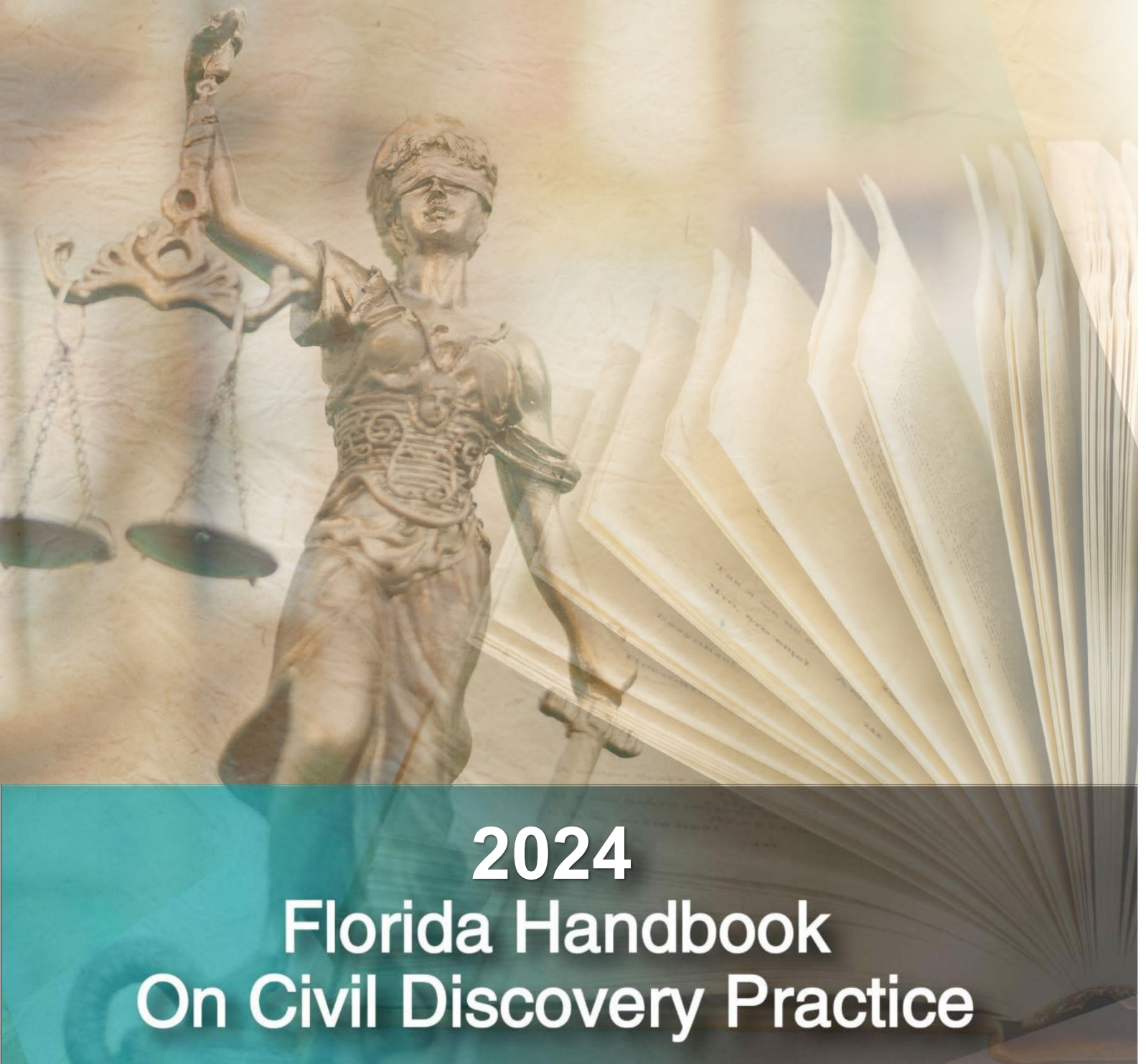


# DISCOVERY

“to secure the just, speedy, and inexpensive determination”



**2024**  
**Florida Handbook**  
**On Civil Discovery Practice**



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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 should still 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 2024 (eighteenth) edition updates the handbook through December 2023.

# TABLE OF CONTENTS

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Chapter 1:	Discovery Standard and Expectations .....	1
Chapter 2:	Preservation and Spoliation of Evidence.....	4
	Preservation.....	4
	Safe Harbor for Electronically Stored Information.....	7
	Spoliation.....	8
	Sanctions.....	8
Chapter 3:	Electronic Discovery.....	12
	The Duty of Electronic Discovery Competence.....	12
	Law, Policy, and Principles of Electronic Discovery .....	13
	Protecting Client Confidences and Data.....	22
	Duties of Attorney and Client Regarding Preservation of ESI .....	23
	Conferring with Opposing Counsel.....	31
	Key Word Search, Relevancy and Scope of Discovery .....	32
	Collection and Review of ESI .....	35
	Framework for the Trial Lawyer Facing E-Discovery.....	36
	Requesting Production and Making Production of ESI.....	41
	Production of ESI Pursuant to Subpoena.....	44
	Discovery of Social Media ESI .....	46
	Discovery of Electronic Media and Health Records .....	47
	Inspection of Opposing Party Devices .....	49
	“Self-Help” Discovery .....	52
	Ten Practical Steps for Handling Electronic Evidence .....	55
	Conclusion .....	58
Chapter 4:	Written Discovery Practice .....	59
	Documents Requested.....	59
	Duty of Good Faith and Due Diligence .....	59
	Formulating Requests for Documents .....	59
	Use of Form Requests.....	59
	Reading and Interpreting Requests for Documents.....	60
	Contact When a Document Request is Received .....	60
	Responding to Document Requests .....	61
	Objections.....	62
	When Production is Limited by Interpretation .....	63
	Supplementation of Document Production .....	64
	Claim of Privilege.....	64
	Oral Requests for Production of Documents .....	65
	Location of Production .....	65
	Available for Copying.....	65
	Manner of Production .....	66

	Listing and Marking.....	66
	Copying .....	67
	Scanning.....	68
	Later Inspection .....	68
	Interrogatories .....	68
	Number and Scope of Interrogatories.....	68
	Answers.....	69
	Objections.....	70
	Claims of Privilege .....	71
	Contention Interrogatories .....	71
	Reference to Deposition or Document.....	71
	Interrogatories Should be Reasonably Particularized .....	72
	Producing Records in Lieu of Answering Interrogatories.....	72
	Answering Objectionable Interrogatories .....	73
	Requests for Admission .....	74
	Number and Scope for Admission .....	74
	Responding to Requests for Admission.....	74
	Objections.....	75
	Asserting Fifth Amendment Privilege.....	75
	Amending Responses to Request for Admission.....	76
Chapter 5:	Proper Conduct of Depositions .....	77
	Objections .....	78
	Proper Form of Objections.....	78
	Speaking Objections.....	79
	Examinations.....	80
	Proper Responses to Improper Conduct.....	81
	Deposition of Corporate Representative(s) .....	82
	Conclusion .....	83
Chapter 6:	Expert Witness Discovery .....	84
	I. Introduction .....	84
	II. Discovery From a Party.....	85
	A. Retained Experts.....	85
	1. Opinion Discovery .....	85
	2. “Financial” or “Litigation Bias” Discovery .....	87
	3. “Relationship Bias” Discovery.....	89
	B. Consulting Experts .....	92
	C. Non-Party Medical Providers.....	93
	1. “Pure” and “Hybrid” Treating Physicians.....	93
	2. Opinion Discovery .....	94
	3. “Financial” or “Litigation Bias” Discovery .....	95
	4. Relationship Bias” Discovery.....	98
	D. LOP Providers .....	100
	1. Opinion Discovery .....	100

	2. “Financial” or “Litigation Bias” Discovery .....	101
	3. “Relationship Bias” Discovery.....	101
	III. Discovery Served Directly on the Experts .....	102
	A. Retained Experts .....	102
	1. Opinion Discovery .....	102
	2. “Financial” or “Litigation Bias” Discovery .....	102
	3. “Relationship Bias” Discovery.....	103
	B. Consulting Experts .....	103
	C. Non-Party Medical Providers.....	103
	1. Opinion Discovery .....	103
	2. “Financial” or “Litigation Bias” Discovery .....	104
	3. “Relationship Bias” Discovery.....	105
	D. LOP Providers .....	106
	E. Discovery in Support of Unreasonable Medical Bill Defense....	107
	IV. Discovery from a Party’s Attorney or Law Firm.....	110
	A. Regarding “Retained” Experts .....	110
	B. Regarding Non-Party Medical Providers .....	111
	V. Privacy Rights of Non-Parties & Non-Party Medical Records.....	112
	VI. Discovery Regarding Expert Not Testifying at Trial .....	113
	VII. <i>Northup</i> Discovery .....	114
Chapter 7:	Compulsory Medical Examinations .....	116
	Location of the CME .....	117
	Selection of the Examiner by the Defense .....	118
	Attending and Recording the CME .....	119
	Discovery of the CME Examiner .....	123
Chapter 8:	Work- Product Protection, Trade Secrets, And Other Privileges .....	126
	Trade Secrets.....	128
	Incident Reports .....	130
	Claims Files.....	131
	Surveillance Video .....	131
	Obtaining Psychological Records when Pain and Suffering Are at Issue .....	131
	Discovery of Lawyer-Client Privileged Communications .....	137
	Third Party Bad Faith Actions.....	138
	Examination Under Oath by Insurer .....	138
	Privilege Logs.....	139
	Inadvertent Disclosure.....	140
Chapter 9:	Motions for Protective Order .....	144
	Depositions .....	144
	Other Forms of Discovery .....	146
Chapter 10:	Motions to Compel .....	147

	Award of Expenses and Fees on Motion to Compel .....	149
	Sanctions for Failure to Obey Court Order .....	150
	Spoilation of Evidence.....	152
	Required Due Process and Findings of Fact.....	153
Chapter 11:	Fraud on the Court.....	158
Appendix 1-1:	Discovery Wake-up Call to the Bar .....	160
Appendix 1-2:	Breaking the Addiction to Boilerplate Discovery Practices .....	163
Appendix 3-1:	Committee Notes to Florida’s 2012 e-Discovery Rules Amendments .....	179
Appendix 3-2:	Comparison of Florida and Federal Rules of E-Discovery .....	181
Appendix 3-3:	Standing Order on Electronically Stored Information Discovery.....	194
Appendix 3-4:	Stipulation Establishing Electronic Discovery Protocol.....	196
Appendix 6-1:	Significant Cases Involving the Breadth and Scope Of Expert Witness Discovery.....	209
Appendix 7-1:	Guidelines Regarding Compulsory Medical Examinations Conducted Pursuant to Fla. R. Civ. P. 1.360(a)(1)(A) & If Ordered (B), As Well As 1.360(B) AND 1.390(B) & (C).....	215
Appendix 7-2:	Form Order on Motions to Compel Compulsory Medical Examinations.....	215
Appendix 11-1:	Selected “Fraud on the Court” Cases.....	226

## CHAPTER ONE

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### DISCOVERY STANDARD AND EXPECTATIONS

The goal of discovery is to prevent surprise, trickery, bluff, and legal gymnastics.<sup>1</sup> Full and fair discovery is essential to the truth-finding function of our justice system, and parties and non-parties alike must comply with the technical provisions of the discovery rules and the purpose and spirit of those rules.<sup>2</sup> According to Webster’s dictionary, “*discovery*” means “*the act or process of discovering.*”<sup>3</sup> Although the scope of discovery differs from case to case, when viewed in a strictly textual context, the critical sentences in all of the discovery rules share a common principle: “to secure the just, speedy, and inexpensive determination of every action.”<sup>4</sup> Relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics.<sup>5</sup> Furthermore, courts neither countenance nor tolerate actions that are not forthright and merely delay and obfuscate the discovery process.<sup>6</sup> As explained in the opinions attached in Appendix 1-1 and Appendix 1-2, boilerplate approaches are inconsistent with the rules and can result in the waiver of all objections and even sanctions. Accordingly, both requests for and responses to discovery must be thoughtful, case-specific, and factually supported.<sup>7</sup>

Most importantly, whether conducting or responding to discovery, and in both oral and written practice, counsel must conduct themselves consistent with the standards of

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<sup>1</sup> Fla. Peninsula Ins. Co. v. Newlin, 273 So. 3d 1172,1182 (Fla. 2d DCA 2019).

<sup>2</sup> Bainter v. League of Women Voters of Fla., 150 So. 3d 1115, 1118 (Fla. 2014).

<sup>3</sup> *Discovery*, Merriam–Webster’s Seventh New Collegiate Dictionary (1969).

<sup>4</sup> FLA. R. CIV. P. 1.010.

<sup>5</sup> Bainter, 150 So. 3d at 1133.

<sup>6</sup> Bainter, 150 So. 3d at 1118.

<sup>7</sup> See e.g., FLA. R. CIV. P. 1.350(b) (“the **reasons** for the objection shall be stated”) (emphasis added).



behavior codified in (1) the Oath of Admission to The Florida Bar; (2) The Florida Bar Creed of Professionalism; (3) The Florida Bar Ideals and Goals of Professionalism; (4) The Rules Regulating The Florida Bar; (5) the decisions of the Florida Supreme Court; and (6) the applicable code of conduct and standing orders promulgated by the circuit or county court within which the action is pending.

Further, counsel and parties alike must be mindful that their discovery requests, as well as their objections and responses to discovery requests, are subject to FLA. STAT. § 57.105 (2023), which authorizes courts to award sanctions against parties who raise claims and defenses not supported by material facts.<sup>8</sup> Section 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 the court considered having been taken primarily for the purpose of unreasonable delay. Moreover, Section 57.105(6) provides that the provisions of Section 57.105 are supplemental to other sanctions or remedies that are available under law or under court rules.

Accordingly, the court has awarded sanctions 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.<sup>9</sup> Furthermore, 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

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

<sup>9</sup> *Pronman v. Styles*, 163 So. 3d 535 (Fla. 4th DCA 2015).

tactics.<sup>10</sup>

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<sup>10</sup> See *Miccosukee Tribe of Indians of Fla. v. Bermudez*, 92 So. 3d 232, 233 (Fla. 3d DCA 2012).

## CHAPTER TWO

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### PRESERVATION AND SPOILIATION OF EVIDENCE

In Florida, all parties have an obligation to preserve evidence when litigation is reasonably anticipated, even if a legal claim has not been filed. However, there is no independent cause of action for spoliation of evidence against a party to the underlying litigation,<sup>11</sup> and this discovery handbook does not discuss the elements of a potential spoliation claim against a third-party custodian of potentially relevant evidence. Instead, as a threshold discovery issue that should be given attention at the earliest stages of potential or actual litigation, this chapter discusses whether and when a party may have a duty to preserve relevant evidence, and reviews the spectrum of remedies for negligent and intentional spoliation.

#### PRESERVATION

“[T]he first issue that must be addressed in any [preservation-spoliation] analysis is whether a duty exists on the part of the possessor to preserve or maintain the evidence.”<sup>12</sup> If the duty does not exist, the spoliation analysis goes no further. Indeed, the landmark spoliation holding in *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987), was grounded in the fact that the defendant hospital had a statutory duty to maintain and produce the medical records sought by the plaintiff. In addition to statutory duties, a regulation, contract, court order, or discovery request may

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<sup>11</sup> *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 346-47 (Fla. 2005).

<sup>12</sup> *Martino*, 908 So. 2d at 348 (Wells, J., concurring); see also *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389, 392 (Fla. 2d DCA 2012) (before considering whether any spoliation sanction may be necessary, the court must first determine that the evidence did, in fact, exist, and that the alleged spoliator had a duty to preserve it)(called into doubt on other grounds by *Adamson v. R.J. Reynolds Tobacco Co.*, 325 So. 3d 887 (Fla. 4th DCA 2021)).

impose a duty to maintain or preserve certain items.<sup>13</sup>

However, the duty of preservation is not a strict-liability concept.<sup>14</sup> Instead, it involves a determination of what is reasonable under the circumstances and in light of the nature and type of evidence at issue (such as whether it was tangible or electronic, static or dynamic, etc.) “A duty to preserve evidence can arise by contract, by statute, or by a properly served discovery request.”<sup>15</sup> Thus, a party has no duty to preserve items that were never within its custody,<sup>16</sup> nor does it have a duty to resist the lawful repossession of an item by a third-party.<sup>17</sup> For similar reason, a personal-injury plaintiff has no duty to provide advance notice to a defendant about an upcoming surgery because there is no obligation to preserve the status quo of a litigant’s body for future examination.<sup>18</sup> Moreover, due to the passage of time, even if a preservation duty may have existed in the past, reason may dictate that the duty expired before any request for the evidence was made.<sup>19</sup> Likewise, in the absence of a reasonably diligent preservation request,

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<sup>13</sup> Royal & Sunalliance v. Lauderdale Marine Ctr., 877 So. 2d 843, 845 (Fla. 4th DCA 2004)

<sup>14</sup> Landry v. Charlotte Motor Cars, LLC, 226 So. 3d 1053, 1058 (Fla. 2d DCA 2017) (citing Reed v. Alpha Prof'l Tools, 975 So. 2d 1202, 1204 (Fla. 5th DCA 2008)).

<sup>15</sup> Silhan v. Allstate Ins. Co., 236 F. Supp. 2d 1303,1309 (N.D. Fla. 2002)

<sup>16</sup> Evidence is not in a party’s custody when it is inadvertently lost or destroyed due to the actions of a third party. Derosier v. Cooper Tire & Rubber Co., 819 So. 2d 143 (Fla. 4th DCA 2002) (holding that no preservation or spoliation issue was presented when separated tread from an allegedly defective tire was discarded by unknown persons immediately after an automobile accident while the plaintiff was being transported to the hospital)(distinguished on other grounds by Coursen v. Toyota Motor North America, Inc., No. 102010CA003069, 2013 WL 1387042 (Fla. Cir. Ct. Jan. 9, 2013)); Fleury v. Biomet, Inc., 865 So. 2d 537 (Fla. 2d DCA 2003) (holding that an allegedly defective artificial knee that was discarded by hospital staff shortly after surgery to remove it was not spoliation of evidence because the knee was not in the party’s custody at the time of its loss).

<sup>17</sup> Landry, 226 So. 3d at 1057-58.

<sup>18</sup> Faris v. Southern-Owners Ins. Co., 240 So. 3d 848, 851 (Fla. 5th DCA 2018).

<sup>19</sup> Martino, 908 So. 2d at 350 (there is no basis upon which to impose any spoliation sanction when a suit is filed two years after an incident and the defendant did not preserve the property during the intervening years); see also Harrell v Mayberry, 754 So. 2d 742, 745 (Fla. 2d DCA 2000) (denying spoliation relief because, among other reasons, the plaintiffs allowed more than four years to pass before requesting another inspection of the item).

Florida's courts have generally avoided basing a preservation duty on simply a pending or reasonably foreseeable litigation: the courts require further analysis to make such a determination.

For example, in *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015), the court approved the judge's reasoning in a bench trial that it was inappropriate for the defendant to systematically delete certain emails and other documents both before and after a lawsuit was filed because the defendant always knew that litigation was a certainty and that the subject emails and documents would be sought in the litigation.<sup>20</sup> On the other hand, in *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389, 392 (Fla. 2d DCA 2012), the court held that even though the retail-store defendant knew that the personal-injury plaintiff had pursued a claim against its insurance carrier, the store had no duty to preserve video-surveillance recordings because no written demand for them was made before their automatic deletion. Reasoning that "it [would] not [be] fair to businesses or homeowners to require them to preserve video evidence in the absence of a written request to do so,"<sup>21</sup> the court held:

if a defendant has knowledge that an accident or incident has occurred on its property and that same defendant has a video camera that may have recorded the accident or incident, that defendant has a duty to obtain and preserve a copy of any relevant information recorded by that camera if a written request to do so has been made by the injured party or their representative prior to the point at which the information is lost or destroyed in the normal course of the defendant's video operations.<sup>22</sup>

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<sup>20</sup> *Detzner*, 172 So. 3d at 378, 385, 390-391, declined to extend by *Shamrock-Shamrock, Inc. v. Remark*, 271 So. 3d 1200, 1203 (Fla. 5th DCA 2019).

<sup>21</sup> *Id.* at 393.

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

As similarly noted in *Martino*<sup>23</sup>, a discovery request – and not merely the initiation of a lawsuit – should generally be the earliest trigger for any duty to preserve electronic evidence because the use of “any earlier demarcation point could lead to unlimited and chaotic disruption of electronic recordkeeping,” and impose “unfair and unpredictable standards of behavior.”

### **SAFE HARBOR FOR ELECTRONICALLY STORED INFORMATION**

By rule, there is a good-faith exemption concerning the failure to preserve certain electronically stored information. Pursuant to Rule 1.380(e)(2)<sup>24</sup> of the Florida Rules of Civil Procedure, a party is subject to sanctions “only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation.” Upon such finding, the court may: “(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.”

Since Florida's state courts may consider federal rules as persuasive guidance, practitioners should likewise be aware of Rule 37(e) of the Federal Rules of Civil Procedure, which proscribes how and when federal courts should impose sanctions for the spoliation of electronically stored information. Guidance may also be found in ethics opinions issued by The Florida Bar. For instance, The Florida Bar has found that attorneys may advise clients to change the privacy settings on their clients' social media pages so they are not publicly accessible, as long as doing so does not violate the rules or

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<sup>23</sup> *Martino*, 908 So. 2d at 349 n.3.

<sup>24</sup> Fla. R. Civ. P. 1.380(e). (Effective Jan. 1, 2020 (292 So.3d 660)).

substantive law pertaining to the preservation and/or spoliation of evidence.<sup>25</sup> Attorneys may also advise their clients to remove information relevant to foreseeable litigation from social media pages as long as the social media information or data is preserved.<sup>26</sup>

## **SPOILIATION**

When a party's actions have caused a crucial piece of evidence to be unavailable at the time of trial, the doctrine of spoliation applies.<sup>27</sup> Spoliation concerns the prejudicial loss, "destruction, mutilation, alteration, or concealment of evidence."<sup>28</sup> Nevertheless, the evidence is not "lost" unless the party seeking its production has conducted a diligent search and has not found it.<sup>29</sup> And whether the destruction, alteration, or loss of the evidence is unduly prejudicial depends on the circumstances, including the totality of the evidence available to the parties. So generally, the extent of any prejudice cannot be assessed until an evidentiary hearing is conducted following the completion of discovery.<sup>30</sup> In addition, any spoliation may fall short of being unduly prejudicial if both parties are similarly affected by its loss,<sup>31</sup> or if the purportedly prejudiced party's own actions or inactions contributed to the loss or destruction of the evidence.<sup>32</sup>

## **SANCTIONS**

The purpose of any spoliation sanction "is not to punish but rather to ensure

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<sup>25</sup> Fla. Bar. Ethics Opinion 14-1 (Jun. 25, 2015).

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

<sup>27</sup> *Araujo v. Winn-Dixie Stores, Inc.*, 290 So. 3d 936, 940 (Fla. 3d DCA 2019).

<sup>28</sup> *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 780 (Fla. 4th DCA 2006), distinguished on unrelated ground by *Adamson v. R.J. Reynolds Tobacco Co.*, 325 So. 3d 887 (Fla. 4th DCA 2021).

<sup>29</sup> *Landry v. Charlotte Motor Cars, LLC*, 226 So. 3d 1053, 1058 (Fla. 2d DCA 2017).

<sup>30</sup> *Reed v. Alpha Profl Tools*, 975 So. 2d 1202, 1205 (Fla. 5th DCA 2008).

<sup>31</sup> *Fleury v. Biomet, Inc.*, 865 So. 2d 537, 540 (Fla. 2d DCA 2003).

<sup>32</sup> *Faris v. Southern-Owners Ins. Co.*, 240 So. 3d 848, 851 (Fla. 5th DCA 2018).

compliance with the rules of civil procedure.”<sup>33</sup> Furthermore, before a court may exercise any leveling mechanism due to the spoliation of evidence, it should consider: (1) the willfulness or bad faith, if any, of the party whose actions led to loss of the evidence, (2) the extent of the prejudice suffered by the other party, and (3) what is required to cure the prejudice.<sup>34</sup> In other words, “a trial court must balance the impact of the sanction against the severity of the infraction.”<sup>35</sup>

Any need to employ a remedial mechanism to ensure a just determination of the case may also depend on the arguments advanced by the parties, such as when the party that failed to preserve the evidence argues that “the thing lost was not as represented by the injured party,” or that the injured party should not prevail because of its failure to present the lost item as evidence.<sup>36</sup> From the circumstances presented in each case, and within the broad discretion of the trial court, a remedy or combination of remedies may be employed, with the spectrum including the admission of evidence about the pre-incident condition of the lost item and the circumstances surrounding its spoliation, as well as instructing the jury on inferences that may be drawn or rebuttable presumptions that it must employ.<sup>37</sup>

When the spoliation was merely negligent and not intentional, generally the harshest sanctions that may be appropriate are the use of adverse evidentiary inferences

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<sup>33</sup> *Id.* (internal quotation and citation omitted).

<sup>34</sup> Landry, 226 So. 2d at 1058; Fleury, 865 So. 2d at 539.

<sup>35</sup> Faris, 240 So. 3d at 850.

<sup>36</sup> American Hospitality Management Co. v. Hettiger, 904 So. 2d 547, 551 (Fla. 4th DCA 2005), declined to extend by Shamrock-Shamrock, Inc. v. Remark, 271 So. 3d 1200, 1203 (Fla. 5th DCA 2019).

<sup>37</sup> Golden Yachts, 920 So. 2d at 780.



or rebuttable presumptions.<sup>38</sup> For example, an adverse-inference instruction advises the jury that it may, but is not required to, infer that the evidence would have been unfavorable to the party that failed to preserve it.<sup>39</sup> However, even the use of an adverse-inference instruction as the mildest of these remedies is “strong medicine” because it invades the province of the jury.<sup>40</sup> Accordingly, such references “are reserved for circumstances where the normal discovery procedures have gone seriously awry,” such as when a defendant received within ten days of an incident a request to preserve crucial evidence within its possession and the evidence was subsequently destroyed.<sup>41</sup>

When there exist specifically enumerated duties to preserve the evidence, such as by statute, regulation, contract, or court order,<sup>42</sup> then the negligent loss of such evidence may warrant the use of a rebuttable presumption that shifts the burden of proof as to a particular claim or defense to the opposing party responsible for the loss of the item, such as a rebuttable presumption of negligence or fault.<sup>43</sup>

In cases involving intentional spoliation, it may be appropriate to employ the draconian remedy of dismissing a plaintiff’s claims or entering a default judgment against a defendant.<sup>44</sup> And when the spoliation was the result of negligence or inadvertence, the

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<sup>38</sup> Landry, 226 So. 2d at 1058.

<sup>39</sup> FLA. STD. JURY INSTR. (Civil) 301.11(a).

<sup>40</sup> Bechtel Corp. v. Batchelor, 250 So. 3d 187 (Fla. 3d DCA 2018), distinguished by Adamson v. R.J. Reynolds Tobacco Co., 325 So. 3d 887 (Fla. 4th DCA 2021).

<sup>41</sup> *Id.*

<sup>42</sup> Osmulski v. Oldsmar Fine Wine, Inc., 93 So. 3d 389, 394 (Fla. 2d DCA 2012); Golden Yachts, 920 So. 2d at 781.

<sup>43</sup> FLA. STD. JURY INSTR. (Civil) 301.11(b).

<sup>44</sup> Golden Yachts, 920 So. 2d at 780.

prejudice may be so great as to warrant such a sanction.<sup>45</sup> In the absence of willfulness or bad faith, however, a dismissal or default – the harshest of all sanctions – “is appropriate only when the movant presents evidence (e.g., expert testimony) demonstrating that its case is fatally prejudiced by its inability to examine the spoliated evidence.”<sup>46</sup> In other words, to enter a dismissal or default “based solely on prejudice to the movant, the spoliated evidence must be so crucial as to completely prevent the movant from [establishing its claim or defense], not merely prevent the movant from [establishing its claim or defense] completely.”<sup>47</sup> Thus, when necessary, the utilization of an adverse-inference instruction or rebuttable presumption is preferred, and the sanction of dismissal or default is the last resort reserved for the most extreme cases where a lesser sanction would fail to achieve a just result.<sup>48</sup>

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<sup>45</sup> *Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824, 826 (affirming default judgment of liability upon which \$6 million was awarded after a damages-only trial); *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014, (Fla. 5th DCA 2000) (affirming dismissal with prejudice because the allegedly defective product was thrown in the garbage after being stored in plaintiff counsel’s garage).

<sup>46</sup> *Landry*, 226 So. 2d at 1058 (emphasis in the original).

<sup>47</sup> *Id.*

<sup>48</sup> *Faris*, 240 So. 3d at 850-51; *Landry*, 226 So. 2d at 1058; *Harrell v. Mayberry*, 754 So. 2d 742, 744 (Fla. 2d DCA 2000).

## CHAPTER THREE

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### ELECTRONIC DISCOVERY

The exabytes of digital information streaming about us today are rich rivers of evidence that will help us find the truth and move us to do justice more swiftly, more economically and more honorably than ever before. It will require every litigator to master new skills and tools and alter the approaches and attitudes we bring to the adversarial process. We must reinvent ourselves to master modern evidence or be content with a justice system that best serves the well-heeled and the corrupt. The path to justice is paved with competent evidence and trod by counsel competent in its use.<sup>49</sup>

Digital evidence is important in almost every case because the vast majority of information today is created and maintained electronically. Computers, phones, and other electronic devices pervade our culture. We live in a digital ecosystem. The principal challenge of e-discovery is to cost effectively locate the important case information within the troves of electronically stored information holding information about us. The electronic discovery era has ushered into practice a new discovery paradigm requiring a new mindset and litigation skills.<sup>50</sup>

#### **THE DUTY OF ELECTRONIC DISCOVERY COMPETENCE**

Competent client representation requires the legal skills, knowledge, thoroughness, and preparation necessary for the representation.<sup>51</sup> Electronically stored information ("ESI")<sup>52</sup> competence is essential for effective and efficient electronic

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<sup>49</sup> *Craig Ball at www.craigball.com.*

<sup>50</sup> William F. Hamilton, **Magistrate Judge Matthewman's New E-Discovery Paradigm and Solving the E-Discovery Paradox**, 71 Fla. L. R. 150 (2020).

<sup>51</sup> Rule 4-1.1, Florida Rules of Professional Conduct. See also ABA Model Rules of Professional Conduct, Rule 1.1 Competence—Comment, Para. (8) found at <http://bit.ly/NZsya6>.

<sup>52</sup> Electronically stored information ("ESI") is the nomenclature adopted in the Florida and federal rules of civil procedure to refer to electronic files and digital data. See FLA. R. CIV. P. 1.280(b)(3); Rule 34, Federal

discovery, Lawyers and judges must become and remain competent on ESI fundamentals and discovery. Staying current entails having up-to-date knowledge about how digital information is created, used, managed, stored, communicated, and manipulated. New technology and information cultures are rapidly evolving. Small personal computer devices such as digital phones watches and hundreds of “apps” are linked to cloud storage locations where information may reside indefinitely. Social media locations maintain more data loaded accounts than the most populous nations combined. Similarly, everyday routine appliances and systems -- such as online security systems and the electronic systems on automobiles and machinery record – constantly store and transmit data. Such data generically referred to as the “Internet of Things” is a rich source of evidence. The volume of potentially relevant electronic evidence continues to increase exponentially.

## **INTRODUCTION TO ELECTRONIC DISCOVERY**

### **LAW, POLICY, AND PRINCIPLES**

The complexity in application of discovery rules and policies to ESI has created a burgeoning body of federal common law.<sup>53</sup> Florida e-discovery case law is important, but less robust because most Florida trial court judges do not publish their decisions and discovery disputes rarely reach the appellate level.<sup>54</sup> Most importantly, current Florida

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Rules of Civil Procedure. The term ESI is not defined in the Florida and federal rules because of the ever-evolving nature of digital information. The *Comments* to the Federal Rules explain that the term ESI should be construed expansively “to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.”

<sup>53</sup> This chapter focuses on Florida state court e-discovery. The discussion of federal law herein is undertaken because of the availability of federal law for guidance in state court cases and is not intended to provide practitioners with a manual for e-discovery in federal court.

<sup>54</sup> See *e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 390–91 (Fla. 2015)(duty to preserve potentially relevant evidence is triggered when litigation is reasonably foreseeable); *Shamrock-Shamrock, Inc. v. Remark*, 271 So. 3d 1200 (Fla. 5th DCA 2019)(absent a statute, contract, or discovery

civil procedure rules for e-discovery were developed by (i) adopting tested federal rules and (ii) distilling Florida common law authority into rules appropriate for the wide array of Florida case types and sizes.<sup>55</sup> Because the Florida e-discovery rules are modeled on the federal rules, Florida trial courts are likely to find federal e-discovery decisions persuasive.<sup>56</sup> Florida courts will also seek guidance from decisions in other states with rules similar to Florida and federal rules. State court judges are also likely to be influenced

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request to preserve, a third party does not have a duty to preserve potentially relevant evidence because a third party does not have a duty based solely on the foreseeability of litigation); *Shir Law Group., P.A. v. Carnevale*, 271 So.3d 152 (Fla. 3d DCA Apr. 24, 2019)(forensic examination of the party's computers by neutral expert was appropriate where parameters and search protocols were crafted to protect against disclosure of privileged or irrelevant information); *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. 4th DCA 2015) (no expectation of privacy in photos posted on Facebook regardless of privacy settings used by producing party); *Root v. Balfour Beatty Constr., LLC*, 132 So 3d 867 (Fla. 2d DCA 2014) (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 Cty. Sch. Bd.*, 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.*, No. 03-5045 Al, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23 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). For a more expansive discussion of Florida case law, see *Artigliere & Hamilton, LEXISNEXIS PRACTICE GUIDE: FLORIDA E-DISCOVERY & EVIDENCE, Ch. 2 Governing Law in Electronic Discovery* (2021). The University of Florida Levin College of Law E-Discovery Project maintains a publicly available curated database of Florida state and federal e-discovery cases. <https://ediscovery.law.ufl.edu/>.

<sup>55</sup> See *In re Amendments to the Florida Rules of Civil Procedure -- Electronic Discovery*, 95 So. 3d 76 (Fla. 2012).

<sup>56</sup> 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. See also 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.

by the publications of e-discovery “think tanks” such as The *Sedona Conference*®,<sup>57</sup> and EDRM<sup>58</sup> which are private research groups of lawyers, judges and e-discovery vendors dedicated to developing e-discovery standards and best practices. The *Sedona Conference*® writings have been widely cited in the federal courts, especially its *Sedona Principles*<sup>59</sup> and *Cooperation Proclamation*.<sup>60</sup> Also especially helpful are its *Glossary*<sup>61</sup> of e-discovery related terms, and its commentaries on *Search and Retrieval Methods*,<sup>62</sup> *Achieving Quality*,<sup>63</sup> and *Litigation Holds*,<sup>64</sup> and its Primer on Social Media.<sup>65</sup> In addition to publications by The Sedona Conference and models, guides, datasets and tools published by EDRM, many excellent text and trade publications, including free online resources, are also available.<sup>66</sup> The Association of Certified E-Discovery Specialists (“ACEDS”) offers various certificates and certifications for attorneys, paralegals and e-discovery professionals.<sup>67</sup>

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<sup>57</sup> The Sedona Conference® publications are all available online without charge for individual use. See <https://thesedonaconference.org/>. 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 9-15.

<sup>58</sup> [www.edrm.net](http://www.edrm.net).

<sup>59</sup> [https://thesedonaconference.org/publication/The\\_Sedona\\_Principles](https://thesedonaconference.org/publication/The_Sedona_Principles).

<sup>60</sup> See “*The Sedona Conference® Cooperation Proclamation*,” 10 Sedona Conf. J. 331 (2009 Supp.).

<sup>61</sup> [https://thesedonaconference.org/publication/The\\_Sedona\\_Conference\\_Glossary](https://thesedonaconference.org/publication/The_Sedona_Conference_Glossary).

<sup>62</sup> [https://thesedonaconference.org/publication/Commentary\\_on\\_Search\\_and\\_Retrieval\\_Methods](https://thesedonaconference.org/publication/Commentary_on_Search_and_Retrieval_Methods).

<sup>63</sup> [https://thesedonaconference.org/publication/Commentary\\_on\\_Achieving\\_Quality\\_in\\_the\\_E-Discovery\\_Process](https://thesedonaconference.org/publication/Commentary_on_Achieving_Quality_in_the_E-Discovery_Process).

<sup>64</sup> <https://thesedonaconference.org/search/node/%22legal%20holds%22>

<sup>65</sup> [https://thesedonaconference.org/publication/Primer\\_on\\_Social\\_Media](https://thesedonaconference.org/publication/Primer_on_Social_Media)

<sup>66</sup> See e.g., Artigliere & Hamilton, LEXISNEXIS PRACTICE GUIDE: FLORIDA E-DISCOVERY & EVIDENCE, Ch. 2 *Governing Law in Electronic Discovery* (2021) updated annually and available from LexisNexis and from The Florida Bar.

<sup>67</sup> [www.aceds.org](http://www.aceds.org).

Florida Civil Procedure Rules and Judicial Administration Rules now expressly address issues raised by the use of digital technology in Florida Courts<sup>68</sup> and discovery of ESI.<sup>69</sup> Effective September 1, 2012, the Florida Supreme Court adopted several amendments to the Florida Rules of Civil Procedure<sup>70</sup> largely modeled on the 2006 Amendments to the Federal Rules of Civil Procedure.<sup>71</sup> Effective January 1, 2020, the Florida Supreme Court amended Fla. R. Civ. P. 1.380(e) (Failure to Preserve Electronically Stored Information) to make it consistent with Federal Rule of Civil Procedure 37(e).<sup>72</sup> Compatibility with federal rules enables Florida courts to use federal decisions on electronic discovery as persuasive authority<sup>73</sup> and ensures harmony of e-discovery law between cases in Florida state courts and cases in federal courts and other states. The Florida electronic discovery rules contain adjustments from their federal counterparts that arguably make the rules better suited to the broader range of state court cases. A chart comparing the Florida electronic rules and the federal rules is attached to this chapter as Appendix A.

Specialized ESI discovery rules address the characteristics of electronically stored

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<sup>68</sup> See, e.g., Fla. R. Jud. Admin. 2.420.

<sup>69</sup> See In re: Amendments to the Fla. Rules of Civ. Procedure-2019 Regular-Cycle Report, 2019 Fla. LEXIS 2249 (Fla. Dec. 5, 2019); 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.

<sup>70</sup> *Id.*

<sup>71</sup> FED. R. CIV. P. 16, 26, 33, 34, 37 and 45. The Federal Rules of Civil Procedure were amended, effective December 1, 2015.

<sup>72</sup> See 2019 Committee Note to Fla. R. Civ. P. 1.380.

