



FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE (2016)
[ALL-IN-ONE DOCUMENT]

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PREFACE

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

The original handbook and the later editions are the result of the continued joint efforts of the Trial Lawyers Section, the Conference of Circuit Judges, and the Conference of County Court Judges. It is intended to be a quick reference for lawyers and judges on many recurring discovery problems. It does not profess to be the dispositive legal authority on any particular issue. It is designed to help busy lawyers and judges quickly access legal authority for the covered topics. The ultimate objective is to help curtail perceived abuses in discovery so that the search for truth is not thwarted by the discovery process itself. The reader still should do his or her own research, to include a review of local administrative orders and rules. The first edition of this handbook was prepared in the fall of 1995. This 2016 (fifteenth) edition updates the handbook through December 2015.

2016 FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE

CHAPTER I AVAILABLE WEAPONS TO COMBAT DISCOVERY ABUSE

ITEMS: 1.01 through 1.07

ITEM 1.01 | IN GENERAL

Full and fair discovery is essential to the truth-finding function of our justice system, and parties and non-parties alike must comply not only with the technical provisions of the discovery rules, but also with the purpose and spirit of those rules.¹ The search for truth and justice as our court system and constitution demand can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise or superior trial tactics.²

Courts should not countenance or tolerate actions during litigation that are not forthright and that are designed to delay and obfuscate the discovery process.³

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Footnotes

¹ *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115, 1118 (Fla. 2014).

² *Id.*, at 1133.

³ *Id.*, at 1118.

ITEM 1.02 | FLORIDA RULE OF CIVIL PROCEDURE 1.380

The language of Fla. R. Civ. P. 1.380 applies to all discovery: depositions, admissions, responses to requests to produce, etc. "If a deponent fails to answer a question propounded or submitted under rule 1.310 or 1.320, or a corporation or other entity fails to make a designation under rule 1.310(b)(6) or 1.320(a), or a party fails to answer an interrogatory submitted under rule 1.340, or if a party in response to a request for inspection submitted under rule 1.350 fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, or if a party in response to a request for examination of a person submitted under rule 1.360(a) objects to the examination, fails to respond that the examination will be permitted as requested, or fails to submit to or to produce a person in that party's custody or legal control for examination, the discovering party may move for an order compelling an answer, or a designation or an order compelling inspection, or an order compelling an examination in accordance with the request." The losing party shall be required to pay "reasonable expenses incurred," including attorneys' fees, in obtaining an order compelling discovery or successfully opposing the motion.⁴

Upon proper showing, the full spectrum of sanctions may be imposed for failure to comply with the order.⁵ The rule sets out possible alternative sanctions: adopting as established facts the matters which the recalcitrant party refused to address or produce; prohibiting the disobedient party from supporting or opposing designated claims or defenses;⁶ prohibiting the introduction of certain evidence;⁷ striking pleadings, which could result in a dismissal of the action; the entry of a default judgment, including an order for liquidated damages;⁸ contempt of court; and the assessment of reasonable expenses or attorney's fees.⁹ The courts have crafted a few additional possibilities: fines;¹⁰ granting a new trial;¹¹ and, in the case of lost or destroyed evidence, creation of an evidentiary inference¹² or a rebuttable presumption.¹³ The court may rely on its inherent authority to impose drastic sanctions when a discovery-related fraud has been perpetrated on the court.¹⁴

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Footnotes

⁴ Fla. R. Civ. P. 1.380(a)(4).

⁵ Fla. R. Civ. P. 1.380(b).

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

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

⁸ *DYC Fishing, Ltd. v. Martinez*, 994 So. 2d 461, 462 (Fla. 3d DCA 2008) (reversing trial court's entry of default final judgment awarding unliquidated damages to the plaintiff and stating that in Florida, default judgments only entitle the plaintiff to liquidated damages). *Bertrand v. Belhomme*, 892 So. 2d 1150 (Fla. 3d DCA 2005)

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

¹⁰ *Evangelos v. 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).

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

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

¹³ *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987) (rebuttable presumption of negligence exists if patient demonstrates that absence of hospital records hinders patient's ability to establish prima facie case); *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701

(Fla. 4th DCA 1995) (destruction or unexplained absence of evidence may result in permissible shifting of burden of proof).

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

ITEM 1.03 | AWARD OF EXPENSES AND FEES ON MOTION TO COMPEL

A motion under Fla. R. Civ. P. 1.380(a)(2) is the most widely used vehicle for seeking sanctions as a result of discovery abuses. Subsection (4) provides:

Award of Expenses of Motion. If the motion 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 movant failed to certify in the motion that a good faith effort was made to obtain the discovery without court action, 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. (emphasis added).

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

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

Generally, where a party fails to respond to discovery and does not give sound reason for its failure to do so, sanctions should be imposed.¹⁵ For purposes of assessing failure to make discovery, an evasive or incomplete answer must be treated as a failure to answer.¹⁶ The punishment should fit the fault.¹⁷ Trial courts are regularly sustained on awards of attorney fees for discovery abuse.¹⁸ The same holds for award of costs and expenses.¹⁹

Failure to make a good faith effort to obtain the discovery without court action, and to so certify in the motion to compel, will be fatal to obtaining relief under subsection (4) of the rule.

Expenses, including fees, can be awarded without a finding of bad faith or willful conduct.²⁰ The only requirement under Fla. R. Civ. P. 1.380 is that the motion to compel be granted and that opposition was not justified. The party to be sanctioned is entitled to a hearing before the sanction is imposed.²¹

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Footnotes

¹⁵ *Ford Motor Co. v. Garrison*, 415 So. 2d 843 (Fla. 1st DCA 1982).

¹⁶ Fla. R. Civ. P. 1.380(a)(3).

¹⁷ *Eastern Airlines, Inc. v. Dixon*, 310 So. 2d 336 (Fla. 3d DCA 1975).

¹⁸ *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).

¹⁹ *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).

²⁰ 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).

²¹ *Burt v. S.P. Healthcare Holdings, LLC* (citation pending).

ITEM 1.04 | EXCLUSION OF EXPERT WITNESSES AND/OR THEIR OPINIONS

A recurring problem in trial practice is late disclosure of expert witnesses and/or their opinions. These issues should be anticipated by counsel or by the court and specifically addressed at pretrial conference and in case management and pretrial orders. An orderly trial is most likely to occur when the judge enforces discovery and pretrial orders strictly and requires each party to make full and proper disclosure before trial. The Fourth District Court of Appeal in *Central Square Tarragon LLC v. Great Divide Insurance Company*,²² reiterated the need to "strictly enforce" provisions of pretrial stipulations. This prevents last minute gamesmanship, and makes disruption of the trial and error on appeal less likely.

Generally, last-minute additions of witnesses and substantial changes to testimony should not be admissible at trial. Failure to exclude such testimony prejudices the opposing party and constitutes reversible error.²³ A party who fails to disclose a substantial reversal in an expert's opinion does so at his peril.²⁴

A claimed violation of the pre-trial order or other discovery violation regarding any witness, including experts, is subject to the *Binger v King Pest Control*²⁵ test before a trial court can consider exclusion or other remedy.

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."²⁶

As with other discovery violations, the sanction must fit the offense. Striking the entire testimony of an expert witness is the most drastic remedy available.²⁷

Under many circumstances, barring the expert from testifying will be too harsh.²⁸ 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.²⁹

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.³⁰ The same rule applies to an expert

who could offer key rebuttal evidence.³¹ 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.³²

Discovery disputes can sometimes arise over the role of experts retained by a party. In *Carrero v. Engle Homes, Inc.*,³³ 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.³⁴ 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.³⁵

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Footnotes

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

²³ *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).

²⁴ *Gouveia v. F. Leigh Phillips, M.D.*, 823 So. 2d 215, 222 (Fla. 4th DCA 2002).

²⁵ 401 So. 2d 1310 (Fla. 1981).

²⁶ *Office Depot*, at 590

²⁷ *Lobue v. Travelers Insurance Company*, 388 So. 2d 1349, 1351 (Fla. 4th DCA 1980).

²⁸ *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).

²⁹ *Keller Industries*, *supra*, at 1203.

³⁰ *Keller Industries*; *Lobue*.

³¹ *Griever v. DiPietro*, 708 So. 2d 666, 672 (Fla. 4th DCA 1998).

³² *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).

³³ 667 So. 2d 1011 (Fla. 4th DCA 1996)

³⁴ *Carrero* at 1012.

³⁵ *Id.*

ITEM 1.05 | REMEDIES UNDER FLA. STAT. §57.105

Fla. Stat. § 57.105 authorizes courts to award sanctions against parties who raised claims and defenses not supported by material facts.³⁶

§ 57.105 can be used in the discovery arena also. § 57.105(2) specifically provides that expenses, including fees and other losses, may be awarded for the assertion of or response to any discovery demand that is considered by the court to have been taken primarily for the purpose of unreasonably delay. § 57.105(6) Provides that the provisions of § 57.105 are supplemental to other sanctions or remedies that are available under law or under court rules.

It is sanctionable to first object to a discovery request and, after the objections are overruled, respond that no such documents exist. Such conduct has been found to constitute discovery abuse and improper delaying tactics.³⁷

Sanctions have been awarded when a party filed a motion to dismiss that was unsupported by the facts and the law, and the same party continually objected to discovery requests, the subject of which was directed to the issues raised in the motion to dismiss.³⁸

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Footnotes

³⁶ 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.

³⁷ See *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189, 1193 n. 2 (Fla. 4th DCA 1999), disapproved of on other grounds by *Fla. Convalescent Ctrs. V. Somberg*, 840 So 2d 998 (Fla. 2003) (citing *Greenleaf v. Amerada Hess Corp.*, 626 So 2d 263, 264 n. 1 (Fla. 4th DCA 1993).

³⁸ *Pronman v. Styles*, 163 So. 3d 535 (Fla. 4th DCA 2015).

ITEM 1.06 | SANCTIONS FOR FAILURE TO OBEY COURT ORDER

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

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

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

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

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

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

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

Such sanctions may be imposed only where the failure to comply with the court's order is attributable to the party. If the failure is that of another party or of a third person whose conduct is not chargeable to the party, no such sanction may be imposed.³⁹ 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.⁴⁰

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.

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Footnotes

³⁹ *Zanathy v. Beach Harbor Club Assoc.*, 343 So. 2d 625 (Fla. 2d DCA 1977).

⁴⁰ *Haverfield Corp. v. Franzen*, 694 So. 2d 162 (Fla. 3d DCA 1997).

ITEM 1.07 | REQUIRED DUE PROCESS AND FINDINGS OF FACT

The trial court must hold a hearing and give the disobedient party the opportunity to be heard. Therefore, it is reversible error to award sanctions before the hearing on the motion to compel takes place.⁴¹ By the same token, striking a party's pleadings before the deadline for compliance with discovery requires reversal.⁴²

If the trial court dismisses an action or enters a default as a sanction for discovery violations, a finding that the violations were willful or deliberate must be made.⁴³ If the offending party is represented by counsel, detailed findings must be included in the order, as delineated in *Kozel v. Ostendorf*.⁴⁴ If the order does not contain such findings, it will be reversed.⁴⁵ *Kozel* findings are not required unless the recalcitrant party is represented by counsel.⁴⁶

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.⁴⁷

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.⁴⁸ Further, issuance and service of the court order/process must be proper, for otherwise, that paper is nothing more than an invitation, as only through properly issued and served process does the court obtain jurisdiction over the person from whom action is sought (and without jurisdiction there can be no "enforcement").

Discovery sanctions should be "commensurate with the offense."⁴⁹ 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.⁵⁰ The Fourth District further found in *Fisher*:

The striking of a party's pleadings is justified only where there is "a deliberate and contumacious disregard

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

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

Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993). The emphasis should be on the prejudice suffered by the opposing party. See *Ham v. Dunmire*, 891 So. 2d 492, 502 (Fla. 2004). After considering these factors, if a sanction less severe than the striking of a party's pleadings is "a viable alternative," then the trial court should utilize such alternatives. *Kozel*, 629 So. 2d at 818. "The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation" and "[t]his purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal" or the striking of a party's pleadings. *Id.*⁵¹

The failure to make the required findings in an order requires reversal.⁵²

In *Ham v. Dunmire*,⁵³ 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*,⁵⁴ the court held that the litigant's participation, while "extremely important," is only one of several factors which must be weighed:

[A] litigant's involvement in discovery violations or other misconduct is not the exclusive factor but is just one of the factors to be weighed in assessing whether dismissal is the appropriate sanction. Indeed, the fact

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

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

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Footnotes

⁴¹ *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).

⁴² *Stern v. Stein*, 694 So. 2d 851 (Fla. 4th DCA 1997).

⁴³ *Rose v. Clinton*, 575 So. 2d 751 (Fla. 3d DCA 1991); *Zaccaria v. Russell*, 700 So. 2d 187 (Fla. 4th DCA 1997).

⁴⁴ 629 So. 2d 817 (Fla. 1993).

⁴⁵ *Zaccaria v. Russell*, 700 So. 2d 187 (Fla. 4th DCA 1997).

⁴⁶ *Sukonik v. Wallack*, No. 14-2197 (Fla. 3d DCA 2015).

⁴⁷ *Medina v. Florida East Coast Rwy.*, 866 So. 2d 89 (Fla. 3d DCA 2004), appeal after remand and remanded, 921 So. 2d 767 (2006).

⁴⁸ See generally, *Powerline Components, Inc. v. Mil-Spec Components, Inc.*, 720 So. 2d 546, 548 (Fla. 4th DCA 1998); *Edlund v. Seagull Townhomes Condominium Assoc., Inc.*, 928 So. 2d 405 (Fla. 3d DCA 2006); *American Pioneer Casualty Insurance Co. v. Henrion*, 523 So. 2d 776 (Fla. 4th DCA 1988); *Tubero v. Ellis*, 472 So. 2d 548, 550 (Fla. 4th DCA 1985).

⁴⁹ *Drakeford v. Barnett Bank of Tampa*, 694 So. 2d 822, 824 (Fla. 2d DCA 1997); *Cape Cave Corporation v. Charlotte Asphalt. Inc.*, 384 So. 2d 1300, 1301 (Fla. 2d DCA 1980), appeal after remand, 406 So. 2d 1234 (1981).

⁵⁰ *Fisher v. Prof'l. Adver. Dirs. Co., Inc.*, 955 So. 2d 78 (Fla. 4th DCA 2007).

⁵¹ *Fisher*, 955 So. 2d at 79-80.

⁵² 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).

⁵³ 891 So. 2d 492 (Fla. 2004).

⁵⁴ Cited supra

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CHAPTER II REMEDIES FOR LOSS OR DESTRUCTION OF EVIDENCE

ITEMS: 2.00 through 2.02

ITEM 2.00 | CHAPTER 2 INTRO

Evidence can be lost or destroyed. It can be lost or destroyed by the defendant or the plaintiff and the act of losing or destroying evidence can be negligent or intentional. Evidence can be lost or destroyed before any claim involving the evidence is made or after a lawsuit is pending. This issue is commonly referred to as spoliation, and an entire handbook can be written concerning these issues.

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ITEM 2.01 | SPOILIATION CLAIMS

The essential elements of a spoliation 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.¹

The Florida Supreme Court clarified the application of spoliation law to parties and nonparties. In *Martino v. Wal-Mart Stores, Inc.*,² the Court held that the remedy for spoliation against a first party defendant is not an independent cause of action for spoliation. Rather, the remedy is imposition of discovery sanctions and a rebuttable presumption of negligence for the underlying tort. The Court did not consider whether there is a cause of action against a third party for spoliation of evidence. The Court also did not consider whether a counterclaim against a plaintiff may be made for spoliation of evidence.

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.³ 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.⁴ 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.⁵

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Footnotes

¹ *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).

² 908 So. 2d 342 (2005).

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

⁴ *Townsend v. Conshor*, 832 So. 2d 166 (Fla. 2d DCA 2002).

⁵ *Id.*

ITEM 2.02 | SANCTIONS FOR FIRST PARTY SPOILIATION

The Court, in *Martino*, determined that the remedy against a first party defendant for spoliation of evidence should be the Valcin presumption and sanctions, if found to be necessary.⁶ To determine whether sanctions are warranted and if so, what sanction(s) is appropriate, the court shall determine (1) whether the evidence existed at one time, (2) whether the spoliator had a duty to preserve the evidence, and (3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense.⁷

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.⁸

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

In *Tramel v. Bass*,⁹ 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.¹⁰

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.¹¹ A finding of bad

faith is not imperative.¹² Conversely, in cases where evidence is destroyed unintentionally and the prejudice is not fatal to the other party, lesser sanctions should usually be applied.¹³

In *Figgie International, Inc. v. Alderman*,¹⁴ the trial court entered a default judgment against a defendant for numerous discovery violations, including destruction of relevant documents. On appeal, the Third District Court of Appeal affirmed. It agreed with the trial court that defendant violated the discovery rules willfully and in bad faith, and that the most severe sanction was justified.

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.*¹⁵ In that case, the plaintiff and her counsel apparently tried to intimidate a critical witness to prevent him from testifying. The plaintiff also refused to allow the witness's deposition to be taken though the court had entered an order compelling her to consent. The court's opinion explained that consent to the deposition was required under the applicable German law.¹⁶ Apparently, German law would have otherwise made the discussions between the plaintiff and the witness privileged.

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

Hernandez v. Pino,¹⁸ 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.¹⁹

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⁶ *Martino*, at 347. See, *Public Health Trust v. Valcin*, 507 So. 2d 596 (Fla. 1987).

⁷ *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777 (Fla. 4th DCA 2006).

⁸ *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).

⁹ *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996).

¹⁰ 672 So. 2d at 84 (citations and footnotes omitted).

¹¹ *Sponco Manufacturing*, supra.

¹² *Id.*

¹³ *Aldrich v. Roche Biomedical Laboratories, Inc.*, 737 So. 2d 1124 (Fla. 5th DCA 1999).

¹⁴ 698 So. 2d 563 (Fla. 3d DCA 1997).

¹⁵ 710 So. 2d 156 (Fla. 3d DCA 1998).

¹⁶ *Id.* at 157.

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

¹⁸ 482 So. 2d 450 (Fla. 3d DCA 1986).

¹⁹ *Aldrich v. Roche Biomedical Laboratories, Inc.*, supra.

