15, 2006), which provides as follows:

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<sup>13</sup> *Abamar Housing & Development, Inc. v. Lisa Daly Lady Decor*, 724 So.2d 572 (Fla. 3d DCA 1998); citing Fla. Bar Comm. On Professional Ethics, OP. 93-3.

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

Inadvertent disclosure does not always involve disclosure to the opposing party. Privileged materials may be inadvertently disclosed to a party's own expert. In that circumstance, a party does not automatically waive the privilege simply by furnishing protected or privileged material. The court will consider whether the expert relied upon the material in forming his or her opinion.<sup>14</sup>

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

The lawyer-client privilege between an insurer, the insured and insured's counsel is not waived in a third party bad faith action. Since the insured is not the party bringing the action, it does not waive the privilege.<sup>15</sup>

#### **EXAMINATION UNDER OATH:**

The lawyer-client privilege has been held to apply to an examination under oath ("EUO"), conducted by an insurer with its insured. The statements made during the examination were not discoverable in a subsequent criminal case

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<sup>14</sup> *Mullins v. Tompkins*, 15 So.3d 798 (Fla. 1st DCA 2009).

<sup>15</sup> *Progressive v. Scoma*, 975 So.2d 461 (Fla. 2d DCA 2007), ("Few evidentiary privileges are as jealously guarded as the attorney-client privilege. Permitting a third party who brings a bad faith claim to abrogate the attorney-client privilege previously held by the insured and insurer would seem to undermine the policy reasons for having such a privilege, such as encouraging open and unguarded discussions between counsel and client as they prepare for litigation.").

involving the insured, and, the presence of criminal defense counsel at the EUO did not waive the privilege.<sup>16</sup>

**REVIEW OF PRIVILEGED DOCUMENTS FOR DEPOSITION:**

Documents used to refresh testimony prior to testifying are discoverable unless otherwise privileged. Therefore, the use of lawyer-client privileged documents to refresh testimony prior to testifying does not waive the privilege. However, the privilege would be waived if the same documents were used to refresh testimony while testifying.<sup>17</sup>

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<sup>16</sup> *Reynolds v. State*, 963 So.2d 908 (Fla. 2d DCA 2007), (“The examination is part of the insurer’s fact gathering for the dual purposes of (1) defending the insured, and (2) determining whether the policy covers the incident giving rise to the claim against the insured.”).

<sup>17</sup> *Proskauer Rose v. Boca Airport, Inc.*, 987 So.2d 116 (Fla. 4th DCA 2008).