<sup>73</sup> Federal courts have generated copious numbers of cases under the federal e-discovery rules since 2007, because federal district judges and magistrates regularly enter published discovery opinions and orders, which creates a body of useful written law that is largely absent in Florida state court.

information. ESI (i) is alterable; (ii) is frequently ephemeral; (iii) is easily hidden, mislabeled, or destroyed; (iv) is stored in multiple locations, (v) is created in a variety of formats; (vi) is searchable; and (vii) contains metadata. ESI is also voluminous. One thousand gigabyte (the equivalent of one terabyte) computer hard drives are now standard issue. A single gigabyte of text-based information is equivalent to thirty Bankers boxes filled with paper or the amount of paper that would fill the bed of a pickup truck. Many people today receive hundreds of e-mails and text messages a day that are stored in multiple locations, some of which may be unknown to the recipient. It is not uncommon for business managers to maintain hundreds of thousands of emails and attachments. Large enterprises commonly store trillions of emails and attachments and may have to search through millions of emails to locate relevant evidence.

Not all electronically stored information is easily collected. Obtaining information from backup tapes presents challenges. Specialized software is necessary to recover deleted emails. Data stored on old legacy computers and expired software present retrieval challenges. These accessibility challenges raise issues of cost, proportionality, and burden shifting.

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 is 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 all relevant ESI because of the high volume of total ESI maintained on a multiplicity of systems.

The cost and difficulty of ESI production is compounded by the need to review the



production for privilege, privacy, and trade secrets<sup>74</sup> before it is disclosed. Today it is far more difficult and expensive to access, search, categorize, compile, and produce relevant ESI than in traditional paper productions when a modest number of documents were organized in centralized locations.

Issues related to the spiraling cost issues of e-discovery contribute to the special treatment for ESI provided in the new rules and case law. Florida rules expressly provide that ESI is discoverable,<sup>75</sup> but they also require proportionality of expense.<sup>76</sup> Florida rules help maintain cost proportionality by providing an express framework for dealing with issues of preservation, production, and protection for hard-to-find and retrieve ESI and the media, equipment, and third-party Internet “cloud” storage websites that hold ESI.<sup>77</sup> A person may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of burden or cost. The

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<sup>74</sup> See Fla. Stat. §§ 90.56 (Trade Secret Privilege); 688.001 *et. seq.* (Uniform Trade Secrets Act). In *Arko Plumbing Corp. v. Rudd*, 230 So. 3d 520 (Fla. 3d DCA 2017), the Third DCA held that trade secret protection applied for requested vehicle ESI where a GPS tracking device on a plumbing company's trucks used a MotoMon program linked up to the GPS tracking devices and also captured in real time the customers and potential customers that the company's trucks visited to provide plumbing services. To determine whether information is protected as trade secret, 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. See *Niagara Indus. v. Giaquinto Elec. LLC*, 238 So. 3d 840 (Fla. 4th DCA 2018) (if the court concludes documents are trade secrets, the burden shifts to the requesting party to show that the disclosure is reasonably necessary).

<sup>75</sup> FLA. R. CIV. P. 1.280(b)(3) (“A party may obtain discovery of electronically stored information in accordance with these rules.”).

<sup>76</sup> FLA. R. CIV. P. 1.280(d)(2)(ii) (“the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that . . . the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”). In addition to FLA. R. CIV. P. 1.280(d)(2)(ii) involving ESI, proportionality in discovery is alive and well as a matter of Florida common law. See *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18 (Fla. 2017) (200 hours and over \$90,000 in costs to discover the collateral issue of bias in a case where the damages sought total \$66,000 is unduly burdensome).

<sup>77</sup> FLA. R. CIV. P. 1.280(d)(2)(ii).

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.<sup>78</sup>

*In Zubulake v. UBS Warburg LLC*, 217 F.R.D. 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.<sup>79</sup> The current Rule 26(b) of the Federal Rules of Civil Procedure takes *Zubulake* a step further by requiring all discovery, even from locations that are reasonably accessible to be bounded by proportionality.

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.<sup>80</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> *Zubulake*, 217 F.R.D. at 322; *F.D.I.C. v. Brudnicki*, 291 F.R.D. 669, 676 (N.D. Fla. 2013) (requesting defendants ordered to pay part of the ESI discovery fees for its 94 separate production requests based on inaccessibility after analyzing *Zubulake* factors).

<sup>80</sup> *Compare* *Root v. Balfour Beatty Constr., 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).

Florida rules also provide additional protection for inadvertently produced confidential and privileged information.<sup>81</sup> Rule 1.285, Florida Rules of Civil Procedure, establishes a process by which a party, person, or entity may retroactively assert privilege as to inadvertently disclosed materials, regardless of whether the inadvertent disclosure was made pursuant to “formal demand or informal request.”<sup>82</sup> The privilege must be asserted within ten days of actual discovery of the inadvertent disclosure by serving a prescribed written notice of the assertion of privilege on the party to whom the materials were disclosed.<sup>83</sup> A party receiving notice under Rule 1.285(a) must promptly (1) return, sequester, or destroy the materials and any copies of the materials, (2) notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of the rule, and (3) take reasonable steps to retrieve the materials disclosed.<sup>84</sup> Rule 1.285 prescribes the manner in which a receiving party may challenge the assertion of privilege<sup>85</sup> and the effect of a court determination that privilege applies.<sup>86</sup> Counsel and parties often enter into “clawback” agreements stipulating that privilege is not waived by inadvertent disclosure connected with the

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<sup>81</sup> FLA. R. CIV. P. 1.285.

<sup>82</sup> FLA. R. CIV. P. 1.285(a).

<sup>83</sup> *Id.* The notice must include specifics on the materials in question, the nature of the privilege asserted, and the date on which inadvertent disclosure was discovered. The process applies to any privilege cognizable at law, including the attorney-client, work product, and the several other types of privileges recognized in the Florida Evidence Code. See Fla. Stat. §§ 90.501–90.510 (journalist, lawyer-client, psychotherapist-patient, sexual assault counselor-victim, domestic violence advocate-victim, husband-wife, clergy, accountant-client, and trade secret privileges). *Id.*

<sup>84</sup> FLA. R. CIV. P. 1.285(b). Nothing in Rule 1.285 diminishes or limits any ethical obligation with regard to receipt of privileged materials pursuant to Fla. R. Prof. Conduct 4-4.4(b). *Id.*

<sup>85</sup> FLA. R. CIV. P. 1.285(c).

<sup>86</sup> FLA. R. CIV. P. 1.285(d).

litigation and obtain a court order confirming the agreement.<sup>87</sup>

Because ESI and the modern computer devices and storage locations that create, hold, communicate, or manipulate ESI are complex and constantly evolving, sometimes expert assistance is needed 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.<sup>88</sup> Early "meet and confer" federal court requirements can be successful in managing e-discovery issues in large and small cases. Many Florida state court judges now require parties to meet and confer early to address e-discovery. Counsel is encouraged to bring any areas of disagreement to the court for resolution early in a case. These issues may also be addressed in a Rule 1.200 or Rule 1.201 case management conference.<sup>89</sup> Specific mention of case management

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<sup>87</sup> See *infra* n. 69-70. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court, in which event the disclosure is also not a waiver in any other federal or state proceeding. See Fed. R. Evid. 502(d). While Florida state court rules do not have a parallel provision for a court order, the parties may stipulate to such an agreement themselves and request court approval. The effectiveness of such a state court order beyond the particular proceeding is questionable because the order impacts non-parties to the litigation. Fed. R. Civ. P. 502(d) should be contrasted with Fed. R. Evid. 502(b) that provides a mechanism for clawing back inadvertently disclosed information to which privilege or protection may apply.

<sup>88</sup> See FLA. R. CIV. P. 1.280, 2012 Committee Notes ("The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information.").

<sup>89</sup> See FLA. R. CIV. P. 1.280, 2012 Committee Notes.

for electronically stored information is found in Rule 1.200<sup>90</sup> and in Rule 1.201 for cases that are declared complex.<sup>91</sup> In resolving these disputes courts must balance the need for legitimate discovery with principles of proportionality and the just, speedy and efficient resolution of the case.<sup>92</sup>

### **PROTECTING CLIENT CONFIDENCES AND DATA**

One of the foremost challenges in this complex data environment is the protection of the client's confidential information, included personal protected information and privileged communications. Counsel must ensure that client information is protected and is disclosed only to the extent required by law or reasonably necessary to serve the client's interest.<sup>93</sup> Court recordkeeping and filing is now done in electronic format in Florida courts. This makes unfettered third party electronic access to court records, including client information in the record, far easier than ever before. Accordingly, counsel should only put in the record that which is required or reasonably necessary to serve the client's interest. If necessary, counsel should invoke the process of sealing private or sensitive information before the record becomes available as a public record.<sup>94</sup> In anticipation of electronic recordkeeping and the need for protection of privacy interests of parties and non-parties, the Florida Supreme Court enacted rules requiring lawyers to analyze and screen information for certain confidential information before it is placed in

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<sup>90</sup> FLA. R. CIV. P. 1.200(a)(5)-(7).

<sup>91</sup> FLA. R. CIV. P. 1.201(b)(1)(J).

<sup>92</sup> FLA. R. CIV. P. 1.010; 1.280(d).

<sup>93</sup> Rule 4-1.6, Florida Rules of Professional Conduct. See *also* Fla. Prof. Ethics Op. 10-2 (obligation of lawyers with regard to confidentiality of client information when employing devices with hard drives and other media); 06-2 (responsibility for confidentiality and other obligations regarding metadata).

<sup>94</sup> FLA. R. JUD. ADMIN. 2.420.

the court record.<sup>95</sup> The scope of data requiring protection expands frequently.<sup>96</sup> At a minimum, pursuant to Rule 1.280(g), information should not be filed with the court absent good cause, which is satisfied only when the filing of the information is allowed or required by another applicable rule of procedure or by court order.<sup>97</sup>

The lawyer is obligated to know enough about the client's computer systems and the locations of potentially relevant ESI to fully comply with discovery obligations. The client should also be fully informed of and guided in the process of preserving relevant information. At the same time, the client's business processes and handling of data should be protected from unnecessary intrusion by perceived but unwarranted court-related obligations.

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

Electronically stored information is by its very nature ephemeral and easily transportable. Relevant ESI is easily lost, altered, destroyed, or hidden. Therefore, steps need to be taken to ensure its preservation. The duty to preserve may arise for those who

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<sup>95</sup> FLA. R. CIV. P. 1.280(g); 1.310(f)(3); 1.340(e); 1.350(d); and Fla. R. Jud. Admin. 2.420; 2.425.

<sup>96</sup> See e.g., In re Amendments to Fla. Rule of Judicial Admin. 2.420 - 2017 Fast-Track Report, 233 So. 3d 1022 (Fla. 2018); FLA. R. JUD. ADMIN. 2.420 (Public Access to and Protection of Judicial Branch Records). FLA. R. JUD. ADMIN. 2.420 was reorganized effective Sept. 21, 2006 (939 So. 2d 966) and amended effective Apr. 5, 2007 (954 So. 2d 16); Mar. 18, 2010 (31 So. 3d 756). Subsection 2.420(d) now contains twenty-two protected information categories which counsel and the clerk must designate and keep confidential when putting information in the court record. Subsection (d) alone was amended Oct. 1, 2010; July 7, 2011 (31 So. 3d 756); May 1, 2013 (SC11-2466); Dec. 18, 2014 (SC14-569); Jan. 22, 2015 (SC14-2434); and Jan. 1, 2018 (SC17-2053). See Fla. R. Jud. Admin. 2.420 (History). See also FLA. R. CIV. P. 1.280(g); FLA. R. JUD. ADMIN. 2.425.

<sup>97</sup> FLA. R. CIV. P. 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."

possess or control evidence and those who seek to use it in litigation.<sup>98</sup> For counsel advising clients on preservation duty, it is essential to advise the client to preserve potentially relevant evidence as soon as there is a reasonable chance a lawsuit will ensue.<sup>99</sup> 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. Persons likely to have access to relevant ESI are often called “custodians” by virtue of the ESI being located 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 clarified to safely determine non-relevant information. While some federal cases have expressed the principle that scope of preservation efforts may be guided by

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<sup>98</sup> Loss of evidence can be devastating to the party whose case would benefit from lost evidence; but a person or party holding relevant evidence may likewise suffer through sanctions if the evidence is lost or destroyed.

<sup>99</sup> See *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 390–91 (Fla. 2015)(duty to preserve potentially relevant evidence is triggered when litigation is reasonably foreseeable).

reasonableness and proportionality,<sup>100</sup> other federal courts disagree.<sup>101</sup> In any event, counsel should advise a client to put a litigation hold in place and undertake reasonable efforts to identify and preserve evidence that is relevant by discovery standards.<sup>102</sup>

As for counsel's duties with regard to preservation of evidence, the seminal federal case was written by Manhattan District Court Judge, Shira Scheindlin. It is actually a series of opinions written in the same case, collectively known as *Zubulake*, after the plaintiff, Laura Zubulake. There are four key opinions in this series.<sup>103</sup> These decisions are widely known by both federal and state judges and practitioners around the country.

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

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<sup>100</sup> See e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done--or not done--was *proportional* to that case and consistent with clearly established applicable standards").

<sup>101</sup> *Orbit One Commc'ns, Inc. v. Ronsen*, 271 F.R.D. 429 (S.D.N.Y. 2010) ("Although some cases have suggested that the definition of what must be preserved should be guided by principles of 'reasonableness and proportionality,' [citations to *Victor Stanley* and *Rimkus* omitted], this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.").

<sup>102</sup> 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 E-DISCOVERY & EVIDENCE, Ch. 2 *Governing Law in Electronic Discovery* (2021).

<sup>103</sup> *Zubulake v UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).



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 when litigation is reasonably anticipated.

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

Counsel must become fully familiar with their client's documents retention policies as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system wide back up procedures in the actual (as opposed to theoretical) implementation of the firm's recycling policy it will also involve communicating with the key players in the litigation, in order to understand how they store information.<sup>104</sup>

Of course, a party to litigation may have a duty to preserve evidence in various forms, paper or ESI, and the bad faith failure to do so may constitute actionable spoliation. This is nothing new.<sup>105</sup> But the extension of this duty to the litigants' outside legal counsel in *Zubulake V*, which is sometimes called the "*Zubulake Duty*," is fairly new and controversial.<sup>106</sup> 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

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<sup>104</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

<sup>105</sup> See *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005); *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006).

<sup>106</sup> See *Metro. Opera Ass'n Inc. v. Local 100, Hotel Emps. and Rest. Emps. 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).

impose such a duty upon attorneys. However, in view of the popularity in the federal system of placing this burden on the counsel of record, a prudent state court practitioner should also assume that they have such a duty.<sup>107</sup> Outside legal counsel should be proactive in communicating with their client and otherwise taking steps to see to it that the client institutes an effective litigation hold. Obviously, Judge Scheindlin does not intend to convert attorneys into guarantors of their client's conduct. She also notes in *Zubulake V* that if attorneys are diligent, and they properly investigate and communicate, they should not be held responsible for their client's failures:

A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve.<sup>108</sup>

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

The duty to preserve of client and counsel may require a corporate client in certain 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

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<sup>107</sup> Like their federal counterparts, Florida judges have statutory, rule-based, and inherent authority to sanction parties and their counsel for discovery violations and for spoliation. Judges are taught to seek out the source of the problem and administer a measured sanction that remedies the wrong committed. If the party is not the culprit, it makes little sense to administer the sanction against an innocent participant. See *Ham v. Dunmire*, 891 So. 2d 492, (Fla. 2004) (dismissal based solely on an attorney's neglect in a manner that unduly punishes a litigant espouses a policy that the Supreme Court of Florida does not wish to promote). Florida courts are not averse to applying appropriate sanctions to counsel. *Id.* at 498 (a trial court "unquestionably has power to discipline counsel" for discovery violations).

<sup>108</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

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.<sup>109</sup>

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

In 2010, Judge Scheindlin wrote another opinion on the subject of litigation holds and ESI spoliation that she refers to as a sequel to *Zubulake*.<sup>110</sup> *Pension Committee* provides further guidance to federal and state courts on preservation issues, and the related issues of sanctions. Judge Scheindlin held that the following failures 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

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<sup>109</sup> *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003); see also FED. R. CIV. P. 37(e).

<sup>110</sup> *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs.*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

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."<sup>111</sup> Counsel should document their efforts to prove reasonableness in the event mistakes are made and relevant ESI deleted, despite best efforts. In any large ESI preservation, collection and production, some errors are inevitable, and Judge Scheindlin notes this on several occasions in *Pension Committee*, including the opening paragraph where she observes:

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

This is an important point to remember. The volume and complexity of ESI makes perfection impossible and mistakes commonplace. All that Judge Scheindlin and other jurors and scholars in this field expect from the parties to litigation and their attorneys are good faith, diligent, and reasonable efforts. It is incumbent on counsel to timely inform the client on the duty to preserve and to instruct and monitor the client's implementation. Counsel should not assume that the client (i) is aware of the legal duties of preservation, (ii) is competent to perform preservation, and (iii) understands the consequences of preservation failures.

The opinion of Judge Scheindlin in *Zubulake V* and the *Pension Committee* cases

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<sup>111</sup> *Id.*

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 provide a starting point for further argument.

The Florida Supreme Court has confirmed that a reasonable anticipation of litigation triggers the duty to preserve relevant information,<sup>112</sup> bringing Florida in line with the federal courts and the majority of other state jurisdictions. Effective January 1, 2020, the Florida Supreme Court amended Florida's discovery sanctions rule by adopting a rule substantially similar to Fed. R. Civ. P. 37(e),<sup>113</sup> which provides that, if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

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<sup>112</sup> League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 390–91 (Fla. 2015).

<sup>113</sup> See *infra* n. 62.

Fla. R. Civ. P. 1.380(e) confirms the common law rule that electronically stored information must be preserved when a party can reasonably anticipate litigation<sup>114</sup> and facilitates the use of federal case law as persuasive authority in the absence of Florida precedent.

### **CONFERRING WITH OPPOSING COUNSEL**

Litigation counsel should meet and confer at the commencement of the case concerning all phases of the EDRM model,<sup>115</sup> which includes preservation scope and methods, collection verification, processing standards, search methods, review standards, and production format.<sup>116</sup> Counsel should also discuss confidentiality concerns and related issues concerning the consequences and cure of the inadvertent disclosure of privileged information. It is now common in the federal system for parties to enter into “clawback” agreements and seek court orders under Fed. R. Civ. P. 502(d) protecting both sides from waiver from unintentional disclosure.<sup>117</sup> Florida has an inadvertent disclosure rule, Rule 1.285, Florida Rules of Civil Procedure (Inadvertent Disclosure of Privileged Materials). Notwithstanding Rule 1.285, clawback agreements are advisable and should be encouraged by courts and strengthened by court order. Because these agreements and protections are completely reciprocal, it is difficult to

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<sup>114</sup> Fla. R. Civ. P. 1.380(e) expressly uses language encompassing the reasonable anticipation of litigation trigger as follows: "If electronically stored information that should have been preserved *in the anticipation or conduct of litigation* is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery... ." (emphasis supplied).

<sup>115</sup> <https://edrm.net/edrm-model/>.

<sup>116</sup> See FED. R. CIV. P. 34(b)(2), governing form of production. This essentially requires production of ESI in its original native format, or in another “reasonably useable” format, at the producer’s choice, unless the request specifies the form.

<sup>117</sup> See FED. R. CIV. P. 26(b)(5)(B), FED. R. EVID. 502.

imagine legitimate grounds to oppose this important safety net.<sup>118</sup>

Some judges require a meet and confer in cases that would benefit from discovery case management. See Appendix 3-3, FIFTEENTH JUDICIAL CIRCUIT STANDING ORDER ON ELECTRONICALLY STORED INFORMATION DISCOVERY.<sup>119</sup> Of course, the parties can case manage their own electronic discovery by stipulation. Appendix 3.4 has a detailed stipulation available on the website of the Business Law Section of The Florida Bar. The stipulation can and should be tailored to a given case and provides an excellent and broad range of issues for discussion with the assistance of experts or IT personnel if available and merited.

### **KEY WORD SEARCH, RELEVANCY AND SCOPE OF DISCOVERY**

Electronic document search predicts a likelihood that a particular document is relevant to the search. Search methodologies ranging from simple keyword, to more complicated keyword strings, to predictive coding algorithm identify only *potentially* relevant documents, viz. files. The fact that a document or file contains a keyword does not in and of itself make it relevant or 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

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<sup>118</sup> FED. R. EVID. 502 orders, properly drafted, are enforceable in other courts, including state court. Clawback agreements in state court, even if entered in the form of a court order, generally do not have authority and application outside the particular litigation.

<sup>119</sup> The Standing Order in Appendix 3-3 is also found at [Electronically-Stored-Information-Discovery-Order.pdf \(palm-beach.fl.us\)](https://www.floridabar.org/electronically-stored-information-discovery-order).

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.<sup>120</sup> 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.

While not a perfect solution, and currently not the most sophisticated search methodology available,<sup>121</sup> Boolean keyword search strings are still widely utilized. 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, NOT), proximity ranges, and parametric limitations (keywords searching in specific document fields). However, asking the judge to determine the search terms is not a good solution. Judges are not information retrieval experts. Parties should confer with each

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<sup>120</sup> FLA. R. CIV. P. 1.280(b)(1); *Root v. Balfour Beatty Constr., LLC*, 132 So 3d 867 (Fla. 2d DCA 2014).



other as well as the clients and experts to determine acceptable parameters for search that will obtain reasonable precision and recall.

Notwithstanding the best efforts, keyword search is limited by the complexity and ambiguity of natural language. Different words mean the same thing (synonymy); the same word may mean different things (polysemy), and words may have special coded meaning. Keyword searches often fail to identify relevant documents (this is called poor “recall”) or identify documents that are not relevant (called poor “precision”). Recall and precision are unfortunately at odds: the more precise (or tailored) the search the more likely relevant documents will be missed; on the other hand, the broader the keywords the more likely that non-relevant information will be identified.

The solution to this keyword search recall-precision paradox is to train an algorithm to identify relevant document by providing the software with a set of examples. The software identifies likely relevant documents in the collection based on the previously identified relevant documents. This new search technology is known in the legal industry as “predictive coding” or “technology assisted review.” The predictive coding software also ranks or scores the relevance of the documents in the collection. Counsel can thus quickly locate what are likely the most important documents. These documents can be reviewed first. Ranking relevance is especially helpful in establishing proportionality boundaries. In some cases, predictive coding can identify 80% of the relevant documents by reviewing only 20% of the ranked collection. Perhaps reviewing only 80% of the potentially relevant documents is all the cost the case can reasonably bear. The remaining 20% of the documents are ranked as not highly relevant and perhaps not worth reviewing.

The predictive coding algorithms will continue to improve; the costs of e-discovery will continue to rise because of the volume of information; and the cost of the predictive coding will continue to decline under competitive pressures in the software market. The result is that increasingly counsel managing e-discovery will deploy predictive coding and technology assisted review in all sized cases.<sup>122</sup> All search results should be checked for quality. The set of documents that have been identified for production as relevant should be checked by statistical sampling to determine whether any non-response documents are included in the production. Similarly, the set of documents determined to be non-relevant and not subject to production should be checked by statistical sampling to assure that no relevant documents have been excluded from the production set. The identification of marginally relevant documents in the excluded set (otherwise known as the “null” set) does not necessarily vitiate the entire search, but rather should be discussed with opposing counsel. Electronic discovery is not a game of perfection.

### **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 file metadata and information associated with the ESI (such as file name and file path). 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

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<sup>122</sup> Artigliere & Hamilton, LEXISNEXIS PRACTICE GUIDE: FLORIDA E-DISCOVERY & EVIDENCE, § 9.14[3] (2021).

electronic evidence.<sup>123</sup>

Custodians are, for instance, quite likely to unintentionally change a computer file's metadata. Simply opening or copying a file may change metadata fields. These altered metadata fields may prove to be important to the case. Custodians are also unlikely to have a sophisticated understanding of legal relevance typically adopting an overly narrow construction.

After collection, the ESI is typically processed to eliminate redundant duplicates and meaningless words, such as "a", "the," "to," and to prepare the ESI for search and viewing. Processing may be thought of as creating a searchable index of the words in the document collection. An e-discovery search does not search the documents themselves; all that is searched is the index. One of the factors of search quality is the quality of the index. Litigation counsel should be apprised of the indexing features of the chosen software. Different software platforms will produce different search results because of the different document indexes. After processing, the ESI is then searched for relevancy, and the subset of potentially relevant ESI is then reviewed for final relevancy, privilege, and confidentiality. Typically, a small percentage of produced documents are redacted to eliminate from viewing privileged or confidential information. Only after this review is production made to the requesting party. All document productions should undergo a "quality control check" and statistical sampling to make reasonable assurances privileged or non-responsive documents are not being produced.

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

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<sup>123</sup> Nat'l Day Laborer Organizing Network v. United States Immigration and Customs Enf't Agency, 877 F. Supp. 2d 87 (S.D.N.Y. 2012) (Scheidlin, J.).

1. Familiarize yourself as early in the case as possible with the client's electronic records and computer systems used for storing this ESI, including how ESI is 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 (in a timely manner) by the client to persons who may hold relevant ESI within their control that instructs them to immediately preserve any potentially relevant ESI 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 custodians to locate or collect potentially relevant ESI. In some circumstances such self-collection should not be permitted, or it should be supplemented by bulk collection of all the custodians' ESI. Bulk collection of all a custodian's email within a certain date range is the rule in all but small cases. Keyword based 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 counsel 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 and extracted text. Metadata is an inherent part of all ESI and should be included in most productions. The removal of internal metadata from a document, which may 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. Counsel may make specific objections to the production of the contents of any metadata fields.

6. Do not underestimate the power of the "meet and confer" process. Although not required under the Florida rules, like it's federal counterpart, Rule 1.200 (pretrial

procedure) gives the court latitude to consider the “possibility of an agreement between the parties regarding the extent to which . . . information should be preserved and the form in which it should be produced.” Some judges require a meet and confer in certain cases for good reason. Appendix 3-3 contains an example of an order requiring counsel to meet and confer. Discussing these issues with opposing counsel from the outset may reduce cost for the client, set early expectations on the amount of ESI that will be involved, and minimize potential issues down the line by agreeing on production file formats, date ranges, custodians and keyword searches. In some cases, opposing parties may even share a large part of the e-discovery cost by sharing a third-party vendor from which both parties access the files.

7. 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 searches of large, disorganized collections of ESI.

8. Seek disclosure of the opposition’s preservation efforts and intended production formats, and what ESI they will seek discovery of, including metadata, if any. Send a request for the opponent to preserve electronically stored information as soon as possible and propound a formal discovery request at the earliest possible date.

9. 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 before any large productions to avoid expensive do-overs. Beware of keyword searching, which is frequently ineffective. Far better technological solutions are now available.<sup>124</sup> When keyword terms are used as part of a search and review protocol they should always be carefully tested and should never be blindly negotiated based on counsel's intuitions. Counsel should discuss the recall and precision of any search. Precision measures the percentage of relevant documents are retrieved by the search; recall measures the percentage of relevant documents in the collection retrieved by the search. The production set and null set should be tested with random sampling.

10. 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.<sup>125</sup>

11. Weigh the cost of ESI discovery and determine whether costs may be shifted to the requesting party or whether the cost of discovery outweighs the potential

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<sup>124</sup> William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009); Ralph Losey, *ADVENTURES IN ELECTRONIC DISCOVERY, Child's Game of "Go Fish" is a Poor Model for e-Discovery Search* (West Thomson Reuters, 2011); Moore v. Publicis Groupe, 287 F.R.D. 182 (S.D.N.Y. 2012).

<sup>125</sup> FLA. R. CIV. P. 1.280(d) (the court **must** limit the frequency or extent of discovery otherwise allowed by these rules if it determines that the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive).

benefit.<sup>126</sup>

12. Electronic discovery is typically conducted in phases wherein the most easily accessible and likely relevant ESI is searched and produced first. Then the necessity for further discovery is evaluated. ESI reviewed in the first phase is often limited by date range, custodians, volume, and storage location.

13. Ensure to the extent possible that the value of the discovery sought and produced is proportional.<sup>127</sup> Counsel should attempt to negotiate an e-discovery budget range based on the value of the case and other proportionality factors.

14. If any of the foregoing steps require expert consultation or assistance, find a suitable expert and involve the expert early in the e-discovery process even including the preservation phase. Again, parties should consider the advisability of sharing a neutral third-party expert, which can realize substantial cost and time savings.

15. Seek protection analogous to the protections offered by Federal Rule of Evidence 502. Fed. R. Evid. 502 allows parties to claw back information that has been inadvertently produced so long as the “court” finds that reasonable steps to prevent and rectify the disclosure were taken. Additionally, a court order under Fed. R. Evid. 502(d) provides the parties with the ability to claw-back the produced document regardless of whether inadvertence and regardless of whether “reasonable steps” were taken to prevent the disclosure. Counsel litigating in Florida state courts, should seek analogous orders from state court judges.

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

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<sup>126</sup> FLA. R. CIV. P. 1.280(d)(1); (d)(2).

<sup>127</sup> FLA. R. CIV. P. 1.280(d)(2)(ii).



Effective September 1, 2012, the Florida Rules of Civil Procedure establish a workable framework for production of electronically stored information. A 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 Florida Rules of Civil Procedure contemplate these issues as will be discussed below. Nonetheless, the most prudent course for counsel on both sides is to meet and confer on the form of production beforehand to avoid disappointment, motion practice, non-productive effort, and needless cost of repeated production. Courts do not demand agreement. Courts demand disciplined, informed good-faith negotiations.

A request for electronically stored information may specify the form or forms in which electronically stored information is to be produced.<sup>128</sup> The form should usually be specified. The requesting party should consider 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 form<sup>129</sup> 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 in the

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<sup>128</sup> FLA. R. CIV. P. 1.350(b).

<sup>129</sup> Native format is a copy of the original electronic file. For example, e-mail from an Outlook e-mail program would be produced in a \*.pst file. Native format files include the metadata of the original file. Native format files also are easy to modify. This presents difficulties in ensuring that the data has not altered after being produced. Cooperation of counsel and well-documented procedures are required to allow effective use of native format evidence at depositions and trial.

production.<sup>130</sup> This sensible provision directs the parties to address any issues in the form of production. For example, if a responding party specifies a form of production and the requesting party fails to object to the form of production, the court has a meaningful record on which to determine whether production in another format will be required and which party should be required to pay the cost of the additional production. If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.<sup>131</sup> Again, this is a sensible process that tells the producing party that they are not permitted to degrade or convert the electronic documents to a less useful format for production.<sup>132</sup>

**Example:** Party A requests Party B’s discoverable emails in native format. Party B’s attorney objects and produces printed copies of Party B’s several thousand emails. When Party A complains, the attorney for Party B states that he has produced every relevant email stating, “You have everything I have.” Is this adequate production under the rules?

**Answer:** No. Party B’s attorney should have objected to the requested format (native) rather than producing in another form without involving Party A or the Court in the

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<sup>130</sup> FLA. R. CIV. P. 1.350(b).

<sup>131</sup> *Id.* ESI is usually “ordinarily maintained” in its native format, meaning the bit coding format used by the software in which the ESI was created. However, some companies utilize a process of converting documents from native to PDF or TIFF images. Electronic files are collections of encoded on and off values. However, a reasonably useable format may be ESI produced in load files with searchable metadata and extracted text. On some occasions, searchable PDF conversion of native files may be adequate if there is an agreement that the original metadata is not relevant.

<sup>132</sup> Such an effort would be equivalent to the unsavory practice of shuffling unnumbered pages or removing file labels from folders before producing paper discovery to the opponent.

decision.<sup>133</sup> 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 is essential when reviewing large numbers and volumes of emails. Metadata may also be needed for authentication when the time comes to introduce the information into evidence. Finally, the lack of metadata and production in an electronic format prevents the requesting party from organizing the information with the requesting party’s software according to date, subject matter, recipient, and sender. Fortunately, as discussed above, Rule 1.350(b) directly addresses this situation. 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. The dispute may have been avoided if Party B’s counsel contacted Party A before going through the extra expense of providing paper copies. In any event, the Rules anticipate that electronically stored information will be produced in a reasonable useable format. Printing ESI to paper is *per se* not reasonably usable format.

The form of production may also be an issue when exercising the option to produce records in lieu of answering interrogatories, so the amendments to the civil rules effective September 1, 2012, (1) specifically authorize the production of electronically stored information in lieu of answers to interrogatories, and (2) set out the procedure for determining the form in which to produce the ESI.<sup>134</sup> 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.<sup>135</sup>

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<sup>133</sup> FLA. R. CIV. P. 1.350(b).

<sup>134</sup> FLA. R. CIV. P. 1.340(c).

<sup>135</sup> *Id.*

## **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 Rule 1.350 request for production and amended Rule 1.410 addresses the issues in similar fashion. It makes abundant sense for the party issuing the subpoena to specify the preferred form of production. However, if a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.<sup>136</sup>

Persons responding to a subpoena may object to discovery of ESI from sources that are not reasonably accessible because of undue costs or burden.<sup>137</sup> On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought, or the form requested is not reasonably accessible because of undue costs or burden. Once that showing is made, the court may order that the discovery not be had or may nonetheless order discovery limited to such sources or in such forms if the requesting party shows good cause, considering the limitations set out in Rule 1.280(d)(2). The court may specify conditions of the discovery, including ordering that

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<sup>136</sup> FLA. R. CIV. P. 1.410(c).

<sup>137</sup> *Id.*

some or all of the expenses of the discovery be paid by the party seeking the discovery.<sup>138</sup> 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.<sup>139</sup>

The court will undoubtedly take into account whether the subpoena is directed to a party, or a person or organization controlled by or closely identified with a party, or to a person or entity totally unrelated to and disinterested in the case. Subpoenas to non-parties have become a major issue in discovery of ESI because an enormous amount of ESI is sent, stored, shared, or created on systems owned or controlled by third parties, including internet accessible sites.

### **DISCOVERY OF SOCIAL MEDIA ESI**

Social media refers 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®, LinkedIn®, Flickr®, Instagram®, YouTube®, Snapchat®, 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

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<sup>138</sup> *Id.*

<sup>139</sup> First Call Ventures, LLC v. Nationwide Relocation Servs., 127 So. 3d 691 (Fla. 4th DCA 2013).

significant challenges in preservation of social media content. Social media sites routinely have privacy settings in which some information is public while other information is available to “friends” or another limited audience. However, in the civil discovery context, information and photographs posted on social media are not protected by any right of privacy regardless of any privacy settings that the user may have established.<sup>140</sup> 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.<sup>141</sup> However, not all information on social media will be relevant. The challenge for the parties and courts is limiting access to relevant social media information while protecting legitimate privacy interests in non-relevant information.

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.<sup>142</sup>

### **DISCOVERY OF ELECTRONIC MEDICAL AND HEALTH RECORDS**

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<sup>140</sup> Because information shared on social networking websites may be copied and disseminated by another, there is no reasonable expectation that such information is private. See *Nucci v. Target Corp.*, 162 So. 3d 146, 154 (Fla. 4th DCA 2015).

<sup>141</sup> *Id.*

<sup>142</sup> 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 normally 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.

Presumptively, the same discovery principles and law for ESI in general apply to electronic medical records. However, electronic medical records, or the more inclusive expression electronic health records ("EHR"), present additional layers of issues for lawyers and judges in discovery and presentation of evidence.<sup>143</sup> Some of the more common discrete and overlapping issues complicating discovery of EHR include: (1) identifying what is relevant, proportional, and discoverable from the sometimes massive amount of data that health care providers amass administratively and medically in caring for patients; (2) protecting privacy interests of the target patient, other patients, and the health care provider; (3) identifying exactly constitutes a patient's medical record or chart; (4) economy, proportionality, and cost of processing records; (5) form of production; (6) proprietary information regarding vendor software; (7) communication of needs of requesting party and capabilities and requirements of the producing party; (8) identifying misleading, counterfeit, or altered data in EHR.

As with any civil discovery, addressing discovery of EHR involves consideration of whether the request for records is made: by or to (i) a party or nonparty, (ii) a fact witness or expert witness, a health care provider or (iii) other entity or person possessing the records; in the course of an ongoing case or by request outside the case; during Florida's presuit process or during the case in chief; and with or without the patient's express written authorization. In each scenario, the requesting party should carefully craft communication so that the request clearly describes the scope and format of the records requested and the basis or authority by which the records are requested.

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<sup>143</sup> Artigliere, Brouillard, Gelzer, Reich, and Teppler, *Diagnosing and Treating Legal Ailments of the Electronic Health Record: Toward an Efficient and Trustworthy Process for Information Discovery and Release*, 18 THE SEDONA CONFERENCE JOURNAL 209 (2017), available online at <https://s3.amazonaws.com/IGG/publications/EHR.TSC.Vol18.rev.pdf>

Despite the complexity of EHR discovery, the same procedural rules that apply to discovery in general, electronic or otherwise, apply to medical records. Because of all the potential pitfalls, delays, undue cost, and need for discretion and protection of the record and privacy interests, it benefits counsel and the parties to talk early and often about conducting and managing discovery of EHR with each other and producing nonparties. Key questions that need to be clarified between requesting and producing persons or entities are the scope of the records sought and the scope of proper discovery. Potentially complicating the discussion would be terminology or definitional barriers between the requesting and producing parties, starting with (1) "what is the medical record?" and (2) whether or not defining the medical record limits discovery in any way. For example, entries about a patient by a person or machine that reside in the system but are not produced in any defined "report" generated as part of the "defined" medical record or any standard report under the software in use may arguably be discoverable. Issues of clarity for scope and form of production are most efficiently and economically handled by meet and confer or by negotiation rather than by motions and hearings.

### **INSPECTION OF OPPOSING PARTY DEVICES**

An issue in e-discovery is direct access to the opposition's computers and computer devices. There is a large body of federal and foreign state case law on the



subject.<sup>144</sup> Florida case law<sup>145</sup> protects a responding party from over-intrusive inspections of its computer systems by the requesting party. Direct inspection of the opposition's computer devices requires a showing of good cause before such an inspection is allowed. The rules, both state and federal, initially provide for the production of the relevant ESI stored on electronic devices, not the devices themselves.

Generally, direct access to and inspection of the opposition's devices is permitted in cases where the producing party's search and production has not been competently or honestly performed.<sup>146</sup> The background and reasoning for this law is set out in the *Menke* case:

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.

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<sup>144</sup> See *Peskoff v. Faber*, 251 F.R.D. 59 (D.D.C. 2008); *Bro-Tech Corp. v. Thermax, Inc.*, No. 05-CV-2330, 2008 WL 724627 (E.D. Pa. Mar. 17, 2008); *Sterle v. Elizabeth Arden, Inc.*, No. 3:06 CV 01584 (DJS), 2008 WL 961216 (D. Conn. Apr. 9, 2008); *Xpel Tech. Corp. v. Am. Filter Film Distribs*; No. SA-08-CV-0175 XR, 2008 WL 744837 (W.D. Tex. Mar. 17, 2008); *Henry v. Quicken Loans, Inc.*, No. 04-40346, 2008 WL 474127 (E.D. Mich. Feb. 15, 2008); *In re Honza*, 242 S.W. 3d 578 (Tex. App. 2008); *Coburn v. PN II, Inc.*, No. 2:07-cv-00662, 2008 WL 879746 (D. Nev. Mar. 28, 2008); *Ferron v. Search Cactus, LLC*, No. 2:06-CV-327, 2008 WL 1902499 (S.D. Ohio Apr. 28, 2008); *Johnson v. Wells Fargo Home Mortg., Inc.*, No. 3:05-CV-0321-RAM, 2008 WL 2142219 (D. Nev. May 16, 2008); *Anadarko Petroleum Corp. v. Davis*, No. H-06-2849, 2006 WL 3837518 (S.D. Tex. Dec. 28, 2006); *Hedenburg v. Aramark Am. Food Servs.*, 476 F. Supp. 2d 1199 (W.D. Wash. 2007); *In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir. 2003); *Ameriwood Indus. v. Liberman*, No. 4:06CV524-DJS, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006).