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CHAPTER III REMEDIES FOR FRAUD ON THE COURT

ITEMS: 3.01 through 3.02

ITEM 3.01 | REMEDIES FOR FRAUD ON THE COURT

A trial court has the inherent authority to dismiss an action as a sanction when a party has perpetuated a fraud on the court. However, this power should be exercised cautiously, sparingly, and only upon the most blatant showing of fraud, pretense, collusion, or other similar wrong doing.¹ 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."²

Although a finding of fraud on the court generally has been premised on a proven outright lie on a critical issue or the intentional destruction or alteration of determinative evidence, whatever scheme or fraud a court finds must be supported by clear and convincing evidence that goes to "the very core issue at trial."³

A trial court's decision on whether to dismiss a case for fraud on the court is reviewed under a somewhat narrowed abuse of discretion standard, to take into account that the dismissal must be established by clear and convincing evidence.⁴ For the trial court to properly exercise its discretion, there must be an evidentiary basis to dismiss the case. An evidentiary hearing is almost always necessary to provide clear and convincing evidence to support dismissal for fraud, even where neither party requests the hearing.⁵ In a recent case, the third district court of appeal remanded the case to the trial court for an evidentiary hearing where the trial court had dismissed the case with prejudice based on fraud on the court.⁶

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Footnotes

¹ *Granados v. Zehr*, 979 So. 2d 1155 (Fla. 5th DCA 2008).

² *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998).

³ *E. I. Dupont DeNemours & Co. v. Sidran*, 140 So. 3d 620, 623 (Fla. 3d DCA 2014).

⁴ *Gautreaux v. Maya*, 112 So. 3d 146, 149 (Fla. 5th DCA 2013).

⁵ *Gilbert v. Eckerd Corp. of FL, Inc.*, 34 So. 3d 773 (Fla. 4th DCA 2010).

⁶ *Diaz v. Home Depot USA, Inc.*, 137 So. 3d 1195 (Fla. 3d DCA 2014).

ITEM 3.02 | SELECTED CASES ON FRAUD ON THE COURT

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

Misconduct that falls short of the rigors of this test, including inconsistency, nondisclosure, poor recollection, dissemblance, and even lying, is insufficient to support a dismissal for fraud, and potential harm must be managed through cross-examination. In some cases, even where fraud is shown, the trial court may impose lesser sanctions than dismissal when warranted.

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

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

<p><i>Johnson v. Swerdzewski</i>, 935 So. 2d 57 (Fla. 1st DCA 2006)</p>	<p>JNOV after verdict</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Hutchinson v. Plantation Bay Apartments, LLC</i>, 931 So. 2d 957 (Fla.1st DCA 2006)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>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.</p>

<p><i>Distefano v. State Farm Mut. Auto. Ins. Co.</i>, 846 So. 2d 572 (Fla. 1st DCA 2003)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>Plaintiff gave false deposition testimony by not disclosing subsequent 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.</p>
<p><i>Baker v. Myers Tractor Services, Inc.</i>, 765 So. 2d 149 (Fla. 1st DCA 2000)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>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."</p>

Second DCA			
<p><i>Pena v. Citizens Prop. Ins. Co.</i>, 88 So. 3d 965 (Fla. 2d DCA 2012)</p>	<p>Dismissal</p>	<p>REVERSED in favor of fees and costs sanction</p>	<p>Affidavits submitted by Plaintiffs in opposition to summary judgment were false hampering the presentation of Defendant's procedural defense; fraud was proven, but dismissal with prejudice too severe where liability was admitted.</p>
<p><i>King v. Taylor</i>, 3 So. 3d 405 (Fla. 2d DCA 2009)</p>		<p>Dismissal of Appeal</p>	<p>Divorce support enforcement case in which former husband filed appeal from lower court ruling but then sent fraudulent correspondence to the entity responsible for disbursing the military retirement benefits and also supplied it with phony court orders in an effort to unburden him from requirements of lower court's order.</p>

<p><i>Ramey v. Haverty Furniture Cos. Inc.</i>, 993 So. 2d 1014 (Fla. 2d DCA 2008)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>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.</p>
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<p><i>Kubel v. San Marco Floor & Wall, Inc.</i>, 967 So. 2d 1063 (Fla. 2d DCA 2007)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Miller v. Nelms</i>, 966 So. 2d 437 (Fla. 2d DCA 2007)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>Complaint was dismissed as sham pleading; App ct found that trial court lacked evidentiary basis for dismissal.</p>
<p><i>Howard v. Risch</i>, 959 So. 2d 308 (Fla. 2d DCA 2007)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>

<p><i>Myrick v. Direct General Ins. Co.</i>, 932 So. 2d 392 (Fla. 2d DCA 2006)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Laschke v. R. J. Reynolds Tobacco Co.</i>, 872 So. 2d 344 (Fla. 2d DCA 2004)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>

<p><i>Jacob v. Henderson</i>, 840 So. 2d 1167 (Fla. 2d DCA 2003)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Morgan v. Campbell</i>, 816 So. 2d 251 (Fla. 2d DCA 2002)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>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."</p>

Third DCA			
<p><i>Lerner v. Halegua</i>, 154 So. 3d 445 (Fla. 3d DCA 2014)</p>	<p>Order Striking Pleadings</p>	<p>REVERSED and remanded</p>	<p>Trial court based finding of fraud on still digital photos from surveillance video. Because the underlying video was not properly authenticated, there was not competent clear and convincing evidence of fraudulent litigation conduct.</p>
<p><i>E.I. DuPont De Nemours & Co. v. Sidran</i>, 140 So. 3d 620 (Fla. 3d DCA 2014)</p>	<p>Order Striking Pleadings</p>	<p>REVERSED and remanded for new trial</p>	<p>Trial court did not base findings of fraud on the court on evidence of record and findings were inconsistent with evidence.</p>
<p><i>Diaz v. Home Depot USA, Inc.</i>, 137 So. 3d 1195 (Fla. 3d DCA 2014)</p>	<p>Dismissal</p>	<p>REVERSED and remanded for evidentiary hearing</p>	<p>Trial court did not provide proper notice and hold hearing from which to make requisite findings supporting dismissal.</p>

<p><i>Faddis v. City of Homestead</i>, 121 So. 3d 1134 (Fla. 3d DCA 2013)</p>	<p>Striking of Pleadings</p>	<p>Affirmed</p>	<p>Record demonstrates plaintiff "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 of fact or unfairly hampering the presentation of the opposing party's claim or defense."</p>
<p><i>Empire World Towers, LLC v. Cdr Créances</i>, 89 So. 3d 1034 (Fla. 3d DCA 2012)</p>	<p>Striking of Pleadings</p>	<p>Affirmed as to certain Defendants, REVERSED as to one Defendant</p>	<p>Trial court made specific factual findings supported by clear and convincing evidence that Defendants attempted to defraud the court and conceal ownership interests by: (1) producing fabricated corporate documents; (2) committing perjury in affidavits and depositions; and (3) suborning the perjury of material witnesses and providing them with scripts of lies to repeat under oath;</p>

			supported by overwhelming clear and convincing evidence.
<i>Suarez v. Benihana Nat'l of Fla. Corp.</i> , 88 So. 3d 349 (Fla. 3d DCA 2012)	Dismissal	VACATED and REMANDED to Reinstate Case	P.I. case alleging failure to provide adequate security; answers in depo in P.I. case differed from testimony in criminal case three years earlier; record fails to show clearly and convincingly a scheme to hide the truth; contradictions do not "go to the very heart" of claims in P.I. case.
<i>Sky Dev., Inc. v. Vistaview Dev., Inc.</i> , 41 So. 3d 918 (Fla. 3d DCA 2010)	Dismissal	Affirmed	Officers of plaintiff corporation passed note to witness during depo and text message to witness during trial; ample evidence for the trial court to conclude unconscionable scheme was underway.

<p><i>Hair v. Morton</i>, 36 So. 3d 766 (Fla. 3d DCA 2010)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>P.I. Plaintiff failed to disclose past back problems; burden on moving party to prove fraud, which almost always requires evidentiary hearing; inconsistencies may bar some back claims but impact on liability and remaining claims best dealt with on cross examination.</p>
<p><i>Gilbert v. Eckerd Corp. of Fla, Inc.</i>, 34 So. 3d 773 (Fla. 3d DCA 2010)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>Premises liability case; Plaintiff claimed lost wages from a company she never worked for according to deposition testimony. Evidence on employment was conflicting, so trial judge should have held a hearing and made findings to resolve inconsistency; but if matter would not meet summary judgment standards, then it is not proper for dismissal.</p>

<p><i>Laurore v. Miami Auto. Retail, Inc.</i>, 16 So. 3d 862 (Fla. 3d DCA 2009)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>Inconsistencies in sworn discovery responses in P.I. case may have given rise to dismissal of some claims but not entire case; failure to disclose preexisting disability due to mental stress may result in loss of some damage claims but not liability issue and back injury claims.</p>
<p><i>Ibarra v. Izaguirre</i>, 985 So. 2d 1117 (Fla. 3d DCA 2008)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>Discovery response did not reveal prior slip and fall in which there was no attorney and no case filed; could be misinterpretation not fraud.</p>
<p><i>Papadopoulos v. Cruise Ventures</i>, 974 So. 2d 418 (Fla. 3d DCA 2007)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>Plaintiff made material representations about medical and litigation history that were established in the record.</p>
<p><i>Austin v. Liquid Distributors, Inc.</i>, 928 So. 2d 521 (Fla. 3d DCA 2006)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>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.</p>

<p><i>Medina v. Florida East Coast Ry. L.L.C.</i>, 921 So. 2d 767 (Fla. 3d DCA 2006)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Canaveras v. Continental Group, Ltd.</i>, 896 So. 2d 855 (Fla. 3d DCA 2005)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Rios v. Moore</i>, 902 So. 2d 181 (Fla. 3d DCA 2005)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>Although plaintiff did not accurately describe her injuries in a prior accident, inconsistencies did not rise to level of fraud.</p>

<p><i>Bertrand v. Belhomme</i>, 892 So. 2d 1150 (Fla. 3d DCA 2005)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Long v. Swofford</i>, 805 So. 2d 882 (Fla. 3d DCA 2001)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>P.I. Plaintiff lied about pre-existing back injury; false or misleading statement given under oath concerning issues central to her case amounted to fraud.</p>
<p><i>Metropolitan Dade County v. Martinsen</i>, 736 So. 2d 794 (Fla. 3d DCA 1999)</p>	<p>Denial of Motion to Dismiss</p>	<p>REVERSED and case dismissed</p>	<p>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</p>

			she had forgotten about the incidents, injuries and treatment; "[t]he integrity of the civil litigation process depends on truthful disclosure of facts."
<i>Hanono v. Murphy</i> , 723 So. 2d 892 (Fla. 3d DCA 1998)	Denial of Motion to Dismiss	REVERSED and case dismissed	Plaintiff found guilty of perjury for testimony in the very case in which dismissal was sought; trial judge ruled that case should go before jury; DCA reversed because of fraudulent attempts to subvert the process.
<i>Young v. Curgil</i> , 358 So. 2d 58 (Fla. 3d DCA 1978)	Dismissal	REVERSED	Trial court inferred collusion on the part of plaintiffs based on suspicious circumstances; matter debatable and the issue should have been determined by the jury; dismissal should be used cautiously and sparingly and only upon blatant showing of fraud, pretense, collusion. Fourth DCA

Fourth DCA			
<p><i>Herman v. Intracoastal Cardiology Ctr.</i>, 121 So. 3d 583 (Fla. 4th DCA 2013)</p>	<p>Dismissal</p>	<p>AFFIRMED</p>	<p>Party's diary contradicted his testimony and false testimony he procured from another witness at trial. Where repeated fabrications undermine the integrity of a party's entire case, the trial court has the right and obligation to deter fraudulent claims from proceeding in court.</p>
<p><i>Chacha v. Transp. USA, Inc.</i>, 78 So. 3d 727 (Fla. 4th DCA 2012)</p>	<p>Dismissal</p>	<p>REVERSED and remanded to make specific findings</p>	<p>P.I. case in which Plaintiff allegedly concealed prior back problems from treating doctors and defendants; abuse of discretion to dismiss an action without express written findings of fact</p>

<p><i>Bass v. City of Pembroke Pines</i>, 991 So. 2d 1008 (Fla. 4th DCA 2008)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>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.</p>
<p><i>Sunex Intern Inc. v. Colson</i>, 964 So. 2d 780 (Fla. 4th DCA 2007)</p>	<p>Dismissal on Motion to Strike</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Gray v. Sunburst Sanitation Corp.</i>, 932 So. 2d 439 (Fla. 4th DCA 2006)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>Judge's order sets out proper standard and analysis; PCA.</p>

<p><i>Cherubino v. Fenstersheib and Fox, P.A.</i>, 925 So. 2d 1066 (Fla. 4th DCA 2006)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Cross v. Pumpco, Inc.</i>, 910 So. 2d 324, (Fla. 4th DCA 2005)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>

<p><i>McKnight v. Evancheck</i>, 907 So. 2d 699 (Fla. 4th DCA 2005)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>Extent of misrepresentation and concealment of prior injuries set forth in prison records justified dismissal.</p>
<p><i>Piunno v. R. F. Concrete Const., Inc.</i>, 904 So. 2d 658 (Fla. 4th DCA 2005)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>Extent of misrepresentation and concealment of prior injuries relating to same damages alleged in instant case justified dismissal.</p>
<p><i>Bob Montgomery Real Estate v. Djokic</i>, 858 So. 2d 371 (Fla. 4th DCA 2003)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>

<p><i>Amato v. Intindola</i>, 854 So. 2d 812 (Fla 4th DCA 2003)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>Court compared testimony to surveillance video and dismissed for fraud; DCA reviewed same record and REVERSED based on <i>Jacob, supra</i>.</p>
<p><i>Arzuman v. Saud</i>, 843 So. 2d 950 (Fla. 4th DCA 2003)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>
<p><i>Savino v. Florida Drive In Theatre Management, Inc.</i>, 697 So. 2d 1011 (Fla. 4th DCA 1997)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>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.</p>

Fifth DCA			
<p><i>Rocka Fuerta Constr., Inc. v. Southwick, Inc.</i>, 103 So. 3d 1022 (Fla. 5th DCA 2013)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>Case plainly fails to present the type of egregious misconduct or extreme circumstance to support dismissal with prejudice. Appellant's behavior is simply not fraud.</p>
<p><i>Gautreaux v. Maya</i>, 112 So. 3d 146 (Fla. 5th DCA 2013)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>The facts of this case do not meet the narrow, stringent standard required for dismissal for fraud on the court. Although Plaintiff showed a "testimonial discrepancy," he failed to show "a scheme calculated to evade or stymie discovery of facts central to the case.</p>
<p><i>Perrine v. Henderson</i>, 85 So. 3d 1210 (Fla. 5th DCA 2012)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>Trial judge held two thorough hearings and determined that Plaintiff made numerous material misrepresentations regarding his medical history and current injuries, which were core issues in the case.</p>

<p><i>Bologna v. Schlanger</i>, 995 So. 2d 526 (Fla. 5th DCA 2008)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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 Cox v. Burke test (see Cox case below).</p>
<p><i>Villasenor v. Martinez</i>, 991 So. 2d 433 (Fla. 5th DCA 2008)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>

<p><i>Granados v. Zehr</i>, 979 So. 2d 1155 (Fla. 5th DCA 2008)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>Plaintiff in PI case misrepresented prior condition but revealed names of treating physicians who revealed true problems so defense not hampered.</p>
<p><i>Saenz v. Patco Trans. Inc.</i>, 969 So. 2d 1145 (Fla. 5th DCA 2007)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>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.</p>
<p><i>Gehrmann v. City of Orlando</i>, 962 So. 2d 1059 (Fla. 5th DCA 2007)</p>	<p>Dismissal</p>	<p>REVERSED</p>	<p>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.</p>

<p><i>Brown v. Allstate Ins. Co.</i>, 838 So. 2d 1264 (Fla. 5th DCA 2003)</p>	<p>Dismissal</p>	<p>Affirmed</p>	<p>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>
<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. 5th 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 stymie discovery on issues central to her case. The integrity of the civil litigation process depends on truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way. Although Cox insists on her constitutional right to have her case heard, she can, by her own conduct, forfeit that right. This is an area where the trial court is and should be vested with discretion to</p>
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			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.
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Footnotes

*Cox case is frequently cited as authority in cases involving dismissal for fraud on the court.

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CHAPTER IV DISCOVERY OF WORK PRODUCT AND TRADE SECRETS

ITEMS: 4.00 through 4.04

ITEM 4.00 | CHAPTER 4 INTRO

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

The standard to be applied in the First, Second, Third and Fifth District Courts in determining whether documents are protected by the work product doctrine, is whether the document was prepared in response to some event which foreseeably could be made the basis of a claim in the future.³ The Fourth District, for years, applied a slightly stricter standard, finding that documents were not work product unless they were prepared when the probability of litigation was substantial and imminent,⁴ or, they were prepared after the claim had already accrued.⁵ However, the Court recently addressed the issue again in the case of *Millard Mall Servs. v. Bolta*,⁶ and the stricter standard was relegated to the dissenting opinion. See that case for a discussion of the work product privilege and the circumstances under which it has been applied in the various appellate districts.

When a party asserts the work product privilege in response to a request for production, the party need only assert in their response the objection and reason for the objection. It is not required that the objecting party file with the objection an affidavit documenting that the incident report was prepared in anticipation of litigation. If the opposing party wants to pursue the request over the objection, they may move to compel production. If the motion to compel challenges the status of the document as work product, defendants must then show that the documents were prepared in anticipation of litigation.⁷

Under Fla. R. Civ. P. 1.280(b)(3), a party may obtain discovery of an opposing party's "documents ... prepared in anticipation of litigation ... only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Therefore, the party requesting such privileged material has a considerable burden to show that

the party has both a significant need and an undue hardship in obtaining a substantial equivalent.⁸ Need and undue hardship "must be demonstrated by affidavit or sworn testimony."⁹ Documents protected by the work product immunity must not be lightly invaded, but only upon a particularized showing of need satisfying the criteria set forth in Rule 1.280. If the moving party fails to show that the substantial equivalent of the material cannot be obtained by other means the discovery will be denied.¹⁰

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.¹¹

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Footnotes

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

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

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

⁴ *Liberty Mut. Fire Ins. Co. v. Bennett*, 883 So. 2d 373, 374 (Fla. 4th DCA 2001).

⁵ *Int'l House of Pancakes (IHOP) v. Robinson*, 8 So. 3d 1180 (Fla. 4th DCA 2009).

⁶ 155 So. 3d 1272 (Fla. 4th DCA 2015).

⁷ Fla. R. Civ. P. 1.350. See also *Wal-Mart Stores, Inc. v. Weeks*, 696 So. 2d 855 (Fla. 2d DCA 1997).

⁸ *Metric Eng'g., Inc v.Small*, 861 So. 2d 1248, 1250 (Fla. 1st DCA 2003); *CSX Transp., Inc. v. Carpenter*, 725 So. 2d 434, 435 (Fla. 2d DCA 1999).

⁹ *N. Broward Hosp. Dist. v. Button*, 592 So. 2d 367 (Fla. 4th DCA 1992).

¹⁰ *S. Bell Tel. & Tel Co. v. Deason*, 632 So. 2d 1377, 1385 (Fla. 1994).

