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

CHAPTER I
AVAILABLE WEAPONS TO COMBAT DISCOVERY ABUSE

E: TextBookDiscrimination@gmail.com
W: www.TextBookDiscrimination.com

visit TBD's website for the most up-to-date information

TABLE OF CONTENTS | CHAPTER I | AVAILABLE WEAPONS TO COMBAT DISCOVERY...

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]

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

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 inference[12] 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]

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

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]

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

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]

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

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] *Griefer 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]

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

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.

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

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.

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

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

APPENDIX

COPYRIGHT NOTICE

ORIGINAL SOURCE

#	Item	Link
1	Original Source	NinthCircuit.org

CONTACT INFORMATION

E: TextBookDiscrimination@gmail.com
W: www.TextBookDiscrimination.com

Congratulations! You're now ***booked up*** on Chapter I from Florida's Handbook on Civil Discovery Practice (2016)!