<sup>145</sup> *Menke v. Broward Cty. Sch. Bd.*, 916 So. 2d 8 (Fla. 4th DCA 2005).

<sup>146</sup> *Id.*; see also *Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163 (Fla. 1st DCA 2014) (defense made a showing of need for information on iPhone and plaintiff offered no less intrusive means for providing relevant information).

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.<sup>147</sup>

The appeals court granted certiorari to quash the administrative law judge's order requiring production of Menke's computers. The court held that production and search of a computer is to be conducted by the producing party so as to protect their confidential information. *Menke* suggests that the production of the computer itself is a last resort only justified "in situations where evidence of intentional deletion of data was present."<sup>148</sup> The *Menke* court concluded with these words:

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 deprivation of

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<sup>147</sup> *Menke*, 916 So. 2d at 10.

<sup>148</sup> *Id.* at 8.

the use of the computer devices for some time period and 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. Any direct inspection by the requesting party must be conditioned on the use of, a qualified expert to conduct the copying and inspection. Additionally, a specific inspection protocol should be in place.

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.*,<sup>149</sup> 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.<sup>150</sup> The first district upheld the order as a proper balance of the need for the discovery and protection of privacy interests.<sup>151</sup> However, the decision of the appellate court was apparently influenced by the plaintiff's failure to advance any less intrusive alternatives

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<sup>149</sup> 148 So. 3d 163 (Fla. 1st DCA 2014); Artigliere & Hamilton, LEXISNEXIS PRACTICE GUIDE: FLORIDA E-DISCOVERY & EVIDENCE, Ch. 2 *Governing Law in Electronic Discovery* § 6.08 (2021).

<sup>150</sup> *Antico*, 148 So. 3d 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.")

<sup>151</sup> *Id.*

for discovery than access as prescribed by the trial court.<sup>152</sup> When direct inspection is appropriate, a protocol must be in place that requires the inspecting expert to disclose the relevant document located in the search to the producing party prior to production to the request party. The producing may then designate any of the documents as privileged. The requesting party then receives the non-objected to relevant documents and a privilege log that may subsequently be contested.

### **SELF-HELP “DISCOVERY”**

Self-help discovery and private investigation occurs outside the litigation’s compulsory discovery processes. 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, or industry or organization. Accessing social media to obtain 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. 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 be required to testify to establish the predicate a trial for its admission into evidence. If the information is sufficiently important to collect for litigation, it should be collected, stored, and preserved

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<sup>152</sup> *Id.* at 168.

properly, and 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 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 print the screenshot to paper and place it in your file for potential use in the case. What issues may arise in connection with moving the paper screenshot into 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 publicly 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.<sup>153</sup> Efforts to access a

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<sup>153</sup> 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

computer or device of a party or witness or a person's email account may lead to sanctions or admissibility<sup>154</sup> challenges and potential disqualification of counsel in egregious cases, such as where counsel has accessed privileged documents of the opposing party.<sup>155</sup> A basis for disqualification of counsel is if counsel has obtained, reviewed, and used privileged documents of the opposing party.<sup>156</sup>

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, it may be important to know that the target person of a viewed LinkedIn® account will know who viewed their account unless the requesting person's LinkedIn settings are set to not disclose such access. Another example involves Facebook® privacy settings. Only limited information is available about a Facebook subscriber except for persons accepted as "Friends." However, it is unethical to "Friend" an opposing party or witness for the sole purpose of extracting additional information from them on Facebook.<sup>157</sup> Information protected by Facebook privacy settings should be requested

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ruled that the evidence was not admissible because the conversations were illegally intercepted under the SECURITY OF COMMUNICATIONS ACT, FLA. STAT. § 934.03).

<sup>154</sup> *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).

<sup>155</sup> *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.*

<sup>156</sup> *Id.*

<sup>157</sup> 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).

through formal rather than self-help discovery.<sup>158</sup>

### **TEN PRACTICAL STEPS FOR HANDLING ELECTRONIC EVIDENCE**

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

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<sup>158</sup> Nucci v. Target Corp., 162 So. 3d 146 (Fla. 4th DCA 2015) (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).

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. Avoid client preservation and self-collection. Work especially closely with international clients not familiar with U.S. based discovery obligations.

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 publicly 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.

## **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.

## CHAPTER FOUR

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### WRITTEN DISCOVERY

#### I. DOCUMENT REQUESTS

##### **Duty of Good Faith and Due Diligence**

Counsel and parties should conduct discovery timely, in good faith, and with due diligence. It is expected that everyone will cooperate and act courteously in all phases of the discovery process with a goal of fairly and efficiently exchanging information about the case so that it may be resolved in a timely, just, and cost-effective manner.

##### **Formulating Requests for Documents**

In addition to complying with the provisions of Rules 1.350 and 1.351, Florida Rules of Civil Procedure, a document request, whether a request for production or subpoena duces tecum, should be clear, concise, and reasonably particularized. For example, a request for “each and every document supporting your claim” or a request for “the documents you believe support Count II” is objectionably broad in most cases. Attorneys should never use requests for production to harass or improperly burden an adversary or to cause the adversary to incur unnecessary expense.<sup>159</sup>

##### **Use of Form Requests**

Counsel should review any standard form document request or subpoena duces tecum and modify it to apply to the facts and contentions of the particular case. A “boilerplate” request or subpoena not directed to the particular facts and issues involved in a case should not be used. Neither should burdensome “boilerplate” definitions or

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<sup>159</sup> The Florida Bar Guidelines for Professional Conduct, Section G.3.

instructions be used in formulating a document request or subpoena or instructions that create obligations on the part of the responding party that do not otherwise exist in the Florida Rules of Civil Procedure. Words used in discovery normally should carry their plain and ordinary meaning unless the particular case requires a special or technical definition, which should be specified plainly and concisely.

### **Reading and Interpreting Requests for Documents**

An attorney receiving a request for documents or a subpoena duces tecum shall reasonably and naturally interpret it, recognizing that the attorney serving it generally does not have specific knowledge of the documents sought and that the attorney receiving the request or subpoena generally has or can obtain pertinent knowledge from the client. Attorneys should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure. Furthermore, evasive or incomplete disclosures, answers, or responses are treated as a failure to answer<sup>160</sup> and may be sanctionable.<sup>161</sup>

### **Contact When a Document Request is Received**

After becoming aware that an action has been initiated but before discovery is ever exchanged, an attorney should become generally familiar with the client's records and storage systems, including electronically stored media, so that counsel may properly advise the client on production, preservation, and protection of relevant data, records, and the treatment of privileged or private information during litigation.<sup>162</sup> Then upon receiving a document request, counsel should promptly confer with the client and take reasonable steps to ensure that the client (i) understands what documents are requested,

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<sup>160</sup> FLA. R. CIV. P. 1.380(a)(3).

<sup>161</sup> See FLA. R. CIV. P. 1.380.

<sup>162</sup> The Florida Bar Guidelines for Professional Conduct, Section G.4.

(ii) has adopted a reasonable plan to obtain documents in a timely and reasonable manner, and (iii) is purposefully implementing that plan in good faith.

### **Responding to Document Requests**

When responding to a request for production or inspection served pursuant to Rule 1.350, the responding party is required to state each discovery request in full as numbered, followed by the answer, objection, or other response.<sup>163</sup> To accommodate opposing counsel, attorneys should provide their opposing counsel with copies of their requests for documents in a format so their opposing counsel does not need to re-type the requests for documents in their response.<sup>164</sup>

A response to a request for production should never be intentionally delayed to prevent opposing counsel from inspecting documents prior to a scheduled deposition or for any other tactical reason.<sup>165</sup> A party is not required to produce evidence that the party does not have,<sup>166</sup> nor manufacture evidence that does not exist.<sup>167</sup> A party and counsel ordinarily have complied with the duty to respond to a document request if they have:

- Responded to the requests within the time set by the governing rule, stipulation, or court-ordered extension;
- Objected with specificity to objectionable requests;
- Produced the documents themselves (or copies), specifically identified those documents that are being or will be produced, or specified precisely where the

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<sup>163</sup> FLA. R. CIV. P. 1.280(i).

<sup>164</sup> The Florida Bar Guidelines for Professional Conduct, Section G.5.

<sup>165</sup> The Florida Bar Guidelines for Professional Conduct, Section G.2.

<sup>166</sup> *Balzebre v. Anderson*, 294 So. 2d 701 (Fla. 3d DCA 1974).

<sup>167</sup> *Fla. Keys Boys Club, Inc. v. Pelekis*, 327 So. 2d 804 (Fla. 3d DCA 1976).

documents can be found and when they can be reviewed. If the documents will be produced, the response should state a specific date when the responsive documents will be available. For example, to state that the requested documents will be made available at a “mutually agreeable time” is not sufficient.

- Stated specifically that no responsive documents have been found or that no responsive documents are in the possession, custody or control of the responding party; and
- Ensured a reasonable inquiry with those persons and a reasonable search of those places likely to result in the discovery of responsive documents.

### **Objections**

Attorneys should not make objections solely to avoid producing documents that are relevant to the case or that are otherwise necessary to discover or understand the issues. “Relevancy” is broader in the context of discovery than in the trial context.<sup>168</sup> A party may be permitted to discover relevant evidence that would otherwise be inadmissible at trial if it may lead to the discovery of relevant evidence.<sup>169</sup> Also, it is misconduct to conceal a document, even temporarily, and even when the information may be available to opposing counsel by other means or from other sources.<sup>170</sup>

Likewise, attorneys should not strain to interpret a request in an artificially restrictive manner to avoid disclosure. Attorneys should only object on the grounds of privilege or work-product when truly appropriate. When requests are unclear, counsel should attempt to discuss the requests with opposing counsel so that the requests can

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<sup>168</sup> *Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995).

<sup>169</sup> *Id.*

<sup>170</sup> See *Fla. Bar v. Forrester*, 818 So. 2d 477, 481–82 (Fla. 2002).

be complied with fully or so that appropriate objections can be raised.<sup>171</sup>

Objections made to document requests should be specific, not generalized,<sup>172</sup> and should be in compliance with the provisions of Rules 1.350(b) and 1.410(c), Florida Rules of Civil Procedure. Boilerplate objections such as “the request is overly broad, unduly burdensome, and outside the scope of permissible discovery” are insufficient without a full, fair explanation particular to the facts of the case. Federal courts have held that general objections without specificity are deemed a waiver of all objections.<sup>173</sup> While this may not yet be the rule in Florida state courts, the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure. Florida courts often turn to federal courts for guidance when construing the Florida Rules of Civil Procedure.<sup>174</sup>

Objections to portions of a document request do not excuse the responding party from producing those documents to which there is no objection.<sup>175</sup> Specific objections should be matched to specific requests.

Absent compelling circumstances, failure to assert an objection to a request for production within the time allowed for responding constitutes a waiver and will preclude a party from asserting the objection in response to a motion to compel.<sup>176</sup>

### **When Production is Limited by Interpretation**

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<sup>171</sup> The Florida Bar Guidelines for Professional Conduct, Section G.1.

<sup>172</sup> FLA. R. CIV. P. 1.350(b) (“[T]he reasons for the objection shall be stated.”).

<sup>173</sup> See Memorandum Opinion and Order Regarding the Court’s Order to Show Cause Why Counsel for Both Parties Should Not be Sanctioned for Discovery Abuses rendered March 13, 2017, Liguria Foods, Inc. v. Griffith Laboratories, Inc., Case No. C 14-3041-MWB, United States District Court Northern District of Iowa; see also Opinion & Order rendered February 28, 2017, Fischer v. Forrest, et al., Case No. 14 Civ. 1304, United States District Court Southern District of New York.

<sup>174</sup> TIG Ins. Corp. of Am. v. Johnson, 799 So. 2d 339, 341–42 (Fla. 4th DCA 2001).

<sup>175</sup> FLA. R. CIV. P. 1.350(b) (“If an objection is made to part of an item or category, the part shall be specified.”).

<sup>176</sup> American Funding, Ltd. v. Hill, 402 So. 2d 1369 (Fla. 1st DCA 1981).

If a party objects to a request as overbroad when a narrower version of the request would not be objectionable, the documents responsive to the narrower version ordinarily should be produced without waiting for a resolution of the dispute over the scope of the request. When production is limited by a party's objection, the producing party should clearly describe the limitation in its response.

### **Supplementation of Document Production**

A party who has responded to a request for production with a response that was complete when made is under no duty to supplement its response with information the party later acquires.<sup>177</sup>

### **Claim of Privilege**

A party who responds to or objects to discovery requests and who withholds information otherwise discoverable by asserting that the information is privileged or subject to other protection from discovery must assert a claim expressly and must describe the nature of the documents, communications, or things not produced or disclosed, such that, without revealing the privileged or protected information itself, the description will enable other parties to assess the applicability of the privilege or protection.<sup>178</sup>

Withholding materials without notice is contrary to the intention of Rule 1.280(b)(6), Florida Rules of Civil Procedure, and may result in sanctions. If a motion to compel is filed, the party asserting a protection has the obligation to establish by affidavit or other

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<sup>177</sup> FLA. R. CIV. P. 1.280(f).

<sup>178</sup> See FLA. R. CIV. P. 1.280(b)(6); *but cf.* Gosman v. Luzinski, 937 So. 2d 293, 296 (Fla. 4th DCA 2006) (“Before a written objection to a request for production of documents is ruled upon, the documents are not ‘otherwise discoverable’ and thus the obligation to file a privilege log does not arise.”); see *also* Life Care Ctr. of Am. v. Reese, 948 So. 2d 830, 833 (Fla. 5th DCA 2007).



evidence all facts essential to the establishment of the privilege or protection relied upon. Failure to file a motion to compel may result in a waiver of remedies otherwise available.<sup>179</sup> Also, while waiver of attorney-client and work-product privileges is not favored in Florida,<sup>180</sup> failure to provide a privilege log when objecting based on privilege may amount to a waiver of privilege.<sup>181</sup>

### **Oral Requests for Production of Documents**

As a practical matter, many attorneys produce or exchange documents upon informal request, often confirmed by letter. An attorney's promise that documents will be produced should be honored. Requests for production of documents and responses may be made on the record at depositions but usually should be confirmed in writing to avoid uncertainty. An informal request may not support a motion to compel.

### **Location of Production**

As a matter of convenience, the request may suggest production at the office of either counsel. Courts expect the attorneys to reasonably accommodate one another with respect to the place of production and shall make the records available in a reasonable manner (i.e., with tables, chairs, lighting, air conditioning or heat, and the like if possible).<sup>182</sup>

### **Available for Copying**

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<sup>179</sup> See *Winn Dixie v. Teneyck*, 656 So. 2d 1348, 1351 (Fla. 1st DCA 1995).

<sup>180</sup> *TIG Ins. Corp. of Am. v. Johnson*, 799 So. 2d 339, 341 (Fla. 4th DCA 2001) (*citing* *Liberty Mut. Ins. Co. v. Lease Am., Inc.*, 735 So. 2d 560, 562 (Fla. 4th DCA 1999)).

<sup>181</sup> *Id.* at 341–42; see also *Kaye Scholer LLP v. Zalis*, 878 So. 2d 447, 449 (Fla. 3d DCA 2004) (“Failure to comply with the requirements of [the rule] results in a waiver of attorney-client and work-product privileges.”).

<sup>182</sup> *Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Commc'n Co.*, 629 So. 2d 852, 855–56 (Fla. 1st DCA 1993) (disapproved on other grounds).

An attorney should not state the documents are available for inspection and copying if they are not in fact available when the representation is made.

### **Manner of Production**

Rule 1.350(b), Florida Rules of Civil Procedure, requires that a party producing documents for inspection produce them as they are maintained in the usual course of business or identify them to correspond with the categories in the request.<sup>183</sup> Additionally, if feasible, all of the documents should be made available simultaneously, so the party inspecting can determine the desired order of review. While the inspection is in progress, the inspecting party shall have the right to review again any documents which have already been examined during the inspection.

If documents are produced as they are kept in the usual course of business, the producing party has a duty to explain the general scheme of record-keeping to the inspecting party. The objective is to acquaint the inspecting party generally with how and where the documents are maintained. If the documents are produced to correspond with the categories in the request, some reasonable effort should be made to identify certain groups of the produced documents with particular categories of the request or to provide some meaningful description of the documents produced. The producing party is not obligated to rearrange or reorganize the documents.<sup>184</sup>

### **Listing and Marking**

The producing party is encouraged to list or mark the documents which have been produced with unique labels, numbers, hash tags, hash values or similar document

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<sup>183</sup> FLA. R. CIV. P. 1.350(b); Evangelos v. Dachiel, 553 So. 2d 245 (Fla. 3d DCA 1989).

<sup>184</sup> Evangelos v. Dachiel, 553 So. 2d 245, 246 (Fla. 3d DCA 1989).

recognition systems. The parties are encouraged to then use marked or stamped documents as deposition and trial exhibits. This marking will prevent later confusion or dispute about which documents were produced. For relatively few documents, a list prepared by the inspecting attorney (which should be exchanged with opposing counsel) may be appropriate; however, when more documents are involved, the inspecting attorney may want to number each document. The producing party should allow such numbering so long as marking the document does not materially interfere with its intended use. Documents that would be materially altered by marking (e.g., promissory notes) should be listed rather than marked. Alternatively, copies of the documents (rather than originals) may be marked.

### **Copying**

Photocopies of the original documents are often prepared by the producing party for the inspecting party as a matter of convenience. However, the inspecting party has the right to insist on inspecting the original documents.

The photocopying of documents will generally be the responsibility of the inspecting party, but the producing party must render reasonable assistance and cooperation depending on its staffing facilities. In a case with a manageable number of documents, the producing party should allow its personnel and its photocopying equipment to be used with the understanding that the inspecting party will pay reasonable charges. If a large quantity of documents is produced, it may be reasonable for the inspecting party to furnish personnel to make copies on the producing party's equipment or it may be reasonable for the inspecting party to furnish both the personnel and the photocopying equipment. It may also be reasonable for the documents to be photocopied

at another location or by an outside professional copy service, at the expense of the inspecting party.

### **Scanning**

The producing party should cooperate reasonably if the inspecting party wishes to scan rather than copy documents.

### **Later Inspection**

The inspecting party's right to inspect the documents again at a later date (after having completed the entire initial inspection) must be determined on a case-by-case basis, but permission should not be unreasonably withheld.

## **II. INTERROGATORIES**

### **Number and Scope of Interrogatories**

Interrogatories should be used sparingly and never to harass or improperly burden an adversary or to cause the adversary to incur unnecessary expense.<sup>185</sup> A party may only serve 30 interrogatories (including all subparts) on any other party.<sup>186</sup> Leave of court, upon motion and notice and for good cause, is required if any party would like to serve more than 30 interrogatories.<sup>187</sup> Interrogatories should be brief, simple, particularized, unambiguous, and capable of being understood by jurors when read in conjunction with the answer. They should not be argumentative, nor should they impose unreasonable burdens on the responding party. In some cases, the court will propound interrogatories for a party to answer. These must be responded to in a timely manner. The 30 interrogatory limit does not apply to court-ordered interrogatories.

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<sup>185</sup> The Florida Bar Guidelines for Professional Conduct, Section H.3.

<sup>186</sup> FLA. R. CIV. P. 1.340(a).

<sup>187</sup> *Id.*

If the Supreme Court has approved a form of interrogatories for the type of action, the party is required to use the form approved by the court in its initial set of interrogatories.<sup>188</sup> The party may reduce or add to the approved form, but the total of approved and additional interrogatories may not exceed 30.<sup>189</sup> Aside from Supreme Court approved forms, the use of “form” interrogatories is ordinarily inappropriate. Attorneys should always carefully review interrogatories to ensure that the interrogatories are tailored to the individual case. “Boilerplate” interrogatories should be avoided.

### **Answers to Interrogatories**

When responding to interrogatories served pursuant to Rule 1.340, the responding party is required to state each interrogatory in full as numbered, followed by the answer, objection, or other response.<sup>190</sup> To accommodate opposing counsel, attorneys should provide opposing counsel with copies of their interrogatories in a format so their opposing counsel does not need to retype the interrogatories into their response.<sup>191</sup>

The respondent is required to answer each interrogatory separately and fully in writing and under oath, unless the respondent objects, in which event the grounds for the objection must be stated and signed by the attorney making the objection.<sup>192</sup> Interrogatories should be reasonably interpreted in good faith and according to the plain meaning of the language used in the interrogatory. When in doubt about the meaning of an interrogatory, the respondent should give it a reasonable interpretation (which may be

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> FLA. R. CIV. P. 1.280(i).

<sup>191</sup> The Florida Bar Guidelines for Professional Conduct, Section H.4.

<sup>192</sup> *Id.*

specified in the response) and offer an answer designed to provide, rather than deny, information. Counsel and parties should avoid “gamesmanship” when answering interrogatories. This means interrogatories should not be read by the recipient in an artificial manner designed to assure the answers are not truly responsive. If necessary, counsel should communicate if the meaning of an interrogatory is unclear so that the interrogatories can be answered fully or appropriate objections can be raised.<sup>193</sup>

A party and counsel ordinarily have complied with their obligation to respond to interrogatories if they have:

- Responded to the interrogatories within the time set by the governing rule, stipulation, or court-ordered extension;
- Conducted a reasonable inquiry, including a review of documents likely to have information necessary to respond to interrogatories;
- Objected specifically to objectionable interrogatories;
- Provided responsive answers; and,
- Submitted answers under oath, signed by the appropriate party representative.

### **Objections**

Absent compelling circumstances, failure to assert objections to an interrogatory within the time to answer constitutes a waiver and will preclude a party from asserting the objection in a response to a motion to compel.<sup>194</sup> All grounds for an objection must be stated with specificity, and should be based on a good faith belief in their merit.<sup>195</sup>

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<sup>193</sup> The Florida Bar Guidelines for Professional Conduct, Section H.1.

<sup>194</sup> Herold v. Computer Components Intl., Inc., 252 So. 2d 576 (Fla. 4th DCA 1971).

<sup>195</sup> The Florida Bar Guidelines for Professional Conduct, Section H.2.

Counsel should not make objections in order to withhold relevant information.<sup>196</sup> Specific objections should be matched to specific interrogatories. When an answer is narrowed by one or more objections, this fact and the nature of the information withheld should be specified in the response itself. The propounding party should file a motion to compel if objections are improper or else they may waive their right to object to the responding party's objections.<sup>197</sup> Written objections to interrogatories should be signed by counsel instead of the party.<sup>198</sup>

### **Claims of Privilege**

Generalized assertions of privilege will be rejected. A claim of privilege must be supported by a statement of particulars sufficient to enable the court to assess its validity. Please refer to Section I, above, on this topic.

### **Contention Interrogatories**

Interrogatories that generally require the responding party to state the basis of particular claims, defenses, or contentions in pleadings or other documents should be used sparingly and, if used, should be designed to (1) target claims, defenses, or contentions that the propounding attorney reasonably suspects may be the proper subject of early dismissal or resolution or (2) to identify and narrow the scope of unclear claims, defenses, and contentions. Interrogatories that purport to require a detailed narrative of the opposing party's case are generally improper because they are overbroad and oppressive.

### **Reference to Deposition or Document**

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<sup>196</sup> *Id.*

<sup>197</sup> *Deutsche Bank Nat'l Trust Co. v. Baker*, 199 So. 3d 967, n.2 (Fla. 4th DCA 2016).

<sup>198</sup> FLA. R. CIV. P. 1.340(a).

Because a party is entitled to discovery both by deposition and by interrogatory, it is ordinarily insufficient to answer an interrogatory by reference to an extrinsic matter, such as “see deposition of Eugene Swanson” or “see insurance claim.” For example, a corporation may be required to state its official, corporate response even though one of its high-ranking officers has been deposed because the testimony of an officer may not necessarily represent a complete or express corporate answer. Similarly, a reference to a single document is not necessarily a full answer, and the information in the document—unlike the interrogatory answer—is not ordinarily set forth under oath.

In rare circumstances, it may be appropriate for a corporation or partnership to answer a complex interrogatory by saying something such as “Acme Plumbing Company adopts as its answer to this interrogatory the deposition testimony of Eugene Swanson, its Secretary, on pages 33–76 of his deposition transcript.” This may suffice when an individual has already fully answered an interrogatory in the course of a previous deposition and the party agrees to be bound by this testimony. However, counsel are reminded, as provided in Rule 1.380(a)(3), Florida Rules of Civil Procedure, that for purposes of discovery sanctions, an evasive or incomplete answer shall be treated as a failure to answer.

### **Interrogatories Should be Reasonably Particularized**

Interrogatories designed to force an exhaustive or oppressive catalogue of information are generally improper. For example, an interrogatory such as “identify each and every document upon which you rely in support of your second affirmative defense” is objectionably overbroad in a typical case, although it may be appropriate, for example in a simple suit on a note. While there is no simple and reliable test, common sense and



good faith usually suggest whether such an interrogatory is appropriate.

### **Producing Records in Lieu of Answering Interrogatories**

Under certain circumstances, a party may be permitted to produce records in lieu of answering interrogatories.<sup>199</sup> When an answer to an interrogatory may be derived from documents (including electronically stored information) and the burden of deriving the answer is substantially the same for the party serving the interrogatory as for the party to whom it is directed, the party answering the interrogatory may produce documents in lieu of answering the interrogatory.<sup>200</sup> However, the party wishing to respond to interrogatories in this manner must observe the following practices as required by Rule 1.340(c), Florida Rules of Civil Procedure:

- Specify the documents to be produced in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the answer as readily as could the party from whom discovery is sought, or identify a person who will be available to assist the requesting party in locating and identifying the records at the time they are produced.<sup>201</sup>
- Give the requesting party an opportunity to inspect and make copies of the records.<sup>202</sup>
- Produce electronically stored information in the form in which it is ordinarily

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<sup>199</sup> FLA. R. CIV. P. 1.340(c); see *Mt. Sinai Med. Ctr., Inc. v. Perez-Torbay*, 555 So. 2d 1300 (Fla. 3d DCA 1990); *Fla. Dept. of Prof. Reg. v. Fla. Psychological Practitioners Ass'n*, 483 So. 2d 817 (Fla. 1st DCA 1986).

<sup>200</sup> FLA. R. CIV. P. 1.340(c).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

maintained or in a reasonably usable form.<sup>203</sup>

It is to the benefit of the answering party to make the document search as simple as possible, or the answering party may be required to answer the interrogatory in full.

### **Answering Objectionable Interrogatories**

If any interrogatory is objectionable because of overbreadth, the responding party, although objecting, must answer the interrogatory to the extent that the interrogatory is not overbroad. In other words, an objection for overbreadth does not relieve the duty to respond to an interrogatory, to the extent that is not overbroad, while a party awaits a judicial determination regarding the objection.

## **III. REQUESTS FOR ADMISSION**

### **Number and Scope of Requests for Admission**

Requests for admissions should be used sparingly and never to harass or impose undue burden or expense on adversaries. A party may only serve 30 requests for admission (including all subparts) on any other party.<sup>204</sup> Leave of court, upon motion and notice and for good cause, is required if any party would like to serve more than 30 requests, unless the parties stipulate to a larger number.<sup>205</sup> If requests for admission are served with the initial process, the responding party has 45 days to respond. Otherwise, responses are due within 30 days of service.<sup>206</sup> All requests for admissions should be within the scope of general discovery rules.<sup>207</sup>

### **Responding to Requests for Admission**

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<sup>203</sup> *Id.*

<sup>204</sup> FLA. R. CIV. P. 1.370(a).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> FLA. R. CIV. P. 1.280.

When responding to requests for admissions served pursuant to Rule 1.370, the responding party is required to state each discovery request in full as numbered, followed by the answer, objection or other response.<sup>208</sup>

If any portion of a request remains unanswered, the requested admission may be deemed admitted. The response should specifically deny the matter or set forth in detail the reasons why the responding party cannot truthfully admit or deny the matter. If parts of the statement are true and parts of the statement are untrue, the answering party must still specify that some of the requested matter is true and then qualify or deny the remainder.<sup>209</sup> If the court determines that an answer does not comply with the rule requirements, it may order either that the matter is admitted or that an amended answer must be served.<sup>210</sup> Under certain conditions, the court may allow a late response.

### **Objections**

Reasons for an objection must be stated.<sup>211</sup> An answering party cannot give lack of information or knowledge as a reason for failing to admit or deny a request unless the party states that the party has made a reasonable inquiry and determined that the information known or readily obtainable is insufficient to enable the party to admit or deny the request.<sup>212</sup>

### **Asserting Fifth Amendment Privilege**

While Rule 1.370(b) of the Florida Rules of Civil Procedure purports to make

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<sup>208</sup> FLA R. CIV. P. 1.280(i).

<sup>209</sup> FLA. R. CIV. P. 1.370(a).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

admissions privileged and applicable only to the instant proceeding, a Fifth Amendment privilege may still apply if the question asked could evoke a response “forming a link in the chain of evidence which might lead to criminal prosecution.”<sup>213</sup> In a concurring opinion, Justice Marshall with the United States Supreme Court stated:

A witness is generally entitled to invoke the Fifth Amendment privilege against self-incrimination whenever there is a realistic possibility that his answer to a question can be used in any way to convict him of a crime. It need not be probable that a criminal prosecution will be brought or that the witness’s answer will be introduced in a later prosecution; the witness need only show a realistic possibility that his answer will be used against him. Moreover, the Fifth Amendment forbids not only the compulsion of testimony that would itself be admissible in a criminal prosecution, but also the compulsion of testimony, whether or not itself admissible, that may aid in the development of other incriminating evidence that can be used at trial. . . .The privilege is inapplicable only “if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution of the witness.”<sup>214</sup>

### **Amending Responses to Request for Admission**

Any matter admitted in response to a request for admissions is “conclusively established unless the court on motion permits withdrawal or amendment of the admission.”<sup>215</sup> Motions to amend or withdraw admissions are liberally granted absent prejudice to the opposing party to ensure cases are decided on their merits.<sup>216</sup> Excusable neglect such as a clerical mistake is a proper reason to allow amendment.<sup>217</sup> A motion

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<sup>213</sup> Delisi v. Smith, 423 So. 2d 934 (Fla. 2d DCA 1982); see Boelke v. Peirce, 566 So. 2d 904 (Fla. 4th DCA 1990).

<sup>214</sup> Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).

<sup>215</sup> FLA. R. CIV. P. 1.370(b).

<sup>216</sup> See Clemens v. Namnum, 233 So. 3d 1146 (Fla. 4th DCA 2017); *but cf.* Asset Mgmt. Consultants of Virginia v. City of Tamarac, 913 So. 2d 1179, 1181 (Fla. 4th DCA 2005) (amendment requested after motion for summary judgment was heard was improper for lack of due diligence and prejudice).

<sup>217</sup> Davison v. First Fed. Sav. & Loan Ass’n of Orlando, 413 So. 2d 1258 (Fla. 5th DCA 1982); Wood v. Fortune Ins. Co., 453 So. 2d 451 (Fla. 4th DCA 1984).

must be filed to obtain such relief,<sup>218</sup> unless the fact admitted has been “continually contradicted” in various filings throughout the litigation.<sup>219</sup>

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<sup>218</sup> See *Morgan v. Thomson*, 427 So. 2d 1134, 1134-35 (Fla. 5th DCA 1983) (holding that “a motion must be made for relief from the admissions automatically resulting from a failure to timely answer a request for admissions” even where the party later files a pleading or affidavit conflicting with the admissions.); see also *Singer v. Nationwide Mut. Fire Ins. Co.*, 512 So. 2d 1125 (Fla. 4th DCA 1987) (admissions were conclusively established absent motion for relief).

<sup>219</sup> See *Moreland v. City of Fort Myers (In re Forfeiture of \$2470.00 in U.S. Currency)*, 164 So. 3d 111, 113 (Fla. 2d DCA 2015) (reversing summary judgment where defendant’s technical failure to respond to request for admissions constituted an admission to dispositive fact but defendant had “continually contradicted” that fact in various filings leading up to summary judgment).

## CHAPTER FIVE

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### PROPER CONDUCT OF DEPOSITIONS

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.<sup>220</sup> 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.<sup>221</sup> 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. Rule 1.310(c) of the Florida Rules of Civil Procedure provides that “examination and cross-examination of witnesses may proceed as permitted at trial.” It is the firm position of the Conference of Circuit Judges and the Conference of County Court Judges that the intention of Rule 1.310(c), as quoted above, is that counsel shall conduct themselves at

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<sup>220</sup> Oath of Admission to the Florida Bar.

<sup>221</sup> See Section F within the Professionalism Handbook.

deposition as they are expected to behave 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 *Florida Bar v. Ratiner*,<sup>222</sup> a lawyer was publicly reprimanded by the Supreme Court of Florida, suspended for sixty days, and put on probation for two years, all for engaging in deposition misconduct. Also, in *5500 North Corp. v. Willis*,<sup>223</sup> 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."

## **Objections**

### **The Proper Form of Objections**

Rule 1.310(c) provides, in part, that "[a]ny objection during a deposition must be stated concisely and in a nonargumentative and nonsuggestive manner." The Florida Rule is derived directly from Rule 30 of the Federal Rules and is almost verbatim. The proper form of a deposition objection is to make an objection to the form of the question and then briefly state the specific form problem, such as, "objection as to form, leading", "objection as to form, compound question", or, "objection as to form, argumentative."<sup>224</sup> The proper objection "concisely" states the basis of the objection. This allows for the objection to be stated in a nonargumentative and nonsuggestive form and gives the questioning attorney the opportunity to correct the asserted defect at the time of the deposition.

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<sup>222</sup> 46 So. 3d 35 (Fla. 2010).

<sup>223</sup> 729 So. 2d 508, 514 (Fla. 5th DCA 1999).

<sup>224</sup> See *Narumi Vargas v. Fla. Crystals Corp.*, No. 16-81399-CV, 2017 WL 1861775 (S.D. Fla. May 5, 2017).

## Speaking Objections

Speaking objections to deposition questions are not permitted. They are designed to obscure or hide the search for the truth by influencing the testimony of a witness. They are, by definition, objections that are argumentative or suggest answers. Objections and statements that a lawyer would not dare make in the presence of a judge should not be 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”, or, simply suggesting a witness only answer “if you know”.

*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.”*

Coaching the deponent or suggesting answers through objections or otherwise is improper and should never occur. There is a difference between preserving an objection and coaching the witness. For example, objecting that a question is “vague” is a speaking objection, especially when it results in the witness expressing a lack of understanding of the question or an inability to answer the question.<sup>225</sup> There are other, similar, speaking objections, such as “calls for speculation” and “improper hypothetical”. The effect of these

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<sup>225</sup> Cincinatti Ins. Co. v. Serrano, 2012 WL 28071 at \*5 (D. Kan. 2012)



types of speaking objections often becomes clear when the witness' response mirrors the objection or the witness states an inability to answer the question. When this occurs it is appropriate for the questioner to ask that opposing counsel limit the objection to "form" only, so that the witness is not unduly influenced. The objection is still preserved and the admissibility of the answer can be addressed by the court prior to trial. In addition, excessive objections are inappropriate. Strategically disrupting a deposition with objections and making an excessive number of unnecessary objections by itself constitute sanctionable conduct.<sup>226</sup> There are a wealth of cases and articles that address proper objections during a deposition. The overriding goal is always to ensure that the witness is not being unduly influenced and is giving independent, honest answers to questions.

If a deponent changes his or her testimony after consulting with counsel, the fact of the consultation may be brought out, but the substance of the communication generally is protected.<sup>227</sup> Where an attorney has improperly instructed the 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.<sup>228</sup>

It has been stated that, "the witness comes to the deposition to testify, not to indulge in a parody of Charles McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness . . . not the lawyer . . . who is the witness."<sup>229</sup>

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<sup>226</sup> BNSF Ry. Co. v. San Joaquin Valley R. Co., 2009 WL 3872043 at \*3 (E.E. Cal. 2009).

<sup>227</sup> Haskell Co. v. Ga. Pac. Corp., 684 So. 2d 297 (Fla. 5th DCA 1996).

<sup>228</sup> McDermott v. Miami-Dade Cty., 753 So. 2d 729 (Fla. 1st DCA 2000).

<sup>229</sup> Hall v. Clifton Precision, A Div. of Litton Sys., Inc., 150 F.R.D. 525 (ED. Pa. 1993).

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).

### **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.

### **The Proper Response 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 is 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.

### **Depositions of Corporate Representative(s)**

Rule 1.310(b)(6) permits the party seeking discovery to designate, with reasonable particularity, the matters for examination and requires the responding party to produce one or more witnesses who can testify as to the corporation’s knowledge of the specified topics. The Rule was designed in part to streamline litigation and is patterned closely after

Federal Rule 30(b)(6). Florida case law and Federal cases interpreting comparable provisions are persuasive on the issues related to the Rule.

The issues that arise under Rule 1.310(b)(6) are numerous and too extensive to address fully in this Handbook. However, some simple guidelines should be followed:

(a) Requested Areas of Testimony. A notice or subpoena to an entity, association, or other organization should accurately and concisely identify the designated area(s) of requested testimony, giving due regard to the nature, business, size, and complexity of the entity being asked to testify.

(b) Designating the Best Person to Testify for the Organization. An entity, association, or other organization responding to a deposition notice or subpoena should make a diligent inquiry to determine the individual(s) best suited to testify.

(c) Reasonable Interpretation Is Required. Both in preparing and in responding to a notice or subpoena to an entity, association, or other organization, a party or witness is expected to interpret the designated area(s) of inquiry in a reasonable manner consistent with the entity's business and operations.

(d) If in Doubt, Clarification Is Appropriate. A responding party or witness, who is unclear about the meaning and intent of any designated area of inquiry, should communicate in a timely manner with the requesting party to clarify the matter so that the deposition may proceed as scheduled. The requesting party is obligated to provide clarification sufficient to permit informed, practical, and efficient identification of the proper witness.

(e) Duty to Prepare Witness. Counsel for the entity should prepare the designated witness so that the witness can provide meaningful information about

the designated area(s) of inquiry.<sup>230</sup>

Additional resources addressing the proper conduct of Rule 1.330(b)(6) depositions include Robert D. Peltz and Robert C. Weill, *Corporate Representative Depositions: In Search of a Cohesive & Well Defined Body of Law*,<sup>231</sup> and, *Carriage Hills Condo., Inc. v. Jbh Roofing & Constr., Inc.*<sup>232</sup>

### **Conclusion**

The proper, ethical and professional conduct of depositions in Florida is addressed in almost every circuit through various guidelines for professional conduct, discovery handbooks and local rules. Counsel must educate themselves on these guidelines and rules, and at all times rise to the level of professionalism expected of members of The Florida Bar.

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<sup>230</sup> Discovery Practice Middle District of Florida – rev. 6/5/15.

<sup>231</sup> 33 NOVA L. REV. 393 (2009).

<sup>232</sup> 109 So. 3d 329 (Fla. 4th DCA 2013).