¹¹ See, *Northup v. Howard W. Acken, M.D.*, 865 So. 2d 1267 (Fla. 2004).

ITEM 4.01 | TRADE SECRETS

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

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

Section 90.506, Florida Statutes provides:

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

Trade secrets are privileged under section 90.506, Florida Statutes, but the privilege is not absolute. *Freedom Newspapers, Inc., v. Egly*, 507 So. 2d 1180, 1184 (Fla. 2d DCA 1987). Information constituting trade secrets can be obtained in discovery under certain in certain circumstances. To determine if those circumstances exist, a trial court generally must follow a three-step process:

- (1) determine whether the requested production constitutes a trade secret;
- (2) if the requested production constitutes a trade secret, determine whether there is a reasonable necessity for production; and
- (3) if production is ordered, the trial court must set forth its findings.

Gen. Caulking Coating Co., Inc. v. J.D. Waterproofing, Inc., 958 So. 2d 507, 508 (Fla. 3d DCA 2007).

Trade secrets are defined in Florida's Uniform Trade Secrets Act as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:

a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. § 688.002(4), Fla. Stat. (2015).

"When a party asserts the need for protection against disclosure of a trade secret, the court must first determine whether, in fact, the disputed information is a trade secret [which] usually requires the court to conduct an in camera review." Summitbridge Nat'l Invs. V. 1221 Palm Harbor, L.L.C.12 A trial court may also conduct an evidentiary hearing. Bright House Networks, LLC v. Cassidy, 129 So. 3d 501, 506 (Fla. 2d DCA 2014). Such a hearing may include expert testimony. Lovell Farms, Inc. v. Levy, 644 So. 2d 103, 105 (Fla. 3d DCA 1994).

If the materials are trade secrets, the court must then determine whether there is a reasonable necessity for production. Gen. Caulking Coating Co., supra, at 509. Once a party has demonstrated that the information sought is a trade secret, the burden shifts to the party seeking discovery to demonstrate reasonable necessity for production. Scientific Games, Inc. v. Dittler Bros., Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991) (citing Goodyear Tire & Rubber Co. v. Coe, 359 So. 2d 1200, 1202 (Fla. 1st DCA 1978)). This requires a trial court to decide whether the need for producing the documents outweighs the interest in maintaining their confidentiality. See Gen. Caulking Coating Co., supra at 509.

If the trial court ultimately decides to order production of trade secrets, it must set forth findings on these points. Gen. Caulking Coating Co., supra at 509 ("Because the order under review makes no specific findings as to why it deemed the requested information not to be protected by the trade secret privilege we find that 'it departs from the essential requirements of the law for which no adequate remedy may be afforded to petitioners on final review.'")

(quoting *Arthur Finnieston, Inc. v. Pratt*, 673 So. 2d 560, 562 (Fla. 3d DCA 1996)).

Further, if disclosure is ordered, the trial court should take measures to limit any harm caused by the production. See § 90.506 ("When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require."). Examples of measures taken by courts to protect trade secrets include, but are not limited to, the following: (a) specifying individuals that may have access to the materials for the limited purposes of assisting counsel in the litigation; (b) requiring that the designated confidential materials and any copies be returned or destroyed at the end of the litigation; (c) allowing the disclosure of the trade secret to only counsel and not to the clients; and (d) requiring all attorneys who request access to confidential information to first sign an attached agreement and be bound by its restrictions. See *Capital One, N.A. v. Forbes*, 34 So. 3d 209, 213 (Fla. 2d DCA 2010); *Cordis Corp. v. O'Shea*, 988 So. 2d 1163, 1165 (Fla. 4th DCA 2008); *Bestechnologies, Inc. v. Trident Envtl. Sys., Inc.*, 681 So. 2d 1175, 1177 (Fla. 2d DCA 1996).

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

ITEM 4.02 | INCIDENT REPORTS

Incident reports have generally been considered not discoverable as falling within the work product privilege because they are typically prepared solely for litigation and have no other business purpose.¹³ Incident reports may be prepared for a purpose other than in anticipation of litigation, and when this is so the reports are not work product. For example, reports prepared solely for personnel reasons, such as to decide whether an employee should be disciplined, are not work product.¹⁴ However, even if an incident report is prepared for one reason not in anticipation of litigation, it will still be protected as work product if it was also prepared for litigation purposes.¹⁵

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Footnotes

¹³ *Winn-Dixie Stores v. Nakutis*, 435 So. 2d 307 (Fla. 5th DCA 1983) petition for review denied 446 So. 2d 100 (Fla. 1984); *Sligar v. Tucker*, 267 So. 2d 54 (Fla. 4th DCA 1972) cert. denied (Fla. 1972); *Grand Union Co., v. Patrick*, 247 So. 2d 474 (Fla. 3d DCA 1971).

¹⁴ See *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1385-86 (Fla. 1994).

¹⁵ *Federal Express Corp. v. Cantway*, 778 So. 2d 1052, 1053 (Fla. 4th DCA 2001); see also *District Board of Trustees of Miami-Dade County College v. Chao*, 739 So. 2d 105 (Fla. 3d DCA 1999).

ITEM 4.03 | CLAIMS FILES

A party is not entitled to discovery related to the claim file or the insurer's business practices regarding the handling of claims until the obligation to provide coverage and damages has been determined.¹⁶

However, the claims file may be discoverable when an insurer is sued for bad faith after any coverage dispute has been settled.¹⁷

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¹⁶ *State Farm Mutual Automobile Ins. Co. v. Tranchese*, 49 So. 3d 809, 810 (Fla. 4th DCA 2010); see also *Scottsdale Ins. Co. v. Camara*, 813 So. 2d 250, 251-52 (Fla. 3d DCA 2002).

¹⁷ *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1129-30 (Fla. 2005).

ITEM 4.04 | SURVEILLANCE VIDEO

Surveillance video is regarded as work product unless it is going to be used at trial, and if it is, a bright line rule has been established that it need not be produced until the surveilling party has had the opportunity to depose the subject of the video.¹⁸

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Footnotes

¹⁸ *Hankerson v. Wiley*, 154 So. 3d 511 (Fla. 4th DCA 2015).

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CHAPTER V EFFECT OF A MOTION FOR PROTECTIVE ORDER ON
PENDING DISCOVERY

ITEMS: 5.01 through 5.03

ITEM 5.01 | APPLICABLE RULE

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.

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ITEM 5.02 | DEPOSITIONS

This issue most commonly arises in connection with a scheduled or court ordered deposition. A motion for protective order does not automatically stay a pending deposition.¹ The movant must file the motion as soon as the need for protection arises, schedule the motion for hearing sufficiently in advance of the pending proceeding, and show good cause why discovery should not go forward. A party who seeks a protective order to prevent discovery must make every reasonable effort to have a motion heard before a scheduled deposition or other discovery is to occur. The movant bears the burden of showing good cause and obtaining a court order related to the pending proceeding before discovery is to be had. The failure to file a timely 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.²

As always, lawyers should cooperate with each other concerning the scheduling of both, discovery, and a hearing on a motion for a protective order. Except where the taking of a deposition is an urgent matter or where the cancellation of a scheduled deposition would be prejudicial to a party, it is generally in the best interest of both parties to have the court rule on objections to depositions prior to the time that the deposition is conducted in order to avoid the necessity for a second deposition of a witness after are later resolved. Faced with a decision as to whether to attend a deposition while a motion for protective order is pending (and for which a prior hearing is unavailable), a lawyer often must make the difficult decision of whether to waive the objection by appearing at the deposition or risking sanctions by the court for not appearing. While the filing of a motion for protective order does not act as a stay until such time as an order is procured from the court, the courts have the authority to grant or withhold sanctions for failing to appear based upon the factors enumerated in the case law, including the diligence and good faith of counsel.³

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¹ *Rahman Momenah v. Ammache*, 616 So. 2d 121 (Fla. 2d DCA 1993); citing: *Stables and CNA Ins. Co. v. Rivers*, 559 So. 2d 440 (Fla. 1st DCA 1990). See also: *Don Mott Agency, Inc. v. Pullum*, 352 So. 2d 107 (Fla. 2d DCA 1977).

² *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).

³ See: *Canella v. Bryant*, 235 So. 2d 328 (Fla. 4th DCA 1970); and *Rahman Momenah*, supra.

ITEM 5.03 | OTHER FORMS OF DISCOVERY

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

The timely filing of objections to written discovery as described above effectively stays any obligation of the party objecting to the discovery to provide same until such time as the objections are ruled upon. This does not, of course, prevent the court from granting an award of attorneys' fees or other sanctions under Rule 1.380 in the event that the court finds that the objections were without merit.

With respect to the necessity for filing a privilege log when withholding information from discovery claiming that it is privileged, see Chapter Ten, Privilege Logs.

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CHAPTER VI PROPER CONDUCT OF DEPOSITIONS

ITEMS: 6.00 through 6.03

ITEM 6.00 | CHAPTER 6 INTRO

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

The Florida Bar's "Guidelines for Professional Conduct," promulgated jointly by the Conference of Circuit Court Judges, the Conference of County Court Judges, and the Trial Lawyers Section of the Florida Bar, specifically address deposition conduct. See Section F (2008 edition), found within the 2014-2016 Professionalism Handbook. These guidelines make clear that counsel should refrain from repetitive and argumentative questions, as well as questions and comments designed to harass or intimidate a witness or opposing counsel. Counsel are also advised not to engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

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

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Footnotes

¹ 46 So. 3d 35 (Fla. 2010)

² 729 So. 2d 508, 514 (Fla. 5th DCA 1999).

ITEM 6.01 | OBJECTIONS

Rule 1.310(c) provides that “[a]ny objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner.” (Emphasis added). Speaking objections to deposition questions are frequently designed to obscure or hide the search for the truth by influencing the testimony of a witness. Objections and statements that a lawyer would not dare make in the presence of a judge are all too often made at depositions. For example:

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

The typical witness response after hearing that:

“I don’t know. I wasn’t there.”

- *“I object, you can answer if you remember.”*

The typical witness response after hearing that:

“I don’t remember.”

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

The typical witness response after hearing that:

“I don’t know. There are too many variables to compare the two.”

Objections should be asserted by stating: “I object to the form of the question.” The grounds should not be stated unless asked for by the examining attorney. When the grounds are requested, they should be stated succinctly. Coaching the deponent or suggesting answers through objection or otherwise is improper and should not occur.

Examination and cross-examination of witnesses may proceed as permitted at the trial. Rule 1.310(c). If a deponent changes his testimony after consulting with his attorney, the fact of the consultation may be brought out, but the substance of the communication generally is protected.³ Where an attorney has improperly instructed his client not to answer a question at deposition, the court may prohibit the attorney from communicating with the client concerning the topic at issue until such time as the deposition recommences.⁴

Rule 1.310(d) provides that a "motion to terminate or limit examination" may be made upon a showing that objection and instruction to a deponent not to answer are being made in violation of Rule 1.310(c).

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Footnotes

³ *Haskell Co. v. Ga. Pac. Corp.*, 684 So. 2d 297 (Fla. 5th DCA 1996).

⁴ *McDermott v. Miami-Dade County*, 753 So. 2d 729 (Fla. 1st DCA 2000).

ITEM 6.02 | EXAMINATIONS

Just as the objecting attorney is required to behave in a professional manner, the examining attorney has the same professional responsibility to treat opposing counsel and the witness or party being examined with respect and courtesy.

Overly aggressive, hostile and harassing examinations intending to intimidate a witness or party would not be permitted in the presence of a judicial officer and are likewise not permitted at deposition. Intentionally misleading a witness or party is similarly unprofessional and not permitted.

Rule 1.310(d) provides that a "motion to terminate or limit examination" may be made upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party.

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ITEM 6.03 | PROPER RESPONSES TO IMPROPER CONDUCT

If opposing counsel exhibits any of the behavior described above, the proper response is to object and concisely describe the improper conduct. Counsel should exhaust all efforts to resolve a dispute that threatens the ability to proceed with deposition.

If such action fails to resolve the issue, many judges permit counsel to telephone the court for a brief hearing when irreconcilable issues arise at deposition. Counsel may want to take a break during the deposition and call chambers, requesting a brief hearing to resolve the matter. This is especially true if the deposition is out-of-state and would be costly to reconvene. It helps to know the judge's preferences in this regard, but judges generally are aware that the use of this procedure—if not abused by counsel—provides an excellent opportunity to attempt to resolve issues on the spot before they develop into more costly and complex proceedings after the fact. However, it is important to note that these emergency hearings place the judge in a difficult position. Having not personally witnessed the behavior and without the aid of a deposition transcript, the judge's ability to issue a thoughtful, informed order may be limited.

A party or witness who reasonably believes that a deposition is "being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the witness or party," or that "objection and instruction to a deponent not to answer are being made in violation of rule 1.310(c)," may move to terminate or limit the deposition and immediately move for protective order. The most appropriate action would be to make such motion orally and concisely on the record at the time of the deposition, and follow promptly with a written motion for protective order. A copy of the deposition will need to be filed with the written motion. Rule 1.310(d) specifically provides that the taking of the deposition shall be suspended upon demand of any party or the deponent for the time necessary to make a motion for an order. All phases of the examination are subject to the control of the court, which has discretion to make any orders necessary to prevent abuse of the discovery and deposition process.

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ITEM 7.00 | CHAPTER 7 INTRO

Fla. R. Civ. P. 1.360 provides that a party may request that any other party submit to an examination by a qualified expert when the condition that is the subject of the requested examination is in controversy and the party submitting the request has good cause for the examination. The party making the request has the burden to show that the rule's "good cause" and "in controversy" requirements have been satisfied.¹ Verified pleadings or affidavits may be sufficient to satisfy the rule's requirements instead of an evidentiary hearing. The party making the request also must disclose the nature of the examination and the extent of testing that may be performed by the examining physician.² Although the examination may include invasive tests, the party to be examined is entitled to know the extent of the tests, in order to seek the protection of the court in providing for reasonable measures so that the testing will not cause injury. A party requesting a compulsory medical examination is not limited to a single examination of the other party; however, the court should require the requesting party to make a stronger showing of necessity before the second request is authorized.³ A plaintiff who has sued multiple defendants, as multiple tortfeasors, may be subject to separate examinations by each defendant.⁴

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.*⁵ 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*,⁶ 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.*⁷ a trial court did not abuse its discretion by compelling the plaintiff, 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 plaintiff was ordered to attend, and the defendants were ordered to contribute to the cost of the plaintiff's trip. In *Blagrove v. Smith*,⁸ 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 CME despite the fact that the plaintiff had moved to a foreign state, advised counsel two days prior that he was financially unable to attend, and filed a motion for protective order with an affidavit detailing his finances and stating he had no available funds or credit to travel to Florida. *Littlefield v. J. Pat Torrence*.⁹

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*¹⁰ involved a claim for uninsured motorist benefits. The insurance contract provided that the claimant would consent to an examination by the insurer's chosen physician if a claim was filed. Before initiation of the lawsuit, the insurer scheduled a medical examination that was attended by the claimant, and the examiner confirmed that the claimant had suffered injury. After suit was filed, the plaintiff sought to take the videotape deposition of the examiner for use at trial. The insurer filed a motion for a protective order, claiming that the examination and report were protected as work product, and the trial court agreed. The *Dimeglio* court reversed, holding that although the examination was prepared in anticipation of litigation, Rule 1.360 applied, and the insurer could not claim a work product privilege for a physician examination of the plaintiff by the insurance company's chosen physician.

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Footnotes

¹ *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).

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

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

⁴ *Goicochea v. Lopez*, 140 So. 3d 1102 (Fla. 3d DCA 2014).

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

⁶ 685 So. 2d 979 (Fla. 5th DCA 1997).

⁷ 993 So. 2d 99, 100 (Fla. 5th DCA 2008).

⁸ 701 So. 2d 584 (Fla. 5th DCA 1997).

⁹ See *Littelfield v. J. Pat Torrence* 778 So. 2d 368 (Fla. 2d DCA 2001). See also *Wapnick v. State Farm Mutual Automobile Insurance Co.*, 54 So. 3d 1065 (Fla. 4th DCA 2011) (requiring plaintiff to travel approximately 100 miles from county of residence where defendant offered to reimburse travel expenses, although reversing denial of coverage).

¹⁰ 708 So. 2d 637 (Fla. 2d DCA 1998).

ITEM 7.01 | ISSUE 1

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.¹¹ 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.¹²

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Footnotes

¹¹ *Toucet v. Big Bend Moving & Storage* 581 So. 2d 952 (Fla. 1st DCA 1991).

¹² See *State Farm Mutual Auto Insurance Company v. Shepard*, 644 So. 2d 111 (Fla. 2d DCA 1994).

ITEM 7.02 | ISSUE 2

Issue 2:

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

Resolution:

Rule 1.360 (a) (3) permits the trial court, at the request of either party, to establish protective rules for compulsory examinations. The general rule is that attendance of a third party at a court-ordered medical examination is a matter within the sound discretion of the trial judge.¹³ 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.¹⁴ 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.¹⁵

Without a valid reason to prohibit the third party's presence, the examinee's representative should be allowed.¹⁶ 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 why the examining doctor objects to the presence of the third party. A doctor must provide a case-specific justification to support an objection in an affidavit that the presence at the examination of a third party will be disruptive.¹⁷ 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 third party (court reporter, attorney, or other representative) present.¹⁸ This criteria applies to compulsory examinations for physical injuries and psychiatric conditions.¹⁹

The rationale for permitting the presence of the examinee's attorney is to protect the examinee from improper questions unrelated to the examination.²⁰ 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."²¹ 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 to have an accurate preservation of the record.

Courts may recognize situations in which a third party's presence should not be allowed. Those situations may include the existence of a language barrier, the inability to engage any medical examiner who will perform the examination in the presence of a third party, the particular psychological or physical needs of the examinee, or the customs and practices in the area of the bar and medical profession.²² 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.²³ 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.²⁴ 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.²⁵ 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.²⁶ 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.²⁷ For example, defendants in a personal injury lawsuit were not entitled to have a videographer record the examination even though the examinee had her own videographer present. *Prince v. Mallari*.²⁸ The Second and Third DCAs follow this opinion.

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, casespecific objections from the complaining party may result in irreparable harm to the requesting party and serve to justify extraordinary relief.²⁹ Similarly, an audiotape may be substituted to ensure that the examiner is not asking impermissible questions and that an accurate record of the examination is preserved.³⁰ Video or audio tape of the CME 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*.³¹

In *McClennan v. American Building Maintenance*,³² 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*,³³ the Florida Supreme Court held that, for a medical examination conducted under F.S. § 627.736(7) for personal injury protection benefits, "the insured should be afforded the same protections as are afforded to plaintiffs for Rule 1.360 and workers' compensation examinations."