# CHAPTER SIX

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## EXPERT WITNESS DISCOVERY

### I. Introduction<sup>233</sup>

Experts generally are qualified to render opinions based on their experience, background, and training. In medical malpractice actions, the law imposes additional requirements to ensure the expert has the necessary expertise.<sup>234</sup> Like any witness, however, an expert and the testimony the expert presents are subject to impeachment. 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 by way of cross-examination and rebuttal.<sup>235</sup>

General challenges to an expert's qualifications include the knowledge, skill, experience, training, and education of the witness. Rarely, however, will an expert be excluded on general challenges to qualification. Indeed, the court should not exclude an expert's opinion based on matters that go to the weight of the expert's opinion because it is the exclusive province of the jury to weigh the evidence.<sup>236</sup> Challenges that go to the weight of an expert's opinions include the reasons given by the witness for the opinion expressed, the reasonableness of the opinion in light of all surrounding facts and

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<sup>233</sup> Updated by the Honorable Elizabeth G. Rice, Circuit Judge, Thirteenth Judicial Circuit, with significant contributions by Aaron Proulx, Esquire.

<sup>234</sup> *E.g.*, FLA. STAT. § 766.102(5) (2018).

<sup>235</sup> In 2019, the Florida Legislature amended section 90.702 and 90.704, Florida Statutes, of the Florida Evidence Code to replace the Frye standard for admitting certain expert testimony with the Daubert standard, the standard for expert testimony found in Federal Rule of Evidence 702. In re Amendments to Florida Evidence Code, 278 So. 3d 551, (Mem)–552 (Fla. 2019), *reh'g denied*, SC19-107, 2019 WL 4127349 (Fla. 2019).

<sup>236</sup> See *e.g.*, Univ. of Fla. Bd. of Trs. v. Stone, 92 So. 3d 264, 272 (Fla. 1st DCA 2012) (citation omitted).

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.<sup>237</sup>

Discovery as to these factors therefore should be broad enough for the opposing party to challenge the expert and the expert's testimony, especially the expert's credibility.<sup>238</sup> Accordingly, when engaging in discovery to obtain facts with which to assault the credibility of an opponent's expert witness, a party may seek that information from multiple sources including: (1) the party for whom the expert will testify; (2) the party's insurance company; (3) the expert; and, in certain circumstances, (4) the attorney for the party.

## **II. Discovery Served on a Party**

### **A. "Retained" Experts**

#### **1. *Opinion Discovery***

Florida Rule of Civil Procedure 1.280(b)(5) (*Trial Preparation: Experts*) confines both the discovery methods that may be employed when directed to expert witnesses and the subject matter of that discovery.<sup>239</sup> Specifically, Rule 1.280(b)(5)(A) provides, in relevant part, that the discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Rule 1.280(b)(1)<sup>240</sup> and which are "*acquired or*

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<sup>237</sup> See FLA. STD. JURY INSTR. (CIV) 601.2.

<sup>238</sup> See *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L.ED.2d 347 (1974) ("A more particular attack on the witness's credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" (quoting 3A J. WIGMORE, EVIDENCE s 940, p. 775 (Chadbourn rev. 1970))).

<sup>239</sup> *Smith v. Eldred*, 96 So. 3d 1102, 1104 (Fla. 4th DCA 2012).

<sup>240</sup> FLA. R. CIV. P. 1.280(b)(1) (*Scope of Discovery – In General*) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to

*developed*” by the expert “*in anticipation of litigation or for trial*” (i.e., by a “retained” expert)<sup>241</sup>, 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.<sup>242</sup>

Rule 1.280(b)(5)(A)(i) allows a party to obtain information about another party’s expert “initially only through the vehicle of interrogatories.”<sup>243</sup> Until these interrogatories have been served, discovery by other means is impermissible.<sup>244</sup> Rule 1.280(b)(5)(A)(ii) thereafter allows a party to depose without order any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial. It is important to note that an “expert,” as the term is used in Rule 1.280(b)(5), is an “expert witness” as

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the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable thing.”).

<sup>241</sup> It is significant to note that the only mention of the word “retained” in FLA. R. CIV. P. 1.280(b)(5) is in Rule 1.280(b)(5)(B). See FLA. R. CIV. P. 1.280(b)(5)(B) (referring to “an expert who has been *retained* or specially employed by another party in anticipation of litigation or preparation for trial and who is *not* expected to be called as a witness at trial”) (emphasis added). It appears that over time, and likely because of the advent of treating physician experts, trial courts started referring to Rule 1.280(b)(5)(A) experts as “retained” experts. Rather than correct the nomenclature, the authors of this chapter have defined these types of experts as “retained” experts.

<sup>242</sup> FLA. R. CIV. P. 1.280(b)(5)(A) (emphasis added).

<sup>243</sup> Smith, 96 So. 3d at 1103 (quoting *Cont’l Ins. Co. v. Cole*, 467 So. 2d 309, 311 (Fla. 4th DCA 1985)).

<sup>244</sup> Smith, 96 So. 3d at 1103 (citations omitted). See *Miller v. Harris*, 2 So. 3d 1070, 1073 (Fla. 2d DCA 2009) (holding trial court departed from essential requirements of law by ordering subpoena to issue before determining whether usual interrogatories would provide the limited information normally discoverable in an automobile negligence action).



defined in Florida Rule of Civil Procedure 1.390(a).<sup>245</sup>

Further discovery by other means may be ordered upon motion, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(5)(C) of the rule regarding fees and expenses, as the court may deem appropriate.<sup>246</sup> Rule 1.280(b)(5)(A) additionally provides that production of an expert's financial and business records may be required "*only* under the most unusual or compelling circumstances"<sup>247</sup> and that an expert witness may not be compelled to compile or produce non-existent documents.<sup>248</sup>

## **2. "Financial" or "Litigation Bias" Discovery**

One manner by which a party may attack the credibility of a witness is by exposing a potential bias.<sup>249</sup> As it relates to a "retained" expert, bias may be demonstrated by revealing an expert's receipt of financial remuneration for testifying and an expert's financial or business interest in supporting the opinions expressed. Accordingly, a party is entitled to discover a "retained" expert's potential for "financial" or "litigation bias" (i.e., the bias that would stem from an expert's general involvement in litigation), as set forth below.

Prior to 1994, some trial courts had 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

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<sup>245</sup> FLA. R. CIV. P. 1.280(b)(5)(D). See FLA. R. CIV. P. 1.390(a) (*Definition*), which provides that the term expert witness "applies exclusively to a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify."

<sup>246</sup> FLA. R. CIV. P. 1.280(b)(5)(A), FLA. R. CIV. P. 1.280(b)(5)(C).

<sup>247</sup> FLA. R. CIV. P. 1.280(b)(5)(A).

<sup>248</sup> FLA. R. CIV. P. 1.280(b)(5)(A). See *Price v. Hannahs*, 954 So. 2d 97, 101 (Fla. 2d DCA 2007).

<sup>249</sup> FLA. STAT. § 90.608(2).

willingness of experts to become involved in litigation. In *Syken v. Elkins*,<sup>250</sup> the Third District Court of Appeal, *en banc*, quashed a trial court order requiring the “retained” experts in the case to produce expansive private financial information, including tax returns and information regarding patients who were examined for purposes of litigation in unrelated actions. In doing so, the *Syken* court fashioned various criteria for financial discovery and a methodology that balanced a party’s need to obtain financial bias discovery regarding a “retained” expert with the need to protect the expert’s privacy rights.<sup>251</sup> The *Syken* court’s criteria subsequently was adopted in full by the Florida Supreme Court in *Elkins v. Syken*,<sup>252</sup> and codified, in part, in Florida Rule of Civil Procedure 1.280(b)(4)(A)(iii), later renumbered as Rule 1.280(b)(5)(A)(iii).<sup>253</sup>

Subsection (iii) of Rule 1.280(b)(5)(A) unquestionably was implemented to protect “retained” experts from the annoyance, embarrassment, oppression, undue burden, or expense associated with discovery of financial information.<sup>254</sup> Rule 1.280(b)(5)(A)(iii) accordingly provides as follows:

(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:

The scope of employment in the pending case and the compensation for such service.

The expert’s general litigation experience, including the percentage of work performed for plaintiffs and defendants.

The identity of other cases, within a reasonable time period, in which

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<sup>250</sup> 644 So. 2d 539 (Fla. 3d DCA 1994), *approved*, 672 So. 2d 517 (Fla. 1996).

<sup>251</sup> *Id.* at 546.

<sup>252</sup> 672 So. 2d 517 (Fla. 1996).

<sup>253</sup> IN RE AMENDMENTS TO FLA. R. CIV. PRO.--ELEC. DISCOVERY, 95 So. 3d 76, 80 (Fla. 2012).

<sup>254</sup> See FLA. R. CIV. P. 1.280 (Committee Notes 1996 Amendment).

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.<sup>255</sup>

Given the purpose of financial discovery - to expose potential bias to the jury - courts have ruled that the financial bias information available under Rule 1.280(b)(5)(A)(iii) usually is sufficient to accomplish this purpose.<sup>256</sup> Thus, an expert generally “shall not be required to disclose his or her earnings as an expert witness or income derived from other services,”<sup>257</sup> and a trial court must make a finding of “the most unusual or compelling circumstances” before an expert is required to do so.<sup>258</sup> The rule clearly limits discovery of the “retained” expert’s general financial information where such information is sought solely to establish bias.<sup>259</sup>

### **3. “Relationship Bias” Discovery**

Another way bias may be demonstrated is by revealing an expert’s relationship with a party or a party’s attorney or law firm. Accordingly, Florida courts have permitted broad discovery into a “retained” expert’s potential for “relationship bias” (i.e., the bias

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<sup>255</sup> FLA. R. CIV. P. 1.280(b)(5)(A)(iii).

<sup>256</sup> See *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996).

<sup>257</sup> FLA. R. CIV. P. 1.280(b)(5)(A)(iii)4. See also *Brana v. Roura*, 144 So. 3d 699, 700 (Fla. 4th DCA 2014) (quashing trial court’s orders denying petitioners’ motions for protective order where respondent issued subpoenas to insurance carriers requiring disclosure of financial information concerning payments made by those carriers to expert witness doctor for services provided as a litigation expert and finding that information was protected from disclosure by Florida Rule of Civil Procedure 1.280(b)(5)(A)(iii)4).

<sup>258</sup> FLA. R. CIV. P. 1.280(b)(5)(A); see *Grabel v. Sterrett*, 163 So. 3d 704, 704 (Fla. 4th DCA 2015).

<sup>259</sup> See *Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.*, 103 So. 3d 200, 204 (Fla. 4th DCA 2012), *disagreed with on other grounds* in *Worley v. Cent. Fla. Young Men’s Christian Ass’n, Inc.*, 228 So. 3d 18 (Fla. 2017), *reh’g denied sub nom.* *Worley v. Cent. Fla. Young Men’s Christian, Etc.*, No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017).

that stems from a “retained” expert’s involvement with a party, an agent for a party, such as a particular insurance carrier, or a party’s attorney or law firm), as set forth below.<sup>260</sup>

After the Florida Supreme Court’s ruling in *Elkins*, parties were limited in the type of discovery they could obtain for impeachment purposes to the information set forth in Rule 1.280(b)(5)(A)(iii). Subsequently, in *Allstate Ins. Co. v Boecher*, the court recognized the need for allowing more extensive relationship bias discovery to assist counsel in impeaching examining physicians and other “retained” experts by demonstrating the experts’ economic ties to insurance companies or defense law firms.<sup>261</sup> In *Boecher*, the plaintiff had sued his uninsured motorist insurance company and was seeking from it discovery of the identity of cases and the amount of fees paid by the insurance company to its “retained” expert during the preceding three years. The precise issue before the court was whether its prior ruling in *Elkins* and former Rule 1.280(b)(4)(iii) prevented discovery requests from being propounded *directly to a party* regarding the extent of that party’s use of and payment to a particular “retained” expert.<sup>262</sup>

The *Boecher* court ultimately ruled that the limitations on expert discovery adopted in *Elkins* could not be used to shield discovery sought from a party regarding its relationship with its expert, particularly its financial relationship.<sup>263</sup> It reasoned that where

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<sup>260</sup> See e.g., *Allstate Ins. Co. v Boecher*, 733 So. 2d 993, 997 (Fla. 1999) (ruling that where discovery is directed to a party about the extent of that party’s *relationship* with a particular expert, “the balance of the interests shifts in favor of allowing the pretrial discovery”); *Morgan, Colling & Gilbert v. Pope*, 798 So. 2d 1 (Fla. 2d DCA 2001) (ruling that had merits of case been considered, trial court’s order requiring plaintiff’s law firm to produce certain financial relationship documents would have conformed to trend of insuring fairness in the jury trial process by permitting discovery of a financial relationship between a witness and a party or representative).

<sup>261</sup> 733 So. 2d 993 (Fla. 1999).

<sup>262</sup> *Id.* at 994 (emphasis added).

<sup>263</sup> *Id.* at 998.

discovery is directed to a party about the extent of that party's relationship with a particular expert, "the balance of the interests shifts in favor of allowing the pretrial discovery."<sup>264</sup> The court distinguished *Elkins* and emphasized that *Elkins* involved discovery *propounded directly on the party's expert* regarding the extent of that expert's relationship with *others*.<sup>265</sup>

Additionally, the court reasoned that the information being requested by the plaintiff in *Boecher* was directly relevant to a party's efforts to demonstrate to the jury the expert's bias by demonstrating the expert's "ongoing relationship" with the party.<sup>266</sup> The court explained that the more extensive the financial relationship between a party and a witness, the more likely it is that the witness has a vested interest in that financially beneficial relationship continuing.<sup>267</sup> It opined that a jury is entitled to know the extent of the financial connection between the witness and a party and the cumulative amount a party has paid an expert during their relationship.<sup>268</sup> It further opined that 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.<sup>269</sup>

The court in *Boecher* therefore concluded that "the jury's right to assess the potential bias of the expert outweighs any of the competing interests expressed in

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<sup>264</sup> *Id.* at 997.

<sup>265</sup> *Id.* at 995 (emphasis added).

<sup>266</sup> *Id.* at 997.

<sup>267</sup> *Id.*

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

<sup>269</sup> *Id.* at 997-98.

*Elkins*.<sup>270</sup> It further clarified that the protections afforded “retained” experts under *Elkins* and former Rule 1.280(b)(4)(iii) were not intended “to place a blanket bar on discovery from parties about information they have in their possession about an expert, including the party’s financial relationship with the expert.”<sup>271</sup>

Courts in Florida subsequently have extended the holding in *Boecher* to allow a plaintiff to obtain discovery directly from an insured party defendant regarding the relationship between the defendant’s insurer and the defendant’s “retained” expert.<sup>272</sup> Florida courts additionally have extended *Boecher*’s application to plaintiffs and have ruled that defendants are entitled to obtain from plaintiffs *Boecher* discovery regarding plaintiffs’ “retained” experts (i.e., “Reverse *Boecher*”).<sup>273</sup>

## **B. “Consulting” Experts**

As to experts retained in anticipation of litigation or in preparation for trial, but who are *not expected to be called as a witness at trial* (i.e., a “consulting” expert), Rule 1.280(b)(5)(B) provides that a party may discover facts known or opinions held by such experts only as provided in Rule 1.360(b) or “upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain

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<sup>270</sup> *Id.* at 998.

<sup>271</sup> *Id.*

<sup>272</sup> See e.g., *Springer v. West*, 769 So. 2d 1068, 1069 (Fla. 5th DCA 2000) (“Where an insurer provides a defense for its insured and is acting as the insured’s agent, the insurer’s relationship to an expert is discoverable from the insured.”).

<sup>273</sup> See e.g., *Morgan, Colling & Gilbert, P.A. v. Pope*, 798 So. 2d 1 (Fla. 2d DCA 2001) (opining that trial court’s order requiring plaintiff’s law firm to produce deposition and trial transcripts in its possession of plaintiff’s expert witnesses and copies of billing invoices submitted by experts to law firm for previous three years conformed to trend of insuring fairness in the jury trial process by permitting discovery of a financial relationship between a witness and a party or representative); *Springer*, 769 So. 2d at 1069 (“[A] defendant may question a plaintiff about any relationship between his or her attorney and the plaintiff’s trial expert.”).

facts or opinions on the same subject by other means.”<sup>274</sup> The identity of “consulting” experts is protected by the work-product privilege.<sup>275</sup>

### C. Non-Party Medical Providers

In addition to the “retained” experts specifically identified in Rule 1.280(b)(5), Florida courts have recognized other types of “experts” about whom and from whom discovery is permitted. These types of experts are identified and discussed below.

#### 1. “Pure” and “Hybrid” Treating Physicians

Florida courts seemingly recognize two types of treating physicians – the “pure” treating physician and the “hybrid” treating physician.<sup>276</sup> The “pure” treating physician, while unquestionably an expert under the Florida Rules of Civil Procedure, is a physician that does not acquire her expert knowledge for the purpose of litigation, but simply in the course of treatment and in attempting to make her patient well.<sup>277</sup> While a treating

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<sup>274</sup> FLA. R. CIV. P. 1.280(b)(5)(B) (emphasis added).

<sup>275</sup> Muldow v. State, 787 So. 2d 159 (Fla. 2d DCA 2001); Myron By & Through Brock v. Doctors Gen., Ltd., 573 So. 2d 34 (Fla. 4th DCA 1990). See *infra*, p. 17 Miscellaneous Issues. 3. Discovery Regarding Expert Not Testifying at Trial.

<sup>276</sup> See e.g., Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co., 103 So. 3d 200, 204 (Fla. 4th DCA 2012), *disagreed with on other grounds* in Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc., 228 So. 3d 18 (Fla. 2017), *reh'g denied sub nom.* Worley v. Cent. Fla. Young Men's Christian, Etc., No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017) (“For purposes of uncovering bias, we see no meaningful distinction between a treating physician witness, who also provides an expert opinion (the so-called ‘hybrid witness’), and retained experts.”); State Farm Mut. Auto. Ins. Co. v. German, 12 So. 3d 1286, 1287 (Fla. 5th DCA 2009). See also Field Club v. Alario, 180 So. 3d 1138, 1141 (Fla. 2d DCA 2015) (noting for purposes of expert witness fees as a taxable cost that physician could properly be considered a retained expert witness because, even though he was plaintiff’s treating physician, he also gave his expert opinions on plaintiff’s injuries and their significance); Lion Plumbing Supply, Inc. v. Suarez, 844 So. 2d 768, 771 (Fla. 3d DCA 2003) (rejecting black letter rule whereby testimony offered by treating physician is never considered for purposes of a one-expert-per-side limitation).

<sup>277</sup> See Frantz v. Golebiewski, 407 So. 2d 283, 285 (Fla. 3d DCA 1981) (finding FLA. R. CIV. P. 1.280(b)(3) did not apply to sworn statement taken by defendant from subsequently treating dentist without notice to plaintiff in malpractice case because treating physician, “while unquestionably an expert, [did] not acquire his expert knowledge for the purpose of litigation” as the rule contemplates) (emphasis added). See Gutierrez v. Vargas, 239 So. 3d 615, 622-23 (Fla. 2018); Clair v. Perry, 66 So. 3d 1078, 1079 n. 1 (Fla. 4th DCA 2011); Ryder Truck Rental, Inc. v. Perez, 715 So. 2d 289 (Fla. 3d DCA 1998).

physician may hold the same qualifications as a “retained” expert witness, “treating physicians form medical opinions in the course of rendering treatment and may therefore testify to the fact that they formed those opinions, and explain why they did so, provided such testimony is otherwise admissible.”<sup>278</sup>

A “hybrid” treating physician, in contrast, has characteristics of both a “pure” treating physician and a “retained” expert. In one regard, the physician is a “fact” witness, a mere treating physician. In another regard, the same physician also provides expert opinions at trial regarding causation, the permanency of injuries, prognosis, and the need for, and cost of, future treatment. Hence, the “hybrid” treating physician is not a typical “pure” treating physician that a patient independently sought out, nor is she a witness retained merely to give an expert opinion about an issue at trial.<sup>279</sup>

## **2. *Opinion Discovery***

Discovery as to the facts and opinions held by “pure” or “hybrid” treating physician expert witnesses in cases where a party is making a claim for personal injury damages is permitted pursuant to Florida Rule of Civil Procedure 1.280(b), because the care and treatment of a party is relevant and not privileged. A party may seek to obtain discovery of this type of information pursuant to Florida Rule of Civil Procedure 1.280(a) by way of written interrogatories, requests for production of documents, requests for admissions,

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<sup>278</sup> Gutierrez, 239 So. 3d at 623.

<sup>279</sup> See *Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060, 1064 (Fla. 4th DCA 2011). See *also* Gutierrez, 239 So. 3d at 624 (“It is entirely possible that even a treating physician’s testimony could cross the line into expert testimony.”) (quoting *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 186 n.1 (Fla. 3d DCA 2005)); *Field Club, Inc.*, 180 So. 3d at 1141 (noting as threshold issue, that plaintiff’s treating physician could properly be considered an expert witness because he also gave expert opinions on plaintiff’s injuries and their significance).



and physical and/or mental examinations.<sup>280</sup> In addition, Florida Rule of Civil Procedure 1.390(b) provides that an expert's testimony may be taken at any time before the trial in accordance with the rules for taking depositions.<sup>281</sup>

### **3. “Financial” or “Litigation Bias” Discovery**

“A treating physician, like any other witness, is subject to impeachment based on bias.”<sup>282</sup> Notwithstanding, trial courts have grappled with the scope and breadth of financial or litigation bias discovery regarding treating physicians in that “[t]estimony given by treating physicians blurs the boundary between fact testimony and expert testimony....”<sup>283</sup> A thoughtful explanation of the issue of whether a party is entitled to discovery regarding a treating physician is set forth in *State Farm Mut. Auto. Ins. Co. v. German*.<sup>284</sup> In his concurring opinion, Judge Torpy explained that a treating physician, like any other witness, may be questioned at trial concerning any bias he or she might have for or against a party.<sup>285</sup> He noted that a treating physician who devotes a substantial portion of his or her practice to expert testimony on behalf of plaintiffs might have a bias towards plaintiffs just as a “retained” expert, and thus, inquiry at trial to expose that potential bias is permitted.<sup>286</sup> He reasoned that it logically followed then that pretrial

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<sup>280</sup> See FLA. R. CIV. P. 1.280(a). See generally FLA. R. CIV. PRO. FORMS – STD. INTERROGATORY FORMS as to physicians who treated or examined party.

<sup>281</sup> FLA. R. CIV. P. 1.390(b).

<sup>282</sup> *Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.*, 103 So. 3d 200, 204 (Fla. 4th DCA 2012), *disagreed with on other grounds* in *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18 (Fla. 2017), *reh'g denied sub nom. Worley v. Cent. Fla. Young Men's Christian, Etc.*, No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017). See *Worley*, 228 So. 3d at 23. See also *Gutierrez*, 239 So. 3d at 624 (“Not all medical opinions formed by a treating physician are automatically admissible.”).

<sup>283</sup> *Gutierrez*, 239 So. 3d at 622.

<sup>284</sup> 12 So. 3d 1286, 1287-88 (Fla. 5th DCA 2009) (Torpy, J., concurring).

<sup>285</sup> *Id.*; see *Siplin v. Carnival Corp.*, No. 17-civ-23741-WILLIAMS/TORRES, 2018 WL 3439452, at \*5 (S.D. Fla. July 17, 2018).

<sup>286</sup> *State Farm Mut. Auto. Ins. Co. v. German*, 12 So. 3d at 1287-88 (Fla. 5th DCA 2009).

discovery to uncover evidence of bias is permissible for all the same reasons discovery on any trial issue is permitted.<sup>287</sup>

Judge Torpy also observed that the extent to which discovery is permitted on this issue of bias is a function of balancing its importance against the burden of providing the discovery.<sup>288</sup> He concluded that in most instances, the correct balance is the same balance contained in Rule 1.280(b)(5)(A)(iii), because there is no logical distinction between treating physicians and “retained” experts for purposes of uncovering this type of information.<sup>289</sup> The information to be obtained from this type of expert witness is similarly relevant, and the burdens of producing the information are the same for all of these types of professionals.<sup>290</sup>

The distinction between “pure” and “hybrid” treating physicians has also been addressed by the federal courts in the context of Federal Rule of Civil Procedure 26(a) disputes regarding witness disclosures.<sup>291</sup> In resolving these types of disputes, federal courts (as did Judge Torpy) have focused on the substance of the expert’s testimony and have found the rule-of-thumb label of “treating physician” irrelevant.<sup>292</sup> Although arising

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<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> See e.g., *Blakely v. Safeco Ins. Co. of Ill.*, No. 6:13-cv-796-Orl-37TBS, 2014 WL 1118071, at \*2 (M.D. Fla. Mar. 20, 2014) (“In determining whether a Rule 26(a)(2)(B) report is required, the label of ‘treating physician’ is irrelevant; instead, the determination turns on the substance of the physician’s testimony.”); *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051-MD, 2012 WL 5199597, at \*4 (S.D. Fla. Oct. 22, 2012) (“In determining whether a Rule 26(a)(2)(B) report is required, the label of ‘treating physician’ is irrelevant; instead, the determination turns on the substance of the physician’s testimony.”); *Singletary v. Stops, Inc.*, No. 6:09-CV-1763-ORL-19KRS, 2010 WL 3517039, at\*6 (M.D. Fla. Sept. 7, 2010) (“Like other provisions of Rule 26, the expert report requirement turns on the substance of the testimony of the witness, not the status or categorization of the witness.”).

<sup>292</sup> *Id.* See also *Anderson v. City of Ft. Pierce*, No. 14-14095-civ-MARTINEZ/LYNCH, 2015 WL 11251762, at \*2 (S.D. Fla. April 15, 2015) (“In the context of a treating doctor, Rule 26(a)(2)(C) applies if the doctor testifies about opinions formed and observations made during the course of treatment. In essence [the

in a slightly different context, the Florida Supreme Court in the case of *Gutierrez v. Vargas* likewise focused on the role played by the physician, rather than the rule-of-thumb label of “treating physician” in ultimately deciding the issue of whether a treating physician was a mere “fact witness” or an expert subject to the “one expert per specialty” at trial limitation.<sup>293</sup>

Accordingly, discovery of financial or litigation bias information as to treating physicians, regardless of whether the treating physician is deemed to be a “pure” treating physician or a “hybrid,” is permissible. Logic and reason dictate, however, that a treating physician expert is entitled to the same protection from overly intrusive general financial bias discovery afforded to “retained” experts under Rule 1.280(b)(5)(a)(iii).<sup>294</sup> Determination as to the scope and extent of this type of discovery will need to be made by the trial judge on a case-by-case basis.<sup>295</sup> Additionally, obtaining this type of discovery directly from the plaintiff may prove inadequate because the plaintiff may not have possession, custody, or control of the treating physician’s relevant documents. A party

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treating doctor] simply is a fact witness whose opinions and insight are informed by his professional training, experience, and expertise. This Court adds that (sic) range of issues that can arise from a treating relationship is broad. However, at that point where a treating doctor offers an opinion outside the scope of treatment, he becomes an expert witness and Rule 26(a)(2)(B) applies.”).

<sup>293</sup> *Gutierrez v. Vargas*, 239 So. 3d 615, 624 (Fla. 2018) (ruling that “if the treating physician gives a medical opinion formed during the course and scope of treatment in fulfillment of their obligation as a physician, then the physician is a fact witness. If, however, the treating physician gives an opinion formed based on later review of medical records for the purpose of assisting a jury to evaluate the facts in controversy, the physician acts as an expert witness, and should be considered as such.”) (emphasis added).

<sup>294</sup> *Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.*, 103 So. 3d 200, 204 (Fla. 4th DCA 2012), *disagreed with on other grounds* in *Worley v. Cent. Fla. Young Men’s Christian Ass’n, Inc.*, 228 So. 3d 18 (Fla. 2017), *reh’g denied sub nom. Worley v. Cent. Fla. Young Men’s Christian, Etc.*, No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017) (“Under ordinary circumstances, a defendant may discover from a plaintiff’s treating physician the type of general financial bias information set out in Rule 1.280(b)(5)(iii).”). See also *Winn-Dixie Stores, Inc. v. Miles*, 616 So. 2d 1108, 1110 (Fla. 5th DCA 1993) (“Absent some sort of basis for suspecting that [the treating physician] is biased, [defendant] should not be allowed to engage in an extensive fishing expedition which may prove worthless.”).

<sup>295</sup> See *State Farm Mut. Auto Ins. Co. v. German*, 12 So. 3d 1286, 1288 (Fla. 5th DCA 2009).

seeking this type of discovery will likely need to seek and obtain it from the treating physician directly.<sup>296</sup>

#### **4. “Relationship Bias” Discovery**

In contrast, relationship bias discovery as to treating physicians, regardless of classification, is severely restricted, especially when such discovery is sought from the plaintiff. In *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, the Florida Supreme Court addressed the issue of whether the financial relationship between a plaintiff's law firm and the plaintiff's treating physician is discoverable.<sup>297</sup> In *Worley*, the defense had asked plaintiff during her deposition if plaintiff's law firm had referred her to plaintiff's treating physicians. It then propounded discovery on plaintiff seeking to discover the existence of a referral relationship between plaintiff's law firm and plaintiff's treating physicians.<sup>298</sup> The Florida Supreme Court ultimately held that the financial relationship between a plaintiff's law firm and a plaintiff's treating physicians was not discoverable from the plaintiff or the plaintiff's law firm.<sup>299</sup>

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<sup>296</sup> See *infra*, p. 97 DISCOVERY SERVED DIRECTED ON THE EXPERTS.

<sup>297</sup> *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18, 23 (Fla. 2017), *reh'g denied sub nom.* *Worley v. Cent. Fla. Young Men's Christian, Etc.*, No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017).

<sup>298</sup> *Id.* at 20 (noting that defendant had propounded three sets of *Boecher* interrogatories directed to specific doctors employed by three medical providers and a supplemental request to produce directed to plaintiff's law firm).

<sup>299</sup> *Id.* at 22-25. The *Worley* decision resulted in disparate treatment between plaintiff and defense litigants, the Fourth and Fifth District Courts of Appeals recently certified to the Supreme Court of Florida, as a matter of great public importance, the questions of whether *Worley* should be applied to protect both the defendant's insurer and law firm, who are not parties to the litigation, from having to disclose financial relationships with retained experts. *Younkin v. Blackwelder*, No. SC19-385, 2019 WL 2180625 (Fla. 5th DCA 2019), *Dodgen v. Grijalva*, 281 So. 3d 490, 492 (Fla. 4th DCA 2019), and *Barnes v. Sanabria*, No. 5D19-1461, 2020 WL 250460 (Fla. 5th DCA 2020).

In reaching its decision, the *Worley* court observed that several Florida courts had extended *Boecher* to allow discovery of the financial relationship between law firms and treating physicians.<sup>300</sup> It noted that *Boecher* had dealt with the discovery of expert witnesses who had been retained for the purpose of litigation, whereas the discovery at issue in *Worley* dealt with treating physicians. The court found though that the “relationship between a law firm and a plaintiff’s treating physician is not analogous to the relationship between a party and its retained expert.”<sup>301</sup> It explained that a treating physician “typically” testifies concerning the physician’s own medical performance on a particular occasion and does not opine about the performance of another.<sup>302</sup>

The court in *Worley* additionally held that the question of whether a plaintiff’s attorney referred him or her to a doctor for treatment is protected by the attorney-client privilege, and the defense is precluded from discovering this type of protected information from the plaintiff and plaintiff’s law firm.<sup>303</sup> Left unresolved by *Worley*, however, is the issue of whether this type of discovery is available from the treating physician or medical provider directly.<sup>304</sup>

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<sup>300</sup> *Id.* at 23.

<sup>301</sup> *Id.* at 23 (disapproving of *Worley v. Cent. Fla. Young Men’s Christian Ass’n, Inc.*, 163 So. 3d 1240 (Fla. 5th DCA 2015), *Brown v. Mittleman*, 152 So. 3d 602 (Fla. 4th DCA 2014), and *Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.*, 103 So. 3d 200 (Fla. 4th DCA 2012)).

<sup>302</sup> *Id.* at 23 (quoting *Fittipaldi USA, Inc. v. Castroneves*, 903 So. 2d 182, 186 (Fla. 3d DCA 2005)).

<sup>303</sup> *Id.* at 25.

<sup>304</sup> *Cf. Siplin v. Carnival Corp.*, No. 17-civ-23741-WILLIAMS/TORRES, 2018 WL 3439452, at \*5 (S.D. Fla. July 17, 2018) (ruling that plaintiff’s reliance on *Worley* to preclude defendant from raising issues at trial that plaintiff’s treating physicians use letters of protection, that her attorneys referred her to certain physicians, and that a relationship existed between her attorneys and her treating physicians was misplaced because defendant merely was seeking to impeach the credibility of plaintiff’s physicians on bias and ruling that “[t]he Florida Supreme Court explicitly held that this line of inquiry is allowed for the limited purpose of impeachment”).

## D. LOP Providers

In recent years, trial courts have observed an increased use by health care providers of “letter of protection” (“LOP”) agreements.<sup>305</sup> The existence of an LOP undeniably gives the provider of medical treatment under an LOP (an “LOP Provider”) a financial interest in the outcome of the plaintiff’s personal injury case.<sup>306</sup> Limited discovery from the plaintiff regarding the existence of an LOP in a case therefore is crucial in demonstrating the LOP Provider’s potential bias in the litigation.<sup>307</sup> As with treating physicians, trial courts similarly have grappled with the scope and breadth of discovery regarding LOP Providers.<sup>308</sup>

### 1. *Opinion Discovery.*

Discovery as to the facts and opinions held by an LOP Provider in cases where a party is making a claim for personal injury damages is permitted pursuant to Florida Rule of Civil Procedure 1.280(b), because the care and treatment of a party is relevant and not

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<sup>305</sup> Worley, 228 So. 3d at 23 n.4 (“A letter of protection is a document sent by an attorney on a client’s behalf to a health-care provider when the client needs medical treatment, but does not have insurance. Generally, the letter states that the client is involved in a court case and seeks an agreement from the medical provider to treat the client in exchange for deferred payment of the provider’s bill from the proceeds of [a] settlement or award; and typically, if the client does not obtain a favorable recovery, the client is still liable to pay the provider’s bills.”) (quoting Caroline C. Pace, *Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values*, 49 HOUS. LAW. 24, 27 (2012)); *Carnival Corp. v. Jimenez*, 112 So. 3d 513, 516 n.3 (Fla. 2d DCA 2013).

<sup>306</sup> *Carnival Corp.*, 112 So. 3d at 520. See also *Worley*, 228 So. 3d at 23 (recognizing that “bias on the part of a treating physician can be established by providing evidence of a . . . (LOP), which may demonstrate that the physician has an interest in the outcome of the litigation”).

<sup>307</sup> See *Pack v. Geico Gen. Ins. Co.*, 119 So. 3d 1284 (Fla. 4th DCA 2013) (emphasizing relevance of evidence pertaining to a letter of protection to show potential bias). See also *Smith v. Geico Cas. Co.*, 127 So. 3d 808 (Fla. 2d DCA 2013) (concluding trial court did not abuse its discretion in allowing defendant to question plaintiff’s treating doctors about their reduction-of-fee agreements); *Carnival Corp.*, 112 So. 3d at 520 (finding defendant could properly present evidence at trial and argue to jury that plaintiff’s treating physician was more likely to testify favorably on plaintiff’s behalf because of his financial interest in case arising from letter of protection).

<sup>308</sup> See e.g., *Pack*, 119 So. 3d 1284 (recognizing existence of potential bias arising from letter of protection and distinguishing rulings in *Katzman* and *Steinger* regarding referral relationship).

privileged.<sup>309</sup> A party may seek to obtain discovery of this type of information about an LOP Provider pursuant to Rule 1.280(a) by way of written interrogatories, requests for production of documents, and requests for admissions.<sup>310</sup> Florida Rule of Civil Procedure 1.390(b) likewise allows for the testimony of an LOP Provider to be taken at any time before the trial in accordance with the rules for taking depositions.<sup>311</sup>

## **2. “Financial” or “Litigation Bias” Discovery.**

Discovery of financial or litigation bias information as to an LOP Provider is permissible for the same reasons it is permissible for “pure” and “hybrid” treating physicians.<sup>312</sup> Obtaining this type of discovery directly from the plaintiff, however, may prove inadequate because the plaintiff may not have possession, custody, or control of the LOP Provider’s relevant documents. A party seeking this type of discovery will likely need to seek and obtain it from the LOP Provider.<sup>313</sup>

## **3. “Relationship Bias” Discovery.**

Based on the Florida Supreme Court’s ruling in *Worley*, it would appear that *Boecher*-type relationship bias discovery from the plaintiff regarding an LOP Provider’s relationship with the plaintiff’s law firm (including any referral relationship) is similarly restricted.<sup>314</sup> A party seeking this type of discovery will need to seek and obtain it from

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<sup>309</sup> FLA. R. CIV. P. 1.280(b). See also *Worley*, 228 So. 3d at 23-24 (stating that “bias on the part of the treating physician can be established by providing evidence of a letter of protection”).

<sup>310</sup> See FLA. R. CIV. P. 1.280(a). See generally FLA. R. OF CIV. PRO. FORMS – STD. INTERROGATORY FORMS as to physicians who treated or examined party.

<sup>311</sup> See FLA. R. CIV. P. 1.390(b).

<sup>312</sup> See *Worley*, 228 So. 3d at 24 (finding that “bias on the part of the treating physician can be established by providing evidence of a letter of protection ... which may demonstrate that the physician has an interest in the outcome of the litigation”).

<sup>313</sup> See *infra*, p. 97 DISCOVERY SERVED DIRECTLY ON THE EXPERTS.

<sup>314</sup> *Worley*, 228 So. 3d at 18, 22.

the LOP Provider.<sup>315</sup>

### III. **Discovery Served Directly on the Experts**

#### A. **“Retained” Experts**

##### 1. ***Opinion Discovery Generally.***

A party may obtain by deposition from a non-party “retained” expert the same type of expert opinion discovery available from a party.<sup>316</sup> Rule 1.280(b)(5)(A) provides that a party is entitled to know the “facts known and opinions held by experts.”<sup>317</sup> Rule 1.280(b)(5)(A)(ii) provides that any person who is “disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed” under Rule 1.390.<sup>318</sup> Accordingly, a party may depose a retained expert witness and obtain the facts known and opinions held by that expert.

##### 2. ***“Financial” or “Litigation Bias” Discovery***

A party may obtain by deposition from a non-party “retained” expert the same type of financial or litigation bias discovery available from a party.<sup>319</sup> The deposing party is entitled to discover the financial or litigation bias listed in Rule 1.280(b)(5)(A)(iii). Rule 1.280(b)(5)(A)(ii) provides that any person who is “disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed” under Rule 1.390.<sup>320</sup> Accordingly, a party may depose a “retained” expert witness and obtain financial or litigation bias discovery from that expert.

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<sup>315</sup> See *infra*, p. 97 DISCOVERY SERVED DIRECTLY ON THE EXPERTS.

<sup>316</sup> See *supra*, p. 105 DISCOVERY FROM A PARTY.

<sup>317</sup> FLA. R. CIV. P. 1.280(b)(5).

<sup>318</sup> FLA. R. CIV. P. 1.280(b)(5)(a)(ii).

<sup>319</sup> See *supra*, p. 105 DISCOVERY FROM A PARTY.

<sup>320</sup> FLA. R. CIV. P. 1.280(b)(5)(a)(ii).