There are limitations on discovery of an examiner performing a CME. For example, an examiner will not be compelled to disclose CME reports of other non-party examinees or to testify about findings contained in those reports.³⁴ In *Allstate Insurance Co. v. Boecher*,³⁵ the Supreme Court held that neither *Elkins v. Syken*³⁶ nor Rule 1.280(b)(4)(A) prevents discovery of a party's relationship with a particular expert when the discovery is propounded directly to the party. In *Boecher*, the court held that the jury was entitled to know the extent of the financial connection between the party and the expert witness. *Boecher* and *Elkins* have spawned dozens of cases on the general issue of medical experts and their bias. However this section deals exclusively with the CME expert. (Commonly referred to by the Plaintiff's Bar as the "Insurance Company's Doctor.").

Fla. R. Civ. P. 1.280(b)(5) establishes the parameters of discovery directed to a non-party retained expert. It is critical that the trial judge read the Rule in every instance

and not get distracted by issues that simply do not relate to CME experts.

(5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)

(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.

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....

In *Gramman v. Stachkunas*, 750 So. 2d 688 (Fla. 5th DCA 1999), the Fifth District quashed an order requiring a medical expert to disclose his billing records and payments for past medical examinations and 1099 forms from insurance companies, which had referred matters to the expert for a medical opinion. The Court stated:

[T]he discovery order which compels [the defendant] and the independent medical expert to answer interrogatories regarding the expert's financial remuneration for past examinations, depositions, and courtroom testimony must be quashed. The trial court departed from the essential requirements of law in compelling this discovery, and in requiring the expert to produce his billing/payment records and 1099s regarding his prior work as an expert in other cases.

A subpoena may not be used to secure discovery of financial or business records concerning a litigation expert unless "unusual or compelling circumstances" have been shown. *Smith v. Eldred*, 96 So. 3d 1102, 1104 (Fla. 4th DCA 2012); *Miller v. Harris*, 2 So. 3d 1070, 1073 (Fla. 2nd DCA 2009).

There are additional third party privacy concerns for the Court to consider when deciding CME Examiner bias discovery issues. Section 456.057(7)(a), Florida Statutes requires notice to patients whose medical records are sought before issuance of a subpoena for the records by a Court of competent jurisdiction. Simply redacting the non-party patients' information is not enough. *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla. 4th DCA 2012). Consider Judge May's concurring opinion in *Coopersmith* relative to the Court's frustration with this type of discovery practice.

I concur with the majority in its reasoning and result, but write to express my concern over recent discovery issues we have seen. We are increasingly reviewing orders on discovery requests that go above and beyond those relevant to the case. Attorneys are propounding interrogatories and making requests for production, which require physicians to divulge private, confidential information of other patients, and to "create" documents.

In an effort to discredit medical witnesses for the other side, attorneys for both plaintiffs and defendants are exceeding the bounds of the rules of civil procedure, confidentiality laws, and professionalism by engaging in irrelevant, immaterial, burdensome, and harassing discovery. Parameters have already been expanded to allow both sides to explore financial interests of medical witnesses and the volume of referrals to those witnesses. See *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). And now, attempts to expand the scope of that discovery to treating physicians as well as retained experts are usurping the limited resources of our trial courts. This not only creates unnecessary burdens on our over-strained justice system, it further taints the public's view of our profession.

For a more detailed discussion of expert witness discovery see Chapter Eleven of this handbook.

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Footnotes

¹³ *Bartell v. McCarrick*, 498 So. 2d 1378 (Fla. 4th DCA 1986).

¹⁴ *Wilkins v. Palumbo*, 617 So. 2d 850 (Fla. 2d DCA 1993).

¹⁵ *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).

¹⁶ 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).

¹⁷ See *Wilkins*, *supra*.

¹⁸ See *Broyles*, *supra*.

¹⁹ *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).

²⁰ See *Toucet*, supra.

²¹ *Gibson v. Gibson*, 456 So. 2d at 1320, 1321 (Fla. 4th DCA 1984).

²² See *Bartell*, supra.

²³ See *Broyles*, supra; See *Wilkins*, supra.

²⁴ See *Collins*, supra.

²⁵ See *McCorkle*, supra; See *Toucet*, supra.

²⁶ *Truesdale v. Landau*, 573 So. 2d 429 (Fla. 5th DCA 1991). See also *Broyles*, supra.

²⁷ See *Broyles*, supra.

²⁸ 36 So. 3d 128 (Fla. 5th DCA 2010).

²⁹ *Lunceford v. Florida Central Railroad Co., Inc.*, 728 So. 2d 1239 (Fla. 5th DCA 1999).

³⁰ *Medrano v. BEC Const. Corp.*, 588 So. 2d 1056 (Fla. 3d DCA 1991).

³¹ *McGarrah v. Bayfront Medical Center*, 889 So. 2d 923 (Fla. 2d DCA 2004).

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

³³ 754 So. 2d 697, 701 (Fla. 2000).

³⁴ *Crowley v. Lamming*, 66 So. 3d 355 (Fla. 2d DCA 2011); *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla. 4th DCA 2012) (sustaining objections to interrogatories directed to the examiner's "opinions and basis of the opinions" of other non-party examinees as same constituted an intrusion into those non-parties' privacy rights).

³⁵ 733 So. 2d 993 (Fla. 1999).

³⁶ 672 So. 2d 517 (Fla. 1996).

2016 FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE

CHAPTER VIII OBTAINING PSYCHOLOGICAL RECORDS WHEN PAIN AND
SUFFERING ARE AT ISSUE

ITEMS: 8.01

ITEM 8.01 | OBTAINING PSYCHOLOGICAL RECORDS WHEN PAIN AND SUFFERING ARE AT ISSUE

Chapter 90, Florida Statutes, codifies the psychotherapist-patient privilege¹ and provides in pertinent part:

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

(4) There is no privilege under this section:

(b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.

(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.³

Moreover, pursuant to section 394.4615, Florida Statutes (2015), clinical records maintained by psychotherapists are shielded by a broad cloak of confidentiality; the statute carves out specific instances wherein disclosure of information from patient records shall or may be released. The intent behind the enactment of the psychotherapist-patient privilege is to encourage individuals suffering from mental, emotional, or behavioral disorders to seek out and obtain treatment without fearing public scrutiny and enable those individuals experiencing such problems to obtain proper care and assistance.⁴

Section 90.503(4)(c), Florida Statutes (2015), one of the statutory exceptions to the privilege, stems from the notion that a party should be barred from using the privilege as both a sword and a shield, that is, seeking to recover for mental and or emotional damages on the one hand, while hiding behind the privilege on the other.⁵ For example, when a plaintiff seeks recovery for mental anguish or emotional distress, Florida courts generally hold that the plaintiff has caused his or her mental condition to be at issue and the psychotherapist privilege is therefore, waived.⁶ The statutory privilege is also deemed waived where a party relies on his or her post-accident mental or emotional condition as an element of a claim or defense.⁷ Failure to timely assert the privilege does not constitute waiver, so long as the information already produced does not amount to a significant part of the matter or communication for which the privilege is being asserted.⁸ The waiver provision contained in section 90.507, Florida Statutes (2015) will apply, however, when information previously produced in discovery is considered a substantial part of the patient's claim of privilege.⁹ Limited voluntary disclosure of some aspects of the psychotherapist-patient privileged matters or communications will not constitute a waiver.¹⁰

The exception to the privilege does not apply merely because the patient's symptoms accompanying a physical injury are of a type which might arguably be associated with some separate mental or emotional condition.¹¹ In addition, a claim for loss of enjoyment of life, "without more, does not place the mental or emotional condition of the plaintiff at issue so as to waive the protection of section 90.503."¹²

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

The privilege does not protect from discovery any relevant medical records of a psychiatrist or other medical provider made for the purpose of diagnosis or treatment of a condition other than mental or emotional ailments.¹⁵ Thus, relevant medical records that do not pertain to the diagnosis or treatment of a mental, emotional or behavioral disorder are not privileged and should be produced even

if they are maintained by a psychiatrist. On the other hand, records made for the purpose of diagnosis or treatment of a mental, emotional or behavioral conditions that may contain other medical information, such as physical examinations, remain privileged and are not subject to disclosure.¹⁶

Florida law recognizes that a plaintiff who has incurred a physical injury may allege and prove physical pain and suffering as an element of a claim for monetary damages.¹⁷ The term "pain and suffering" has not been judicially defined, however, Florida courts have provided a number of factors that may be considered by the trier of fact in awarding damages for pain and suffering.¹⁸ These factors recognize that pain and suffering has a mental as well as a physical component. Physical pain and suffering, absent mental anguish, can impair the enjoyment of life.¹⁹

Section 90.503(2) specifically applies to communications and records "including alcoholism and other drug addiction." In the cases noted below, the trial court allowed discovery of defendant driver's treatment for drug addiction post-accident, inasmuch as the complaint alleged that the defendant driver was under the influence of drugs and alcohol at the time of the accident, other discovery supported that allegation, and defendant's answer denied being under the influence. On review, the appellate courts stated that the defendant did not abrogate the privilege by denying the allegations of the complaint, the plaintiff did not establish the existence of any of the other exceptions to the privilege, and they granted certiorari, and quashed the orders.²⁰

It is worth noting that in *David J. Burton, D.M.D., P.A. v. Becker*, 516 So. 2d 283 (Fla. 2d DCA 1987) the court held that medical records of the physician's treatment for drug abuse were subject to disclosure in a medical malpractice case, because section 397.053(2), Florida Statutes (1985), permitted a court to order disclosure of drug treatment records when good cause is shown.

However, Section 397.053 was repealed effective October 1, 1993. The 2009 amendment to Chapter 397 contains section 397.501, which provides for the rights of clients receiving substance abuse services. Subsection 397.501(7)(a)5, provides for the confidentiality of records, with the following exceptions:

- (a) The records of service providers which pertain to the identity, diagnosis, and prognosis of and service provision to any individual are confidential in accordance with this chapter and with applicable federal

confidentiality regulations and are exempt from s. 119.07(1) and s. 24(a), Art. 1 of the State Constitution. Such records may not be disclosed without the written consent of the individual to whom they pertain except that appropriate disclosure may be made without such consent:

.....

.....

5. Upon court order based on application showing good cause for disclosure. In determining whether there is good cause for disclosure, court shall examine whether the public interest and the need for disclosure outweigh the potential injury to the individual, to the service provider and the individual, and to the service provider itself.

Consider *Brown v. Montanez*, 90 So. 3d 982, (Fla. 4th DCA 2012) where the Court held that where the criminal defendant was sent to drug related treatment as a result of his bond and not as a negotiated criminal plea agreement with the Court, there had been no Court ordered examination of the mental or emotional condition of the patient under § 90.503(4)(b), Fla. Stat. (2011).

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Footnotes

¹ A psychotherapist is defined by section 90.503(1), Florida Statutes (2015) and includes any person authorized to practice medicine or reasonably believed by the patient so to be, that is “engaged in the diagnosis or treatment of a mental or emotional condition.” A medical doctor is a psychotherapist for purposes of the statute if he or she is engaged in treating or diagnosing a mental condition, however, other health care professionals, such as psychologists, are only considered psychotherapists if they are “engaged primarily in the diagnosis or treatment of a mental or emotional condition...” Compare § 90.503(1)(a)1., with § 90.503(1)(a)2., Fla. Stat. (emphasis added). In 2006, the Legislature amended section 90.503(1)(a), Florida Statutes, to include advanced registered nurse practitioners within the ambit of the statute. See § 90.503(1)(a)5., Fla. Stat. (2006) (effective July 1, 2006).

² § 90.503(2), Fla. Stat. (2015).

³ § 90.503(4)(c), Fla. Stat.(2015).

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

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

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

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

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

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

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

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

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

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

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

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

¹⁶ *Byxbee*, 850 So. 2d at 596.

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

¹⁸ *Tampa Electric Co. v. Bazemore*, 96 So. 297, 302 (Fla. 1923) (In determining the measure of damages, the court embraced various elements when considering pain and suffering, including, physical and mental pain and suffering, resulting from the character or nature of the injury, the inconvenience, humiliation, and

embarrassment the plaintiff will suffer on account of the loss of a limb, the diminished capacity for enjoyment of life to which all the limbs and organs of the body with which nature has provided us are so essential, and the plaintiff's diminished capacity for earning a living.); *Bandorf*, 939 So. 2d at 251 (observing that, “[i]t should be apparent that physical pain and suffering, absent mental anguish, can impair the enjoyment of life”).

¹⁹ *Id.*

²⁰ See *Cruz-Govin v. Torres*, 29 So. 3d 393 (Fla 3d DCA 2010) and *Brown v. Montanez*, 90 So. 3d 982 (Fla. 4th DCA 2012).

2016 FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE

CHAPTER IX ELECTRONIC DISCOVERY

ITEMS: 9.00 through 9.13

ITEM 9.00 | CHAPTER 9 INTRO

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

Competent representation of the client requires the legal skill, knowledge, thoroughness, and preparation necessary for the representation.² Competence in ESI discovery is essential to successfully manage such discovery in an effective, economical, efficient, and balanced fashion. Since the law lags behind emerging and changing technology and because of the increasing availability of discoverable ESI, it is incumbent on lawyers and judges to make special efforts to become competent and stay current on ESI fundamentals and discovery. Staying current entails up-to-date knowledge of the culture of information: how information is created, used, managed, stored, communicated, and manipulated. New technology and information cultures are rapidly evolving, including new types of social media, small personal computer devices such as watches, cloud storage websites of all kinds where information may be kept indefinitely, and even appliances such as online security systems that are part of what is called the Internet of Things. All of these new products and information sources can create relevant evidence in a variety of cases. The volume of potentially relevant electronic evidence also continues to increase at an exponential level.

One of the foremost challenges in this kind of complex environment is protection of the client's confidential information, included personal protected information and privileged communications. This requires counsel to ensure that client information is protected and is disclosed only to the extent required by law or reasonably

necessary to serve the client's interest.³ Court recordkeeping and filing is now done in electronic format in Florida courts. This makes unfettered third party electronic access to court records, including client information in the record, far easier than ever before. Accordingly, counsel should only put in the record that which is required or reasonably necessary to serve the client's interest. If necessary, invoke the process of sealing private or sensitive information before the record becomes available as a public record.⁴ In anticipation of electronic recordkeeping and the need for protection of privacy interests of parties and non-parties, the Florida Supreme Court enacted rules requiring lawyers to analyze and screen information for certain confidential information before it is placed in the court record.⁵ At a minimum, pursuant to Fla. R. Civ. P. 1.280(g), information should not be filed with the court absent good cause, which is satisfied only when the filing of the information is allowed or required by another applicable rule of procedure or by court order.⁶ The lawyer is obligated to know enough about the client's ESI and the locations where it may be found to fully comply with discovery without making unnecessary disclosures. The client's equipment, data, and software should be protected from damage or destruction. The client should also be fully informed on the extent, if any, of the obligation to preserve information. At the same time, the client's business processes and handling of data should be protected from unnecessary intrusion from perceived court-related obligations. Finally, counsel and the court should be sufficiently informed of the ESI technology systems likely to contain relevant information in order to assist counsel to obtain permitted discovery of ESI from the opposing party and third parties.

Rulemaking for electronic discovery nationwide and in Florida has lagged behind the technology of how data is created, stored, and communicated. Nonetheless, Florida Civil Procedure and Judicial Administration Rules now expressly address issues caused by the use of digital technology in Florida Courts⁷ and discovery of ESI.⁸ Effective September 1, 2012, the Florida Supreme Court adopted several amendments to the Florida Rules of Civil Procedure⁹ largely modeled on the 2006 Amendments to the Federal Rules of Civil Procedure.¹⁰ Compatibility with federal rules enables use of federal decisions on electronic discovery as persuasive authority¹¹ in the absence of Florida cases and ensures harmony of e-discovery law between cases in Florida state courts and cases in federal court and other states. The Florida electronic discovery rules contain some improvements and adjustments from their federal

counterparts that arguably make the rules better suited to the broader range of state court jurisdiction in size and subject matter. A chart comparing the Florida electronic rules and the federal rules is attached to this chapter as Appendix A.

There are many good reasons for specialized rules for ESI discovery. ESI is ephemeral; sometimes easily hidden, mislabeled, or destroyed; available from multiple sources in a variety of forms; capable of electronic search, analysis and compilation; sometimes accompanied by information or availability not apparent to the creator or user, such as metadata; and frequently misunderstood by persons lacking in expertise. ESI also exists in incredibly large quantities. One Thousand gigabyte (One Terabyte) computer hard-drives are now standard issue on many 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 in a variety of locations, some of which may be unknown to them. It is not uncommon in business today for management personnel to each keep hundreds of thousands of emails and attachments. Large enterprises commonly store trillions of emails and attachments, and in many cases may have to search through millions of emails to try to locate relevant evidence. There are often accessibility problems for some of the ESI stored, including backup systems. The places on which ESI can be stored or located are manifold and ever changing, and include the over one-trillion websites that now exist on the Internet. ESI may sometimes be easier and cheaper to search and to produce in electronic form than the same quantity of paper documents, but it is often much more difficult to locate and retrieve relevant ESI. Again, that is largely because of the high volume of total ESI maintained on a multiplicity of systems that may contain relevant information. The problem is compounded by the need to review most of the material for privilege, privacy, and trade secrets before it is disclosed. For these reasons it is today far more difficult and more expensive to access, search, categorize, compile, and produce relevant ESI than in the past when most records were only in paper form, were easily organized and accessed in centralized locations, and were far, far fewer in number and type.

Issues related to the spiraling cost issues of e-discovery contribute to the special treatment for ESI provided in the new rules and case law. Florida rules expressly provide that ESI is discoverable,¹² but they also require proportionality of expense.¹³ Florida rules help maintain cost proportionality by providing an

express framework for dealing with issues of preservation, production, and protection for hard-to-find and retrieve ESI and the media, equipment, and third party Internet "cloud" storage websites that hold ESI.¹⁴ A person may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of burden or cost. The person from whom discovery is sought has the initial burden of showing that the information sought or the format requested is not reasonably accessible because of undue burden or cost. If that showing is made by specific evidence, the court may nonetheless order the discovery upon a showing of good cause. The court may specify conditions of the discovery, including ordering that some or all of the expenses incurred by the person from whom discovery is sought be paid by the party seeking the discovery.¹⁵

In *Zubulake v. UBS Warburg LLC*, 217 FRD 309 (S.D.N.Y. 2003), the court set forth an analytical framework for determining whether it is appropriate to shift the costs of electronic discovery. If the responding party is producing data from "inaccessible" sources, i.e. data that is not readily useable and must be restored to an accessible format, the court identified seven factors to be considered in determining whether shifting the cost of production is appropriate.¹⁶

The scope of discovery may also be limited by the producing party or person's privacy rights, as when the relevance or need for the information requested does not exceed the privacy interests of the person or party from whom it is sought.¹⁷

Florida rules also provide additional protection for confidential and privileged information not discoverable that may be inadvertently produced with discoverable material.¹⁸ Rule 1.285, Florida Rules of Civil Procedure, establishes a process by which a party, person, or entity may retroactively assert privilege as to inadvertently disclosed materials, regardless of whether the inadvertent disclosure was made pursuant to "formal demand or informal request."¹⁹ The privilege must be asserted within ten days of actual discovery of the inadvertent disclosure by serving a prescribed written notice of the assertion of privilege on the party to whom the materials were disclosed.²⁰ A party receiving notice under Fla. R. Civ. P. 1.285(a) must promptly (1) return, sequester, or destroy the materials and any copies of the materials, (2) notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of the rule, and (3) take reasonable

steps to retrieve the materials disclosed.²¹ Rule 1.285 prescribes the manner in which a receiving party may challenge the assertion of privilege²² and the effect of a court determination that privilege applies.²³

Because ESI and the modern equipment that creates, holds, communicates, or manipulates it are complex and constantly evolving, sometimes expert assistance is needed by clients, counsel, or the court to search and prepare ESI for production. Such expert assistance may involve legal as well as technical issues and tasks. The parties and Court should consider the appointment of Special Masters or Third Party Neutral experts in appropriate cases.

The developing principles for electronic discovery and the Committee Notes to the Florida Rules of Civil Procedure encourage cooperation and transparency by the parties during meetings between counsel early in a case to try to agree on the scope of preservation and discovery and methods of production.²⁴ Counsel are encouraged to bring any areas of disagreement to the courts for resolution early in a case. These issues may also be addressed in a Rule 1.200 or Rule 1.201 case management conference.²⁵ Specific mention of case management for electronically stored information is found in Rule 1.200, Fla. R. Civ. P.²⁶ and in Rule 1.201 for cases that are declared complex.²⁷ In resolving these disputes courts must balance the need for legitimate discovery with principles of proportionality and the just, speedy and efficient resolution of the case.²⁸

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Footnotes

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

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

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

⁴ Fla. R. Jud. Admin. 2.420.

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

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

⁷ Id.

⁸ See *In re Amendments to the Florida Rules of Civil Procedure -- Electronic Discovery*, 95 So. 3d 76 (Fla. 2012). See also Fla. R. Civ. P. 1.285 (inadvertent disclosure of privileged material). In addition, Florida's 9th, 11th, 13th, and 17th Circuits have business or commercial litigation sections with special local administrative rules and processes for more complicated cases. These local rules include special handling of electronically stored information. Refer to local rules and comply with all requirements when handling cases assigned to a special commercial or business court.

⁹ Id.

¹⁰ Fed. R. Civ. P. 16, 26, 33, 34, 37 and 45. The Federal Rules of Civil Procedure were amended, effective December 1, 2015.

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

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

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

¹⁴ Fla. R. Civ. P. 1.280(d)(2)(ii).

¹⁵ *Id.*

¹⁶ *Zubulake*, *id.*, 217 FRD at 322.

¹⁷ Compare *Root v. Balfour Beatty Const., LLC*, 132 So. 3d 867,869 (Fla. 2d DCA 2014) (order compelling the production of social media discovery that implicates privacy rights demonstrates irreparable harm), with *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. 4th DCA 2015) (photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established).

¹⁸ Fla. R. Civ. P. 1.285.

¹⁹ Fla. R. Civ. P. 1.285(a).

²⁰ *Id.* The notice must include specifics on the materials in question, the nature of the privilege asserted, and the date on which inadvertent disclosure was discovered. The process applies to any privilege cognizable at law, including the attorney-client, work product, and the several other types of privileges recognized in the Florida Evidence Code. See Fla. Stat. § 90.501–.510 (journalist, lawyer-client, psychotherapist-patient, sexual assault counselor-victim, domestic violence advocate-victim, husband-wife, clergy, accountant-client, and trade secret privileges). *Id.*

²¹ Fla. R. Civ. P. 1.285(b). Nothing in Rule 1.285 diminishes or limits any ethical obligation with regard to receipt of privileged materials pursuant to Fla. R. Prof. Conduct 4-4.4(b). *Id.*

²² Fla. R. Civ. P. 1.285(c).

²³ Fla. R. Civ. P. 1.285(d).

²⁴ See Fla. R. Civ. P. 1.280, 2012 Committee Notes (“The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information.”).

²⁵ See Fla. R. Civ. P. 1.280, 2012 Committee Notes.

²⁶ Fla. R. Civ. P. 1.200(a)(5)-(7).

²⁷ Fla. R. Civ. P. 1.201(b)(1)(J).

²⁸ Fla. R. Civ. P. 1.010; 1.280(d).

ITEM 9.01 | LAW, POLICY, AND PRINCIPLES OF ELECTRONIC DISCOVERY

The complexity in application of discovery rules and policies to ESI and hardware and media is creating a burgeoning body of common law, primarily in federal court.²⁹ Case law in Florida on this subject is currently limited, but useful.³⁰ Most importantly, current Florida civil procedure rules for e-discovery were developed by selecting the best of the federal rules and distilling Florida common law authority into practical and balanced rules appropriate for the wide array of types and size of cases in Florida state courts that apply the civil rules.³¹ The rules provide a useful framework for anticipating and addressing prominent e-discovery issues. Based on the similarity between Florida and federal rules, Florida trial courts are likely to refer to federal courts and the extensive body of case law in the federal system³² as well as cases arising in states with rules similar to Florida and federal rules. State court judges are also likely to be influenced by the publications of The Sedona Conference®,³³ a private research group of lawyers, judges and e-discovery vendors dedicated to the development of standards and best practices in this evolving field of law and policy. The Sedona Conference® writings have been widely cited in the federal courts, especially its Sedona Principles,³⁴ and Cooperation Proclamation.³⁵ Also especially helpful are its Glossary³⁶ of e-discovery related terms, and its commentaries on Search and Retrieval Methods,³⁷ Achieving Quality,³⁸ and Litigation Holds.³⁹ Many excellent text and trade publications, including free online resources, are also available.⁴⁰

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²⁹ This chapter focuses on Florida state court e-discovery. Discussion of federal law herein is undertaken only because of the availability of federal law for guidance in state court cases and is not intended to provide practitioners with a manual for discovery in federal court cases. See *supra* n. 11.

³⁰ See, e.g., *Nucci v. Target Corp.*, *supra* n. 16 (no expectation of privacy in photos posted on Facebook regardless of privacy settings used by producing party); *Root v. Balfour Beatty Const., LLC*, *supra* n. 17 (privacy interest in Facebook postings upheld against overbroad request); *Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163 (Fla. 1st DCA 2014) (access to decedent's iPhone granted to determine whether she was texting during automobile accident in which she was killed); *E.I. DuPont De Nemours & Co. v. Sidran*, 140 So. 3d 620, 650 (Fla. 3d DCA 2014) (sanctions not appropriate for fraud on the court in the manner in which ESI was collected and stored by defendant for discovery in multiple suits); *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389 (Fla. 2d DCA 2012), *rev. den.*, 109 So. 3d 781 (Fla. 2013) (preservation obligations before case is filed are explained in this case); *Holland v. Barfield*, 35 So. 3d 2010 Fla. App. LEXIS 6293; 35 Fla. L. Weekly D 1018 (Fla. 5th DCA May 7, 2010) (order granting opposing expert in wrongful death case unrestricted access to review petitioner's hard drive and SIM card quashed as violative of privacy); *Menke v. Broward County School Board*, 916 So. 2d 8 (4th DCA 2005) (establishing basis and limits on access to opposing party's hardware in order to search for discoverable information); *Strasser II: Strasser v. Yalamanchi*, 783 So. 2d 1087 (Fla. 4th DCA 2001) (spoliation of electronic records); *Strasser I: Strasser v. Yalamanchi*, 669 So. 2d 1142 (Fla. 4th DCA 1996) (designating Florida procedural rules giving rise to discovery of ESI and the equipment that holds them and setting limits on scope of such discovery); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.* 2005 WL 674885, (Fla. Cir. Ct., 2005) (one of the best known e-discovery opinions in the country, primarily because the sanctions for ESI spoliation resulted in a default judgment for \$1.5 Billion. The judgment was reversed on other grounds).

³¹ See *In re Amendments to the Florida Rules of Civil Procedure -- Electronic Discovery*, *supra* n. 8.

³² See the following Federal Rules of Civil Procedure and accompanying rule commentary pertaining to the 2015 amendment: Rule 16(b), 26(a)(1)(B), 26(b)(2)(B), 26(f), 26(b)(5), 33, 34, 37(f) and 45. Also see the large and rapidly growing body of opinions by United States Magistrate Judges and District Court Judges in Florida and elsewhere around the country. Federal law is far more developed than Florida e-discovery law and provides useful guidance for lawyers and judges. That is not likely to change because Florida trial court decisions are seldom published.

³³ The Sedona Conference® publications are all available online without charge for individual use. See <http://www.thesedonaconference.org/>. As of 2013, judges have exclusive access to special judicial resources developed by The Sedona Conference® which are based on the aforementioned Sedona Principles and writings but tailored to the judicial perspective. Accordingly, lawyers who use, conform to, and cite pertinent materials from The Sedona Conference® will hopefully find judges enlightened on relevant policies and principles referenced *infra* notes 32-37.

³⁴ This can be downloaded after registration at: <http://www.thesedonaconference.org/dltForm?did=2007SummaryofSedonaPrinciples2ndEditionAug17as sent forWG1.pdf>.

³⁵ See "The Sedona Conference® Cooperation Proclamation," 10 Sedona Conf. J. 331 (2009 Supp.).

³⁶ http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf.

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http://www.thesedonaconference.org/dltForm?did=Best_Practices_Retrieval_Methods_revised_cover_and_preface.pdf.

³⁸ http://www.thesedonaconference.org/dltForm?did=Achieving_Quality.pdf

³⁹ http://www.thesedonaconference.org/dltForm?did=Legal_holds.pdf.

⁴⁰ See e.g.: Ralph Losey's weekly blog: e-discovery team found at <http://www.e-discoveryteam.com> and his several books and law review articles on electronic discovery that are referenced there.

ITEM 9.02 | FRAMEWORK FOR THE TRIAL LAWYER FACING E-DISCOVERY

1. Familiarize yourself with the client's electronic records and computer systems used for storing this ESI, including how they are distributed, maintained, deleted, and backed-up. If the client has a routine destruction policy for hard copies, or also for ESI (and most companies now do), address the issue of preservation immediately. Failure to preserve records, including ESI, may result in severe sanctions for the client and possibly counsel.

2. Ensure that written preservation hold notices are provided by the client to any key players within their control that instructs them to preserve any potentially relevant ESI in their custody, and to not alter or destroy potentially relevant ESI pending the conclusion of the lawsuit. Notice should also be provided to third parties who are believed to hold or control ESI that is likely to be relevant to issues in the case. Counsel should follow-up on these written notices by prompt personal communications with key players, and then periodic reminder notices thereafter. Caution should be exercised is relying upon key players to locate or collect potentially relevant ESI. In some circumstances such self-collection should not be permitted, or should be supplemented by bulk collection of all the custodian's ESI. Today bulk collection of all a custodian's email within a certain date range is the rule in all but small cases. Keyword filtering of bulk collection is also disfavored in all but smaller cases because of the known unreliability of keywords and concern that important evidence will be omitted. Mistakes are easily made in ESI preservation and collection, and counsel has a personal duty to supervise the preservation, search and collection of potentially relevant ESI. If counsel is not competent to carry out these responsibilities in a particular matter, then they should affiliate with other counsel who are competent. The hiring of non-law firm vendors in e-discovery cannot discharge an attorney's duty of competence and personal responsibility.

3. Inform the client of all obligations for discovery by both sides and develop a plan to protect privileged or private information. Again, counsel should be actively involved in client's ESI preservation and collection efforts.

4. Work with the client and IT experts, if required, to develop a plan to collect and review ESI for possible

production, including a review for private, privileged, or trade secret information that may be entitled to protection from open disclosure. Determinations of responsiveness, relevance, or qualification for confidentiality or privilege protections should not be delegated to the client, IT expert, or vendor as these are uniquely legal determinations for which counsel is responsible.

5. Determine the preferred format to make and receive production of ESI, typically either in the original native format, which would necessarily include all internal metadata of a document, or in some type of flat-file type PDF or TIFF format, with a load file containing the file's internal metadata. Metadata is an inherent part of all ESI and should be included in most productions. The removal of internal metadata from a document, which would include such information as who created the document, the date of creation, last date it was accessed, blind copy of an email, and the like, constitutes an alteration of the original electronic version of that document and is typically not desired or necessary. If there is a particular type of metadata of concern to the requesting or responding party, specific requests or objections should be made.

6. Determine whether expert legal or technical assistance, or both, may be needed to sort out legal or practical issues involving ESI and its media or equipment. Reach out to opposing counsel early to attempt to coordinate and cooperate on technical issues and set up lines of communication and cooperation between the IT technicians that may be retained by both sides to assist in the e-discovery efforts. It may be appropriate for the parties to retain third-party neutral experts in some cases with unusual or complex technical issues, or other e-discovery challenges, such as search of large disorganized collections of ESI.

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. Send a request for the opponent to preserve electronically stored information as soon as possible and include a formal discovery request for such information at the earliest possible date.⁴¹

8. Evaluate the reasonability and suitability of the opponent's preservation, collection, and production plans,

including any search or production issues, and attempt early resolution of any disputes. This should be accomplished before any large productions are actually made so as to avoid expensive do-overs. Beware of preservation, collection, and search based on keyword matching alone. This approach is frequently ineffective and far better technological solutions are now available.⁴² When keyword terms are used as part of a search and review protocol they should always be carefully tested, and should never be negotiated in the blind based on mere intuition by counsel that they will include most of the relevant evidence.

9. Determine whether discoverable ESI is available from multiple sources, including third parties. Frequently ESI documents, such as e-mail or draft contracts that have been communicated to or handled by multiple parties will contain useful additional or even conflicting information. Some sources of information are more accessible than others, meaning they are easier or less costly to access. Upon a proper showing under the rules, parties must be required to obtain information from the least burdensome source, and the court must limit unreasonably cumulative or duplicative discovery.⁴³

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.⁴⁴

11. Electronic discovery is typically conducted in phases wherein the most easily accessible and likely relevant ESI are searched and produced first, and then the necessity for further discovery is evaluated. Limiting factors for the first pass include accessibility, date range, custodians, volume, and secondary ESI storage.

12. Ensure to the extent possible that the value of the discovery sought and produced is proportional in the context of the case at hand.⁴⁵

13. If any of the foregoing steps require expert consultation or assistance, find a suitable expert and involve the expert early enough in the process that preservation obligations for the client and opponent are timely invoked.⁴⁶ Again, parties should consider the advisability of sharing a neutral third-party expert, which can realize substantial cost and time savings.

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Footnotes

⁴¹ *Osmulski*, supra n. 29 (preservation obligations may occur before case is filed).

⁴² *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009); Losey, R. *Adventures in Electronic Discovery, Chapter Child's Game of "Go Fish" is a Poor Model for e-Discovery Search*, (West Thomson Reuters, 2011); *Da Silva Moore v. Publicis Groupe*, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).

⁴³ Fla. R. Civ. P. 1.280(d) (the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive).

⁴⁴ Fla. R. Civ. P. 1.280(d)(1); (d)(2).

⁴⁵ Fla. R. Civ. P. 1.280(d)(2)(ii).

⁴⁶ For preservation triggers, see *Osmulski*, supra n. 29; *Gayer v. Fine Line Constr. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007).

ITEM 9.03 | DUTIES OF ATTORNEY AND CLIENT REGARDING PRESERVATION OF ESI

Electronically stored information is by its very nature ephemeral and easily transportable, so it can be instantaneously lost, altered, destroyed, or hidden. Understanding the duties regarding preservation of evidence is vital to those who possess or control evidence and those who seek to use it in litigation.⁴⁷ The Florida state court common law of preservation is unique⁴⁸ and somewhat unsettled, increasing the challenge for lawyers advising their clients on preservation duty. In general, a duty to preserve in Florida can arise from many sources, including court orders, subpoenas, government regulations, statutes, contracts, discovery requests, and common law. Some Florida courts have held that a duty to preserve evidence is triggered by contract, by statute, or by a properly served discovery request once a lawsuit has already been filed.⁴⁹ In fact, a number of Florida cases have expressly held that, absent a contractual or statutory duty, there is no duty to preserve evidence before litigation commences.⁵⁰ However, a few Florida cases somewhat inconsistently appear to recognize a pre-suit obligation to preserve evidence where the party controlling evidence can reasonably foresee a claim and the relevance of the evidence.⁵¹ For counsel advising clients on preservation duty, notwithstanding these conflicts, or perhaps because of them, it makes sense to advise the client to preserve rather than dispose of relevant evidence, even if suit has not been filed. First, some cases may be filed in either state or federal court, and reliance on a perceived lack of pre-suit duty to preserve under Florida law will not succeed in federal court where the duty to preserve is triggered when litigation is reasonably anticipated. Second, there may be a statutory or contractual obligation to preserve that is not apparent at the time advice is rendered. Third, a finding of spoliation against client or counsel is indeed a serious outcome and may have ramifications beyond the case at issue.

A common e-discovery issue for parties and counsel is the "scope" of evidence that must be preserved. Virtually all cases involve decision-making on the time frame for preservation, the substantive content which determines whether documents are relevant, and the breadth of places in which relevant evidence may be found. In large cases, parties may delineate preservation by persons who are likely to have relevant information, often called "custodians" as they have personal custody of the ESI by virtue of it being their email account, text message account, etc.

The very breadth of reasonably required preservation may raise issues of burden and cost. However, in applying proportionality to limit discovery duties, counsel must be careful to distinguish between scope of preservation versus scope of production. Preservation occurs at a point in time in which potential issues may not be crystallized and the relevance of certain documents may be fuzzy or indeterminable. Counsel and parties should usually err on the side of preservation, at least until the relevance picture sufficiently clarifies to safely distinguish that which must be preserved and produced. While some federal cases have expressed the principle that scope of preservation efforts may be guided by reasonableness and proportionality,⁵² other federal courts disagree.⁵³ In any event, counsel should advise a client to put a litigation hold in place and undertake reasonable efforts to identify and preserve evidence that is relevant by discovery standards.⁵⁴

As for counsel's duties with regard to preservation of evidence, the seminal federal case was written by Manhattan District Court Judge, Shira Scheindlin. It is actually a series of opinions written in the same case, collectively known as *Zubulake*, after the plaintiff, Laura Zubulake. There are four key opinions in this series.⁵⁵ 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.⁵⁶

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.⁵⁷ 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.⁵⁸ Although the "Zubulake Duty" 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.⁵⁹ Outside legal counsel should be proactive in communicating with their client and otherwise taking steps to see to it that the client institutes a litigation hold. Obviously, Judge Scheindlin does not intend to convert attorneys into guarantors of their client's conduct. She also notes in *Zubulake V* that if attorneys are diligent, and they properly investigate and communicate, they should not be held responsible for their client's failures:

A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve.⁶⁰

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

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

their duty to preserve ESI broadly and reminded that 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), social media accounts, 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, especially if the relevant information on the tapes is likely just duplicative.⁶¹

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

Judge Scheindlin wrote another opinion on the subject of litigation holds and ESI spoliation, which she refers to as her sequel to Zubulake.⁶² 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."⁶³ 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 opinion of Judge Scheindlin in Zubulake V and the Pension Committee cases provide a road map to practitioners on what needs to be done in order to preserve ESI from destruction, either intentional or accidental, and so avoid sanctions for spoliation. These and hundreds of other cases like it in the federal system are quite likely to be referred to and cited in state court proceedings. Although none of these federal cases are binding upon state court system, many judges find them persuasive, and the federal cases will often at least provide a starting point for further argument.