### **3. “Relationship Bias” Discovery**

Pursuant to the Florida Supreme Court’s rationale in *Boecher*, it would appear that relationship bias discovery regarding a “retained” expert is available only from a party. In *Boecher*, the Florida Supreme Court’s justification for expanding the discovery of impeachment information beyond what it had pronounced was the limit three years earlier in *Elkins* was that the discovery at issue in *Boecher* was served directly to a *party*.<sup>321</sup> Hence, it would appear that neither party is entitled to this type of impeachment information in a deposition of the other party’s “retained” expert.<sup>322</sup>

#### **B. “Consulting” Experts**

Because the identity of a “consulting” expert is protected by the work-product privilege, it would appear that neither party is entitled, at least initially, to any type of discovery directly from a consulting expert.<sup>323</sup>

#### **C. Non-Party Medical Providers**

##### **1. Opinion Discovery**

A party generally may obtain by deposition from a “pure” or “hybrid” treating physician or an LOP Provider the same type of expert opinion discovery available from a party.<sup>324</sup> Rule 1.280(b)(5)(A) provides that a party is entitled to know the “facts known and opinions held by experts.”<sup>325</sup> Rule 1.280(b)(5)(A)(ii) provides that any person who is “disclosed by interrogatories or otherwise as a person expected to be called as an expert

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<sup>321</sup> Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 997 (Fla. 1999).

<sup>322</sup> See *id.*

<sup>323</sup> See *supra*, p. 105 DISCOVERY FROM A PARTY.

<sup>324</sup> *Id.*

<sup>325</sup> FLA. R. CIV. P. 1.280(b)(5).

witness at trial may be deposed” under Rule 1.390.<sup>326</sup> Accordingly, a party may depose a “pure” or “hybrid” treating physician or an LOP Provider and obtain the facts known and opinions held by that type of expert.

## **2. “Financial” or “Litigation Bias” Discovery**

A party generally may obtain by deposition from a “pure” or “hybrid” treating physician or an LOP Provider the same type of financial or litigation bias discovery available from a party.<sup>327</sup> Rule 1.280(b)(5)(A)(ii) provides that any person who is “disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed” under Rule 1.390.<sup>328</sup>

Additionally, Florida Rule of Civil Procedure 1.310(b)(6) allows a party to depose a corporation or other entity that is not a party to the case. The party seeking discovery is required to describe, with reasonable particularity, the matters for examination.<sup>329</sup> The corporation must then produce one or more witnesses who can testify as to the corporation's knowledge of the specified topics.<sup>330</sup> This method of discovery enables the deposing party to gather information from the corporation by way of a human being named by that corporation to serve as the corporation's voice. The person(s) designated to testify represents the collective knowledge of the corporation.<sup>331</sup> As the corporation's voice, the witness does not simply testify about matters within his or her personal knowledge, but

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<sup>326</sup> FLA. R. CIV. P. 1.280(b)(5)(a)(ii).

<sup>327</sup> See *supra* p. 105 DISCOVERY FROM A PARTY.

<sup>328</sup> FLA. R. CIV. P. 1.280(b)(5)(a)(ii).

<sup>329</sup> See FLA. R. CIV. P. 1.310(b)(6).

<sup>330</sup> See *id.*

<sup>331</sup> See *Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 334 (Fla. 4th DCA 2013).

rather is speaking for the corporation.<sup>332</sup> Accordingly, Rule 1.310(b)(6) allows a party to depose a representative of a treating physician's or an LOP Provider's practice.

### **3. "Relationship Bias" Discovery**

Pursuant to the Florida Supreme Court's rationale in *Boecher*, it would appear that relationship bias discovery regarding a non-party medical provider is available only from a party. As mentioned, the Florida Supreme Court's justification in *Boecher* for expanding the discovery of impeachment information beyond what it had pronounced was the limit in *Elkins*, was that the discovery at issue in *Boecher* was served directly to a party.<sup>333</sup> Because this additional information was discoverable only because it was propounded on a party, the defense is not entitled to this information in a deposition of the expert nor a corporate representative deposition of the treating physician's or an LOP Provider's practice. However, the defense is entitled to discover the existence of a referral relationship with the plaintiff's law firm directly from a "hybrid" treating physician or an LOP Provider because the evidence code clearly allows a party to attack a witness's credibility based on bias.<sup>334</sup> Indeed, the existence of a reciprocal referral arrangement between a "hybrid" treating physician or an LOP Provider and a plaintiff's law firm could reasonably be viewed as creating a bias toward testifying favorably for a party.<sup>335</sup>

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<sup>332</sup> See *id.*

<sup>333</sup> *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 997 (Fla. 1999).

<sup>334</sup> See § 90.608(2), Fla. Stat. (2018); *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18, 23 n.4 (Fla. 2017), *reh'g denied sub nom. Worley v. Cent. Fla. Young Men's Christian, Etc.*, No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017) (finding only that such information regarding a "pure" treating physician was not discoverable from the plaintiff or the plaintiff's law firm and making no finding as to a "hybrid" treating physician or LOP Provider).

<sup>335</sup> See *Flores v. Miami-Dade Cty.*, 787 So. 2d 955, 958 (Fla. 3d DCA 2001) (ruling that cross examination of plaintiff's treating physician who rendered opinion as to causation as to his referral arrangements with plaintiff's attorney was within permissible grounds on the issue of bias).

#### **D. LOP Discovery**

The Florida Supreme Court in *Worley* expressly stated that three items of discovery related to an LOP are available to the defense – (1) the LOP, (2) the percentage of the provider’s practice based on patients with LOPs, and (3) higher than normal medical bills.<sup>336</sup> Specifically, the court opined that:

bias on the part of the treating physician can be established by providing evidence of a letter of protection (LOP), which may demonstrate that the physician has an interest in the outcome of the litigation. In the instant case, *Worley* was treated by all of her specialists pursuant to letters of protection. Bias may also be established by providing evidence that the physician's practice was based entirely on patients treated pursuant to LOPs, as was found in the instant case. Specifically, a Sea Spine employee testified during depositions that at the time of *Worley's* treatment, its entire practice was based on patients treated pursuant to LOPs. Additionally, medical bills that are higher than normal can be presented to dispute the physician's testimony regarding the necessity of treatment and the appropriate amount of damages.<sup>337</sup>

Accordingly, it would appear under *Worley* that these three types of discovery may be obtained directly from an LOP Provider.<sup>338</sup>

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<sup>336</sup> *Worley*, 228 So. 3d at 23–24.

<sup>337</sup> *Id.* See also *Steinger, Iscoe & Green, P.A. v. GEICO Gen. Ins. Co.*, 103 So. 3d 200, 204 n.3 (Fla. 4th DCA 2012), *disagreed with on other grounds* in *Worley v. Cent. Fla. Young Men’s Christian Ass’n, Inc.*, 228 So. 3d 18 (Fla. 2017), *reh’g denied sub nom.* *Worley v. Cent. Fla. Young Men’s Christian, Etc.*, No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017) (explaining that the inquiry under Rule 1.280(b)(5)(A)(iii)4 – regarding the extent of participation in litigation – is not limited to income from expert activities but is expanded to income from treating patients in litigation and/or pursuant to referrals) (*disagreed with in Worley* on different grounds).

<sup>338</sup> *Id.* See also *Alvarez Crespo v. Home Depot U.S.A., Inc.*, No. 16-60086-CIV-COHN/SELTZER, 2016 WL 3854585, at \*3 (S.D. Fla. July 15, 2016) (finding that the amounts ultimately accepted by those medical providers under letters of protection is relevant to the reasonableness of the medical bills and that defendant had proffered a sufficient basis for obtaining that information).

### ***E. Discovery in Support of Unreasonable Medical Bill Defense***

In personal injury actions, plaintiffs must prove their medical expenses are reasonable.<sup>339</sup> Consequently, defendant tortfeasors are entitled to obtain certain items of discovery to demonstrate that such medical expenses are not reasonable. Because Rule 1.280 permits parties to obtain discovery regarding matters that are relevant, a defendant may take the deposition *duces tecum* of a treating physician or an LOP Provider to obtain these items of discovery to challenge the reasonableness of a plaintiff's medical bills.

Some items of discovery that have been found relevant in challenging the reasonableness of medical bills have been borrowed from case law involving medical providers' collection efforts against patients.<sup>340</sup> In *Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc.*, the Second District Court of Appeal ruled that where a medical provider sues a patient to collect on a medical bill, the defendant patient is entitled to discovery that would enable the patient to challenge the reasonableness element of the provider's case.<sup>341</sup> In particular, the *Giacalone* court observed three non-exclusive kinds of evidence relevant in the determination of a claim of unreasonable pricing by a hospital - (1) the relevant market for services (including the rates charged by other similarly situated providers for similar services); (2) the usual and customary rate that the provider charges and receives for its services; and (3) the provider's internal cost structure.<sup>342</sup> Other courts examining

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<sup>339</sup> See *Albertson's, Inc. v. Brady*, 475 So. 2d 986, 988 (Fla. 2d DCA 1985); *USAA Cas. Ins. Co. v. Shelton*, 932 So. 2d 605, 608 (Fla. 2d DCA 2006); FLA. STD. JURY INSTR. (CIV) 501.4(a).

<sup>340</sup> See e.g., *Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc.*, 8 So. 3d 1232 (Fla. 2d DCA 2009). See also *Lawton-Davis v. State Farm Mut. Auto. Ins. Co.*, No. 6:14-cv-1157-Orl-37DAB, 2016 WL 1383015, at \*2 (M.D. Fla. Apr. 7, 2016); *Urquhart v. Manatee Mem. Hosp.*, 8:06-cv-1418-T-17-EAJ, 2007 WL 781738, at \*3 (M.D. Fla. Mar. 13, 2007); *Colomar v. Mercy Hosp., Inc.*, 461 F. Supp. 2d 1265, 1269 (S.D. Fla. 2006) (identifying several non-exclusive factors relevant to inquiry).

<sup>341</sup> *Giacalone*, 8 So. 3d at 1235.

<sup>342</sup> 8 So. 3d at 1235 (citing *Colomar*, 461 F. Supp. 2d 1265).

the second category of discovery permitted in *Giacalone* have allowed discovery as to the amount received or accepted by the provider – not merely the amount charged or billed by the provider.<sup>343</sup>

Because of the relevance of the amount of damages in personal injury actions, Florida courts have found that defendant tortfeasors in such actions are entitled to obtain from a non-party provider the same three categories of “reasonableness” information the *Giacalone* court ruled was available to the defendant patient against the plaintiff provider.<sup>344</sup> Indeed, discovery of this type of information appears to have been endorsed by the court in *Worley*.<sup>345</sup>

Perhaps the best explanation for why defendant tortfeasors are allowed to conduct

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<sup>343</sup> See *id*; *Laser Spine Inst., LLC v. Makanast*, 69 So. 3d 1045, 1046 (Fla. 2d DCA 2011); *Columbia Hosp. (Palm Beaches) Ltd. P'ship v. Hasson*, 33 So. 3d 148, 150 (Fla. 4th DCA 2010); *Katzman, M.D. v. Rediron Fabrication, Inc.*, 76 So. 3d 1060, 1064 (Fla. 4th DCA 2011); *Crable v. State Farm Mut. Auto. Ins. Co.*, No. 5:10–CV–402–OC–37TBS, 2011 WL 5525361, at \*10 (M.D. Fla. Nov. 14, 2011).

<sup>344</sup> See *Gulfcoast Surgery Ctr., Inc. v. Fisher*, 107 So. 3d 493, 495 (Fla. 2d DCA 2013) (applying *Giacalone* and stating that it did not matter who was seeking the information – the patient himself or a third-party defendant in a personal injury suit). See *also* *Columbia Hosp.*, 33 So. 3d at 150 (“We conclude that Defendants sufficiently explained below why they needed the information: in order to dispute, as unreasonable, the amount of medical expenses that the plaintiff will seek to recover from them, if the hospital charges non-litigation patients a lower fee for the same medical services.”); *Katzman, M.D. v. Rediron Fabrication, Inc.*, 76 So. 3d 1060, 1062, 1064 (Fla. 4th DCA 2011) (allowing discovery of the amounts collected over four years from health insurance compared to letters of protection for the same type of surgery as was performed in that case because the “limited intrusion into the financial affairs of the doctor in this case is justified by the need to discover case-specific information relevant to substantive issues in the litigation, i.e., the reasonableness of the cost and necessity of the procedure”); *Makanast*, 69 So. 3d at 1046; *Crable*, 2011 WL 5525361, at \*10 (holding that nonparty, Dr. Deukmedjian, was required to provide information to the defendant regarding among other things, (1) the amount received by Deuk Spine in reimbursement from Medicare and private insurers for the same procedures performed on plaintiff, (2) what fields are searchable in Deuk Spine's medical billing software, (3) what other healthcare providers reimburse for the procedures performed on plaintiff, and (4) whether Deuk Spine negotiates lower rates for patient medical bills as a standard part of its practice).

<sup>345</sup> See *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18, 23-24 (Fla. 2017), *reh'g denied sub nom.* *Worley v. Cent. Fla. Young Men's Christian, Etc.*, No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017) (“Additionally, medical bills that are higher than normal can be presented to dispute the physician's testimony regarding the necessity of treatment and the appropriate amount of damages.”). *But see* *Baker Cty. Med. Servs., Inc. v. Aetna Health Mgmt., LLC*, 31 So. 3d 842, 845 (Fla. 1st DCA 2010) (“In determining the fair market value of the services, it is appropriate to consider the amounts billed and the amounts accepted by providers with one exception. The reimbursement rates for Medicare and Medicaid are set by government agencies and cannot be said to be ‘arms-length.’”)

this discovery as to non-party medical providers was stated by the Fourth District Court of Appeal in *Columbia Hosp. (Palm Beaches) Ltd. P'ship v. Hasson*.<sup>346</sup> In *Columbia Hosp.*, the trial court had ordered a non-party hospital in a personal injury action to produce certain confidential information as to the amounts charged by the hospital to different categories of patients for a particular medical procedure.<sup>347</sup> In concluding that the defendants had sufficiently explained their need for such information as a means by which to dispute as unreasonable the amount of the plaintiff's medical expenses, the court noted as follows:

[A] hospital's cost to provide a service no longer bears much relationship to what it charges, but reimbursement rates from third party payors give hospitals an incentive to set their usual charges at an artificially high amount, from which discounts are negotiated; cost-shifting results in *discriminatorily high charges* to uninsured patients, in that every patient is billed at full charges, but only the uninsured are expected to pay those amounts; as a result, actual charges are not instructive on what is reasonable; instead, Defendants argue, a realistic amount is what hospitals are willing to accept.<sup>348</sup>

The Fourth District ultimately affirmed the trial court's order requiring the non-party provider to produce documents regarding the non-party provider's "*charges, and discounts* to different classes of patients," reasoning that "what a health care provider *charges and accepts* as payment from private non-litigation payors is relevant for a jury to determine what amount is a reasonable charge for the procedure."<sup>349</sup>

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<sup>346</sup> *Columbia Hosp.*, 33 So. 3d at 150.

<sup>347</sup> *Id.* at 149. In particular, the defendants sought discovery from the hospital regarding the particular procedure the plaintiff had performed at the hospital, including the amount the hospital had charged patients with and without insurance, those with letters of protection, and differences in billing for litigation patients versus non-litigation patients.

<sup>348</sup> *Id.* at 150, n. 3.

<sup>349</sup> *Id.* (emphasis added).

#### **IV. Discovery from a Party's Attorney or Law Firm.**

##### **A. Regarding "Retained" Experts**

There appears to be only one Florida state court case addressing "retained" expert discovery propounded directly on a law firm.<sup>350</sup> In *Morgan, Colling & Gilbert, P.A. v. Pope*, the Second District Court of Appeal held that the discovery was permissible.<sup>351</sup> The reasoning for allowing the discovery directly on the law firm was because neither of the "retained" experts were able in depositions to "provide sufficient information regarding its financial relationship with Morgan Colling."<sup>352</sup> The court noted in dicta that had the "retained" experts provided the information, the discovery on the law firm would have been "moot or inappropriate."<sup>353</sup>

The decision in *Pope* is noteworthy for three reasons. First, the dicta appears to be contrary to the Florida Supreme Court's reasoning in *Boecher*. The discovery at issue in *Pope* was the same kind of relationship bias discovery at issue in *Boecher*. In *Boecher*, the Florida Supreme Court stated that the relationship bias discovery was permissible only because it was propounded on the party. Thus, it is curious that the Second District, in *Pope*, reasoned that the relationship bias discovery should have been propounded first upon the non-party expert. Second, *Worley* did not abrogate or even disagree with *Pope*. The holding in *Worley* applies only to treating physicians and LOP Providers, not the "retained" experts involved in *Pope*. Third, the *Pope* court never expressed any opinion as to whether the discovery should have been propounded on the party (in the form of

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<sup>350</sup> See *Morgan, Colling & Gilbert, P.A. v. Pope*, 798 So. 2d 1 (Fla. 2d DCA 2001).

<sup>351</sup> *Id.* at 3.

<sup>352</sup> *Id.* at 2.

<sup>353</sup> *Id.* at 4.



interrogatories and requests to produce) as opposed to the law firm. Because the “retained” expert bias discovery is available under ordinary discovery to a party, it would seem that trial courts should exercise their discretion to prohibit such discovery on a law firm (which could involve a corporate representative deposition of the law firm) in favor of ordinary expert discovery on a party seeking the same information as discussed in the preceding sections.

### **B. Regarding Non-Party Medical Providers**

In *Worley*, the Florida Supreme Court disagreed with the rulings of two cases involving LOP Provider expert discovery propounded on a law firm.<sup>354</sup> The court disagreed with these rulings because it believed the “relationship between a law firm and a plaintiff’s treating physician is not analogous to the relationship between a party and its “retained” expert.”<sup>355</sup> Accordingly, the financial relationship between a plaintiff’s law firm and a plaintiff’s treating physician is not discoverable from the plaintiff’s law firm.<sup>356</sup>

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<sup>354</sup> *Worley v. Cent. Fla. Young Men’s Christian Ass’n, Inc.*, 228 So. 3d 18, 23 n.4 (Fla. 2017), *reh’g denied sub nom.* *Worley v. Cent. Fla. Young Men’s Christian, Etc.*, No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017), (*disagreeing with* *Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.*, 103 So. 3d 200, 206 (Fla. 4th DCA 2012); *and Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay*, 133 So. 3d 1178 (Fla. 4th DCA 2014)).

<sup>355</sup> *Id.* at 23. The close reading of the facts in *Worley* reveals it is not a case involving discovery served on a law firm. *Compare* *Worley*, 228 So. 3d at 20, in which the Supreme Court suggested that the supplemental request to produce was propounded on Morgan and Morgan – the law firm, *with* *Worley*, 163 So. 3d at 1243, in which the Fifth District stated that the supplemental request was propounded upon *Worley* – the party. Thus, it is unclear whether the Florida Supreme Court actually was expressing disapproval with the functionality of discovery upon a law firm generally, or whether the disagreement with the Fifth District’s opinion was based only on the substance of the discovery – the financial relationship between the plaintiff’s law firm and the LOP Provider. In any event, because expert bias discovery is available under ordinary discovery to a party, it would seem that trial courts should exercise their discretion to prohibit discovery on a law firm (which could involve a corporate representative deposition of the law firm) in favor of ordinary expert discovery on a party seeking the same information as discussed in DISCOVERY FROM NON-PARTY EXPERTS 3.c. and DISCOVERY FROM A PARTY’S ATTORNEY OR LAW FIRM 1.

<sup>356</sup> *Worley v. Cent. Fla. Young Men’s Christian Ass’n, Inc.*, 228 So. 3d 18, 25 (Fla. 2017), *reh’g denied sub nom.* *Worley v. Cent. Fla. Young Men’s Christian, Etc.*, No. SC15-1086, 2017 WL 4547140 (Fla. Oct. 12, 2017).

## V. Privacy Rights of Non-Parties & Non-Party Medical Records

Privacy rights, statutory law,<sup>357</sup> and common sense dictate that discovery of non-party medical records and information is severely restricted.<sup>358</sup> The issue has arisen most often in association with experts who do a Compulsory Medical Examination (“CME”) 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.<sup>359</sup>

Section 456.057(7)(a)(3), *Florida Statutes* (2018), as it has been interpreted and applied by Florida courts, creates “a broad and express privilege of confidentiality as to the medical records and the medical condition of a patient.”<sup>360</sup> 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

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<sup>357</sup> FLA. STAT. § 456.057(7)(a)(3) (2018) (prohibiting disclosure of nonparty CME reports without prior notice to all affected nonparties).

<sup>358</sup> See *Graham v. Dacheikh*, 991 So. 2d 932, 934 (Fla. 2d DCA 2008) (“Section 456.057(7) contains a broad prohibition preventing a health care practitioner who generates a medical record for a patient from furnishing that record to ‘any person other than the patient or the patient’s legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.’”). See *also* *Coopersmith v. Perrine*, 91 So. 3d 246, 247 (Fla. 4th DCA 2012) (“Section 456.057(7)(a), Florida Statutes, prohibits a health care practitioner from discussing a patient’s medical records without the patient’s written authorization unless one of three detailed exceptions applies.”); *Crowley v. Lamming*, 66 So. 3d 355 (Fla. 2d DCA 2011) (ruling that trial court departed from essential requirements of law when it ordered CME doctor to bring nonparties’ CME reports to deposition and to testify to some of information contained in those reports); *USAA Cas. Ins. Co. v. Callery*, 66 So. 3d 315 (Fla. 2d DCA 2011) (ruling it was departure from essential requirements of law to enter order compelling insurance company party to produce CME results from CME doctor’s last 20 exams for party with all patient-identifying information redacted and only including physician’s conclusions/impressions, physician’s signature, date of report, and name and address of receiving attorney).

<sup>359</sup> See *Graham*, 991 So. 2d at 932.

<sup>360</sup> FLA. STAT. § 456.057(7)(a)(3) (2018).

nonparty.<sup>361</sup> Similarly, 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.<sup>362</sup>

## **VI. Discovery Regarding 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 Florida Rule of Civil Procedure 1.360(b).<sup>363</sup> 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.<sup>364</sup> 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 expert interrogatory answers, initially discloses a particular expert as a witness at trial, but later withdraws the expert from the party’s trial witness list, the opposing party is precluded from taking the expert’s deposition absent a showing

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<sup>361</sup> Crowley, 66 So. 3d at 358. See also Brana v. Roura, 144 So. 3d 699, 700 (Fla. 4th DCA 2014) (noting that section 456.057(7)(a), Florida Statutes, requires notice to patients whose medical records are sought before issuance of a subpoena for records by a court of competent jurisdiction).

<sup>362</sup> Coopersmith, 91 So. 3d at 246 (denying discovery where nonparty CME patient information was requested from party as opposed to compulsory medical examination physician).

<sup>363</sup> FLA. R. CIV. P. 1.360(b) (*Report of Examiner*).

<sup>364</sup> State Farm Fla. Ins. Co. v. Marascuillo, 161 So. 3d 493, 498 (Fla. 5th DCA 2014).

of compelling circumstances.<sup>365</sup> However, where a party withdraws the expert's name from the party's trial witness list after the expert gives testimony unfavorable to that party, such testimony may be allowed to be presented at trial. If the opposing party hires the expert or lists the expert on the party's trial witness list and calls the witness to testify at trial, the trial court has the discretion to allow the jury to be told that the opposing party originally retained the expert.<sup>366</sup> However, if a party retains an expert, then chooses not to call the expert at trial due to the expert's unfavorable testimony, and the opposing party chooses to use the expert's deposition in the party's case-in-chief, the opposing party may not be permitted to establish that the other party previously retained the expert.<sup>367</sup>

## **VII. Northup Discovery**

In Florida, a party may serve discovery requests and is entitled to receive copies of depositions, witness statements, surveillance videos, and other impeachment-type materials in the opposing party's possession if it is reasonably anticipated by the opposing party that the items requested are going to be used for purposes of impeachment at trial.<sup>368</sup> In *Northup v. Acken*, the Florida Supreme Court held "that if attorney work product is expected or intended for use at trial, it is subject to the rules of discovery."<sup>369</sup> Specifically, the court articulated the decision litigants must make before the entry of a

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<sup>365</sup> *Rocca v. Rones*, 125 So. 3d 370, 372 (Fla. 3d DCA 2013).

<sup>366</sup> See *Broward Cty. v. Cento*, 611 So. 2d 1339, 1340 (Fla. 4th DCA 1993); DISCOVERY, CIVPRAC FL-CLE 16-1.D.6. (12th ed. 2017).

<sup>367</sup> *Sun Charm Ranch, Inc. v. City of Orlando*, 407 So. 2d 938 (Fla. 5th DCA 1982). See also *Bogosian v. State Farm Mut. Auto. Ins. Co.*, 817 So. 2d 968 (Fla. 3d DCA 2002) (finding that opposing party should not have been allowed, on its direct examination, to bring out fact that expert was originally plaintiff's expert where plaintiff had dismissed party that expert had determined was negligent and opposing party at trial had failed to list that expert on its trial witness list).

<sup>368</sup> See *Northup v. Acken*, 865 So. 2d 1267, 1272 (Fla. 2004).

<sup>369</sup> *Id.*

pretrial case management order by the trial court:

[a]n attorney must evaluate whether he or she intends to use evidence in his or her possession for strategy and trial preparation purposes only, which would qualify the selection of the particular items as a protected product of the thought processes and mental impressions of an attorney. On the other hand, ***if the evidence or material is reasonably expected or intended to be disclosed to the court or jury at trial, it must be identified, disclosed, and copies provided to the adverse party in accordance with the trial court's order and the discovery requests of the opposing party.***<sup>370</sup>

In reaching its decision, the *Northup* court reaffirmed Florida's dedication to the prevention of “surprise, trickery, bluff and legal gymnastics” at trial and emphasized that “[t]rial by ambush is distant history.”<sup>371</sup>

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<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 1271.

## CHAPTER SEVEN

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### COMPULSORY MEDICAL EXAMINATIONS

Rule 1.360 of the Florida Rules of Civil Procedure provides that a party may request that any other party submit to an examination by a qualified expert when the condition that is the subject of the requested examination is in controversy and the party submitting the request has good cause for the examination. The party making the request has the burden to show that the rule's "good cause" and "in controversy" requirements have been satisfied.<sup>372</sup> Verified pleadings or affidavits may be sufficient to satisfy the rule's requirements instead of an evidentiary hearing. The party making the request also must disclose the nature of the examination and the extent of testing that may be performed by the examining physician.<sup>373</sup>

Although the examination may include invasive tests, the party to be examined is entitled to know the extent of the tests to make an informed decision about seeking the protection of the court so that the testing will not cause injury. A party requesting a compulsory medical examination is not limited to a single examination of the other party; however, the court should require the requesting party to make a stronger showing of necessity before the second request is authorized.<sup>374</sup> A plaintiff who has sued multiple defendants, as multiple tortfeasors, may be subject to separate examinations by each

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<sup>372</sup> Fla. R. Civ. P. Rule 1.360. See *also* *Russenberger v. Russenberger*, 639 So. 2d 963 (Fla. 1994); *Olges v. Dougherty*, 856 So. 2d 6 (Fla. 1st DCA 2003). Once the mental or physical condition ceases to be an issue or "in controversy," good cause will not exist for an examination under Rule 1.360, and *Hastings v. Rigsbee*, 875 So. 2d 772 (Fla. 2d DCA 2004).

<sup>373</sup> *Schagrín v. Nacht*, 683 So. 2d 1173 (Fla. 4th DCA 1996).

<sup>374</sup> *Royal Caribbean Cruises, Ltd. v. Cox*, 974 So. 2d 462, 466 (Fla. 3d DCA 2008).

defendant.<sup>375</sup> Some districts or judges may require that any objection to the examination must be set for hearing immediately and failure to do so may be deemed an abandonment of the “Request.”<sup>376</sup>

### **Location of the CME**

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.<sup>377</sup> Rule 1.360 is based on Rule 35 of the Federal Rules of Civil Procedure, which has been interpreted as permitting the trial court to order the plaintiff to be examined where the trial will be held because the trial venue was selected by the plaintiff and it would make it convenient for the physician to testify.

In *McKenney v. Airport Rent-A-Car, Inc.*, 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.<sup>378</sup> In *Tsutras v. Duhe*,<sup>379</sup> it was held that the examination of a nonresident plaintiff, who already had come to Florida at his expense for his deposition, should either be at a location that had the appropriate medical specialties convenient to the nonresident plaintiff, or the defense should be required to

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<sup>375</sup> Goicochea v. Lopez, 140 So. 3d 1102 (Fla. 3d DCA 2014).

<sup>376</sup> Ninth Judicial Circuit Court Uniform Guidelines Regarding Compulsory Medical Examinations, April 2015, Guidelines Regarding Compulsory Medical Examinations, Flagler County, Division 49.

<sup>377</sup> *McKenney v. Airport Rent-A-Car, Inc.*, 686 So. 2d 771 (Fla. 4th DCA 1997). See also *Leinhart v. Jurkovich*, 882 So. 2d 456 (Fla. 4th DCA 2004) (request for CME ten days before trial was denied and upheld on appeal as being within the trial court’s discretion). See also Ninth Judicial Circuit Court Uniform Guidelines Regarding Compulsory Medical Examinations, April 2015 (requiring Plaintiff’s attorney to notify opposing counsel before their client moves out of state).

<sup>378</sup> *McKenney v. Airport Rent-A-Car, Inc.*, 686 So. 2d 771 (Fla. 4th DCA 1997).

<sup>379</sup> 685 So. 2d 979 (Fla. 5th DCA 1997).

cover all expenses of the plaintiff's return trip to Florida for examination. In *Goeddel v. Davis, M.D.*<sup>380</sup> 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 when 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*,<sup>381</sup> a Hernando County trial court did not abuse its discretion by permitting a medical examination in nearby Hillsborough County because of the geographical proximity of the two counties. However, a trial court did abuse its discretion when 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.<sup>382</sup>

### **Selection of the Examiner by the Defendant**

Judges generally will allow the medical examination to be conducted by the doctor of the defendant's choice. The rationale sometimes given is that the plaintiff's examining and treating physicians have been selected by the plaintiff.<sup>383</sup> However, whether to permit a defendant's request for examination under Rule 1.360 is a matter of judicial discretion.

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<sup>380</sup> 993 So. 2d 99, 100 (Fla. 5th DCA 2008).

<sup>381</sup> 701 So. 2d 584 (Fla. 5th DCA 1997).

<sup>382</sup> See *Littelfield v. J. Pat Torrence*, 778 So. 2d 368 (Fla. 2d DCA 2001); see also *Wapnick v. State Farm Mut. Auto. Ins. 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).

<sup>383</sup> *Toucet v. Big Bend Moving & Storage*, 581 So. 2d 952 (Fla. 1st DCA 1991).



Furthermore, Rule 1.360(a)(3) permits a trial court to establish protective rules for the compulsory examination. Thus, a defendant does not have an absolute right to select the expert to perform the examination.<sup>384</sup>

### **Attending and Recording the CME**

Rule 1.360 (a)(3) permits the trial court, at the request of either party, to establish protective rules for compulsory examinations. The general rule is that attendance of a third party at a court-ordered medical examination is a matter within the sound discretion of the trial judge.<sup>385</sup> A plaintiff may request that a third party attend an examination to (1) accurately record events at the examination; (2) “assist” in providing a medical history or a description of an accident; and (3) validate or dispute the examining doctor’s findings and conclusions.<sup>386</sup> The burden of proof and persuasion rests with the party opposing the attendance to show why the court should deny the examinee’s right to have present counsel, a physician, or another representative.<sup>387</sup>

Without a valid reason to prohibit the third party’s presence, the examinee’s representative should be allowed.<sup>388</sup> In making the decision about third-party attendance at the examination, the trial court should consider the nature of the examination, the function that the requested third party will serve at the examination, and the reason why

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<sup>384</sup> See *State Farm Mut. Auto Ins. Co. v. Shepard*, 644 So. 2d 111 (Fla. 2d DCA 1994).

<sup>385</sup> *Bartell v. McCarrick*, 498 So. 2d 1378 (Fla. 4th DCA 1986).

<sup>386</sup> *Wilkins v. Palumbo*, 617 So. 2d 850 (Fla. 2d DCA 1993).

<sup>387</sup> *Broyles v. Reilly*, 695 So. 2d 832 (Fla. 2d DCA 1997); *Wilkins*, 617 So. 2d at 850; *Stakely v. Allstate Ins. Co.*, 547 So. 2d 275 (Fla. 2d DCA 1989).

<sup>388</sup> See *Broyles*, 695 So. 2d at 832 (videographer and attorney); *Palank v. CSX Transp., Inc.*, 657 So. 2d 48 (Fla. 4th DCA 1995) (in a wrongful death case, mother of minor plaintiffs, counsel, and means of recording); *Wilkins*, 617 So. 2d at 850 (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*, 547 So. 2d at 275 (court reporter); *Bartell*, 498 So. 2d at 1378 (representative from attorney’s office); *Gibson v. Gibson*, 456 So. 2d 1320 (Fla. 4th DCA 1984) (court reporter).

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.<sup>389</sup> Once this test is satisfied, the defendant must prove at an evidentiary hearing that no other qualified physician can be located in the area who would be willing to perform the examination with a third party (court reporter, attorney, or other representative) present.<sup>390</sup> This criteria applies to compulsory examinations for physical injuries and psychiatric conditions.<sup>391</sup>

The rationale for permitting the presence of the examinee's attorney is to protect the examinee from improper questions unrelated to the examination.<sup>392</sup> Furthermore, the examinee has a right to preserve, by objective means, the precise communications that occurred during the examination. Without a record, the examinee will be compelled to challenge the credibility of the examiner should a dispute arise later. "Both the examiner and examinee should benefit by the objective recording of the proceedings, and the integrity and value of the examination as evidence in the judicial proceedings should be enhanced."<sup>393</sup> The rationale for permitting a third party's presence or recording the examination is based on the examinee's right to 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

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<sup>389</sup> See *Wilkins*, 617 So. 2d at 850.

<sup>390</sup> See *Broyles*, 695 So. 2d at 832.

<sup>391</sup> *Freeman v. Latherow*, 722 So. 2d 885 (Fla. 2d DCA 1998); *Stephens v. State of Fla.*, 932 So. 2d 563 (Fla. 1st DCA 2006) (the DCA held that the trial court did not deviate from the law when it denied plaintiff's request that his expert witness be permitted to accompany him on a neuropsychological exam by a state-selected medical professional).

<sup>392</sup> See *Toucet v. Big Bend Moving & Storage*, 581 So. 2d 952 (Fla. 1st DCA 1991).

<sup>393</sup> *Gibson v. Gibson*, 456 So. 2d at 1320, 1321 (Fla. 4th DCA 1984).

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.<sup>394</sup> However, in the absence of truly extraordinary circumstances, a defendant will not be able to satisfy its burden of proof and persuasion to prevent the attendance of a passive observer.<sup>395</sup> It has been held that a court reporter's potential interference with the examination or inability to transcribe the physician's tone, or facial expressions are invalid reasons.<sup>396</sup> The examiner's refusal to perform the examination in the presence of third parties also is an insufficient ground for a court to find that a third party's presence would be disruptive.<sup>397</sup> Excluding a court reporter because of a claimed chilling effect on physicians and the diminishing number of physicians available to conduct examinations also is insufficient.<sup>398</sup> However, it would take an exceptional circumstance to permit anyone other than a videographer or court reporter and the plaintiff's attorney to be present on behalf of the plaintiff at a Rule 1.360 compulsory examination.<sup>399</sup> For example, defendants in a personal injury lawsuit were not entitled to have a videographer record the examination

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<sup>394</sup> See Bartell, 498 So. 2d at 1378.

<sup>395</sup> See Broyles, 695 So. 2d at 832; see Wilkins, 617 So. 2d at 850.

<sup>396</sup> See Collins, 576 So. 2d at 1377.

<sup>397</sup> See McCorkle, 599 So. 2d at 277; see Toucet, 581 So. 2d at 952.

<sup>398</sup> Truesdale v. Landau, 573 So. 2d 429 (Fla. 5th DCA 1991); see *also* Broyles, 695 So. 2d at 832.

<sup>399</sup> See Broyles, 695 So. 2d at 832.

even though the examinee had her own videographer present.<sup>400</sup> 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, case-specific objections from the complaining party may result in irreparable harm to the requesting party and serve to justify extraordinary relief.<sup>401</sup> Similarly, an audiotape may be substituted to ensure that the examiner is not asking impermissible questions and that an accurate record of the examination is preserved.<sup>402</sup> 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.<sup>403</sup>

In *McClennan v. American Building Maintenance*,<sup>404</sup> the court applied the rationale in *Toucet*, 581 So. 2d at 952, and *Bartell*, 498 So. 2d at 1378, to workers' compensation disputes, and held that third parties, including attorneys, could attend an independent medical examination given under Fla. Stat. § 440.13(2)(b). In *U.S. Security Insurance Company v. Cimino*,<sup>405</sup> the Florida Supreme Court held that for a medical examination conducted under Fla. Stat. § 627.736(7) for personal injury protection benefits, "the

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<sup>400</sup> Prince v. Mallari, 36 So. 3d 128 (Fla. 5th DCA 2010).

<sup>401</sup> Lunceford v. Fla. Cent. R.R. Co., 728 So. 2d 1239 (Fla. 5th DCA 1999).

<sup>402</sup> Medrano v. BEC Constr. Corp., 588 So. 2d 1056 (Fla. 3d DCA 1991).

<sup>403</sup> See McGarrah v. Bayfront Med. Ctr., 889 So. 2d 923 (Fla. 2d DCA 2004); see also Form Order on Motions to Compel Compulsory or Independent Medical Examinations, Pinellas County, Section 11, and Form Order Compelling Rule 1.360 Examination, Hillsborough County.

<sup>404</sup> 648 So. 2d 1214 (Fla. 1st DCA 1995).

<sup>405</sup> 754 So. 2d 697, 701 (Fla. 2000).

insured should be afforded the same protections as are afforded to plaintiffs for Rule 1.360 and workers' compensation examinations."

### **Discovery of the CME Examiner**

Notably, there are third-party privacy concerns for the court to consider when analyzing discovery directed to CME examiners. 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.<sup>406</sup> 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 [the] 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.<sup>407</sup>

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<sup>406</sup> *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla. 4th DCA 2012).

<sup>407</sup> *Id.* at 248.

Accordingly, an examiner will not be compelled to disclose CME reports of other non-party examinees or to testify about findings contained in those reports.<sup>408</sup>

Nevertheless, discovery concerning the examination report and a 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. For example, in *Dimeglio v. Briggs-Mugrauer*,<sup>409</sup> which 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 an suffered injury. After a 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 appellate 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 physical examination of the plaintiff by the insurance company's chosen physician.

Following the production of written reports and prior to trial, counsel may be required to disclose to opposing counsel any changes of the examining expert's opinion, diagnostic impressions, causation opinions, or other conclusions which are not contained

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<sup>408</sup> *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).

<sup>409</sup> *Dimeglio v. Briggs-Mugrauer*, 708 So. 2d 637 (Fla. 2d DCA 1998).

in the report(s) produced or testimony given. Failure to do so could result in the exclusion of such evidence at trial.

For additional reference, please see Chapter 6: Expert Witness Discovery.

## CHAPTER EIGHT

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### WORK-PRODUCT PROTECTION AND PRIVILEGES

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.”<sup>410</sup> There is no requirement in this rule that for something to be protected as work product, it must be an item ordered to be prepared by an attorney.<sup>411</sup> Materials may qualify as work product even if no specific litigation was pending at the time the materials were compiled. Even preliminary investigative materials are privileged if compiled in response to some event which foreseeably could be made the basis of a claim.<sup>412</sup>

The standard to be applied in the First, Second, Third and Fifth District Courts of Appeal in determining whether documents are protected by the work product doctrine, is whether the document was prepared in response to some event which foreseeably could be made the basis of a claim in the future.<sup>413</sup> Prior to 2015, the Fourth District 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,<sup>414</sup> or, they were prepared after the claim had already

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<sup>410</sup> Fla. R. Civ. P. 1.280(b)(3).

<sup>411</sup> *Barnett Bank v. Dottie-G. Dev. Corp.*, 645 So. 2d 573 (Fla. 2d DCA 1994) (Documents sought to be discovered are subject to work product privilege even when litigation is neither pending nor threatened so long as there is a possibility that suit may ensue.).

<sup>412</sup> *Time Warner, Inc. v. Gadinsky*, 639 So. 2d 176 (Fla. 3d DCA 1994).

<sup>413</sup> *Anchor Nat’l Fin. Servs., Inc., v. Smeltz*, 546 So. 2d 760, 761 (Fla. 2d DCA 1989).

<sup>414</sup> See *Marshalls of MA, Inc. v. Minsal*, 932 So. 2d 444 (Fla. App. 3d DCA 2006), and the cases cited therein.



accrued.<sup>415</sup> However, the 4<sup>th</sup> DCA joined the other DCA's in *Millard Mall Servs. v. Bolda*,<sup>416</sup> with a dissent endorsing the continued use of the standard.

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, the party seeking to compel may file a motion challenging the status of the document as work product. The party asserting the privilege must then show that the documents were prepared in anticipation of litigation.<sup>417</sup>

Under Rule 1.280(b)(3), Florida Rules of Civil Procedure, 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.<sup>418</sup> Need and undue hardship "must be demonstrated by affidavit or sworn testimony."<sup>419</sup> Documents protected by the assertion of work product protection must not be lightly invaded, but only upon a particularized showing of need satisfying the criteria set forth in Rule

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<sup>415</sup> *Compare* Liberty Mut. Fire Ins. Co. v. Bennett, 883 So. 2d 373, 374 (Fla. 4<sup>th</sup> DCA 2001), *quashed* 905 So. 2d 119 (Fla. 2005).

<sup>416</sup> *Bolda*, 155 So. 3d 1272 (Fla. 4<sup>th</sup> DCA 2015) (Reports created in the course of shopping mall's investigations were protected from disclosure under the work produce doctrine; a lawsuit need not be filed for information gathered in an accident investigation to qualify for work product protection).

<sup>417</sup> *Wal-Mart Stores, Inc. v. Weeks*, 696 So. 2d 855 (Fla. 2d DCA 1997).

<sup>418</sup> *Metric Eng'g, Inc. v. Small*, 861 So. 2d 1248, 1250 (Fla. 1<sup>st</sup> DCA 2003) (need and undue hardship need to be shown to justify compelling production of protected work product); *CXS Transp., Inc. v. Carpenter*, 725 So. 2d 434, 435 (Fla. 2d DCA 1999).

<sup>419</sup> *N. Broward Hosp. Dist. V. Button*, 592 So.2d 367 (Fla. 4<sup>th</sup> DCA 1992); *but see* *Columbia Hosp. Corp. of Broward v. Fain*, 16 So.3d 236 (Fla. 4<sup>th</sup> DCA 2009) (constitutional amendment on patient rights to discovery records for adverse medical incidents not pre-empted by work product assertion).

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.<sup>420</sup>

It should be noted that if attorney work product is expected or intended for use at trial, it is subject to the rules of discovery. The Florida Supreme Court has held that the attorney work product doctrine and work product privilege is specifically bounded and limited to materials not intended for use as evidence or as an exhibit at trial, including rebuttal.<sup>421</sup>

### **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. The privilege may be claimed by the person or person’s agent or employee.

Trade secrets are privileged under section 90.506, Florida Statutes, but the privilege is not absolute.<sup>422</sup> 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:

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<sup>420</sup> Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1385 (Fla. 1994).

<sup>421</sup> Northup v. Howard W. Acken, M.D., 865 So. 2d 1267 (Fla. 2004).

<sup>422</sup> Freedom Newspapers, Inc., v. Egly, 507 So. 2d 1180, 1184 (Fla. 2d DCA 1987).

- (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.<sup>423</sup>

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.<sup>424</sup>

"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."<sup>425</sup> A trial court may also conduct an evidentiary hearing.<sup>426</sup> Such a hearing may include expert testimony.<sup>427</sup>

If the materials are trade secrets, the court must then determine whether there is a reasonable necessity for production.<sup>428</sup> Once a party has demonstrated that the information sought is a trade secret, the burden shifts to the party seeking discovery to demonstrate

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<sup>423</sup> Gen. Caulking Coating Co., Inc. v. J.D. Waterproofing, Inc., 958 So. 2d 507, 508 (Fla. 3d DCA 2007) (trial court could not order production of information in documents claimed to be trade secrets without conducting an in camera inspection and making the necessary findings of fact).

<sup>424</sup> Fla. Stat. § 688.002(4), (2020).

<sup>425</sup> Bright House Networks, LLC v. Cassidy, 129 So. 3d 501 (Fla. 2d DCA 2014)

<sup>426</sup> Bright House Networks, LLC v. Cassidy, 129 So. 3d 501, 506 (Fla. 2d DCA 2014).

<sup>427</sup> Lovell Farms, Inc. v. Levy, 644 So. 2d 103, 105 (Fla. 3d DCA 1994).

<sup>428</sup> Gen. Caulking Coating Co., Inc., v. J.D. Waterproofing, Inc., 958 So. 2d 507, 508 (Fla. 3d DCA 2007).

reasonable necessity for production.<sup>429</sup> This requires a trial court to decide whether the need for producing the documents outweighs the interest in maintaining their confidentiality.<sup>430</sup> If the trial court ultimately decides to order production of trade secrets, it must set forth findings on these points.<sup>431</sup>

Further, if disclosure is ordered, the trial court should take measures to limit any harm caused by the production.<sup>432</sup> 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.<sup>433</sup>

### **Incident Reports**

Incident reports have generally been considered not discoverable as falling within the work product privilege because they are typically prepared solely for litigation and have no other business purpose.<sup>434</sup> Incident reports may be prepared for a purpose other than in anticipation of

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<sup>429</sup> *Scientific Games, Inc. v. Dittler Bros., Inc.*, 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991) (citing *Goodyear Tire & Rubber Co. v. Cooney*, 359 So. 2d 1200, 1202 (Fla. 1st DCA 1978)).

<sup>430</sup> See *Gen. Caulking Coating Co.*, 958 So. 2d at 509.

<sup>431</sup> *Id.* (“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))).

<sup>432</sup> Fla. Stat. § 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.”).

<sup>433</sup> *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 Env’tl. Sys., Inc.*, 681 So. 2d 1175, 1177 (Fla. 2d DCA 1996).

<sup>434</sup> *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).

litigation, and when this is so the reports are not work product. For example, reports prepared solely for personnel reasons, such as to decide whether an employee should be disciplined, are not work product.<sup>435</sup> However, even if an incident report is prepared for one reason not in anticipation of litigation, it will still be protected as work product if it was also prepared for litigation purposes.<sup>436</sup>

### **Claims Files**

A party is not entitled to discovery related to the claim file or the insurer's business practices regarding the handling of claims until the obligation to provide coverage and damages has been determined.<sup>437</sup>

However, the claims file may be discoverable when an insurer is sued for bad faith after any coverage dispute has been settled.<sup>438</sup>

### **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.<sup>439</sup>

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

Section 90.503(2), Florida Statutes, codifies the psychotherapist-patient privilege<sup>440</sup> and provides in pertinent part:

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<sup>435</sup> Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1385-86 (Fla. 1994).

<sup>436</sup> Fed. Express Corp. v. Cantway, 778 So. 2d 1052, 1053 (Fla. 4th DCA 2001); Dist. Bd. of Trs. of Miami-Dade Cty. Coll. v. Chao, 739 So. 2d 105 (Fla. 3d DCA 1999).

<sup>437</sup> State Farm Mut. Auto. Ins. Co. v. Tranchese, 49 So. 3d 809, 810 (Fla. 4th DCA 2010); Scottsdale Ins. Co. v. Camara, 813 So. 2d 250, 251-52 (Fla. 3d DCA 2002).

<sup>438</sup> Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121, 1129-30 (Fla. 2005).

<sup>439</sup> Hankerson v. Wiley, 154 So. 3d 511 (Fla. 4th DCA 2015).

<sup>440</sup> A psychotherapist is defined by Fla. Stat. § 90.503(1)(a) (2020) 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

(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.<sup>441</sup>

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(4) There is no privilege under this section:

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(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.<sup>442</sup>

Moreover, pursuant to section 394.4615, Florida Statutes (2020), clinical records maintained by psychotherapists are shielded by a broad cloak of confidentiality; the statute carves out specific instances wherein disclosure of information from patient records shall or may be released. The intent behind the enactment of the psychotherapist-patient privilege is to encourage individuals suffering from mental, emotional, or behavioral disorders to seek out and obtain treatment without fearing public scrutiny and enable those individuals experiencing such problems to obtain proper care and assistance.<sup>443</sup>

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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. (20) (effective July 1, 2006).

<sup>441</sup> Fla. Stat. § 90.503(2) (2018).

<sup>442</sup> Fla. Stat. § 90.503(4)(c) (2018).

<sup>443</sup> *Segarra v. Segarra*, 932 So. 2d 1159, 1161 (Fla. 3d DCA 2006) (citing *Cedars Healthcare Grp., 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.

Section 90.503(4)(c), Florida Statutes (2020), one of the statutory exceptions to the privilege, stems from the notion that a party should be barred from using the privilege as both a sword and a shield, that is, seeking to recover for mental and or emotional damages on the one hand, while hiding behind the privilege on the other.<sup>444</sup> For example, when a plaintiff seeks recovery for mental anguish or emotional distress, Florida courts generally hold that the plaintiff has caused his or her mental condition to be at issue and the psychotherapist privilege is therefore, waived.<sup>445</sup> 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.<sup>446</sup> Failure to timely assert the privilege does not constitute waiver, so long as the information already

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2d 301, 305-306 (Fla. 4th DCA 2001); *Carson v. Jackson*, 466 So. 2d 1188, 1191 (Fla. 4th DCA 1985); see also *Jaffee v. Redmond*, 518 U.S. 1, 10-12 (1996) (In 1996, the United States Supreme Court held that the psychotherapist privilege serves the public interest and, if the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled.).

<sup>444</sup> *Nelson v. Womble*, 657 So. 2d 1221, 1222 (Fla. 5th DCA 1995) (citing *Sykes v. St. Andrews Sch.*, 619 So. 2d 467, 469 (Fla. 4th DCA 1993)).

<sup>445</sup> See *Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1476 (11th Cir. 1984) (applying Florida law to a claim for mental anguish due to medical malpractice); *Belmont v. N. 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.").

<sup>446</sup> *Arzola*, 534 So. 2d at 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).

See *Palm Beach Cty. 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).

produced does not amount to a significant part of the matter or communication for which the privilege is being asserted.<sup>447</sup> The waiver provision contained in section 90.507, Florida Statutes (2018) will apply, however, when information previously produced in discovery is considered a substantial part of the patient's claim of privilege.<sup>448</sup> Limited voluntary disclosure of some aspects of the psychotherapist-patient privileged matters or communications will not constitute a waiver.<sup>449</sup>

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.<sup>450</sup> In addition, a claim for loss of enjoyment of life,

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<sup>447</sup> *Id.*; *Garbacik v. Wal-Mart Transp., LLC*, 932 So. 2d 500, 503-504 (Fla. 5th DCA 2006) (citing *Sykes v. St. Andrews Sch.*, 619 So.2d 467, 469 (Fla. 4th DCA 1993)).

*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.); *Bandorf v. Volusia Cty. 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).

*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).

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

<sup>448</sup> *Garbacik*, 932 So.2d at 503; *Morrison*, 621 So. 2d at 468; *Yoho v. Lindsley*, 248 So.2d 187, 192 (Fla. 4th DCA 1971).

<sup>449</sup> *Weinstock v. Groth*, 659 So.2d 713, 715 (Fla. 5th DCA 1995) (plaintiff able to assert privilege because she had not placed her mental condition at issue in her defamation action); *Cruz-Govin v. Torres*, 29 So.3d 393, 396 (Fla. 3d DCA 2010) ("The statutory exception applies when the patient, not the opposing party who seeks the privileged information, places his mental health at issue.").

<sup>450</sup> *Oswald v. Diamond*, 576 So.2d 909, 910 (Fla. 1st DCA 1991) (reversing in part a trial order granting a motion to compel discovery of medical records to the extent that medical testimony and reports not pertaining to the diagnosis and treatment of a mental or emotional disorder may exist).



“without more, does not place the mental or emotional condition of the plaintiff at issue so as to waive the protection of section 90.503.”<sup>451</sup>

The party seeking to depose a psychotherapist or obtain psychological records bears the burden of showing that the patient’s mental or emotional condition has been introduced as an issue in the case.<sup>452</sup> What is more, if a plaintiff has not placed his or her mental condition at issue, the defendant’s sole contention that the plaintiff’s mental stability is at issue will not overcome the privilege.

The privilege does not protect from discovery any relevant medical records of a psychiatrist or other medical provider made for the purpose of diagnosis or treatment of a condition other than mental or emotional ailments.<sup>453</sup> Thus, relevant medical records that do not pertain to the diagnosis or treatment of a mental, emotional or behavioral disorder are not privileged and should be produced even if they are maintained by a psychiatrist. On the other hand, records made for the purpose of diagnosis or treatment of a mental, emotional or behavioral condition that may contain other medical information, such as physical examinations, remain privileged and are not subject to disclosure.<sup>454</sup>

Florida law recognizes that a plaintiff who has incurred a physical injury may allege and

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<sup>451</sup> Partner-Brown v. Bornstein, 734 So. 2d 555 (Fla. 5<sup>th</sup> DCA 1999)

<sup>452</sup> Broussard v. Broward County Bd. Of Commissioners, 992 So. 2d 882 (Fla. 4<sup>th</sup> DCA 2008)

<sup>453</sup> Byxbee, 850 So.2d at 596.

<sup>454</sup> Id.; Parrish v. City of Orlando, 53 So.3d 1199, 1203 (Fla. 5<sup>th</sup> 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.”).

*C.F.* Tampa Elec. 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”).

prove physical pain and suffering as an element of a claim for monetary damages.<sup>455</sup> The term “pain and suffering” has not been judicially defined, however, Florida courts have provided a number of factors that may be considered by the trier of fact in awarding damages for pain and suffering.<sup>456</sup> 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.<sup>457</sup>

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.<sup>458</sup>

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

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<sup>455</sup> *Id.*

<sup>456</sup> See *Poole v. Veterans Auto Sales & Leasing Co., Inc.*, 668 So. 2d 189 (Fla. 1996)

<sup>457</sup> *Bandorf*, 939 So.2d at 251.

<sup>458</sup> 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).

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:

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5. Upon court order based on application showing good cause for disclosure. In determining whether there is good cause for disclosure, the 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).

#### **DISCOVERY OF LAWYER-CLIENT PRIVILEGED COMMUNICATIONS**

Confidential lawyer-client communications are, by statute, privileged, and therefore not discoverable.<sup>459</sup> A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services to the client, and those reasonably necessary for the transmission of the communication.<sup>460</sup> However, the privilege can be waived, intentionally or unintentionally, thus subjecting the

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<sup>459</sup> Fla. Stat. § 90.502; Fla. R. Civ. P. 1.280(b)(1).

<sup>460</sup> Fla. Stat. § 90.502.

communication to discovery. A waiver by the client of part of the privileged communications, serves as a waiver as to the remainder of the communications about the same subject.<sup>461</sup>

In *Southern Bell Tel. & Tel. Co. v. Deason*,<sup>462</sup> the Florida Supreme Court set forth the following criteria to judge whether a corporation's communications are protected by the attorney-client privilege:

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

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

The lawyer-client privilege between an insurer, the insured and insured's counsel is not waived in a third-party bad faith action. Since the insured is not the party bringing the action, it does not waive the privilege.<sup>463</sup>

### **EXAMINATION UNDER OATH BY INSURER**

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

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<sup>461</sup> *Int'l Tel. & Tel. Corp v. United Tel. Co. of Fla.*, 60 F.R.D. 177 (M.D. Fla. 1973).

<sup>462</sup> 632 So. 2d 1377 (Fla. 1994).

<sup>463</sup> *Progressive v. Scoma*, 975 So.2d 461 (Fla. 2d DCA 2007) ("Few evidentiary privileges are as jealously guarded as the attorney-client privilege. Permitting a third party who brings a bad faith claim to abrogate the attorney-client privilege previously held by the insured and insurer would seem to undermine the policy reasons for having such a privilege, such as encouraging open and unguarded discussions between counsel and client as they prepare for litigation.").

discoverable in a subsequent criminal case involving the insured, and, the presence of criminal defense counsel at the EUO did not waive the privilege.<sup>464</sup>

### **PRIVILEGE LOGS**

Rule 1.280(b)(6), Florida Rules of Civil Procedure, provides, in part, that a party withholding information from discovery claiming that it is privileged shall make the claim expressly, and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protections. It has been suggested that the privilege log should include at a minimum (for documents), sender, recipients, title or type, date and subject matter.<sup>465</sup>

The United States District Court for the Southern District of Florida has promulgated a Local Rule for the content required in a privilege log.<sup>466</sup> In at least one instance, that Local Rule has served as guidance for a Florida court.<sup>467</sup> Guidance for the content required in a privilege log can also be found in the Civil Discovery Handbook for the United States District Court Middle District of Florida.<sup>468</sup>

The failure to file a privilege log can result in a waiver of the attorney-client privilege.<sup>469</sup> However, that is not a common sanction, and Florida courts generally recognize that such a sanction should be resorted to only when the violation is serious.<sup>470</sup> The failure to submit a

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<sup>464</sup> Reynolds v. State, 963 So.2d 908 (Fla. 2d DCA 2007) (“The examination is part of the insurer’s fact gathering for the dual purposes of (1) defending the insured, and (2) determining whether the policy covers the incident giving rise to the claim against the insured.”).

<sup>465</sup> Bankers Sec. Ins. Co. v. Symons, 889 So.2d 93 (Fla. 5th DCA 2004).

<sup>466</sup> Local Rule 26.1(e)(2), U.S. District Court, Southern District of Florida (Rev. 12/1/20).

<sup>467</sup> TIG Ins. Corp. of Am. v. Johnson, 799 So. 2d 339 (Fla. 4th DCA 2001).

<sup>468</sup> Middle District Discovery, a Handbook on Discovery Process (Feb. 1, 2021).

<sup>469</sup> Bainter v. League of Women Voters of Fla., 150 So. 3d 1115, 1129 (Fla. 2014).

<sup>470</sup> Gosman, 937 So. 2d at 293; Nevin v. Palm Beach Cty. Sch. Bd., 958 So. 2d 1003 (Fla. 1st DCA 2007) (citing Matlock v. Day, 907 So. 2d 577 (Fla. 5th DCA 2005)).

privilege log at the same time as a discovery response is served, does not waive the privilege. Rule. 1.280(b)(6) 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.<sup>471</sup>

A privilege log is not required until such time as broader, preliminary objections have been addressed. “A party is required to file a [privilege] log only if the information is otherwise discoverable. Where the party claims that the production of documents is burdensome and harassing . . . the scope of discovery is at issue. Until the court rules on the request, the party responding to discovery does not know what will fall into the category of discoverable documents . . . .”<sup>472</sup> Waiver does not apply where assertion of the privilege is not document-specific, but category specific, and the category itself is plainly protected.<sup>473</sup>

### **INADVERTENT DISCLOSURE**

As communications technology advances (facsimile, e-mail, text, etc.), the opportunities for inadvertent disclosure of lawyer-client privileged communications increase. Inadvertent disclosure of lawyer-client privileged communications, and the resultant issues of waiver and disqualification have been addressed by Florida courts more frequently in recent years, 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.<sup>474</sup> The rule is self-explanatory. To preserve

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<sup>471</sup> Fla. R. Civ. P. 1.285 (Inadvertent Disclosure of Privileged Materials).

<sup>472</sup> Fla. R. Civ. P. 1.285(a).

<sup>473</sup> Fla. R. Civ. P. 1.285(b).

<sup>474</sup> Fla. R. Civ. P. 1.285(c).

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 ten days of actually discovering the inadvertent disclosure. The rule sets forth the duty of the party receiving such notice;<sup>475</sup> the right to challenge the assertion of the privilege;<sup>476</sup> and, the effect of a determination that the privilege applies.<sup>477</sup>

Florida law has always required the recipient of inadvertently disclosed attorney-client privileged communications to act appropriately, or risk being disqualified from the case.<sup>478</sup> An attorney who promptly notifies the sender and immediately returns the inadvertently produced materials without exercising any unfair advantage will, generally, not be subject to disqualification.<sup>479</sup>

The recipient still has the right to challenge the claimed privilege on the basis of waiver.<sup>480</sup> The rule does not set forth any specific test to determine whether a waiver occurred, however, the courts have addressed this issue in the past. To determine 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;

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<sup>475</sup> Fla. R. Civ. P. 1.285(d)

<sup>476</sup> Fla. R. Civ. P. 1.285(c)(4).

<sup>477</sup> Fla. R. Civ. P. 1.285(d)

<sup>478</sup> See *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117 (Fla. 3d DCA 2008).

<sup>479</sup> *Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor*, 724 So. 2d 572 (Fla. 3d DCA 1998)(citing Fla. Bar Comm. On Professional Ethics, OP. 93-3).

<sup>480</sup> Fla. R. Civ. P. 1.285(c)(4).

- (4) any delay and measures taken to rectify the disclosures; and
- (5) whether the overriding interests of justice would be served by relieving a party of its error.<sup>481</sup>

One should note the court's consideration of the "precautions taken to prevent inadvertent disclosure." As communications are more commonly transmitted by facsimile/e-mail, the prudent lawyer should carefully consider the protections in place (or not in place) at the recipient's location. For example, many facsimile terminals are used by large groups of people and may not provide the necessary privacy for the transmission of privileged communications. Facsimile and e-mail communications should, at the very least, always include a lawyer-client privilege notice.<sup>482</sup>

Attorneys should also remember that they have ethical duties when they send and receive electronic documents in the course of representing their clients. Practitioners must be mindful that others 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

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<sup>481</sup> Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007).

<sup>482</sup> Nova Southeastern Univ., Inc. v. Jacobson, 25 So. 3d 82 (Fla. 4th DCA 2009).



lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

Inadvertent disclosure does not always involve disclosure to the opposing party. Privileged materials may be inadvertently disclosed to a party's own expert. In that circumstance, a party does not automatically waive the privilege simply by furnishing protected or privileged material. The court will consider whether the expert relied upon the material in forming his or her opinion.<sup>483</sup>

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<sup>483</sup>. See *Mullins v. Thompkins*, 15 So. 3d 798 (Fla. 1<sup>st</sup> DCA 2009)

## CHAPTER NINE

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### MOTIONS FOR PROTECTIVE ORDER

#### 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.

#### 1. 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.<sup>484</sup> 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

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<sup>484</sup> 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).

burden of showing good cause and obtaining a court order related to the pending proceeding before discovery is to be had. To satisfy the “good cause” requirement, the movant should present record evidence rather than general or conclusory objections.<sup>485</sup> 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.<sup>486</sup>

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 the issues 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

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<sup>485</sup> Hepco Data, LLC v. Hepco Medical, LLC, 301 So. 3d 406 (Fla. 2d DCA 2020); Clarke v. Coca-Cola Refreshments USA, Inc., 282 So. 3d 897 (Fla. 3d DCA 2019).

<sup>486</sup> Liberty Mut. Ins. Co. v. Lease Am., Inc., 735 So. 2d 560 (Fla. 4th DCA 1999); Ins. Co. of N. Am. v. Noya, 398 So. 2d 836 (Fla. 5th DCA 1981); Allstate Ins. Co. v. Langston, 627 So. 2d 1178, 1179 (Fla. 4th DCA 1993); *see also* BERMAN, FLORIDA CIVIL PROCEDURE § 1.350:12 (2020 Ed.).

diligence and good faith of counsel.<sup>487</sup>

## **2. 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 Eight, Privilege Logs.

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<sup>487</sup> See *Canella v. Bryant*, 235 So. 2d 328 (Fla. 4th DCA 1970); and *Rahman Momenah*, 616 So. 2d at 121.



## CHAPTER TEN

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### MOTIONS TO COMPEL

The language of Rule 1.380(a)(2) of the Florida Rules of Civil Procedure, authorizing a party to move the court to compel production of discovery, applies to all civil litigation matters:

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.<sup>488</sup>

Following a hearing on a Motion to Compel, the prevailing party may be entitled to court-ordered "reasonable expenses incurred," including attorneys' fees, paid by the opposing party or deponent.<sup>489</sup>

Upon proper showing, the full spectrum of sanctions may be imposed for failure to comply with an order compelling discovery.<sup>490</sup> 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

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<sup>488</sup> FLA. R. CIV. P. 1.380(a)(2).

<sup>489</sup> FLA. R. CIV. P. 1.380(a)(4).

<sup>490</sup> FLA. R. CIV. P. 1.380(b).

designated claims or defenses;<sup>491</sup> prohibiting the introduction of certain evidence;<sup>492</sup> striking pleadings, which could result in a dismissal of the action; the entry of a default judgment, including an order for liquidated damages;<sup>493</sup> contempt of court; and the assessment of reasonable expenses or attorney's fees.<sup>494</sup> The courts have crafted a few additional possibilities: fines;<sup>495</sup> granting a new trial;<sup>496</sup> and, in the case of lost or

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<sup>491</sup> *Metro Dade Cty. v. Martinsen*, 736 So. 2d 794, 795 (Fla. 3d DCA 1999) (finding that a party who engages in serious misconduct forfeits the right to participate in the proceedings, including the right to defend against an opposing party's claims). *But see* *Salazar v. Gomez*, No. 3D19-1448, 2021 Fla. App. LEXIS 2273, at \*5 (3d DCA Feb. 17, 2021) (cautioning that dismissal of claims for discovery violations must be reserved for only the most egregious circumstances).

<sup>492</sup> *Briarwood Capital, LLC v. Lennar Corp.*, 160 So. 3d 544 (Fla. 3d DCA 2015); *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); *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981) (trial court may exclude testimony of witness whose name had not been disclosed in accordance with pretrial order).

<sup>493</sup> *DYC Fishing, Ltd. v. Martinez*, 994 So. 2d 461, 462 (Fla. 3d DCA 2008) (reversing trial court's entry of default final judgment awarding unliquidated damages to the plaintiff and stating that in Florida, default judgments only entitle the plaintiff to liquidated damages); *Bertrand v. Belhomme*, 892 So. 2d 1150 (Fla. 3d DCA 2005); *Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983) (finding that although "the striking of pleadings is the most severe of all sanctions which should be employed only in extreme circumstances[,] [a] deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness.") (citations omitted)).

<sup>494</sup> FLA. R. CIV. P. 1.380(b)(2)(A)-(E) and (d); see *Bartow HMA, LLC v. Kirkland*, 146 So. 3d 1213 (Fla. 2d DCA 2014); *Blackford v. Fla. 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 Auto. Ass'n v. Strasser*, 492 So. 2d 399 (Fla. 4th DCA 1986) (affirming attorneys' fees and costs as sanctions for consistently tardy discovery responses, but reversing default).

<sup>495</sup> *Creative Choice Homes, II, Ltd., v. Keystone Guard Servcs., Inc.*, 137 So. 3d 1144 (Fla. 3d DCA 2014) ("[A] contemnor must be given a reasonable opportunity to purge the contempt before such fines are imposed."); *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 at 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); see also *Channel Components, Inc. v. Am. II Elec., Inc.*, 915 So. 2d 1278 (Fla. 2d DCA 2005) (ordering over \$79,000 as a sanction for violation of certain discovery orders does not constitute abuse of discretion).

<sup>496</sup> *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981) (intentional nondisclosure of witness, combined with surprise, disruption, and prejudice, warranted new trial); *Nordyne, Inc. v. Fla. 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. Univ. Med. Ctr., Inc.*, 559 So. 2d 393 (Fla. 1st DCA 1990) (plaintiff entitled to new trial because defendant failed to produce map that was requested repeatedly).

destroyed evidence, creation of an adverse evidentiary inference<sup>497</sup> or a rebuttable presumption.<sup>498</sup> The court may rely on its inherent authority to impose drastic sanctions when a discovery-related fraud has been perpetrated on the court.<sup>499</sup>

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

A motion under Rule 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 substantially 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.<sup>500</sup>

The Rule requires that the court "shall" award expenses to the prevailing party

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<sup>497</sup> Fed. Ins. Co. v. Allister Mfg. Co., 622 So. 2d 1348 (Fla. 4th DCA 1993) (reversing the trial court's granting of a motion for summary judgment and discussing options for imposing evidentiary inferences adverse to the party responsible for inadvertent loss of evidence).

<sup>498</sup> Public Health Trust of Dade Cty. v. Valcin, 507 So. 2d 596 (Fla. 1987) (rebuttable presumption of negligence exists if patient demonstrates that absence of hospital records hinders patient's ability to establish prima facie case); Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701 (Fla. 4th DCA 1995) (destruction or unexplained absence of evidence may result in permissible shifting of burden of proof).

<sup>499</sup> Tramel v. Bass, 672 So. 2d 78 (Fla. 1st DCA 1996) (affirming default against sheriff for intentionally omitting portion of videotape of automobile pursuit).

<sup>500</sup> FLA. R. CIV. P. 1.380(a)(4) (2024) (emphasis added).



unless the court finds the opposition was justified or an award would be unjust. Thus, under the Rule the trial court should award expenses, which may include attorney fees, in every case in which there is no defensible opposition or the motion to compel is not justified, as it would seem that the absence of a justifiable position should, by definition, render a sanction just.

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 required to work together in good faith to avoid the need for motion practice or unnecessary court intervention.

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. The punishment should fit the fault, and any award must be limited to the reasonable expenses incurred in seeking a court order.<sup>501</sup>

Expenses, including fees, can be awarded without a finding of bad faith or willful conduct.<sup>502</sup> The party to be sanctioned is entitled to a hearing before the sanction is imposed.<sup>503</sup>

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

If a party or its designated representative fails to obey a prior order to provide or

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<sup>501</sup> *Liebreich v. Church of Scientology Flag Serv. Org., Inc.*, 855 So. 2d 658, 660 (Fla. 2d DCA 2003) (remanding “for the trial court to determine sanctions based only on the reasonable expenses incurred in obtaining the order compelling discovery”); *Eastern Airlines. Inc. v. Dixon*, 310 So. 2d 336 (Fla. 3d DCA 1975).

<sup>502</sup> Where the attorney, and not the client, is responsible for noncompliance with a discovery order, a different set of factors must be applied in determining sanctions. *Sonson v. Hearn*, 17 So. 3d 745 (Fla. 4th DCA 2009).

<sup>503</sup> FLA. R. CIV. P. 1.380(a)(4); *Burt v. SP Healthcare Holdings, LLC*, 163 So. 3d 1274 (Fla. 2d DCA 2015).

permit discovery, the court in which the action is pending may take any punitive action as set forth under the Rules. As an example, not a limitation, Rule 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.<sup>504</sup>

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.<sup>505</sup>

Such sanctions may be imposed only where the failure to comply with the court's

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<sup>504</sup> FLA. R. CIV. P. 1.380(b)(2).

<sup>505</sup> Id.

order is attributable to a party to the matter. If the failure is that of another party or of a third person whose conduct is not chargeable to the party, no such sanction may be imposed.<sup>506</sup> A court may impose sanctions against a non-party that violates a discovery order, if the court find the non-party to be in contempt after a due process proceeding.<sup>507</sup>

For the trial court to be on solid footing it is wise to stay within the enumerated orders set forth in Rule 1.380(b)(2). If a court imposes an enumerated sanction, it is doubtful that the order will be viewed as outside the discretion of the court. A court should always strictly follow due process and make appropriate factual and legal findings on the record, in order to ensure its ruling will withstand appellate scrutiny.

### **SPOILATION OF EVIDENCE**

Spoliation, or the destruction of evidence, can be the basis for a sanctionable discovery violation under Rule 1.380. If evidence is lost or destroyed, the court must apply a three-part test to determine what remedy may apply: (1) whether the evidence had existed at a prior point in time; (2) whether a party had a duty to preserve the evidence; and (3) whether the evidence was critical to proving or defending a claim.<sup>508</sup> If all three elements are proven, the court may remedy a negligent spoliation through an adverse instruction, and adverse inference, or a presumption. If the spoliation was found to be intentional, the court has discretion to strike the offender's pleadings.<sup>509</sup>

On January 1, 2020, The Florida Supreme Court adopted new language to Rule 1.380(e), extending the spoliation rule to electronically stored information (ESI), including

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<sup>506</sup> *Zanathy v. Beach Harbor Club Ass'n*, 343 So. 2d 625 (Fla. 2d DCA 1977). It is likely an abuse of discretion to strike a party's pleadings based on a non-party's refusal to comply with discovery requests. *Haverfield Corp. v. Franzen*, 694 So. 2d 162 (Fla. 3d DCA 1997) (Shevin, J., dissenting in part).

<sup>507</sup> *CB Condos., Inc. v. GRS S. Fla., Inc.*, 165 So. 3d 739, 741 (Fla. 4th DCA 2015).

<sup>508</sup> *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006).

<sup>509</sup> *Id.* at 780.

emails, text messages, and computer applications, and bringing the Rule into alignment with Federal Rule of Civil Procedure 37(e).<sup>510</sup> Under this new standard, negligent spoliation of ESI will not authorize the imposition of an adverse inference or adverse instruction sanction; the moving party must prove that the ESI evidence was lost or destroyed with an intent to deprive its use in the litigation.<sup>511</sup>

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

The trial court must hold a hearing and give the party facing sanctions for a discovery violation an opportunity to be heard before issuing an order. It is reversible error to award sanctions before a hearing on the motion to compel takes place.<sup>512</sup> By the same token, striking a party's pleadings before the deadline for compliance with discovery requires reversal.<sup>513</sup>

A moving party's 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.

If the trial court dismisses an action or enters a default as a sanction for discovery violations, a predicate finding that the violations were willful or deliberate must be made.<sup>514</sup> If the offending party is represented by counsel and the actions of the attorney – not the party – resulted in the discovery violation, detailed findings must be included in

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<sup>510</sup> In re: Amendments to the Fla. Rules of Civil Proc.-2019 Regular-Cycle Rep., 292 So. 3d 660 (Fla. 2019).

<sup>511</sup> FLA. R. CIV. P. 1.380(e)(2).

<sup>512</sup> Joseph S. Arrigo Motor Co. v. Lasserre, 678 So. 2d 396, 397 (Fla. 1st DCA 1996) (reversing an award of \$250 in sanctions where the award was entered before the motion hearing).

<sup>513</sup> Stern v. Stein, 694 So. 2d 851 (Fla. 4th DCA 1997).

<sup>514</sup> SPS Dev. Co., LLC v. DS Enters. of the Palm Beaches, Inc., 970 So. 2d 495, 498 (Fla. 4th DCA 2007); Zaccaria v. Russell, 700 So. 2d 187 (Fla. 4th DCA 1997).

the order, as delineated in *Kozel v. Ostendorf*.<sup>515</sup> If the order does not contain such findings, it will be reversed.<sup>516</sup> To preserve this issue for appellate review, however, the sanctioned party must ask the trial court to make these findings.<sup>517</sup> *Kozel* findings are not required unless the recalcitrant party is represented by counsel.<sup>518</sup> Additionally, the Second DCA and Fifth DCA have ruled that the *Kozel* analysis is applicable only when the sanction is a dismissal with prejudice or its functional equivalent. The First DCA and Third DCA disagree, applying the *Kozel* analysis to all dismissals as a sanction, even those without prejudice. The Fourth DCA has not yet weighed in on this issue.<sup>519</sup>

It is reversible error to dismiss a case for discovery violations without first granting the disobedient party's request for an evidentiary hearing. The party should be given a chance to explain the discovery violations.<sup>520</sup> For purposes of assessing failure to make discovery, an evasive or incomplete answer must be treated as a failure to answer.<sup>521</sup>

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

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<sup>515</sup> 629 So. 2d 817 (Fla. 1993).

<sup>516</sup> *Zaccaria*, 700 So. 2d at 187.

<sup>517</sup> *Sanderson v. Karch*, 257 So.3d 1091, 1091 (Fla. 4th DCA 2018); *Shelswell v. Boudreau*, 239 So.3d 707, 709 (Fla. 4th DCA 2018); *Gozzo Dev., Inc. v. Prof'l Roofing Contractors, Inc.*, 211 SO.3d 145, 146 (Fla. 4th DCA 2017) (Lee, J., concurring); *Bank of America, N.A. v. Ribaud*, 199 So.3d 407, 409 (Fla. 4th DCA 2016); *Bank of N.Y. Mellon v. Sandhill*, 211 So.3d 944, 945 (Fla. 5th DCA 2016).

<sup>518</sup> *Sukonik v. Wallack*, 178 So. 3d 455, 457 n.2 (Fla. 3d DCA 2015); *Ledo v. Seavie Res., LLC*, 149 So. 3d 707, 710 (Fla. 3d DCA 2014); *see also Levine v. Del Am. Properties*, 642 So. 2d 32, 33-34 (Fla. 5th DCA 1994) (reasoning that *Kozel* does not apply where it is shown that the litigant and not the attorney is responsible for the misconduct).

<sup>519</sup> Compare *Federal Nat'l Mortgage Ass'n v. Linner*, 193 So.3d 1010, 1012-13 (Fla. 2d DCA 2016); and *SRMOF II 2012-1 Trust v. Garcia*, 209 So.3d 681 (Fla. 5th DCA 2017), with *HSBC Bank USA v. Cook*, 178 So.3d 548 (Fla. 1st DCA 2015); and *Fed. Nat'l Mortg. Ass'n v. Wild*, 164 So.3d 94, 95 (Fla. 3d DCA 2015).

<sup>520</sup> *Medina v. Fla. East Coast Rwy.*, 866 So. 2d 89 (Fla. 3d DCA 2004), *appeal after remand and remanded*, 921 So. 2d 767 (2006).

<sup>521</sup> FLA. R. CIV. P. 1.380(a)(3).

unambiguous, properly issued, and properly served, in order to be grounds for claiming or sanctioning a discovery violation. A court can only enforce an order compelling conduct when the order is clear, because otherwise the question of what constitutes a “violation” becomes far too murky to meet due process requirements.<sup>522</sup> Further, issuance and service of the court order must be procedurally correct, because only through properly issued and served process does the court obtain jurisdiction over the person from whom action is sought – and without jurisdiction there can be no “enforcement.”