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⁴⁷ Loss of evidence can be devastating to the party whose case would benefit from lost evidence; but a person or party holding relevant evidence make likewise suffer through sanctions if the evidence is lost or destroyed.

⁴⁸ Florida law on triggering of the duty to preserve is unlike federal court law and virtually every other state court jurisdiction. In federal court, and in many other jurisdictions, a party in control of relevant evidence is obligated to preserve it if there is reasonable anticipation of litigation.

⁴⁹ See, e.g., *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (4th DCA 2004).

⁵⁰ Id. (holding that "we find Royal's argument that there was a common law duty to preserve the evidence in anticipation of litigation to be without merit"); *Gayer v. Fine Line Constr. & Electric, Inc.*, supra n. 45 at 426 (Fla. 4th DCA 2007)(holding that "[b]ecause a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request"); *In re: Electric Machinery Enterprises, Inc.*, 416 B.R. 801, 873 (M.D. Fla. 2009)("The majority of Florida courts have held that there is no common law duty to preserve evidence before litigation has commenced").

⁵¹ See *Osmulski*, supra n. 29 at 393, citing *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005)(where a defendant has evidence within its control, it can "be charged with a duty to preserve evidence where it could reasonably have foreseen the [plaintiff's] claim."). This is also the federal rule on when a duty to preserve is triggered.

⁵² See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. Sep. 9, 2010); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)("Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done--or not done--was proportional to that case and consistent with clearly established applicable standards").

⁵³ *Orbit One Communications, Inc. v. Ronsen*, 271 F.R.D. 429; 2010 U.S. Dist. LEXIS 123633 (S.D. N.Y. 2010)("Although some cases have suggested that the definition of what must be preserved should be guided by principles of "reasonableness and proportionality," [citations to Victor Stanley and Rimkus omitted], this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.").

⁵⁴ Information on preservation advice and litigation holds in Florida state court litigation is found in Ch. 5, *Initial Procedures in EDiscovery and Preservation of Evidence in Florida State Court*, Artigliere & Hamilton, LexisNexis Practice Guide Florida EDiscovery and Evidence, LexisNexis/Matthew Bender (2012) available from LexisNexis and from The Florida Bar.

⁵⁵ *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*).

⁵⁶ *Zubulake V*, supra n. 54 at 432.

⁵⁷ 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).

⁵⁸ 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).

⁵⁹ Like their federal counterparts, Florida judges have statutory, rule-based, and inherent authority to sanction parties and their counsel for discovery violations and for spoliation. Judges are taught to seek out the source of the problem and administer a measured sanction that remedies the wrong committed. If the party is not the culprit, it makes little sense to administer the sanction against an innocent participant. See *Ham v. Dunmire*, 891 So. 2d 492, (Fla. 2004)(dismissal based solely on an attorney's neglect in a manner that unduly punishes a litigant espouses a policy that the Supreme Court of Florida does not wish to promote). Florida courts are not averse to applying appropriate sanctions to counsel. *Id.* at 498 (a trial court "unquestionably has power to discipline counsel" for discovery violations).

⁶⁰ *Zubulake V*, supra n. 54 at 433.

⁶¹ *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.

⁶² *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.*, 2010 WL 184312, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010).

⁶³ *Id.*

ITEM 9.04 | FLORIDA'S "SAFE HARBOR" PROVISION

Many organizations have standard policies and procedures by which outdated and unnecessary electronically stored information is routinely deleted for purposes of economy, efficiency, security, or other valid business or organizational purposes. Florida followed the lead of the federal rules⁶⁴ by adopting a safe harbor provision to clarify that a party should not be sanctioned for the loss of electronic evidence due to the routine, good-faith operation of an electronic information system.⁶⁵ The existence of a "good faith" component prevents a party from exploiting the routine operation of an information system to thwart discovery obligations by allowing that operation to destroy information that party is required to preserve or produce. In determining good faith, the court may consider any steps taken by the party to comply with court orders, party agreements, or requests to preserve such information.⁶⁶

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⁶⁴ Fed. R. Civ. P. 37(e) (2006). The federal rule has been amended, effective December 1, 2015.

⁶⁵ Fla. R. Civ. P. 1.380(e).

⁶⁶ Fla. R. Civ. P. 1.380 Committee Notes, 2012 Amendment.

ITEM 9.05 | 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 typically includes the metadata in or associated with the ESI (such as file name). 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.⁶⁷ 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. They are also likely to have a wrong understanding of what documents might be relevant for discovery purposes, typically adopting an over-narrow construction or otherwise not understanding the meaning of legal relevance. Also, as mentioned, keyword search based collection is hazardous, and should be avoided unless necessary in small cases for proportionality purposes to reduce the expense of review.⁶⁸ When keywords are used, they should be carefully tested in advance to evaluate efficacy and multiple refinements should be considered, typically Boolean logic combinations (and, or, but not, within a certain number of words, etc) and parametric limitations (keywords in specific fields of a document, as opposed to anywhere).

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

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⁶⁷ *National Day Laborer Organizing Network et al. v. United States Immigration and Customs Enforcement Agency, et al.*, 2012 U.S. Dist. Lexis 97863 (SDNY, July 13, 2012) (J. Scheindlin).

⁶⁸ See n. 41 *supra*.

ITEM 9.06 | TEN PRACTICAL STEPS FOR HANDLING ELECTRONIC EVIDENCE⁶⁹

1. Plan carefully to secure the client's relevant electronic evidence and to obtain evidence from the opponent or third parties. Electronically stored information (ESI) is volatile and may be altered, corrupted, or lost by human accident or error, by malicious intentional conduct, or through the automated operation of computers.

2. Plan carefully before and during discovery to obtain and to secure the foundation needed to admit evidence. Frequently, foundation is available in the form of metadata or other electronically stored information such as the file path, which may be available for a limited time and is volatile, alterable, or corruptible. Foundation may also be obtained through testimony or ancillary ESI or information about the equipment or software associated with the ESI. Many times such information or testimony is readily available only for a limited time. Plan for the admission of electronically stored information in the collection process. Manage the opposition so that the produced information will contain foundational information.

3. Request admission of the authenticity and admissibility of ESI whenever possible. Obtaining admissions on admissibility is not only economical; it saves drudgery and wasting of time during trial which can alienate the jury or judge.

4. When in doubt, err on the side of preservation. The scope of preservation and the timing of when preservation is triggered are based upon the circumstances of the case. Reasonable counsel may differ. However, the "down side" of potential sanctions against a client and attorney who fail to preserve electronic evidence or who engage in spoliation are universally less acceptable than the burden of preservation. If preservation appears overly burdensome, seek judicial assistance in advance under the doctrine of proportionality. Seeking forgiveness after destruction of evidence is not a reasonable strategy.

5. Use summaries and charts rather than voluminous printouts when presenting evidence to the trier of fact. The rules permit the admission of a summary document distilling of numerous and obscure documents into a cogent and organized chart if the chart is accurately based on admissible evidence, is introduced by a qualified witness and properly noticed, and will assist the trier of fact in understanding the evidence. Presenting important

evidence in organized form is much better than relying on a jury to locate information in a maze of exhibits.

6. Check public sources or social media. Information may be readily available from the Internet and especially social media. Valuable information may be retrievable outside formal discovery without alerting the opponent. When copying such media try to capture as much metadata as possible and document when the information was captured. The capture of a website as a PDF file will have its own metadata that may be used to demonstrate the capture time and date.

7. Use competent and effective witnesses to obtain publically available evidence. Frequently authentication of evidence will require a witness to testify about the manner in which the evidence was obtained and the device or software associated with the creation, modification, transmission, or storage of the ESI. Professional investigators with E-Discovery credentials and experience are good candidates for investigations of social networking websites, and conducting self-help E-Discovery. The receipt and management of ESI production from the opposition should be supervised by persons with adequate testifying witness skills.

8. Curb the client's self-help efforts by delineating strict boundaries of behavior. While self-help and self-collection may be desirable for the client economically, the client must understand the risks of inadequate or improper collections. An unbiased, technically competent expert may be the best person to collect the electronic evidence. A competent investigator can then authenticate the collected information at trial or hearings. In no case should the client illegally obtain evidence, misappropriate a password, or access information through subversion or artifice.

9. Advise the client of preservation obligations and warn against loss, alteration, or destruction of ESI. Sanctions can arise from behavior the client (or attorney) considers routine. For example, removing injudicious Facebook entries after preservation is triggered may be considered spoliation if a copy of the Facebook entries as they appeared before removal was not preserved.

10. Cooperate with opposing counsel concerning the admissibility of electronic evidence. All parties are well advised to exchange information and to anticipate and resolve by agreement as many electronic evidence issues as possible. The downstream costs associated with incorrect E-Discovery decisions and errors are substantial and occasionally case dispositive. Cooperation by

counsel on such matters is a sign of strength, professionalism, and competency.

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Footnotes

⁶⁹ Artigliere, R. and Hamilton, W., LEXISNEXIS® PRACTICE GUIDE: FLORIDA E-DISCOVERY AND EVIDENCE, §1.05 (2015).

ITEM 9.07 | "SELF-HELP" DISCOVERY

Self-help discovery refers to the informal search and collection of electronically stored information outside the formal discovery process. Valuable information may be accessed without alerting the opponent or witnesses from whom or about whom the information is collected. A simple example of self-help discovery is obtaining information available on the internet about a party, witness, opposing counsel, issue in the case, industry or organization, or obtaining facts pertaining to the case. Using a Google or other search engine or a service or accessing social media⁷⁰ to get publicly available information through self-help methods can be cost-effective if properly done, but there are some caveats and cautions.

As with any collection of ESI for use in litigation, copying of the computer files should be done in a manner that does not alter or delete relevant information, such as contextual material or the metadata in or associated with the ESI. Self-collection by attorneys, attorney staff, or clients may be a dangerous practice due to technical limitations and increased risk of accidental or intentional deletion of electronic evidence. Further, the person who searches, finds, and collects information may end up being a witness to introduce the information. If the information is important enough to the litigation, it should be properly collected, stored, and preserved properly, and the collection should include information necessary for ultimate introduction of the ESI into evidence. This may require sophisticated or expert involvement.

Example: In an employment case, your employee client finds a government website that contains data in a spreadsheet form about the employer's industry that are relevant to issues in the case. The client takes a "screenshot" of the portions of the spreadsheet that apply to the employer and brings it to you. You put the information in your file in paper form for potential use in the case. What other steps may be considered with regard to this evidence? Answer: At this point, the file contains essentially a "picture" of a portion of ESI, so the client may ultimately need to testify at a minimum that the screenshot is a true and accurate depiction of what appeared on the website on the date and time of the screenshot. The client as well as the completeness and accuracy of the document are subject to challenge and cross-examination unless there is an admission on authenticity or admissibility from the opposing party. Spreadsheets may contain metadata, internal

calculations, footnotes, and other information that may be essential to the case. The data on the government website may change at any time or may not otherwise be available in the future, so a full and proper collection should be done right away by a sophisticated person, including contextual information and metadata. If necessary, use competent and effective witnesses to obtain publically available evidence. Proper collection, storage, and preservation of databases and spreadsheets can be technically challenging.

Self-help collection of information that is not clearly public information can be problematic. Self-help is only productive if it is done within the law.⁷¹ Efforts to access a computer or device of a party or witness or a person's email account may lead to sanctions or challenges on admissibility⁷² and potential disqualification of counsel in egregious cases, as where counsel has accessed privileged documents of the opposing party.⁷³ One basis for disqualification counsel is if counsel has obtained privileged documents of the opposing party.⁷⁴

Social media is a prolific source of information and a potential candidate for self-help discovery. Counsel should be familiar with the technology and characteristics of social media so as to be able to properly find, collect, and preserve information. For example, if discretion is needed when getting information from a party or witness' LinkedIn account, it is important to know that the target person will know who viewed their account unless the requesting person's LinkedIn settings are set to not disclose such access. Another example involves privacy settings on Facebook. Only limited information is available about a Facebook subscriber except for persons accepted as "Friends." However, it may be unethical to "Friend" an opposing party or witness for the sole purpose of extracting additional information from them on Facebook.⁷⁵ It may be necessary to request information subject to Facebook privacy settings through formal rather than self-help discovery.⁷⁶

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Footnotes

⁷⁰ See DISCOVERY OF SOCIAL MEDIA ESI *infra*.

⁷¹ *O'Brien v. O'Brien*, 899 So. 2d 1133, 1137–38 (Fla. 5th DCA 2005)(where wife installed spyware on her husband's computer and retrieved the husband's on-line chats with other women, the trial judge correctly ruled that the evidence was not admissible because the conversations were illegally intercepted under the **Security of Communications Act**, Fla. Stat. § 934.03).

⁷² *Id.* Attorneys implicated in such improper behavior may be subject to discipline. *Fla. Bar v. Black*, 121 So. 3d 1038 (Fla. 2013)(attorney reprimanded for obtaining and keeping opposing party's iPhone which contained confidential and privileged information).

⁷³ *Castellano v. Winthrop*, 27 So. 3d 134 (Fla. 5th DCA 2010)(attorney disqualified after client illegally obtained opposing party privileged information and provided it to her attorney). The assessment and remedies vary depending on the findings and circumstances of the case after an evidentiary hearing to determine (1) whether counsel for a party possessed privileged materials, (2) the circumstances under which disclosure occurred, and (3) whether obtaining the privileged materials gave counsel an unfair advantage on material matters in the case. *Id.*

⁷⁴ *Id.*

⁷⁵ See *The Philadelphia Bar Assoc. Professional Guidance Committee, Op.* 2009-2 (Mar. 2009). Presumably the decision in Florida would be the same under Florida Rules. See Fla. R. of Prof. Cond. 4-4.1 (Truthfulness in Statements to Others) and 4-4.4 (Respect for Rights of Third Persons).

⁷⁶ Nucci, *supra* n. 16 (a personal injury case plaintiff's photographs on Facebook are discoverable regardless of privacy settings because there is no expectation of privacy for such information posted to others on Facebook).

ITEM 9.08 | 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,⁷⁷ 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.⁷⁸ Florida now has a nearly identical rule that went into effect on January 1, 2011, in the form of Rule 1.285, Florida Rules of Civil Procedure (Inadvertent Disclosure of Privileged Materials). Clawback Agreements under the Florida Rule are anticipated and should be encouraged by courts and strengthened by court order. Since these agreements and protections are completely reciprocal, it is difficult to foresee legitimate grounds for opposition to this important safety net.

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Footnotes

⁷⁷ 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.

⁷⁸ See Rule 26(b)(5)(B), Federal Rules of Civil Procedure, and Rule 502, Federal Rules of Evidence.

ITEM 9.09 | 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.⁷⁹ 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 party.⁸⁰ 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. Generally, 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.⁸¹ 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 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.⁸²

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."⁸³ 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.

One infrequent exception to the high bar protecting access to a party's computer or personal device may be when there is a showing that the device may contain relevant information, and there is no less intrusive means of discovery other than access to the device. In *Antico v. Sindt Trucking, Inc.*,⁸⁴ evidence was presented in a wrongful death auto negligence case that showed that the decedent-driver was texting or talking on her iPhone at the time of the automobile accident at issue in the case. Over vague "privacy" objections, the trial judge ordered that the defense (requesting

party) expert could examine the information on the decedent's iPhone over a 9-hour period around the accident, but the order strictly controlled how the confidential inspection must proceed.⁸⁵ The first district upheld the order as a proper balance of the need for the discovery and protection of privacy interests.⁸⁶ However, the decision of the appellate court was apparently influenced by the plaintiff's failure to advance any less intrusive alternatives for discovery than access as prescribed by the trial court.⁸⁷

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Footnotes

⁷⁹ *Menke v. Broward County School Board*, 916 So. 2d 8 (Fla. 4th DCA 2005).

⁸⁰ 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).

⁸¹ *Menke* supra n. 78 at 12. See also *Antico*, supra note 16 discussed below (defense made a showing of need for information on iPhone and plaintiff offered no less intrusive means for providing relevant information).

⁸² *Id.* at 10.

⁸³ *Id.* at 8.

⁸⁴ *Antico*, supra n. 16.

⁸⁵ *Antico*, supra n. 16 at 167 (“[the trial court’s order] limits the data that the expert may review to the nine-hour period immediately surrounding the accident; it gives Petitioner’s counsel a front-row seat to monitor the inspection process; and it allows Petitioner the opportunity to interpose objections before Respondents can obtain any of the data.”)

⁸⁶ *Id.*

⁸⁷ *Id.* at 168.

ITEM 9.10 | REQUESTING PRODUCTION AND MAKING PRODUCTION OF ESI

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

A request for electronically stored information may specify the form or forms in which electronically stored information is to be produced.⁸⁸ The form should usually be specified. The requesting party should take into account the reasons for specifying a given form, such as: (1) Will the document's native functionality be needed, such as a spreadsheet's embedded calculations? (2) Will the native form⁸⁹ of the document be needed in order to determine the context in which the document was created or stored? (3) What are the format requirements of the software that the requesting party plans to use to review the production?