Discovery sanctions should be “commensurate with the offense.”<sup>523</sup> It has been held that the striking of pleadings for discovery misconduct is the most severe of penalties and must be employed only in extreme circumstances.<sup>524</sup>

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.**

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<sup>522</sup> See generally, *Edlund v. Seagull Townhomes Condo. Ass’n, Inc.*, 928 So. 2d 405 (Fla. 3d DCA 2006); *Powerline Components, Inc. v. Mil-Spec Components, Inc.*, 720 So. 2d 546, 548 (Fla. 4th DCA 1998); *Am. Pioneer Cas. Ins. Co. v. Henrion*, 523 So. 2d 776 (Fla. 4th DCA 1988); *Tubero v. Ellis*, 472 So. 2d 548, 550 (Fla. 4th DCA 1985).

<sup>523</sup> *Drakeford v. Barnett Bank of Tampa*, 694 So. 2d 822, 824 (Fla. 2d DCA 1997); *Cape Cave Corp. v. Charlotte Asphalt, Inc.*, 384 So. 2d 1300, 1301 (Fla. 2d DCA 1980), *appeal after remand*, 406 So. 2d 1234 (1981).

<sup>524</sup> *Fisher v. Prof’l. Adver. Dirs. Co., Inc.*, 955 So. 2d 78 (Fla. 4th DCA 2007).

*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.<sup>525</sup>

The failure to make the required findings in an order requires reversal.<sup>526</sup>

In *Ham v. Dunmire*,<sup>527</sup> the Florida Supreme Court held that participation of the litigant in the misconduct is not required to justify the sanction of dismissal. Relying on its prior decision in *Kozel v. Ostendorf*,<sup>528</sup> the court held that the litigant's participation, while "extremely important," is only one of several factors that must be weighed:

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

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<sup>525</sup> *Id.* at 79-80.

<sup>526</sup> See *Bank One, N.A. v. Harrod*, 873 So. 2d 519, 521 (Fla. 4th DCA 2004) (citing Fla. Nat'l Org. for Women v. State, 832 So. 2d 911, 914 (Fla. 1st DCA 2002)); see also *Carr v. Reese*, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001) (holding that trial court's failure to consider all of the factors as shown by final order requires reversal).

<sup>527</sup> 891 So. 2d 492 (Fla. 2004).

<sup>528</sup> 629 So. 2d 817, 818 (Fla. 1993).

However, the Court reversed the dismissal in the case before it, finding that the attorney's misconduct did not rise to the level necessary to justify dismissal under the *Koze/* test.



## CHAPTER ELEVEN

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### 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, Because dismissal with prejudice is an extreme remedy that sounds the "death knell of a lawsuit," this power should be exercised cautiously, sparingly, and only upon the most blatant showing of fraud, pretense, collusion, or other similar wrong doing.<sup>529</sup> Fraud on the court occurs where there is clear and convincing evidence "that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."<sup>530</sup> Misconduct that falls short of the rigors of this test, including inconsistency,<sup>531</sup> nondisclosure, poor recollection, dissemblance, and even lying,<sup>532</sup> is insufficient to support a dismissal or default for fraud, and potential harm must be managed through cross-examination.<sup>533</sup> And even when fraud is shown, the imposition of a lesser sanction may be warranted and remains within the court's discretion.<sup>534</sup> "When reviewing a case for fraud, the court should consider a proper mix of factors, and carefully balance a policy favoring adjudication on the merits

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<sup>529</sup> Cox v. Burke, 706 So. 2d 43, 46 (Fla. 5th DCA 1998).

<sup>530</sup> *Id.*

<sup>531</sup> Suarez v. Benihana Nat'l of Fla. Corp., 88 So. 3d 349, 353 (Fla. 3d DCA 2012).

<sup>532</sup> Gautreaux v. Maya, 112 So. 3d 146, 149 (Fla. 5th DCA 2013).

<sup>533</sup> Beseler v. Avatar Prop. & Cas. Ins. Co., 291 So. 3d 137, 140 (Fla. 4th DCA 2020).

<sup>534</sup> Suarez, 88 So. 3d at 353.

with competing policies to maintain the integrity of the judicial system.”<sup>535</sup>

Although a finding of fraud on the court generally requires proof that a party lied on a critical issue or intentionally destroyed or altered determinative evidence, any such finding must be supported by clear and convincing evidence that goes to “the very core issue at trial.”<sup>536</sup>

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.<sup>537</sup> For the trial court to properly exercise its discretion, there must be an evidentiary basis to dismiss the case. The better practice is for the trial court to conduct an evidentiary hearing and make specific findings of clear and convincing evidence to support dismissal for fraud, even where neither party requests the hearing.<sup>538</sup> The appellate court may remand the case to conduct a hearing.<sup>539</sup>

All of Florida's district courts of appeal have all applied the same basic test for fraud on the court sanctions.<sup>540</sup> However, some nuance exists between the districts, and this case-dispositive issue should be considered in light of precedent within each district and statewide. For additional reference, please see the chart of case law in Appendix 11-1, which displays representative cases by district and by appellate outcome.

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<sup>535</sup> Cox, 706 So. 2d at 46.

<sup>536</sup> E.I. Dupont DeNemours & Co. v. Sidran, 140 So. 3d 620, 624 (Fla. 3d DCA 2014).

<sup>537</sup> Suarez, 88 So. 3d at 353.

<sup>538</sup> Gilbert v. Eckerd Corp. of Fla., Inc., 34 So. 3d 773 (Fla. 4th DCA 2010).

<sup>539</sup> Smith v. Brinks, Inc., 133 So. 3d 1176 (Fla. 4th DCA 2014).

<sup>540</sup> See, e.g., Wallace v. Keldie, 249 So. 3d 747, 754 (Fla. 1st DCA 2018); Duarte v. Snap-on Inc., 216 So. 3d 771,775 (Fla. 2d DCA 2017); Diaz v. Home Depo USA, Inc.,196 So. 3d 504, 571 (Fla. 3d DCA 2016); Bob Montgomery Real Estate v. Djokic, 858 So. 2d 371, 374 (Fla. 4th DCA 2003); Cox,706 So. 2d 43 at 46.

# APPENDIX 1-1

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2017 WL 773694

Only the Westlaw citation is currently available.  
United States District Court, S.D. New York.

James H. FISCHER, Plaintiff,

v.

Stephen T. FORREST, Jr., Sandra F. Forrest, Shane  
R. Gebauer, and Brushy Mountain Bee Farm, Inc.,  
Defendants.

14 Civ. 1304 (PAE) (AJP), 14 Civ. 1307 (PAE) (AJP)

Signed February 28, 2017

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## OPINION & ORDER

[Andrew J. Peck](#), United States Magistrate Judge

\*1 It is time, once again, to issue a discovery wake-up call to the Bar in this District:<sup>1</sup> the Federal Rules of Civil Procedure were amended effective December 1, 2015, and one change that affects the daily work of every litigator is to Rule 34. Specifically (and I use that term advisedly), responses to discovery requests must:

- State grounds for objections with specificity;
- An objection must state whether any responsive materials are being withheld on the basis of that objection; and
- Specify the time for production and, if a rolling production, when production will begin and when it will be concluded.

Most lawyers who have not changed their “form file”

violate one or more (and often all three) of these changes. Rule 34(b)(2)(B)-(C) as amended states (new language in bold):

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state **with specificity the grounds for objecting** to the request, including the reasons. **The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.**

(C) *Objections.* **An objection must state whether any responsive materials are being withheld on the basis of that objection.** An objection to part of a request must specify the part and permit inspection of the rest.

The 2015 Advisory Committee Notes to Rule 34 emphasize the reasons for the amendments:

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters “withheld” anything beyond the scope of the search specified in the objection.

\*2 Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the

### beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been “withheld.”

2015 Adv. Comm. Notes to Rule 34 (emphasis added).

Despite the clarity of the no-longer-new 2015 Amendments, the Court still sees too many non-compliant Rule 34 responses. This case is the latest.

### **The Defendants’ Objections in These Cases Violate Rule 34**

In these related cases asserting claims for, among other things, copyright and trademark violations,<sup>2</sup> defendants’ amended Rule 34 Responses (dated February 10, 2017) contain 17 “general objections,” including General Objections No. I stating that “Defendant objects to the requests to the extent that they call for the disclosure of information that is not relevant to the subject matter of this litigation, nor likely to lead to the discovery of relevant, admissible evidence.” At the end of the general objections, defendants state that “Subject to and without waiver of the foregoing general objections which are hereby incorporated by reference into each response, Defendant’s Response to Plaintiff’s Request for Production of Documents are as follows....”

Turning to defendants’ responses to the requests, the Court will reproduce the first two:

#### Request for Production of Documents

1. All emails, correspondence, letters and other written communications between any employee, agent, officer, director, or member of Defendant and Plaintiff from 2008 to present.

Response: Defendant objects to this Request for Production to the extent that it is overly broad and unduly burdensome, and not likely to lead to the discovery of relevant evidence. Defendant further objects to this

Request as it requests information already in Plaintiff’s possession.

2. All drafts, revisions, amendments and final versions of Defendant’s catalog(s) from 2008 to present.

Response: Defendant objects to this Request for Production to the extent that it is overly broad and unduly burdensome, and not likely to lead to the discovery of relevant evidence. Defendant further objects to this Request as it requests information already in Plaintiff’s possession. Subject to and without waiving said objections, Defendant has provided Plaintiff with the cover page and page advertising either Bee-Quick or Natural Honey Harvester.

\*3 Let us count the ways defendants have violated the Rules:

First, incorporating all of the General Objections into each response violates Rule 34(b)(2)(B)’s specificity requirement as well as Rule 34(b)(2)(C)’s requirement to indicate whether any responsive materials are withheld on the basis of an objection. General objections should rarely be used after December 1, 2015 unless each such objection applies to each document request (e.g., objecting to produce privileged material).

Second, General Objection I objected on the basis of non-relevance to the “subject matter of this litigation.” (See page 3 above.) The December 1, 2015 amendment to Rule 26(b)(1) limits discovery to material “relevant to any party’s claim or defense....” Discovery about “subject matter” no longer is permitted. General Objection I also objects that the discovery is not “likely to lead to the discovery of relevant, admissible evidence.” The 2015 amendments deleted that language from Rule 26(b)(1), and lawyers need to remove it from their jargon. See [In re Bard IVC Filters Prod. Liab. Litig.](#), 317 F.R.D. 562, 564 (D. Ariz. 2016) (Campbell, D.J.) (“The 2015 amendments thus eliminated the ‘reasonably calculated’ phrase as a definition for the scope of permissible discovery. Despite this clear change, many courts [and lawyers] continue to use the phrase. Old habits die hard.... The test going forward is whether evidence is ‘relevant to any party’s claim or defense,’ not whether it is ‘reasonably calculated to lead to admissible evidence.’”).

Third, the responses to requests 1-2 stating that the requests are “overly broad and unduly burdensome” is meaningless boilerplate. Why is it burdensome? How is it overly broad? This language tells the Court nothing. Indeed, even before the December 1, 2015 rules amendments, judicial decisions criticized such boilerplate objections. See, e.g., [Mancia v. Mayflower Textile Servs. Co.](#), 253 F.R.D. 354, 358 (D. Md. 2008) (Grimm, M.J.) (“[B]oilerplate objections that a request for discovery is ‘over[broad] and unduly burdensome, and not reasonably calculated to lead to the

discovery of material admissible in evidence,' persist despite a litany of decisions from courts, including this one, that such objections are improper unless based on particularized facts." (record cite omitted)).

Finally, the responses do not indicate when documents and ESI that defendants are producing will be produced.

The Court requires defendants to revise their Responses to comply with the Rules.

### **Conclusion**

#### Footnotes

- 1 See [William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.](#), 256 F.R.D. 134, 134 (S.D.N.Y. 2009) (Peck, M.J.) ("This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or 'keywords' to be used to produce emails or other electronically stored information ('ESI').").
- 2 For background information about these cases, see [Fischer v. Forrest](#), 14 Civ. 1304, 2017 WL 128705 (S.D.N.Y. Jan. 13, 2017) (Peck, M.J.).

The December 1, 2015 amendments to the Federal Rules of Civil Procedure are now 15 months old. It is time for all counsel to learn the now-current Rules and update their "form" files. From now on in cases before this Court, any discovery response that does not comply with Rule 34's requirement to state objections with specificity (and to clearly indicate whether responsive material is being withheld on the basis of objection) will be deemed a waiver of all objections (except as to privilege).

SO ORDERED.

#### **All Citations**

Not Reported in Fed. Supp., 2017 WL 773694

## APPENDIX 1-2

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320 F.R.D. 168  
United States District Court,  
N.D. Iowa, Central Division.

LIGURIA FOODS, INC., Plaintiff,  
v.  
GRIFFITH LABORATORIES, INC., Defendant.

No. C 14-3041-MWB  
|  
Signed March 13, 2017

### Synopsis

**Background:** Manufacturer of pepperoni products brought action against spice supplier, alleging on claims for breach of implied warranty of fitness for a purpose and breach of implied warranty of merchantability that spices delivered were defective and caused spoilage, leading to economic damages. Order was entered to show cause why counsel for both parties should not be sanctioned for discovery abuses.

**[Holding:]** The District Court, [Mark W. Bennett, J.](#), held that imposition of sanctions against parties was not warranted.

Ordered accordingly.

West Headnotes (13)

<sup>[1]</sup> **Federal Civil Procedure**  
🔑 Scope

No party has the unilateral ability to dictate the scope of discovery based on their own view of the parties' respective theories of the case because litigation in general and discovery in particular are not one sided. [Fed. R. Civ. P. 26\(b\)\(1\)](#).

[1 Cases that cite this headnote](#)

<sup>[2]</sup> **Federal Civil Procedure**  
🔑 Scope

Discovery is not limited to material that might be deemed relevant and admissible at trial because it is an investigatory tool intended to help litigants gain an understanding of the key persons, relationships, and evidence in a case and the veracity of those persons and purported evidence, even if the evidence discovered is later deemed not admissible. [Fed. R. Civ. P. 26\(b\)\(1\)](#).

[2 Cases that cite this headnote](#)

<sup>[3]</sup> **Federal Civil Procedure**  
🔑 Scope

Concepts of materiality, relevancy, and discoverability are not fixed; parties can change their views of the necessity of certain information or their theories of the case during the course of discovery as new facts and relationships are revealed or explained. [Fed. R. Civ. P. 26\(b\)\(1\)](#).

[Cases that cite this headnote](#)

<sup>[4]</sup> **Federal Civil Procedure**  
🔑 Objections and grounds for refusal  
**Federal Civil Procedure**  
🔑 Motion and Proceedings Thereon

The party resisting production in response to interrogatories or requests for documents bears the burden of establishing lack of relevancy or undue burden. [Fed. R. Civ. P. 26\(c\)\(1\)](#).

[Cases that cite this headnote](#)

<sup>[5]</sup> **Federal Civil Procedure**  
🔑 Objections and grounds for refusal

## Federal Civil Procedure

### 🔑 Objections and Grounds for Refusal

Merely asserting boilerplate objections that the discovery sought is vague, ambiguous, overbroad, unduly burdensome, et cetera, without specifying how each interrogatory or request for production is deficient and without articulating the particular harm that would accrue if the responding party were required to respond to the proponent's discovery requests is not adequate to voice a successful objection. [Fed. R. Civ. P. 33, 34.](#)

[6 Cases that cite this headnote](#)

question is overly broad, burdensome, or oppressive, and no attempt to articulate the particular harm that would accrue if the responding party were required to respond to the proponent's discovery requests, but relies, instead, on the mere statement that the interrogatory or request for production was overly broad, burdensome, oppressive, and irrelevant, the response is not adequate to voice a successful objection; instead, the response is an unacceptable "boilerplate" objection. [Fed. R. Civ. P. 33, 34.](#)

[7 Cases that cite this headnote](#)

<sup>16]</sup>

## Federal Civil Procedure

### 🔑 Motion for leave to submit, and proceedings thereon

## Federal Civil Procedure

### 🔑 Time for motion

It is not a valid objection that interrogatories or requests for documents are "premature" if they were propounded after the time specified in the governing provisions and there was no order specifying the timing of discovery on any specific issues. [Fed. R. Civ. P. 26\(d\)\(1\), \(d\)\(2\).](#)

[Cases that cite this headnote](#)

<sup>19]</sup>

## Federal Civil Procedure

### 🔑 Objections and grounds for refusal

## Federal Civil Procedure

### 🔑 Objections and Grounds for Refusal

Simply stating that a response to an interrogatory or request for production is "subject to" one or more general objections does not satisfy the specificity requirement, because, for example, it leaves the propounding party unclear about which of the numerous general objections is purportedly applicable as well as whether the documents or answers provided are complete, or whether responsive documents are being withheld. [Fed. R. Civ. P. 34\(b\)\(2\)\(C\).](#)

[2 Cases that cite this headnote](#)

<sup>17]</sup>

## Federal Civil Procedure

### 🔑 Depositions and Discovery

## Federal Civil Procedure

### 🔑 Failure to respond; sanctions

There is no limitation on the sequence of discovery and a party cannot delay responding to discovery simply because the other party has not yet responded to its discovery. [Fed. R. Civ. P. 26\(d\)\(3\).](#)

[Cases that cite this headnote](#)

<sup>110]</sup>

## Federal Civil Procedure

### 🔑 Objections and grounds for refusal

## Federal Civil Procedure

### 🔑 Objections and Grounds for Refusal

Party did not preserve its rights by making general objections to interrogatories or request for production or "boilerplate" objections to certain specific requests to assure that it was not waiving its rights while parties met and conferred about scope of privileges, pertinent time periods, and myriad of other issues in complex case. [Fed. R. Civ. P. 33, 34.](#)

[13 Cases that cite this headnote](#)

<sup>18]</sup>

## Federal Civil Procedure

### 🔑 Objections and grounds for refusal

## Federal Civil Procedure

### 🔑 Objections and Grounds for Refusal

When an objecting party makes no attempt to show specifically how each interrogatory or request for production is not relevant or how each

<sup>111]</sup>

## Federal Civil Procedure

### 🔑 Objections and grounds for refusal

## Federal Civil Procedure

### 🔑 Objections and Grounds for Refusal

Any ground not stated in a timely objection to an interrogatory or request for production is waived, unless the court excuses the failure. [Fed. R. Civ. P. 33, 34](#).

1 Cases that cite this headnote

[12]

## Federal Civil Procedure

### 🔑 Failure to Answer; Sanctions

## Federal Civil Procedure

### 🔑 Failure to Comply; Sanctions

Imposition of sanctions against parties was not warranted for making general objections to discovery requests or “boilerplate” objections to certain specific requests, since parties had cooperative and professional relationship during discovery, counsel did everything that court might expect them to do to confer and cooperate to work out issues about scope of discovery, parties’ reliance on improper “boilerplate” objections was result of local “culture” of protectionist discovery responses, parties did not try to raise frivolous defenses for their conduct when called on it, and parties were able to work out most of their discovery disputes through consultation and cooperation. [Fed. R. Civ. P. 33, 34](#).

12 Cases that cite this headnote

[13]

## Federal Civil Procedure

### 🔑 Objections and grounds for refusal

## Federal Civil Procedure

### 🔑 Objections and Grounds for Refusal

The “natural and probable consequences” of “boilerplate” objections to an interrogatory or request for production is delay and impediment of discovery, not the narrowing of issues and the avoidance of expense and delay toward which the discovery rules are aimed. [Fed. R. Civ. P. 33, 34](#).

1 Cases that cite this headnote

\*169 [David J. Ben-DOV](#), [Jeffery M. Heftman](#), [Richard A. Del Giudice](#), [Christina M. Faklis](#), [Gozdecki, Del Giudice, Americus, Farkas & Brocato LLP](#), Chicago, IL, [David L. Reinschmidt](#), [Jay Elliott Denne](#), [Munger, Reinschmidt & Denne](#), Sioux City, IA, for Plaintiff.

[Christopher Brennan Wilson](#), [Perkins Coie, LLP](#), Chicago, IL, [John C. Gray](#), [Heidman Law Firm, LLP](#), Sioux City, IA, for Defendant.

## MEMORANDUM OPINION AND ORDER REGARDING THE COURT’S ORDER TO SHOW CAUSE WHY COUNSEL FOR BOTH PARTIES SHOULD NOT BE SANCTIONED FOR DISCOVERY ABUSES

[MARK W. BENNETT](#), U.S. DISTRICT COURT JUDGE,  
NORTHERN DISTRICT OF IOWA

### TABLE OF CONTENTS

#### *I. INTRODUCTION ...171*

##### *A. Factual Background ...171*

##### *1. The nature of the litigation ...171*

##### *2. Potentially obstructionist discovery responses ...172*

##### *B. Procedural Background ...180*

##### *1. Pretrial matters ...180*

##### *2. The Show Cause Order ...180*

##### *C. Responses Of The Parties To The Order To Show Cause ...180*

##### *\*170 1. Responses in briefs ...180*

##### *2. Responses at the evidentiary hearing ...181*

#### *II. LEGAL ANALYSIS ...182*

##### *A. Proper Discovery Responses ...182*

##### *B. Improper discovery responses ...185*

##### *C. Sanctions ...187*

Attorneys and Law Firms



### III. CONCLUSION ...190

“Laws are like sausages, it is better not to see them being made.”

—Otto von Bismarck

This litigation is about who is responsible for tons and millions of dollars’ worth of sausage, of the pepperoni variety, some of which turned rancid. It’s also about lawyers who were not concerned about how the federal discovery rules were made, but how and why they flaunted them. This ruling involves one of the least favorite tasks of federal trial and appellate judges—determining whether counsel and/or the parties should be sanctioned for discovery abuses. This case squarely presents the issue of why excellent, thoughtful, highly professional, and exceptionally civil and courteous lawyers are addicted to “boilerplate” discovery objections.<sup>1</sup> More importantly, why does this widespread addiction continue to plague the litigation industry when counsel were unable to cite a single reported or non-reported judicial decision or rule of civil procedure from any jurisdiction in the United States, state or federal, that authorizes, condones, or approves of this practice? What should judges and lawyers do to substantially reduce or, more hopefully and optimistically, eliminate this menacing scourge on the legal profession? Perhaps surprisingly to some, I place more blame for the addiction, and more promise for a cure, on the judiciary than on the bar.<sup>2</sup> What follows is my ruling after a hearing on March 7, 2017, pursuant to my January 27, 2017, Order To Show Cause Why Counsel For Both Parties Should Not Be Sanctioned For Discovery \*171 Abuses And Directions For Further Briefing,

[Rule 1 of the Federal Rules of Civil Procedure](#) states that the Rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Nevertheless, modern “litigation” practice all too often disregards that admonition and seems to favor wars of discovery attrition. “[A]lthough the rule is ‘more aspirational than descriptive,’ ” it can, nevertheless, inform the courts’ authority to sanction discovery misconduct.<sup>3</sup> Furthermore, the specific Rules devoted to discovery attempt to facilitate the disclosure of relevant information and to avoid conflicts by setting out the when, what, and how of discovery, as well as how to raise objections, in ways that should lead to the narrowing of issues and the resolution of disputes without the involvement of the court. Even so, discovery all too often becomes a needlessly time-consuming, and often needlessly expensive, game of obstruction and non-disclosure. Indeed, obstructionist discovery practice is a firmly entrenched “culture” in some parts of the country, notwithstanding that it involves practices that are contrary to the rulings of every federal and state court to address them. As I remarked at an earlier hearing in this matter, “So what is it going to take to get ... law firms to change and practice according to the rules and the cases interpreting the rules? What’s it going to take?”<sup>4</sup>

While one of the attorneys gave the hopeful answer that admonitions from the courts had made clear what practices are unacceptable, it is clear to me that admonitions from the courts have not been enough to prevent such conduct and that, perhaps, only sanctions will stop this nonsense.

I know that I am not alone in my goal of eliminating “boilerplate” responses and other discovery abuses, because the goal is a worthy one.<sup>5</sup> As one commentator observed:

Though boilerplate objections are relatively common in modern civil litigation, the legal community can take steps to curb their use. Attorneys and judges alike must recognize the costs these objections impose on the efficient administration of justice and on the legal profession. Only with such an understanding, and an attendant willingness to effectively penalize those who issue boilerplate objections, can their use be reduced. Hopefully, with an increased focus on preventing abusive discovery practices, including boilerplate objections, the legal profession can move toward fairer, more effective discovery practices.<sup>6</sup>

Thus, while I find the task distasteful, I embark on my consideration of whether the conduct of the parties in this case warrants sanctions for discovery abuses.

## I. INTRODUCTION

### A. Factual Background

#### 1. The nature of the litigation

Plaintiff Liguria Foods, Inc., (Liguria) is a pepperoni and dried sausage manufacturer \*172 with its principal place of business in Humboldt, Iowa. Liguria’s most popular product is a finished pepperoni product called “Liguria Pepperoni,” although Liguria makes other kinds of pepperoni, as well. Defendant Griffith Laboratories, Inc., (Griffith) is a manufacturer of food seasonings and spice blends with its principal place of business in Alsip, Illinois. Beginning in approximately 1994, Griffith sold mixes of custom spices to Liguria or its predecessor company, Humboldt Sausage. In late 2012 and early 2013, Liguria received complaints from customers that the Liguria Pepperoni, which contains Griffith’s Optimized Pepperoni Seasoning, was prematurely turning green and grey, within 140 to 160 days after production, even though Liguria Pepperoni was supposed to have a shelf life of 270 days from slicing. After this problem arose, Liguria lost several

of its longstanding customers.

Eventually, Liguria concluded that Griffith's Optimized Pepperoni Seasoning contributed to the premature spoilation of its Liguria Pepperoni. On July 3, 2014, Liguria filed a Complaint asserting claims for breach of implied warranty of fitness for a purpose and breach of implied warranty of merchantability. Griffith filed an Answer denying the substance of Liguria's claims. Throughout this litigation, Griffith has contended, *inter alia*, that either underlying problems in Liguria's raw meat supply or Liguria's "rework"<sup>7</sup> policies were far more likely to be responsible for Liguria's rancidity problems than Griffith's spices.

## **2. Potentially obstructionist discovery responses**

In my review of another discovery dispute between the parties, raised in Griffith's January 12, 2017, Emergency Motion To Address Possible Discovery Abuses, the issue now before me, which involves potentially obstructionist discovery responses by *both* parties, came to my attention. In preparing for a hearing on January 23, 2017, on Griffith's Motion, I reviewed some of Liguria's written responses to Griffith's discovery requests attached to the Motion. I noted discovery responses that I suspected or believed were abusive and/or not in compliance with the applicable rules, but mere "boilerplate" objections. At the hearing on January 23, 2017, after questioning Griffith's lead counsel and hearing his candid responses, I indicated my belief that it was likely that Griffith's written responses to Liguria's discovery requests were also abusive "boilerplate" responses. Consequently, I directed the parties to file, under seal, all their written responses to each other's discovery requests by the following day. I also notified counsel of my intention to impose sanctions on every attorney who signed the discovery responses, if I determined that the responses were, indeed, improper or abusive. The parties filed their written responses to discovery requests, as directed, the following day.

After reviewing those discovery responses, I entered an order advising the parties that I suspected that the discovery responses listed in the following table were improper:

\*173

\*174

\*175

\*176

\*177

\*178

\*179

**[TABULAR MATERIAL OMITTED]**

**[Editor's Note:** The preceding image contains the reference for footnote<sup>8,9,10</sup>].

Liguria's responses to Griffith's interrogatories and requests for production of documents were signed by local counsel on behalf of Liguria's lead attorneys, who have their offices in Chicago, Illinois. Griffith's pertinent discovery responses were signed by its lead attorney, who also has offices in Chicago, Illinois. At the January 23, 2017, hearing, \*180 I ascertained that local counsel for both parties had acted essentially as "drop boxes" for filings, but did not have any active role in formulating the discovery responses in question.

## **B. Procedural Background**

### **1. Pretrial matters**

The relevant pretrial matters can be summarized quite briefly. On July 3, 2014, Liguria filed a Complaint asserting claims for breach of implied warranty of fitness for a purpose and breach of implied warranty of merchantability, and, on August 29, 2014, Griffith filed an Answer denying the substance of Liguria's claims. The trial has been reset to begin on May 1, 2017.

### **2. The Show Cause Order**

On January 27, 2017, I entered an Order To Show Cause Why Counsel For Both Parties Should Not Be Sanctioned For Discovery Abuses And Directions For Further Briefing. In the Order To Show Cause, I directed that every attorney for the parties who signed a response to interrogatories or a response to a request for documents in

this case, with the exception of local counsel, appear and show cause, at a hearing previously scheduled for March 7, 2017, why he should not be sanctioned for discovery abuses.<sup>11</sup> I also provided the table of the discovery responses, included above, showing the responses that I suspected were improper. In Section II of that order, I then directed the parties to submit, not later than February 28, 2017, briefs in response to the Show Cause part of the Order addressing the following matters:

1. Whether each of the discovery responses by that party identified in the table ... is or is not a violation of the rule cited or otherwise an abuse of discovery, and
2. If any responses identified in the table ... are discovery abuses, the appropriate sanction or combination of sanctions that is appropriate for an offending attorney.

On February 28, 2017, the parties filed those briefs, as directed. Those briefs were Liguria's Brief In Response To Section II Of The Order To Show Cause Of January 27, 2017, and Griffith's Response To Order To Show Cause.

### ***C. Responses Of The Parties To The Order To Show Cause***

#### ***1. Responses in briefs***

In its brief in response to the Order To Show Cause, Liguria states that, based upon its review of my Order To Show Cause, the applicable Federal Rules of Civil Procedure, and its discovery responses, it recognizes that many of its objections are not stated with specificity. Liguria asserts, nevertheless, that it has not interposed any objection "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," pursuant to Rule 26(g)(1)(B)(ii). Liguria also points out that some of its objections did interpose explanations to justify their basis, such as the ones that I identified, *supra*, in notes 8 and 9. In addition, Liguria argues that it did so in its responses to Interrogatories Nos. 2 and 18 and Request For Production No. 1.

In its brief in response to the Order To Show Cause, Griffith, like Liguria, states that its written responses to Liguria's discovery requests were not intended for any improper purposes and that the parties have, in fact, conducted this litigation in a cooperative and professional manner. Griffith also contends that a magistrate judge has already reviewed various of Griffith's responses and found no fault with them. Griffith contends that both parties relied on standard "boilerplate" language to assure that they were not waiving their rights while they met and conferred about

the scope of privileges, pertinent time periods, and myriad other issues in this complex case. Indeed, Griffith contends that the eleven statements in its discovery responses that I identified in my Order To Show Cause do not constitute discovery abuses. This is so, Griffith argues, because the responses were intended to preserve any objection, but not for harassment or delay, and they did not require any additional work or expense by \*181 Liguria. Griffith contends that certain of its responses were intended to narrow the privilege issues or protect information until an appropriate protective order was entered, or were intended to narrow the relevant time frame, where the parties have had a relationship since at least 1995, but the problems at the center of the litigation arose only in late 2012. Counsel for Griffith does acknowledge that, in light of my concerns expressed at the January 23, 2017, hearing and in the Order To Show Cause, four of its responses were not helpful nor well-constructed, but nevertheless were not in bad faith or for any improper purpose, and another response could have been "more artful" to indicate an intent to supplement that response later.

#### ***2. Responses at the evidentiary hearing***

The first part of the hearing on March 7, 2017, was devoted to the issues raised in my Show Cause Order. Counsel for both parties candidly admitted that there were no published decisions that allowed or condoned the sort of "boilerplate" objections that I had pointed out in the Show Cause Order. Counsel for both parties also represented that, notwithstanding the "boilerplate" objections, they had conferred professionally and cordially and had been able to resolve most discovery issues by consultation, with what I agree was surprisingly little need for intervention by the court in such a complicated case involving such voluminous discovery.

As to the question of why counsel for both sides had resorted to "boilerplate" objections, counsel admitted that it had a lot to do with the way they were trained, the kinds of responses that they had received from opposing parties, and the "culture" that routinely involved the use of such "standardized" responses. Indeed, one of the attorneys indicated that some clients—although not the clients in this case—expect such responses to be made on their behalf. I believe that one of the attorneys hit the nail squarely on the head when he asserted that such responses arise, at least in part, out of "lawyer paranoia" not to waive inadvertently any objections that might protect the parties they represent. Even so, counsel for both parties admitted that they now understood that such "boilerplate" objections do not, in fact, preserve any objections. Counsel also agreed that part of the problem was a fear of "unilateral disarmament." This is where neither party's attorneys wanted to eschew the standard, but impermissible, "boilerplate" practices that they had all come to use because they knew that the other

side would engage in “boilerplate” objections. Thus, many lawyers have become fearful to comply with federal discovery rules because their experience teaches them that the other side would abuse the rules. Complying with the discovery rules might place them at a competitive disadvantage.

Returning to the matter of the conduct of counsel in this case, counsel for both parties reiterated that their relationship has been professional and effective in narrowing the scope of discovery requests. They represented that the responses with which I had taken issue, and which they admitted were improper under the Federal Rules of Civil Procedure, were taken by counsel in this case as signals of a need or desire to narrow discovery requests, and a desire for discussion, rather than as refusals to provide responses or indications of any intent to impede or improperly delay discovery. Thus, while they admitted that both sides had made improper discovery responses, they suggested that this was a poor case in which to impose sanctions, because there had been no bad faith and no real detriment or impediment to discovery.

Furthermore, counsel for both parties sincerely pledged not to engage in such improper discovery practices in the future and to work within their firms to change the way their firms do things. They also both suggested that they would be willing to put together courses or continuing legal education programs for lawyers or law students about the applicable discovery rules and proper and improper discovery objections. They also raised legitimate concerns that sanctions could impede their ability to obtain *pro hac vice* admission in other jurisdictions, which they suggested was a negative consequence out of proportion to their conduct in this case, which had involved an effective working relationship between opposing counsel \*182 despite whopping defiance of discovery rules and court decisions.

Formal discovery under the Federal Rules of Civil Procedure is one of the most abused and obfuscated aspects of our litigation practice.<sup>12</sup>

## II. LEGAL ANALYSIS

Although it was the second issue to arise, I find it appropriate to rule, first, on the Order To Show Cause, relating to what I believed were obstructionist discovery responses by both parties. Having considered the parties’ arguments, I now confirm that belief as to all or nearly all the responses that I identified. The question of whether or not to impose sanctions, in light of such improper responses, is a much more difficult issue, however, because I find that this case involved courteous and professional attorneys who worked together in good faith to resolve discovery disputes without the need for intervention by the

court.

### A. Proper Discovery Responses

Unfortunately, experience has taught me that attorneys do not know or pay little attention to the discovery rules in the [Federal Rules of Civil Procedure](#). I preface this discussion with an observation by United States District Judge Paul w. Grimm, of the District of Maryland, who was, at the time, a member of the Advisory Committee on Civil Rules, and the Chair of the Discovery Subcommittee, and David S. Yellin, a litigation associate with a New York law firm:

[Surveys have] found that, “[a]lthough the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today’s system takes too long and costs too much.” Few practicing attorneys would be surprised that discovery was singled out as “the primary cause for cost and delay,” and often “can become an end in itself.”

Hon. Paul W. Grimm and David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 495–96 (2013) (citations omitted). Furthermore, “[b]y some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case” and “[d]iscovery abuse also represents one of the principal causes of delay and congestion in the judicial system.” Beisner, *Discovering A Better Way*, 60 DUKE L.J. at 549. It is *ignoring* the applicable Federal Rules of Civil Procedure that I find is at least partially responsible for the increase in the costs and delays of discovery.<sup>13</sup>

Thus, I will begin my analysis with the rules that are pertinent, here. In this case, I am concerned with responses to interrogatories and document requests, which are specifically governed by [Rules 33 and 34 of the Federal Rules of Civil Procedure](#), respectively. Nevertheless, Rule 26 also establishes important requirements for all discovery.

The first part of Rule 26 that is significant, here, is Rule 26(b), which defines the scope of permissible discovery, generally, as follows:

#### (b) Discovery Scope and Limits.

**(1) Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: *Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at \*183 stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance*

of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED. R. CIV. P. 26(b)(1) (emphasis added).

<sup>[1]</sup> <sup>[2]</sup> <sup>[3]</sup>The Eighth Circuit Court of Appeals has explained that Rule 26(b)(1) does not give any party “the unilateral ability to dictate the scope of discovery based on their own view of the parties’ respective theories of the case,” because “[l]itigation in general and discovery in particular ... are not one sided.” *Sentis Grp., Inc. v. Shell Oil Co.*, 763 F.3d 919, 925 (8th Cir. 2014). Nor is discovery “limited to material that might be deemed relevant and admissible at trial,” because it “is a[n] investigatory tool intended to help litigants gain an understanding of the key persons, relationships, and evidence in a case and, as this case well illustrates, the veracity of those persons and purported evidence, even if the evidence discovered is later deemed not admissible.” *Id.* at 926. Furthermore, a party is wrong to suppose “that the concepts of materiality, relevancy, and discoverability are fixed rather than fluid such that parties cannot change their views of the necessity of certain information or their theories of the case during the course of discovery as new facts and relationships are revealed or explained.” *Id.*

<sup>[4]</sup>As a counterbalance to the breadth of permissible discovery set out in Rule 26(b), Rule 26(c) provides, “The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more [listed limitations].” FED. R. CIV. P. 26(c)(1). In short, as I explained more than a decade-and-a-half ago, “as long as the parties request information or documents relevant to the claims at issue in the case, and such requests are tendered in good faith and are not unduly burdensome, discovery shall proceed.” *St. Paul Reins. Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511 (N.D. Iowa 2000). “The party resisting production bears the burden of establishing lack of relevancy or undue burden.” *Id.* at 512. I have found nothing to suggest that a more restrictive view of the scope of discovery is now the norm.

Rule 26(d) sets out requirements for the timing of discovery that are pertinent, here. Specifically, Rule 26(d)(1) provides that, generally, a party may not seek discovery before the parties’ discovery conference, but Rule 26(d)(2) provides that document requests pursuant to Rule 34 may be delivered “[m]ore than 21 days after the summons and complaint are served on a party.” Rule 26(d)(3) sets out the rule for the “sequence” of discovery, as follows:

**(3) Sequence.** Unless the parties stipulate or the court orders otherwise for the parties’ and witnesses’ convenience and in the interests of justice:

**(A)** methods of discovery may be used in any sequence; and

**(B)** discovery by one party does not require any other party to delay its discovery.

FED. R. CIV. P. 26(d)(3) (emphasis added). Indeed, the Advisory Committee Notes, 1970 Amendments explain, “[One] principal effect[ ] of the new provision [is] ... to eliminate any fixed priority in the sequence of discovery.... In principle, one party’s initiation of discovery should not wait upon the other’s completion, unless the delay is dictated by special considerations.” Thus, Rule 26(d)(3) makes clear that there is no limitation on the sequence of discovery and that a party cannot delay responding to discovery simply because the other party has not yet responded to its discovery.

Rule 26(b)(5) is also relevant, here, because it recognizes the propriety of asserting privileges in response to interrogatories or document requests, but it also requires more than bald assertions of privilege, as follows:

#### **(5) Claiming Privilege or Protecting Trial-Preparation Materials.**

**(A) Information Withheld.** When a party withholds information otherwise discoverable by claiming that \*184 the information is privileged or subject to protection as trial-preparation material, the party must:

**(i)** expressly make the claim; and

**(ii)** describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

FED. R. CIV. P. 26(b)(5)(A) (emphasis added). The Eighth Circuit Court of Appeals recognized, some time ago, that Rule 26(b)(5) codified a common process for eliminating time-consuming delays in the determination of privilege issues by requiring the party asserting the privilege to provide the party seeking discovery with a list or log that describes the pertinent documents without disclosing the allegedly privileged communications they contain. *PaineWebber Grp., Inc. v. Zinsmeyer Trusts P’ship*, 187 F.3d 988, 992 (8th Cir. 1999). Thus, Rule 26(b)(5)(A)’s requirement of a privilege log as part of any privilege-based objection to discovery is nothing new.