If the responding party objects to a requested form, or if no form is specified in the request, the responding party must state the form or forms it intends to use.⁹⁰ This is a quite sensible provision that essentially directs the parties to address any issues in the form of production. For example, if a responding party specifies a form of production and the requesting party fails to object to the form of production, the court has a meaningful record on which to determine whether production in another format will be required and which party should be required to pay the cost of the additional production. If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms, which is almost always the native format.⁹¹ Again, this is a sensible process that tells the producing party that they are not permitted to degrade or convert the electronic documents to a less useful format for production.⁹²

Example: Party A requests Party B's discoverable emails in native format. Party B's attorney dislikes using electronic forms in handling discovery and evidence, so he requests a printed copies of every one of Party B's several thousand emails and sends a copy to Party A. When Party A objects, the attorney for Party B states that he has given up every email (which, of course includes everything that would be relevant or discoverable) and "you have everything I have." Is this adequate production under the rules? Answer: No. Party B's attorney should have objected to the requested form (native) rather than producing in another form without involving Party A or the Court in the decision.⁹³ While technically every discoverable email may be included in the production, the printed out versions do not contain metadata, which may be discoverable. In addition, the printed version is not "reasonably usable" because a non-electronic version is not searchable, which can be a valuable tool with large numbers and volumes of emails. Party A, having made a proper request, is entitled to receive the emails in the form requested unless there is an objection followed by an agreement by the parties or court determination on form. In a sense, production of all the emails rather than discoverable emails can be a form of "data dump" exacerbated by the lack of ability to electronically search, sort, deduplicate, and manage the information. The dispute may have been avoided if Party B's counsel contacted Party A before going through the extra expense of providing paper copies.

The form of production may also be an issue when exercising the option to produce records in lieu of answering interrogatories, so the amendments to the civil rules effective September 1, 2012, (1) specifically authorize the production of electronically stored information in lieu of answers to interrogatories, and (2) set out the procedure for determining the form in which to produce the ESI.⁹⁴ If the records to be produced consist of electronically stored information, the records must be produced in a form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.⁹⁵

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⁸⁸ Fla. R. Civ. P. 1.350(b).

⁸⁹ Native format is a copy of the original electronic file. For example, e-mail from an Outlook e-mail program would be produced in a *.pst file. Native format files include the metadata of the original file. Native format files also are easy to modify. This presents difficulties in ensuring that the data has not altered after being produced. Cooperation of counsel and well-documented procedures are required to allow effective use of native format evidence at depositions and trial.

⁹⁰ Fla. R. Civ. P. 1.350(b).

⁹¹ Id. ESI is usually “ordinarily maintained” in its native format, meaning the format used by the software in which the ESI was created.

⁹² Such an effort would be equivalent to the unsavory practice of shuffling unnumbered pages or removing file labels from folders before producing paper discovery to the opponent.

⁹³ Fla. R. Civ. P. 1.350(b).

⁹⁴ Fla. R. Civ. P. 1.340(c).

⁹⁵ Id.

ITEM 9.11 | PRODUCTION OF ESI PURSUANT TO SUBPOENA

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

The issue of form of production in response to a subpoena is much the same as the issues implicated in a Fla. R. Civ. P. 1.350 request for production, and amended Rule 1.410 addresses the issues in similar fashion. It makes abundant sense for the party issuing the subpoena to specify the preferred form of production. However, if a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.⁹⁶

Persons responding to a subpoena may object to discovery of ESI from sources that are not reasonably accessible because of undue costs or burden.⁹⁷ On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought or the form requested is not reasonably accessible because of undue costs or burden. Once that showing is made, the court may order that the discovery not be had or may nonetheless order discovery limited to such sources or in such forms if the requesting party shows good cause, considering the limitations set out in Fla. R. Civ. P. 1.280(d)(2). The court may specify conditions of the discovery, including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery.⁹⁸ Failure of the court or a party to make provision for cost of production from non-parties to produce subpoenaed documents is a departure from the essential requirements of the law and may be remedied by certiorari review.⁹⁹ The court will undoubtedly take into account whether the subpoena is directed to a party or a person or organization controlled by or closely identified with a party, or to a person or entity totally unrelated to and disinterested in the case. Subpoenas to non-parties have become a major issue in discovery of ESI because an enormous amount of ESI is sent, stored, shared, or created on systems owned or controlled by third parties, including internet accessible sites.

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Footnotes

⁹⁶ Fla. R. Civ. P. 1.410(c).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *First Call Ventures, LLC v. Nationwide Relocation Servs.*, 127 So. 3d 691 (Fla. 4th DCA 2013).

ITEM 9.12 | DISCOVERY OF SOCIAL MEDIAL ESI

Social media is a term referring to a broad array of networking sites with varying participation by individuals, businesses, governmental bodies, and other organizations. Social media sites are proliferating in type, form, and content. No longer just a way for kids and young adults to connect about their current activities and status, social media has captured the attention of individuals of all ages as well as businesses, corporations, government entities, and virtually any organization or person that wants to reach target or broad audiences. Some of the more popular social media sites are Facebook, Myspace, LinkedIn, Wikipedia, Flickr, Instagram, YouTube, and Twitter, but there are many more. Social media policies, agreements, structure, make-up, and culture all differ from site to site, which creates varied and complex data management and ownership issues and significant challenges in preservation of social media content. Most social media sites include features allowing members to send direct messages between themselves, much like emails or text messages. Assuming relevancy under the facts and circumstances of a given case, social media evidence is discoverable. See *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. 4th DCA 2015).

Social media may contain important relevant evidence in any number of different legal disputes. It is important to note that the information of a member in a social media site is not obtained by subpoena of the social media provider itself, any more than email is obtained by subpoena of an email provider. The information is discovered from the member. It is their information, they own it, not the providers, and thus the proper course of conduct is a request for production, or subpoena, from them.¹⁰⁰ Text searches are run, the use of key words only determines potentially relevant documents or files. The fact that a document or file comes up in a key word search, or otherwise is found to contain an agreed upon keyword, does not in and of itself make it discoverable.

Example: Party A in a commercial case seeks discovery of all emails in the possession or control of Party B that relate to the same transaction that is at issue or similar transactions for the previous five years. Two key words selected by Party A are the word "cobalt" and the name "Prosser." Party B is willing to run those key words and then select and produce discoverable, non-privileged documents. Party A contends that it is entitled to receive all emails containing "cobalt" or

"Prosser." Is Party A entitled to the discovery of all the emails identified in the word search using these terms? Answer: NO. Relevancy is determined by examination of the document itself. The words used in a search, even if they are agreed upon by the parties as appropriate search terms, are but a tool to identify potentially relevant documents. Relevancy is determined by legal analysis of whether the document is (1) relevant to the case's subject matter, and (2) admissible in court or reasonably calculated to lead to evidence that is admissible in court.¹⁰¹ Documents that turn up in a word search may or may not meet these criteria, and Party B is only obligated to produce discoverable documents. The analog equivalent to the demand made by party A is to request a search of all file folders with the words "Cobalt" and "Prosser" on the file labels and then contend that all paper within those folders is discoverable. The determination of relevancy is made by examination of the document itself, not normally by the wording of the label on the folder in which the document is found.

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¹⁰⁰ **Stored Communications Act** (SCA, codified at 18 U.S.C. Chapter 121 §§ 2701–2712) is a law that addresses voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" held by third-party internet service providers (ISPs). It is a waste of time to subpoena internet service providers. Instead, a social media member should be requested to produce their information, and motions to compel should be directed against them if they do not comply.

¹⁰¹ Fla. R. Civ. P. 1.280(b)(1); Balfour, *supra* n. 16.

ITEM 9.13 | CONCLUSION

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

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CHAPTER X DISCOVERY OF LAWYER-CLIENT PRIVILEGED
COMMUNICATIONS

ITEMS: 10.00 through 10.06

ITEM 10.00 | CHAPTER 10 INTRO

Confidential lawyer-client communications are, by statute, privileged, and therefore not discoverable.¹ A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services to the client, and those reasonably necessary for the transmission of the communication.² 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.³

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

- (1) the communication would not have been made but for the contemplation of legal services;
- (2) the employee making the communication did so at the direction of his or her corporate superior;
- (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- (4) the content of the communication relates to the legal services being rendered, within the scope of the employee's duties; and
- (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

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Footnotes

¹ Fla. Stat. § 90.502; Fla. R. Civ. P. 1.280(b)(1).

² Fla. Stat. § 90.502.

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

⁴ 632 So. 2d 1377 (Fla. 1994).

ITEM 10.01 | 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.⁵

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

The failure to file a privilege log can result in a waiver of the attorney-client privilege.⁸ 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.⁹ The failure to submit a privilege log at the same time as a discovery response is served, does not waive the privilege. Fla. R. Civ. P. 1.280(b)(5) does not detail the procedure to follow for service of privilege logs and does not specifically address the appropriate sanction to be imposed if a party is tardy in filing a privilege log. If a party does not submit a privilege log within a reasonable time before a hearing on the motion to compel, then the trial court can be justified in finding a waiver because there would be no basis on which to assess the privilege claim. A very late and inadequate privilege log could subject a party to waiver of the privilege.¹⁰

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..."¹¹ Waiver does not apply where assertion of the privilege is not document-specific, but category specific, and the category itself is plainly protected.¹²

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Footnotes

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

⁶ U.S. District Court, Southern District of Florida, Local Rule 26.1(g)(3)(B)(ii).

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

⁸ *Id.*

⁹ *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.”).

¹⁰ *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115, 1129 (Fla. 2014).

¹¹ *Gosman*, *supra*.

¹² *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).

ITEM 10.02 | INADVERTENT DISCLOSURE

As communications technology advances (facsimile, e-mail, test, 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, and in 2010, Fla. R. Civ. P. 1.285 was enacted, governing the inadvertent disclosure of privileged materials. It was amended effective January 1, 2011.¹³ The rule is self-explanatory. To preserve the privileges recognized by law, the party must serve written notice of the assertion of privilege on the party to whom the materials were disclosed, within 10 days of actually discovering the inadvertent disclosure.¹⁴ The rule sets forth the duty of the party receiving such notice;¹⁵ the right to challenge the assertion of the privilege;¹⁶ and, the effect of a determination that the privilege applies.¹⁷

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

The recipient still has the right to challenge the claimed privilege on the basis of waiver.²⁰ The rule does not set forth any specific test to determine whether a waiver occurred, however, the courts have addressed this issue in the past. To determine 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.²¹

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

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

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

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

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

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

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¹³ Fla. R. Civ. P. 1.285 Inadvertent Disclosure of Privileged Materials.

¹⁴ Fla. R. Civ. P. 1.285(a).

¹⁵ Fla. R. Civ. P. 1.285(b).

¹⁶ Fla. R. Civ. P. 1.285(c).

¹⁷ Fla. R. Civ. P. 1.285(d).

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

¹⁹ *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.

²⁰ Fla. R. Civ. P. 1.285(c)(4).

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

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

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

ITEM 10.03 | 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.²⁴

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Footnotes

²⁴ *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.”).

ITEM 10.04 | EXAMINATION UNDER OATH

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

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Footnotes

²⁵ *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.").

ITEM 10.05 | 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.²⁶

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Footnotes

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

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CHAPTER XI EXPERT WITNESS DISCOVERY

ITEMS: 11.01 through 11.05

ITEM 11.01 | INTRODUCTION

If scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

1. The testimony is based upon sufficient facts or data;
2. The testimony is the product of reliable principles and methods; and
3. The witness has applied the principles and methods reliably to the facts of the case.¹

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.²

The facts or data upon which an expert bases an opinion may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonable relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.³

Like any witness, an expert is subject to impeachment, as is the testimony the expert presents. Challenges to the expert's qualifications and the validity of an opinion may be made to the court in its gatekeeper role; and, if the opinion is allowed, challenges may be made before the trier of fact. Experts in general are qualified to render opinions based on their experience, background, and training. In medical malpractice actions, the law imposes additional requirements to ensure that the expert has the necessary expertise.⁴ General challenges to the qualifications of the expert include the knowledge, skill, experience, training, or education of the witness. As the gatekeepers, trial courts have considerable discretion in determining whether an expert is qualified to give an opinion in a given case, but in fact rarely will the expert be excluded on general challenges to qualification. The court should not exclude an expert's opinion based on matters that go to the weight of the opinion because it is the exclusive province of the jury to weigh the evidence.⁵

Challenges that go to the weight of the opinions of an expert include the reasons given by the witness for the opinion expressed, the reasonableness of the opinion in light of all surrounding facts

and circumstances, whether the opinion differs from that of other qualified experts or recognized authorities and treatises, and any relationship or circumstance that may give rise to bias on the part of the expert.⁶ These factors require discovery broad enough for the opposing party to challenge the expert and the expert testimony.

In 2013, the Florida Legislature amended Fla. Stat. § 90.702 and stated in the preamble to the amendment that it intended to adopt as standards for expert testimony to be used by the courts of this state to be those as provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), and to no longer apply the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Florida Supreme Court is currently considering whether to adopt the amendment as a rule of evidence, to the extent that it is procedural.

As gatekeeper, the trial court, upon objection, must determine whether *Daubert* applies, and, if so, whether the testimony of the expert is admissible under *Daubert* standards. The details of the analysis required to challenge or support opinions is beyond the scope of this work.

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Footnotes

¹ Fla. Stat. § 90.702 (2015).

² Fla. Stat. § 90.703 (2015).

³ Fla. Stat. § 90.704 (2015).

⁴ E.g., Fla. Stat. § 766.102(5).

⁵ See, e.g., *Univ. of Fla. Bd. of Trs. v. Stone*, 92 So. 3d 264, 272 (Fla. 1st DCA 2012).

⁶ For example, bias can be shown in the form of financial remuneration for testifying, financial or business interest in supporting the opinions expressed, a relationship between the witness and a party or counsel, etc.

ITEM 11.02 | DISCUSSION

Pursuant to Fla. R. Civ. P. 1.280(b)(5)(A) discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Fla. R. Civ. P. 1.280(b)(1) (scope of discovery) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) By interrogatories a party may require a party (a) to identify each person whom the party expects to call as an expert witness at trial and (b) to state the subject matter on which the expert is expected to testify, and (c) to state the substance of the facts and opinions to which the expert is expected to testify and (d) to provide a summary of the grounds for each opinion.

(ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with Fla. R. Civ. P. 1.390 without motion or order of court.

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial: (1) The scope of employment in the pending case and the compensation for such service; (2) The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants. (3) The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial; and (4) An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

Under the same rule, an expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(5)(C) of the rule concerning fees and expenses as the court may deem appropriate. The referenced rules confine both the discovery methods that can be employed when directed to expert witnesses and the subject

matter of discovery. By its terms the rule allows a party to obtain information about another party's expert initially only through the vehicle of interrogatories.⁷

A party may attack the credibility of a witness by exposing a potential bias.⁸ A financial relationship between the expert and a party, an agent for a party, or counsel for a party is an area often explored to attempt to uncover possible bias. In the years up to the mid-1990's, trial courts permitted broad discovery into the private financial affairs of experts far beyond what was reasonably necessary to fairly litigate the potential for bias, and which was invasive and harassing and threatened to chill the willingness of experts to become involved in litigation. In *Syken v. Elkins*,⁹ experts retained to provide compulsory medical examinations (CME) were ordered by the trial court to produce expansive private financial information, including tax returns, and information regarding patients who were examined for purposes of litigation in unrelated actions. On certiorari appeal, the appellate court, en banc, quashed the trial court order, holding that the required information was overly burdensome, caused annoyance and embarrassment, and provided little useful information. The Court fashioned criteria for financial discovery and a methodology that balanced a party's need to obtain financial bias discovery from an expert with the need to protect their privacy rights. The criteria governing the discovery of financial information from expert witnesses adopted by *Elkins* are as follows:

1. The medical expert may be deposed either orally or by written deposition.
2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each.
4. The expert may be asked to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of IME's that he or she performs in one year. The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.

5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.
6. The production of the expert's business records, files, and 1099's may be ordered produced only upon the most unusual or compelling circumstance.
7. The patient's privacy must be observed.
8. An expert may not be compelled to compile or produce nonexistent documents.

The Florida Supreme Court adopted in full the Third District's criteria in *Elkins*, and subsequently the methodology was codified in part in Fla. R. Civ. P. 1.280(b)(5)(A). The purpose of Fla. R. Civ. P. 1.280(b)(5)(A) is to protect experts from the annoyance, embarrassment, oppression, undue burden, or expense associated with discovery of financial information. In general, without making any finding of "the most unusual or compelling circumstances" that might justify the production of financial or business records, the trial court may not order an expert to produce financial and business records beyond that allowed by the rule.¹⁰ The purpose of financial discovery is to expose potential bias to the jury, and normally the information available from discovery had under Fla. R. Civ. P. 1.280(b)(5)(A) is sufficient to accomplish that purpose.¹¹

Several years following *Elkins*, the Supreme Court decided *Allstate Insurance Co. v. Boecher*.¹² In *Boecher*, an insured sought discovery from his insurance company of the identity of cases and amount of fees paid to its expert reconstruction and injury causation expert during the preceding three years. The Supreme Court held that the *Elkins* limitations could not be used to shield the discovery sought from a party regarding its financial relationship with the expert and stated:

The information sought here would reveal how often the expert testified on Allstate's behalf and how much money the expert made from its relationship with Allstate. The information sought in this case does not just lead to the discovery of admissible information. The information requested is directly relevant to a party's efforts to demonstrate to the jury the witness's bias.

The more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing. A jury is entitled to know the extent of the financial connection between the party and the witness, and the cumulative amount a party has paid an expert during their relationship. A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship.

In this case Boecher attempted to discover facts known directly by Allstate concerning the extent of Allstate's relationship with its expert witness. We find no indication from either the language of Rule 1.280(b)(4) or our opinion in Elkins that the rule was intended to shield a party from revealing the extent of its relationship with an expert witness.

Because the discovery in Boecher sought information from the party regarding its relationship with a particular expert, the court found that the analysis changed and the balance of interests shifted in favor of allowing the discovery.

While Rule 1.280(b)(5)(A)(iii) was drafted to protect retained experts only, a treating physician expert is entitled to similar protection from overly intrusive general financial bias discovery.¹³ Cases in which there is evidence of a referral relationship between a physician and lawyer may result in the need for financial discovery beyond that provided by Fla. R. Civ. P. 1.280(b)(5)(A) from both the law firm and the doctor.¹⁴

The situation in which a physician treats a patient on referral from a lawyer has been addressed in a number of cases. In one respect, the physician is a "fact" witness, a treating physician. In another respect, the same physician often provides expert opinions at trial regarding the permanency of injuries, prognosis, and the need for future treatment. In such cases, the physician is not merely a witness retained to give an expert opinion about an issue at trial and is not a typical treating physician that a patient independently sought out.¹⁵ A lawyer referred the patient to the physician in anticipation of litigation and therefore the physician has injected himself into the litigation, and the witness potentially has a stake in the outcome of the litigation because of the referral by the lawyer, which provides the "compelling circumstances" to expand discovery beyond that provided by rule.¹⁶

A law firm's financial relationship with a doctor is discoverable on the issue of bias.¹⁷ Discovery seeking to establish that a financial relationship exists should first be sought from a party, a treating doctor, or other witnesses—not the party's legal counsel. Once there is evidence that a referral relationship exists, discovery from the law firm may be appropriate, with the trial court balancing the privacy rights of the former patients and clients, and implementing appropriate safeguards. Where a testifying expert doctor in deposition denied having any records and provided "nebulous testimony" in connection with the number of his patients who were represented by the law firm, the law firm became an appropriate source of the necessary information.¹⁸

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Footnotes

⁷ *Smith v. Eldred*, 96 So. 3d 1102 (Fla. 4th DCA 2012).

⁸ Fla. Stat. § 90.608(2) (2015).

⁹ 644 So. 2d 539 (Fla. 3d DCA 1994), approved, 672 So. 2d 517 (Fla. 1996)

¹⁰ *Grabel v. Sterrett*, 163 So. 3d 704 (Fla. 4th DCA 2015).

¹¹ *Id.*

¹² 733 So. 2d 993 (Fla. 1999).

¹³ *Steinger, Iscoe & Greene, P.A. v GEICO Gen. Ins. Co.*, 103 So. 3d 200, 203-04 (Fla. 4th DCA 2012).

¹⁴ *Id.* at 547

¹⁵ See *Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060, 1064 (Fla. 4th DCA 2011).

¹⁶ *Id.*

¹⁷ *Worley v. Cent. Fla. YMCA*, 163 So. 3d 1240 (Fla. 5th DCA 2015).

¹⁸ *Id.*; *Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay*, 133 So. 3d 1178 (Fla. 4th DCA 2014).

ITEM 11.03 | DISCOVERY OF NON-PARTY MEDICAL RECORDS

Privacy rights, statutory law,¹⁹ and common sense dictate that discovery of nonparty medical records and information is severely restricted.²⁰ The issue has arisen most often in association with experts who do a Compulsory Medical Examination and are asked to provide records or information from records of CME's for other patients. Simply redacting the names of patients does not necessarily resolve privacy and patient confidentiality issues, and the issues of undue burden and relevance are also associated with such requests. Section 456.057(7)(a)(3) Fla. Stat. (2015), as it has been interpreted and applied in Florida courts, creates "a broad and express privilege of confidentiality as to the medical records and the medical condition of a patient." The clear terms of the statute prohibit the production of a nonparty patient's medical records and they prohibit discussion about a nonparty patient's medical condition without prior notice to that nonparty.²¹ Likewise, an interrogatory to a party requesting that the party furnish a "general summary of the opinions and basis of the opinions" offered by his medical experts in other cases has been found to invade the privacy rights of non-parties, as protected by the referenced statute.²²

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¹⁹ Fla. Stat. § 456.057(7)(a)(3)(prohibits the disclosure of nonparty CME reports without prior notice to all of the affected nonparties); *Graham v. Dacheikh*, 991 So. 2d 932 (Fla. 2d DCA 2008)(disclosure is disclosure whether it is production of records or through deposition testimony).

²⁰ *Crowley v. Lamming*, 66 So. 3d 355 (Fla. 2d DCA 2011)(trial court departed from the essential requirements of the law when it ordered CME doctor to bring the CME reports of nonparties to his deposition and to testify to some of the information contained in those reports); *USAA Casualty Insurance Co. v. Callery*, 66 So. 3d 315 (Fla. 2d DCA 2011)(it was departure from essential requirements of the law to enter an order compelling an insurance company party to produce CME results from CME doctor's last 20 exams for the party with all patient-identifying information redacted and only including the physician's conclusions/impressions, the physician's signature, the date of report, and the name and address of the receiving attorney). See also *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla. 4th DCA 2012)(similar denial of discovery where the nonparty CME patient information was requested from a party as opposed to the CME physician).

²¹ *Crowley*, supra at 358.

²² *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla 4th DCA 2012).

ITEM 11.04 | DISCOVERY FROM EXPERT NOT TESTIFYING AT TRIAL

While a party is entitled to reasonable discovery from and about a testifying expert witness, such access changes when the expert is withdrawn from the witness list. A party is entitled to discover facts known or opinions held by an expert who has been retained by a party in anticipation of litigation or preparation for trial and who is not expected to testify at trial, only as provided in Rule 1.360(b). Alternatively, such discovery may be had upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. Thus, an expert witness that is not expected to testify in trial may not be deposed except upon such a showing of exceptional circumstances. Where a party, through answers to expert interrogatories, initially disclosed a particular doctor as an expert who would testify as a witness at trial, but later withdrew the doctor's name and he was no longer a witness who would be called at trial, it would be error for a judge to compel the doctor's deposition absent a showing of compelling circumstance.²³

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Footnotes

²³ *Rocca v. Rones*, 125 So. 3d 370 (Fla. 3d DCA 2013).

ITEM 11.05 | SIGNIFICANT CASES INVOLVING THE BREADTH AND SCOPE OF EXPERT WITNESS DISCOVERY

Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994).

En banc, the appellate court reviewed trial court orders requiring defendant's trial experts to produce, among many other things, certain 1099s and P.A. federal income tax returns, as well as information regarding patients who were examined for purposes of litigation in unrelated matters. In quashing the orders, the court concluded that decisions in the field have gone too far in permitting burdensome inquiry into the financial affairs of physicians and established eight criteria limiting discovery of an opposing medical expert for impeachment. One of the limiting criteria was that production of the experts business records, files, and 1099s may be ordered produced only upon the most unusual or compelling circumstances. The court commented that the problem the criteria addresses is the attempt by litigators to demonstrate the possibility of a medical expert's bias through "overkill discovery," to prove a point easily demonstrable by less burdensome and invasive means, and that production of the information ordered in the cases before them caused annoyance and embarrassment while providing little information.

Elkins v. Syken, 672 So. 2d 517 (Fla. 1996).

On conflict certiorari review, the supreme court acknowledged that the issues presented in the case were an expanding problem, approved what the court called a well-reasoned decision, adopted in full the criteria governing the discovery of financial information from expert witnesses in an effort to prevent the annoyance, embarrassment, oppression, undue burden or expense, claimed on behalf of medical experts, and directed that the criteria be made part of the commentary to Fla. R. Civ. P. 1.280. The court stated that discovery was never intended to be used as a tactical tool to harass an adversary in a manner that actually chills the availability of information by non-party witnesses.

Allstate v. Boecher, 733 So. 2d 993 (Fla. 1999).

Conflict certiorari review of appellate decisions, one sustaining a trial court's order overruling Allstate's objections to interrogatories directed to it seeking the identity of cases in which its expert had performed analyses and rendered opinions for Allstate nationally in the preceding three years, and the amount of fees paid to that expert nationally during that same period. In approving that order, the court held that neither its decision in *Elkins* nor Fla. R. Civ. P. 1.280(b)(4)(A)(iii) prevents this type of discovery. The court pointed out that, unlike the information requested in *Elkins*, which related to the extent of the expert's relationships with others, the specific information sought from Allstate in this case pertained to the expert's ongoing relationship with Allstate. The court further stated that the information requested was directly relevant to the party's efforts to demonstrate to the jury the witness's bias.

Katzman v. Rediron, 76 So. 3d 1060 (Fla. 4th DCA 2011).

Defendant sought discovery from Dr. Katzman, plaintiff's treating physician, regarding how often he had ordered discectomies over the past four years (the procedure performed on both plaintiffs after an auto accident, on referral from plaintiffs' attorney, and under letters of protection), and what he had charged to perform it in litigation and non-litigation cases. Dr. Katzman objected and argued that the discovery was overbroad and exceeded the financial discovery permitted from retained experts under the discovery rules and *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). The circuit court ruled that Dr. Katzman must respond and provide information as to the number of patients and what amount of money he collected from health insurance companies and under letters of protection, over the preceding four years. The appellate court held that since a lawyer referred the patient to the physician in anticipation of litigation the physician had injected himself into the litigation, and the circumstance would allow the defendant to explore possible bias on the part of the doctor. It agreed that *Elkins* discovery should generally provide sufficient discovery into such financial bias. The appellate court further held that the discovery sought is not relevant merely to show that the witness may be biased based on an ongoing financial relationship with a party or lawyer, but was relevant to a

discrete issue, whether the expert had performed an allegedly unnecessary and costly procedure with greater frequency in litigation cases, and whether he allegedly overcharged for the medical services at issue, a substantive issue being the reasonableness of the cost and necessity of the procedure. In the Court's view, it meets the requirements of "unusual and compelling circumstances," and denied the petition to quash the discovery order.

Katzman v. Ranjana Corp., 90 So. 3d 873 (Fla. 4th DCA 2012).

Certiorari review of trial court order allowing discovery by subpoena duces tecum to Dr. Katzman, plaintiff's treating physician on referral from another physician, that included voluminous information covering four years concerning the number of times he performed four different surgeries, the amounts he had collected from health insurance coverage on an annual basis over four years regarding the type of surgeries (four) performed on plaintiff, and the number of patients and amounts received each year under letters of protection from attorneys. Dr. Katzman provided medical services pursuant to a letter of protection from her attorney. Dr. Katzman objected to the subpoena on the basis that it sought unrelated information, and confidential private business and financial records which exceeded the scope of permissible discovery under Fla. R. Civ. P. 1.280 as well as *Elkins v. Sykens*, 672 So. 2d 517 (Fla. 1996). He also asserted that the requests were extremely burdensome and would require thousands of man hours and dollars to comply. In denying the motion for protective order the trial court held, among other things, that the doctor potentially has a stake in the outcome of the litigation and had injected himself in the litigation by virtue of the letter of protection from plaintiff's attorney. In quashing the order, the appellate court said that the trial court did not have the benefit of the appellate court's revised opinion in *Rediron* when it entered its order, and thus had not seen that part of the revised opinion stating that it was the referral, not the letter of protection, that injects a doctor into litigation. On remand, the trial court was instructed to reconsider all of the objections raised by the doctor against the back drop of the clarified *Rediron* opinion, and that the trial court should consider petitioner's argument of undue burden, since requiring information on four surgical procedures is far more extensive

and potentially burdensome than the "limited intrusions" found in *Rediron*.

Smith v. Eldred, 96 So. 3d 1102 (Fla. 4th DCA 2012).

Trial court overruled defendant's objection to plaintiff's Notice of Intent to Serve a Subpoena and Notice of Service of Expert Witness Request for Production directed to defendant's liability expert. Defendant asserted that Fla. R. Civ. P. 1.280(b)(4) does not allow a party to serve a subpoena or a request for production, and that a party may request the court to seek discovery of financial or business records by other means, but only when unusual or compelling circumstances exist. The appellate court agreed, quashed the order, and stated that Rule 1.280(b)(4) means what it says and says what it means, that the rule confines both the discovery methods that can be employed when directed to expert witnesses and the subject matter of that discovery, and that a request for productions is simply NOT a method condoned by the rule except upon motion.

Steinger v. Geico, 103 So. 3d 200 (Fla. 4th DCA 2012).

The trial court ordered plaintiff's law firm to produce discovery pertaining to the law firm's relationship with four of plaintiff's treating physicians who would render expert opinions on matters such as causation, permanency, and future damages. The production requests included all records of payments by the firm to these doctors, as well as all letters of protection to them. Client names could be redacted in cases that settled or where no lawsuit was filed. The appellate court stated that where there is a preliminary showing that the plaintiff was referred to the doctor by the lawyer (whether directly or through a third party) or vice versa, the defendant is entitled to discover information regarding the extent of the relationship between the law firm and the doctor with the trial court balancing the privacy rights of the former patients and clients, and implementing appropriate safeguards. "Normally, discovery seeking to establish that a referral has occurred should first be sought from the party, the treating doctor or other witnesses, not the party's legal counsel. We do not suggest, however, that the law firm may never be a primary source for such discovery where, as here, the doctor has no records or provides nebulous testimony about the doctor's past dealings with the referring law firm." The appellate court further stated: "We do not suggest that all

financial discovery from a physician who also serves as an expert in litigation must always be limited to those matter listed in Rule 1.280(b)(5)(A). We stress that the limitations of financial bias discovery from expert witnesses cannot be used as a shield to prevent discovery of relevant information from a material witness - such as a treating physician. The rule limits discovery of the general financial information of the witness where it is sought solely to establish bias. However, trial courts have discretion to order additional discovery where relevant to a discrete issue in a case. See *Rediron*, 76 So. 3d at 1064-65." Since from the record the Court was unable to determine whether defendant had established the existence of a referral relationship between the doctors and the law firm, it granted the petition, stating that it was premature to order more extensive financial bias discovery, and remanded the case for proceedings consistent with the opinion.

Pack v. Geico, 119 So. 3d 1284 (Fla. 4th DCA 2013).

Plaintiff sought a new trial after a defense verdict alleging error when the trial court denied her motion in limine and permitted the defendant to introduce into evidence a letter of protection between her and her physician, who testified as her expert witness on her claim of more serious injuries to her neck. Plaintiff argued that evidence of a letter of protection, absent a referral relationship from the lawyer to the doctor, was not relevant according to the Court's prior ruling in *Katzman v. Rediron*, 76 So. 3d 1060 (Fla. 4th DCA 2011). The appellate court acknowledged that in *Katzman* it held that a letter of protection was not sufficient in itself to allow discovery of an expert beyond that permissible under Fla. R. Civ. P. 1.280(b)(4)(A). However, the Court stated that in *Katzman* it did not hold that a letter of protection is not relevant to show potential bias, and affirmed the trial court's ruling denying plaintiff's motion for new trial.

Lytal v. Malay, 133 So. 3d 1178 (Fla. 4th DCA 2014).

The trial court ordered plaintiff's law firm to provide a list of all payments made to plaintiff's treating expert, who was expected to provide expert opinions at trial, with all client and patient information redacted. At his deposition, the doctor denied having any records and provided "nebulous testimony" in connection with the number of patients who were represented by the law firm. The court held that under these

circumstances the law firm was an appropriate source of this information, citing the Steinger case, and denied the petition to quash the discovery order.

Brown v. Mittelman, 152 So. 3d 602 (Fla. 4th DCA 2014).

Defense counsel, in a case arising from an automobile accident, subpoenaed the person in one of plaintiff's treating physician's office with the most billing knowledge, to produce documents regarding patients previously represented by both of plaintiff's law firms, LOP cases, and referrals from both law firms. One of plaintiff's attorneys had referred her to that doctor, who treated her under a LOP agreement. The trial court overruled the doctor's objections to the subpoena. The appellate court stated that because Rule 1.280(b)(5) did not apply to the requested discovery, and because "a law firm's financial relationship with a doctor is discoverable on the issue of bias" the petition for certiorari was denied. The court pointed out that a party may attack the credibility of a witness by exposing a potential bias. § 90.608(2), Fla. Stat. (2009). The court noted that the financial relationship between the treating doctor and plaintiff's attorneys in present and past cases creates the potential for bias and discovery of such relationship is permissible. The discovery available under Rule 1.280(b)(5) does not compel full disclosure of a treating physician's potential bias, but limits financial discovery to an approximation of the portion of the expert's involvement as an expert witness based on data such as the percentage of earned income derived from serving as an expert witness. A physician's continued financial interest in treating other patients referred by a particular law firm could conceivably be a source of bias "not immediately apparent to a jury," *Morgan, Colling & Gilbert, P.A. v. Pope*, 798 So. 2d 1 (Fla. DCA 2001), at 3. Rule 1.280(b)(5) neither addresses or circumscribes discovery of this financial relationship. Also, the court stated that whether the law firm directly referred the patient to the treating doctor does not determine whether discovery of the doctor/law firm relationship is allowed, and pointed out that a potential bias arising from a letter of protection exists independent of any referral relationship, as does a doctor's referral arrangements with a law firm in other cases.

Grabel v. Sterrett, 163 So. 3d 704 (Fla. 4th DCA 2015).

Dr. Grabel, a medical expert retained by State Farm to conduct a CME in an uninsured motorist claim, petitioned the court to grant certiorari and quash an order of the circuit court that overruled his objections to a subpoena duces tecum. The order required the expert to produce copies of all billing invoices submitted to State Farm and its attorneys for the past three years; to produce any existing document and/or statement that included the total amount of money paid by or on behalf of State Farm or its attorneys for work the expert had performed as an expert witness on their behalf for the past three years; and to produce all documents evidencing the amount or percentage of work performed by Dr. Grabel on behalf of any defendant or their defense attorneys, during the last three years, including time records, invoices, 1099s or other income reporting documents. In granting certiorari and quashing the order, the appellate court held that without making any finding of "the most unusual or compelling circumstances" that might justify the production of financial and business records, the trial court ordered the doctor to produce financial and business records beyond that allowed by the rule and *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). The court pointed out that plaintiff had obtained, or could obtain, records regarding payments from the insurer to the doctor pursuant to *Allstate v. Boecher*, and that this is more than sufficient information to reveal any potential bias.

Worley v. Central Florida YMCA, 163 So. 3d 1240 (Fla. 5th DCA 2015).

During the discovery process in a slip and fall case, Morgan & Morgan tenaciously opposed all attempts by defendant to learn how plaintiff became a patient of certain medical care providers. After hearings on various discovery requests by defendant, the trial court entered an order that required plaintiff to produce "the names of any and all cases (including plaintiff, defense, court and case number) where a client was referred directly or indirectly by any Morgan & Morgan attorney" to the relevant treating physicians in the present case, which necessarily included information on whether plaintiff in the pending case was referred by Morgan & Morgan to her treating physicians. The appellate court concluded that the order did not depart from the essential requirements of law, especially considering that YMCA had

sufficiently demonstrated a good faith basis for suspecting that a referral relationship existed. "The limited type of discovery presently at issue concerns only the existence of a referral relationship between Morgan & Morgan and the treating physicians in this case," which is directly relevant to the potential bias of the physicians. The appellate court further held that: "Having exhausted all other avenues without success we find - contrary to the trial court's preliminary ruling and to *Burt v. Geico*, 603 So. 2d 125 (Fla. 2d DCA 1992) - that it was appropriate for YMCA to ask Worley if she was referred to the relevant physicians by her counselor or her counselor's firm."

Grabel v. Roura, 4D15-194, (Fla 4th DCA 2015).

The trial court, finding that the deposition responses of the defense expert witness were inconsistent with the interrogatory answers provided by defense counsel regarding the percentage of income the doctor derived from working as an expert and the number of times he has testified for plaintiffs and defendants in personal injury litigation, concluded that these inconsistencies constituted "the most unusual or compelling circumstances" that allowed production of the expert's financial and business records. The trial court allowed plaintiff to issue subpoenas to twenty non-party insurance carriers, not shown to have any involvement in the litigation, requiring production of financial records (including tax records) showing the total amount of fees paid to the doctor for expert litigation services since 2009. The appellate court quashed the order, stating that this extensive financial discovery as to a retained expert exceeded that allowed by the rule and was unnecessary, pointing out that the rule expressly provides that "the expert shall not be required to disclose his or her earnings as an expert witness." The appellate court further held that the alleged inconsistencies do not constitute "unusual or compelling circumstance" to warrant such broad financial disclosure, as there was no showing that the inconsistencies were the result of falsification, misrepresentation, or obfuscation.

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CHAPTER XII SOURCES & AUTHORITIES

ITEMS:

5

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