Finally, Rule 26(e) is relevant, here, because it imposes obligations to correct or supplement prior discovery answers, as follows:

#### **(e) Supplementing Disclosures and Responses.**

**(1) In General.** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory,

request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

[Fed. R. Civ. P. 26\(e\)](#).

The discovery responses at issue, here, are to requests for interrogatories, pursuant to [Rule 33](#), and requests for production of documents, pursuant to [Rule 34](#). The specific requirements of [Rules 33](#) and [34](#) at issue are the requirements for objections. [Rule 33](#) provides, in pertinent part, as follows:

(4) **Objections.** *The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.*

(5) **Signature.** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

[FED. R. CIV. P. 33\(b\)\(4\)](#) (emphasis added). Similarly, [Rule 34](#) provides, in pertinent part, as follows:

(B) **Responding to Each Item.** For each item or category, the response must either state that inspection and related activities will be permitted as requested *or state with specificity the grounds for objecting to the request, including the reasons.* The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) **Objections.** *An objection must state whether any responsive materials are being withheld on the basis of that objection.* An objection to part of a request must specify the part and permit inspection of the rest.

[FED. R. CIV. P. 34\(b\)\(2\)\(B\) & \(C\)](#) (emphasis added).

<sup>15</sup>The key requirement in both [Rules 33](#) and [34](#) is that objections require “specificity.” As I explained a decade-and-a-half ago, “the mere statement by a party that the interrogatory [or request for production] was overly broad, burdensome, oppressive and irrelevant \*185 is not adequate to voice a successful objection”; “[o]n the contrary, the party resisting discovery must show specifically how ... each interrogatory [or request for production] is not relevant or how each question is overly broad, burdensome or oppressive.” [St. Paul Reins. Co.](#),

[Ltd.](#), 198 F.R.D. at 511–12 (internal quotation marks and citations omitted). In other words, “merely assert[ing] boilerplate objections that the discovery sought is vague, ambiguous, overbroad, unduly burdensome, etc.... without specifying how each [interrogatory or] request for production is deficient and without articulating the particular harm that would accrue if [the responding party] were required to respond to [the proponent’s] discovery requests” simply is not enough. *Id.* at 512. Again, I have found nothing to suggest that such responses are now considered adequate; rather, there is precedent too ample to cite, in both the Eighth Circuit and the Seventh Circuit, where the lead attorneys for both sides have their offices, demonstrating the insufficiency of such responses.

Although [Rule 33](#) contains an express “waiver” provision, explaining that a party has waived “[a]ny ground not stated in a timely objection,” [Rule 34](#) does not. Nevertheless, as a magistrate judge of this court recently explained, that does not mean that inadequate responses to requests for documents do not constitute waivers:

[Federal Rule of Civil Procedure 34](#) does not explicitly provide that a party waives an objection by failing to file a timely response to a request for production of documents. Nonetheless, courts have routinely found that “if the responding party fails to make a timely objection, or fails to state the reason for an objection, he *may* be held to have waived any or all of his objections.” [Scaturro v. Warren & Sweat Mfg. Co., Inc.](#), 160 F.R.D. 44, 46 (M.D. Pa. 1995) (citing 4A *Moore’s Federal Practice*, § 34.05[2] ) (emphasis in original). *See also Henry v. National Housing Partnership*, 2007 WL 2746725 (N.D. Fla. 2007) (finding that the law is “well settled” that a party’s failure to file timely objections to a request for production of documents constitutes a waiver of the objections); [Krewson v. City of Quincy](#), 120 F.R.D. 6, 7 (D. Mass. 1988) (“Any other result would completely frustrate the time limits contained in the Federal Rules and give a license to litigants to ignore the time limits for discovery without any adverse consequences.”).

In [Cargill, Inc. v. Ron Burge Trucking, Inc.](#), 284 F.R.D. 421, 424 (D. Minn. 2012), the Court addressed the issue of whether “the same waiver provision found in [Rule 33\(b\)\(4\)](#) applies to document requests under [Rule 34](#).” After reviewing the history of the “automatic waiver provision” found in [Rule 33](#), the Court noted that recent decisions concerning waiver of objections “reflect broad exercise of judicial discretion.” *Id.* at 425.

[Sellars v. CRST Expedited, Inc.](#), No. C15-0117, 2016 WL 4771087, at \*2 (N.D. Iowa Sept. 13, 2016) (footnote omitted). The court then listed factors to consider in determining whether to excuse a waiver, and conditions under which courts will impose a waiver. *Id.*

## B. Improper discovery responses

Although the federal discovery rules were intended to facilitate discovery and refocus cases on the legal merits, “the discovery process has supplanted trial as the most contentious stage in litigation.” London, *Resolving the Civil Litigant’s Discovery Dilemma*, 26 GEO. J. LEGAL ETHICS at 837. Improper discovery responses necessarily add to the contentiousness of litigation, because they start with non-disclosure as their premise.

The recitation, in the preceding section, of the specific requirements of the applicable discovery rules highlights what is wrong with the sort of “boilerplate” objections that the parties used in this case, but it does not address their full negative impact:

The problems with using boilerplate objections, however, run deeper than their form or phrasing. Their use obstructs the discovery process, violates numerous rules of civil procedure and ethics, and imposes costs on litigants that frustrate the timely and just resolution of cases.

Jarvey, *Boilerplate Discovery Objections*, 61 DRAKE L. REV. at 916. There may also be practical consequences for the party who asserts such objections. “District courts often \*186 repeat the warning: ‘Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all.’ ” *Id.* (citing *Walker v. Lakewood Condo. Owners Ass’n*, 186 F.R.D. 584, 587 (C.D. Cal. 1999) (citations omitted); *Adelman v. Boy Scouts of Am.*, 276 F.R.D. 681, 688 (S.D. Fla. 2011) (“[J]udges in this district typically condemn boilerplate objections as legally inadequate or meaningless.” (citations omitted) (internal quotation marks omitted)); *Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc.*, No. 09-CV-11783, 2011 WL 669352, at \*2 (E.D. Mich. Feb. 17, 2011) (refusing to consider “[b]oilerplate or generalized objections”)); *see id.* at 688 (identifying other reasons that “boilerplate” objections are disfavored).

I now find, without doubt or hesitation, that the discovery responses by the parties in this case that I identified as potentially abusive and/or not in compliance with the applicable rules, but mere “boilerplate” objections, are just that. I am not convinced that the possible exceptions to the “boilerplate” objections that I noted in two of Liguria’s responses or the three additional responses that Liguria now cites are sufficient to “show specifically how ... each interrogatory [or request for production] is not relevant or how each question is overly broad, burdensome or oppressive.” *St. Paul Reins. Co., Ltd.*, 198 F.R.D. at 511–12. Even if I accepted all five of the responses that Liguria has identified as adequate, there are certainly plenty of others that are not.

<sup>161</sup> <sup>171</sup>First, as I suggested, in the table, above, several discovery responses by both parties violate Rule 26(d). It

is not a valid objection that interrogatories or requests for documents are “premature” if, as is the case here, they were propounded after the time specified in Rule 26(d)(1) or (d)(2) and there was no order specifying the timing of discovery on any specific issues. Rule 26(d)(3) also makes clear that there is no limitation on the sequence of discovery and that a party cannot delay responding to discovery simply because the other party has not yet responded to its discovery. FED. R. CIV. P. 26(d)(3)(B); *see also id.* Advisory Committee Notes, 1970 Amendments. Moreover, it is not an “objection” at all, and certainly not a valid one, that a party may not have a response or responsive documents, yet, or that the party may have to supplement its response later, because Rule 26(e) imposes that very obligation to supplement responses. *See id.* at 26(e).

The parties’ attempts to invoke privileges as the bases for various objections, as indicated in the table, are, likewise, deficient, because they violate the requirements of Rule 26(b)(5)(A)(iii). Conspicuously absent from either parties’ objections based on “privileges” is the required list or log that describes the pertinent documents without disclosing the allegedly privileged communications they contain. FED. R. CIV. P. 26(b)(5)(A)(iii); *PaineWebber Grp., Inc.*, 187 F.3d at 992. Thus, the responses improperly hampered, rather than facilitated, the timely and inexpensive determination of privilege issues. *PaineWebber Grp., Inc.*, 187 F.3d at 992 (the privilege log requirement codified in Rule 26(b)(5) was designed to eliminate time-consuming delays in the determination of privilege issues).

<sup>181</sup> <sup>191</sup>The rest of the discovery responses identified in the table fail the “specificity” requirements of Rules 33(b)(4) and 34(b)(2) in various ways, while utterly failing to carry the objecting party’s burden to demonstrate lack of relevance or undue burdensomeness under Rule 26(b)(1). *St. Paul Reins. Co., Ltd.*, 198 F.R.D. at 511. As the Eighth Circuit Court of Appeals has explained, an objecting party does not have “the unilateral ability to dictate the scope of discovery based on their own view of the parties’ respective theories of the case,” so that a “lack of relevance” objection, without explanation, is contrary to the rules. *Sentis Grp., Inc.*, 763 F.3d at 925. When, as here, an objecting party makes no attempt to “show specifically how ... each interrogatory [or request for production] is not relevant or how each question is overly broad, burdensome or oppressive,” and no attempt to “articulat[e] the particular harm that would accrue if [the responding party] were required to respond to [the proponent’s] discovery requests,” but relies, instead, on “the mere statement ... that the interrogatory [or request for production] was overly broad, burdensome, oppressive and irrelevant,” the response “is not \*187 adequate to voice a successful objection”; instead, the response is an unacceptable “boilerplate” objection. *St. Paul Reins. Co., Ltd.*, 198 F.R.D. at 511–12 (internal quotation marks and citations omitted). Moreover, simply stating that a response is “subject to” one or more general objections does not satisfy

the “specificity” requirement, because, for example, it leaves the propounding party unclear about which of the numerous general objections is purportedly applicable as well as whether the documents or answers provided are complete, or whether responsive documents are being withheld. *See, e.g., FED. R. CIV. P. 34(b)(2)(C)*.

[10] [11] I also reject Griffith’s argument that its general objections to discovery requests or its “boilerplate” objections to certain specific requests were to assure that Griffith was not waiving its rights while the parties met and conferred about the scope of privileges, pertinent time periods, and a myriad of other issues in this complex case. As I pointed out, above, under both *Rule 33* and *34*, any ground not stated in a timely objection is waived, unless the court excuses the failure. *Sellars, 2016 WL 4771087 at \*2*. Indeed, the idea that such general or “boilerplate” objections preserve any objections is an “urban legend.” Jarvey, *Boilerplate Discovery Objections*, 61 *DRAKE L. REV.* at 925–26 (quoting *Carmichael Lodge No. 2103, Benevolent & Protective Order of Elks of U.S. of Am. v. Leonard*, No. CIV S-07-2665 LKK GGH, 2009 WL 1118896, at \*4 (E.D. Cal. Apr. 23, 2009)). Chief Justice Menis E. Ketchum II of the West Virginia Supreme Court of Appeals had particularly harsh yet insightful condemnations for such practices:

Many federal courts have opined that “subject to” or “without waiving” objections are misleading, worthless and without legitimate purpose or effect. They reserve nothing. As one federal judge observed, “The Parties shall not recite a formulaic objection followed by an answer to the request. It has become common practice for a Party to object on the basis of any of the above reasons, and then state that ‘notwithstanding the above,’ the Party will respond to the discovery request, subject to or without waiving such objection. Such an objection and answer preserves nothing and serves only to waste the time and resources of both the Parties and the Court. Further, such practice leaves the requesting Party uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered.”

Chief Justice Menis E. Ketchum II, *Impeding Discovery: Eliminating Worthless Interrogatory Instructions And Objections*, 2012–JUN W. VA. L. 18, 19 (2012) (citation omitted). He then observed,

Our circuit judges are swamped with motions to compel regarding discovery. Stiff sanctions by judges for each violation would have a dramatic effect on these unauthorized boilerplate objections. The word would spread quickly, and the practice would suddenly stop. “Without waiving” and “subject to” objections are cute and tricky but plainly violate the purpose of our *Rules of Civil Procedure*: “to secure just, speedy and inexpensive determination of every action.”

*Id.* at 20 (citation omitted).

Thus, the general objections and the “boilerplate” objections to specific requests did not preserve the parties’ rights, or, at the very least, they ran a substantial risk of delaying and increasing the costs of discovery, because they provided the opposing party with no clue how to begin narrowing the issue, and because the court might have to become involved to determine whether any waiver should be excused. *Sellars, 2016 WL 4771087 at \*2*. A better approach to preserving rights and narrowing the scope of discovery, and one likely to cause less ultimate delay and expense, would be to request an extension of time to respond and to confer on troublesome discovery requests. Yet another approach would have been to request an *ex parte* and *in camera* review of certain documents by a magistrate judge, who might quickly render an opinion on whether the documents in question were discoverable.

### C. Sanctions

[12] This litany of discovery abuses leads to the question of whether sanctions are appropriate for such misconduct. I am not alone \*188 in thinking that more frequent application of sanctions by trial judges might have a beneficial impact. As Chief Justice Kechum wrote,

Civil lawyers who are brave enough to appear in front of juries are becoming extinct. Perhaps they no longer have the time to appear in front of juries because they are dealing with pusillanimous objections to interrogatories and reading pages and pages of mindless interrogatory instructions. *I wish more judges would punish this nonsense*. Even better: I wish judges could force these lawyers who play games with interrogatories to appear before juries. These discovery-abusing lawyers would quickly find that you can’t win a jury trial by being cute or tricky; you only win by doing the hard work.

Chief Justice Ketchum II, *Impeding Discovery*, 2012–JUN W. VA. L. at 21 (emphasis added); *accord* Jarvey, *Boilerplate Discovery Objections*, 61 *DRAKE L. REV.* at 932 (“Judges are in a unique position to deter the use of unethical boilerplate discovery objections. Unlike attorneys, judges may rely on their authority to issue sanctions under *Federal Rule of Civil Procedure 26* and on the inherent power of the court. In order to curb boilerplate objections, judges should be more willing to dole out sanctions against lawyers who abuse the discovery process by issuing these objections.” (footnotes omitted)). On the other hand, as I pointed out at the beginning of this decision, imposing sanctions is an odious task. As one commentator has observed,



Although courts certainly have the power to sanction discovery violators, many are reluctant to impose severe sanctions in the discovery context because of the oft-enunciated policy that cases should be decided on their merits. Also, though they rarely say so, many judges are reluctant to impose sanctions that may adversely affect the professional reputations and livelihoods of lawyers who practice before them.

Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. at 511. I turn to the court's authority to impose sanctions and whether doing so is appropriate in this case.

As I have pointed out, "Rule 26(g) of the Federal Rules of Civil Procedure imposes on counsel and parties an affirmative duty to conduct pretrial discovery in a responsible manner." *St. Paul Reins. Co., Ltd.*, 198 F.R.D. at 515 (citing FED. R. CIV. P. 26(g), Advisory Committee Notes to 1983 Amendments). The Rule specifically requires certification that the responses or objections to discovery requests are "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 26(g)(2)(B). Thus, this Rule allows the court to impose sanctions on the signer of a discovery response when the signing of the response is incomplete, evasive, or objectively unreasonable under the circumstances. *St. Paul Reins. Co., Ltd.*, 198 F.R.D. at 515. Even if the opposing party "did not seek sanctions pursuant FED. R. CIV. P. 26(g), the court has authority to make a *sua sponte* determination as to whether Rule 26(g) sanctions should be imposed." *Id.* Rule 26(g)(3) states, "The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation." FED. R. CIV. P. 26(g)(3). The Eighth Circuit Court of Appeals has rejected the notion "that it is an abuse of discretion for a district court to impose something other than the minimally punitive sanction available within the range of possible sanctions," flatly stating, "[i]t is not." *Sentis Grp., Inc.*, 763 F.3d at 926.

More specifically, as to the basis for determining whether sanctionable conduct has occurred and what sanctions to apply, I have explained as follows:

The Advisory Committee's Notes indicate that the "nature of sanctions is a matter of judicial discretion to be exercised in light of the particular circumstances." FED. R. CIV. P. 26(g), Advisory Committee Notes to the 1983 Amendments. The standard for imposing Rule 26(g) sanctions is objective. The court tests the signer's certification under an objective standard of reasonableness, except that it may inquire into the signer's actual knowledge and motivation to determine whether a discovery request, response or objection was interposed for an improper purpose. \*189 *Oregon RSA No. 6 v. Castle Rock Cellular*, 76 F.3d 1003, 1007 (9th Cir.1996); accord

*Zimmerman v. Bishop Estate*, 25 F.3d 784, 790 (9th Cir.), cert. denied, 513 U.S. 1043, 115 S.Ct. 637, 130 L.Ed.2d 543 (1994). While there is no requirement that the court find bad faith to find improper purpose, see *Oregon RSA No. 6*, 76 F.3d at 1008, outward behavior that manifests improper purpose may be considered in determining objective improper purpose deserving sanction. See *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1366 (9th Cir.1990) (Rule 11 sanctions). The certification by the signer is tested as of the time the discovery paper is signed. The court must strive to avoid the wisdom of hindsight in determining whether the certification was valid at the time of the signature, and all doubts are to be resolved in favor of the signer. See, e.g., *Bergeson v. Dilworth*, 749 F.Supp. 1555, 1566 (D.Kan.1990). However, each signing of a new discovery request, response, or objection must be evaluated in light of the totality of the circumstances known at the time of signing. Therefore, the practical import of Rule 26(g) is to require vigilance by counsel throughout the course of the proceeding. *Chapman & Cole v. Itel Container Int'l, B.V.*, 865 F.2d 676 (5th Cir.), cert. denied, 493 U.S. 872, 110 S.Ct. 201, 107 L.Ed.2d 155 (1989).

*St. Paul Reins. Co., Ltd.*, 198 F.R.D. at 516 (footnotes omitted).

Liguria proposes that, if I conclude that sanctions are appropriate, notwithstanding Liguria's contention that it did not make its responses for any improper purposes, the proper sanction is the submission of a presentation to either (1) a group of civil litigation trial attorneys at the Chicago Bar Association or Illinois State Bar Association, or (2) a group of law students at a Chicago area law school engaged in an advanced civil procedure course covering the rules of discovery. Liguria suggests that such a presentation include the following topics: (a) Rules 26, 33, and 34 of the Federal Rules of Civil Procedure; (b) proper approaches to propounding and responding to discovery requests; and (c) reasons why "boilerplate" objections are improper.

Griffith argues that, as to the matters identified in the Show Cause Order, this case does not involve the sort of extreme misconduct in discovery that should warrant sanctions. Nevertheless, Griffith's counsel professes to having no objection to participating in a continuing legal education program or providing such a program, regarding the problems relating to "boilerplate objections," or to writing an article on those problems for the court to review and approve. Griffith asserts, however, that under the facts of this case to impose a sanction, rather than a voluntary undertaking, would constitute an abuse of discretion.

<sup>13</sup>Ordinarily, I would likely find the parties' use of what they admit are "standard," albeit plainly improper, responses to discovery requests is objective evidence of intent to delay or impede discovery. *St. Paul Reins. Co., Ltd.*, 198 F.R.D. at 517. Although I find that it makes a very poor jury instruction on "intent" for lay jurors, "[i]t is a

well-accepted proposition that one ordinarily intends the natural and probable consequences of one's actions." See, e.g., *Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 955 (8th Cir. 2014). The "natural and probable consequences" of "boilerplate" objections is delay and impediment of discovery, not the narrowing of issues and the avoidance of expense and delay toward which the discovery rules are aimed. Ordinarily, I would also likely find that the impropriety of employing such frivolous objections in every single discovery response also demonstrates the parties' obstructionist attitude toward discovery and would further confirm suspicions that the responses were interposed for an improper purpose. Cf. *St. Paul Reins. Co., Ltd.*, 198 F.R.D. at 517.

I conclude that this is *not* an "ordinary" case where the parties' responses to discovery were not only contrary to the applicable rules and "improper," but warrant some sanction. In this case, I do not have lawyers who are not "brave enough to appear in front of juries," but able trial lawyers; nor do I find that they focused on "pusillanimous objections" as an end in themselves or as part of a campaign to avoid timely and just disposition of this case. Compare Chief Justice \*190 Ketchum II, *Impeding Discovery*, 2012–JUN W. VA. L. at 21. The parties agree, and I find, that they have had a cooperative and professional relationship during discovery, at least until the issues addressed in Griffith's Motion arose. Indeed, it appears to me that counsel for the parties did everything that the court might expect them to do to confer and cooperate to work out issues about the scope of discovery. It is also clear to me that both parties' reliance on improper "boilerplate" objections is the result of a local "culture" of protectionist discovery responses, even though such responses are contrary to the decisions of every court to address them. Notable by their absence from the parties' responses to the Order To Show Cause are citations to any published rulings of any court approving the kind of "boilerplate" responses that the parties used in this case, and the parties did not try to raise frivolous defenses for their conduct when called on it. The fact that the parties were able to work out most of their discovery disputes through consultation and cooperation is a clear indication that their "boilerplate" responses were completely unnecessary to protect any supposed rights or interests, but they do not warrant sanctions, in the circumstances presented, here.

I have suggested, more than once, in this opinion that judges should be more involved in trying to eliminate discovery practices that are improper. Indeed, nearly twenty years ago, a commentator explained that all of the groups of lawyers involved in his conversations with large-firm litigators "pointed to judges as pivotal to changing how the system operates." He cautioned,

Yet it seems clear after talking to the judges about how they view these disputes, as well as after talking to lawyers about the tactics they

deploy, that judicial intervention is not likely to be the answer. Judges do not have the time, resources, or inclination to constantly monitor the discovery process. Stronger judges who were committed to changing the norms of the system would probably help. They will need considerably more resources to do so, however.

Nelson, *The Discovery Process as a Circle of Blame*, 67 *FORDHAM L. REV.* at 804–05. One resource available to judges, when they encounter attorneys willing to do so, is to use those attorneys to spread *proper* practices, rather than *improper* ones

Thus, I strongly encourage counsel for both parties to take the steps that they have volunteered to take to improve discovery practices at their own firms and to educate their colleagues and law students on proper discovery responses. I would be gratified to see the parties prepare presentations to either (1) a group of civil litigation trial attorneys at the Chicago Bar Association or Illinois State Bar Association, or (2) a group of law students at a Chicago area law school engaged in an advanced civil procedure course covering the rules of discovery and, in particular, (a) [Rules 26, 33, and 34 of the Federal Rules of Civil Procedure](#); (b) proper approaches to propounding and responding to discovery requests; and (c) reasons why "boilerplate" objections are improper. Because no sanctions are imposed, I neither require them to do so nor need to review what they intend to do. These are very honorable, highly skilled, extremely professional and trustworthy lawyers. The legal culture of "boilerplate" discovery objections will not change overnight. I trust these lawyers to do their part, as I will do mine.

### III. CONCLUSION

Federal discovery rules and the cases interpreting them uniformly finding the "boilerplate" discovery culture impermissible are not aspirational, they are the law. What needs to be done? I am confident, based on the sincere representations from lead counsel in this case, that they will be ambassadors for changing the "boilerplate" discovery objection culture in both their firms. I also encourage them to change the "boilerplate" culture with other firms that they come up against in litigation. I encourage all lawyers, when they receive "boilerplate" objections, to informally request that opposing counsel withdraw them by citing the significant body of cases that condemn the "boilerplate" discovery practice. If opposing counsel fail to withdraw their "boilerplate" objections, the \*191 lawyers should go to the court and seek relief in the form of significant sanctions—because the offending lawyers have been warned, given a safe harbor to reform and conform their "boilerplate" discovery practices to the law, and failed to

do so.

The second part of this process is for judges to faithfully apply the discovery rules and put an end to “boilerplate” discovery by imposing increasingly severe sanctions to change the culture of discovery abuse. I realize my judicial colleagues, especially state trial court judges, are overwhelmed with cases, deluged with discovery matters, likely sick and tired of them, and lack the resources needed to deal with them in as timely a manner as they aspire to. In my view, the imposition of increasingly severe sanctions will help solve the problems. Lawyers are advocates and trained to push the envelope—rightly so. Judges need to push back, get our judicial heads out of the sand, stop turning a blind eye to the “boilerplate” discovery culture and do our part to solve this cultural discovery “boilerplate” plague. Like Chief Justice Ketchum, I am convinced that “[s]tiff sanctions by judges for each violation would have a dramatic effect on these unauthorized boilerplate objections. The word would spread quickly, and the practice would suddenly stop.”<sup>14</sup>

The addiction to “boilerplate” discovery objections has been exacerbated by an unintended consequence of a 1980 amendment to [Rule 5 of the Federal Rules of Civil Procedure](#). That amendment exempted interrogatories and requests for documents, as well as their responses, from filing with the court. The rationales—“the added expense” of copying and the “serious problems of storage in some districts”—made some sense at the time.<sup>15</sup> However, judges no longer have access to discovery requests and their responses, unless brought to their attention by motion. Thus, because both sides to federal litigation are so often afflicted with this addiction, there is not only no incentive to bring the matter to the court’s attention, there is a perverse incentive to bilaterally succumb to the addiction without the need to ever inform the court of the parties’ “boilerplate” addiction. This makes the discovery of “boilerplate” addiction much more difficult for judges. “Boilerplate” responses cause the very harm that justifies their prohibition, even if neither party brings them to the

court’s attention.

To address the serious problem of “boilerplate” discovery objections, my new Supplemental Trial Management Order advises the lawyers for the parties that “in conducting discovery, form or boilerplate objections shall not be used and, if used, may subject the party and/or its counsel to sanctions.<sup>16</sup> Objections must be specific and state an adequate individualized basis.” The Order also imposes an “affirmative duty to notify the court of alleged discovery abuse” and warns of the possible sanctions for obstructionist discovery conduct.<sup>17</sup>

**\*192** I recall the words of a former U.S. Attorney General in a different context: “Each time a [person] stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, [they] send [ ] forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current which can sweep down the mightiest walls of oppression and resistance.”<sup>18</sup> I pledge to do my part—enough of the warning shots across the bow.

The conduct identified in the Show Cause Order does not warrant sanctions, notwithstanding that the conduct was contrary to the requirements for discovery responses in the Federal Rules of Civil Procedure. NO MORE WARNINGS. IN THE FUTURE, USING “BOILERPLATE” OBJECTIONS TO DISCOVERY IN ANY CASE BEFORE ME PLACES COUNSEL AND THEIR CLIENTS AT RISK FOR SUBSTANTIAL SANCTIONS.

**IT IS SO ORDERED.**

#### All Citations

320 F.R.D. 168, 97 Fed.R.Serv.3d 213

#### Footnotes

<sup>1</sup> As one commentator explained, The hallmark of a boilerplate objection is its generality. The word “boilerplate” refers to “trite, hackneyed writing”—an appropriate definition in light of how boilerplate objections are used. An objection to a discovery request is boilerplate when it merely states the legal grounds for the objection without (1) specifying how the discovery request is deficient and (2) specifying how the objecting party would be harmed if it were forced to respond to the request. For example, a boilerplate objection might state that a discovery request is “irrelevant” or “overly broad” without taking the next step to explain why. These objections are taglines, completely “devoid of any individualized factual analysis.” Often times they are used repetitively in response to multiple discovery requests. Their repeated use as a method of effecting highly uncooperative, scorched-earth discovery battles has earned them the nicknames “shotgun”—and “Rambo”—style objections. The nicknames are indicative of the federal courts’ extreme disfavor of these objections.

Matthew L. Jarvey, *Boilerplate Discovery Objections: How They are Used, Why They are Wrong, and What We Can Do About Them*, 61 *DRAKE L. REV.* 913, 914–16 (2013) (footnotes omitted).

<sup>2</sup> My views on the extent of the scourge and the possible cures are not entirely idiosyncratic—or even new. See, e.g., Stanley P. Santire, *Discovery Objections Abuse In Federal Courts: “... Objecting to Discovery Requests Reflexively—But Not Reflectively ...,”* 54 *AUG HOUS. LAW.* 24 (2016); Hon. Paul W. Grimm and David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 *S.C. L. REV.* 495 (2013); Jarvey, *Boilerplate Discovery Objections*, 61

DRAKE L. REV. 913; Mitchell London, *Resolving the Civil Litigant's Discovery Dilemma*, 26 GEO. J. LEGAL ETHICS. 837 (2013); Chief Justice Menis E. Ketchum II, *Impeding Discovery: Eliminating Worthless Interrogatory Instructions And Objections*, 2012–JUN W. VA. L. 18 (2012); John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547 (2010); John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 565 (2000); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior In Corporate Litigation*, 67 FORDHAM L. REV. 773 (1998); Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996).

For example, I note that, in 1986—a full three decades ago—the A.B.A. Commission on Professionalism “encouraged judges to impose sanctions for abuse of the litigation process, noting that the Federal Rules permit the imposition of sanctions for such abuse.” See Cary, *Rambo Depositions*, 25 HOFSTRA L. REV. at 594 (emphasis added) (citing A.B.A. Comm’n on Professionalism, “... *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 265, 291–92 (1986)). Thus, calls for judges to be more willing to punish discovery abuses came from the bar, as well as from commentators and the bench.

3 London, *Resolving the Civil Litigant's Discovery Dilemma*, 26 GEO. J. LEGAL ETHICS at 851 (footnotes omitted) (quoting *Lee v. Max Int'l, L.L.C.*, 638f3 1318, 1321 (10th Cir. 2011)).

4 01/23/17 Hrg. Tr. 12:15–17.

5 Although I have made no secret of my unhappiness with obstructionist practices in discovery and, on one occasion, I fashioned a sanction for such conduct that the appellate court found too unusual to affirm without more notice to the sanctioned party, I have still rarely imposed sanctions for obstructionist practices in my twenty-two years as a federal district judge and my three years prior to that as a federal magistrate judge. See *Security Nat'l Bank of Sioux City v. Abbott Labs.*, 299 F.R.D. 595 (N.D. Iowa 2014) (requiring an attorney to write and produce a training video that addressed the impropriety of her obstructionist deposition conduct as a sanction for such conduct), *rev'd*, 800 F.3d 936 (8th Cir. 2015) (vacating the sanction for failure to give adequate advance notice of the unusual nature of the sanction being considered); *St. Paul Reins.Co., Ltd., v. Commercial Fin. Corp.*, 197 F.R.D. 620 (N.D. Iowa 2000) (a party's continued assertion of privileges, after once being warned of the impropriety of its assertions, was “without substantial justification,” and warranted the payment of the opposing party's attorney's fees and expenses in bringing a motion to compel as a sanction); *St. Paul Reins.Co., Ltd., v. Commercial Fin. Corp.*, 198 F.R.D. 508 (N.D. Iowa 2000) (requiring an attorney to write an article regarding why his objections to discovery requests were improper and submit such article to bar journals).

6 Jarvey, *Boilerplate Discovery Objections*, 61 DRAKE L. REV. at 936.

7 “Rework” is ends or parts of a product that are cut off and not used in the finished product, but are, instead, mixed back into a later batch of the product.

8 Liguria's Ans. To Df's 1st Set (#116), Doc. Req. 7 does add, presumably as an explanation of overbreadth, “Request No. 7 seeks all communications between Liguria representatives and any distributor of [Griffith's Optimized Pepperoni Seasoning], without regard to the subject matter of the requested communication.”

9 Liguria's Ans. To Df's 2nd Set (#118) Interrog. 23 does add, presumably as an explanation of overbreadth, “to the extent it purports to seek studies which ‘evaluate the effectiveness’ of mixers used by Liguria.”

10 Interestingly, in Df's Ans. To Pl's First Set (#118, Tab A), Doc. Req. 3, Griffith identifies “communications” as “vague and ambiguous,” but Griffith used that term in its own 1st Request For Documents, for example, in Request No. 9, and other discovery requests.

11 The Order To Show Cause also specified that any attorney not arguing Griffith's Motion was allowed to appear by telephone for the “show cause” portion of the hearing. See Order To Show Cause at 1.

12 Francis E. McGovern & E. Allan Lind, *The Discovery Survey*, 51 LAW & CONTEMP. PROBS. 41, 41 (1988)

13 Judges and lawyers must not downplay the costs imposed by discovery:  
The unchecked rise in discovery costs has attracted the attention of corporations, which now list discovery as one of their most pressing concerns when litigation is imminent. This concern is well founded. Discovery costs in U.S. commercial litigation are growing at an explosive rate; estimates indicate they reached \$700 million in 2004, \$1.8 billion in 2006, and \$2.9 billion in 2007. And these figures do not even account for the billions of dollars that corporations pay each year to settle frivolous lawsuits because the burdens of litigating until summary judgment or a favorable verdict are too onerous.  
Beisner, *Discovering a Better Way*, 60 DUKE L.J. at 574 (also discussing economic consequences of the “litigation tax”).

14 Chief Justice Ketchum II, *Impeding Discovery*, 2012–JUN W. VA. L. at 20.

15 See FED. R. CIV. P. 5, Advisory Committee Notes on 1980 Amendment. Of course, the drafters of this 1980 amendment could not have anticipated that copying costs and storage space would be far less of a problem in the electronic age in which lawyers and

judges now work. But unintended consequences of civil rules of procedure, which often render the proposed cure worse than the alleged disease, are nothing new. *See e.g.*, Mark W. Bennett, *Essay: The Grand Poobah And Gorillas In Our Midst: Enhancing Civil Justice In The Federal Courts Courts–Swapping Discovery Procedures In The Federal Rules Of Civil And Criminal Procedure And Other Reforms Like Trial By Agreement*, 15 NEV. L.J., 1293, 1300 (Summer 2015).

16 My new Supplemental Trial Management Order was implemented prior to these issues arising in this case, but it is not applicable, here, because I only started using it in 2017.

17 The portion of the Supplemental Trial Management Order prohibiting “boilerplate” objections continues, as follows:

For example:

1. When claiming privilege or work product, the parties must comply with [FED. R. CIV. P. 26\(b\)\(5\)\(A\)](#).
2. The Court does not recognize “object as to form” as a valid objection to a deposition question; rather, the objecting party must state the basis for the form objection. *e.g.* compound, argumentative, etc.
3. Attorneys cannot respond to any discovery request with something similar to “blanket objections and a statement that discovery would be provided ‘subject to and without’ waiving the objections.” *See, e.g. Network Tallahassee, Inc., v. Embarq Corp.*, 2010 WL 4569897 (N.D. Fla. 2010).

After defining and prohibiting other obstructionist discovery conduct, the Supplemental Trial Management Order imposes an “affirmative duty to notify the court of alleged discovery abuse” and warns of the possibility of sanctions, as follows:

D. **AFFIRMATIVE DUTY TO NOTIFY THE COURT OF ALLEGED DISCOVERY ABUSE.** Any party subjected to obstructionist conduct in discovery or depositions or conduct that the party reasonably believes to be intended to impede, delay, or frustrate the fair examination of deponents or the process of discovery shall promptly file a Report to the Court in writing, advising the Court of the specific nature of the alleged discovery abuse, regardless of whether or not the party intends to seek sanctions on its own motion. The Court will then determine whether to issue a notice to show cause why sanctions should not be imposed, conduct a hearing after notice, and impose sanctions, if appropriate.

E. **SANCTIONS.** Sanctions for obstructionist conduct or other misconduct during discovery may include, but are not limited to, individually or in combination, the following:

1. monetary sanctions;
2. attendance at, or preparation of, a continuing legal education presentation or training video on appropriate and inappropriate discovery conduct tailored to the discovery violation;
3. preparation and submission for publication of a law review or legal journal article on appropriate and inappropriate discovery conduct tailored to the discovery violation;
4. revocation or suspension of *pro hac vice* status or admission to practice in the United States District Court for the Northern District of Iowa;
5. sanctions in [FED. R. CIV. P. 37\(b\)\(2\)\(A\)](#); or
6. any other reasonable sanction.

18 Robert F. Kennedy, Day of Affirmation Address at Cape Town University (June 6, 1966) (transcript available at [www.americanrhetoric.com/speeches/rfkcapetown.htm](http://www.americanrhetoric.com/speeches/rfkcapetown.htm)).

## APPENDIX 3-1

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### Committee Notes to Florida's 2012 and 2019 e-Discovery Rules Amendments

#### **1.200 Committee Notes**

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

#### **1.201 Committee Notes**

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

#### **1.280 Committee Notes**

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

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

Under the proportionality and reasonableness - 13 -

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

#### **1.340 Committee Notes**

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

#### **1.350 Committee Notes**

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

### **1.380 Committee Notes**

**2019 Amendment.** Subdivision (e) of this rule was amended to make it consistent with Federal Rule of Civil Procedure 37(e).

**2012 Amendment.** Subdivision (e) is added to make clear that a party should not be sanctioned for the loss of electronic evidence due to the good-faith operation of an electronic information

system; the language mirrors that of Federal Rule of Civil Procedure 37(e). Nevertheless, the good-faith requirement contained in subdivision (e) should prevent a party from exploiting the routine operation of an information system to thwart discovery obligations by allowing that operation to destroy information that party is required to preserve or produce. In determining good faith, the court may consider any steps taken by the party to comply with court orders, party agreements, or requests to preserve such information.

### **1.410 Committee Notes**

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

## APPENDIX 3-2

### COMPARISON OF FLORIDA AND FEDERAL RULES OF E-DISCOVERY

#### Florida Rules of Civil Procedure

##### **RULE 1.200. PRETRIAL PROCEDURE**

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

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

- (1) the simplification of the issues;
- (2) the necessity or desirability of amendments to the pleadings;

#### Federal Rules of Civil Procedure

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

(a) PURPOSES OF A PRETRIAL CONFERENCE. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

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

(b) SCHEDULING.

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

(A) after receiving the parties' report under Rule 26(f); or

(B) **after consulting** with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) *Time to Issue*. The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) *Contents of the Order*.

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

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

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

**(iii) provide for disclosure, discovery, or preservation of electronically stored information;**

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.



<p>(3) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof;</p> <p>(4) the limitation of the number of expert witnesses;</p> <p>(5) the potential use of juror notebooks; and</p> <p>(6) any matters permitted under subdivision (a) of this rule.</p> <p>(c) Notice. Reasonable notice shall be given for a case management conference, and 20 days' notice shall be given for a pretrial conference. On failure of a party to attend a conference, the court may dismiss the action, strike the pleadings, limit proof or witnesses, or take any other appropriate action. Any documents that the court requires for any conference must be specified in the order. Orders setting pretrial conferences must be uniform throughout the territorial jurisdiction of the court.</p> <p>(d) Pretrial Order. The court must make an order reciting the action taken at a conference and any stipulations made. The order controls the subsequent course of the action unless modified to prevent injustice.</p>	<p>(4) <i>Modifying a Schedule.</i> A schedule may be modified only for good cause and with the judge's consent.</p> <p>(c) ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.</p> <p>(1) <i>Attendance.</i> A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.</p> <p>(2) <i>Matters for Consideration.</i> At any pretrial conference, the court may consider and take appropriate action on the following matters:</p> <p>(A)-(P) OMITTED</p> <p>(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.</p> <p>(e)-(f) OMITTED</p> <p>(2) <i>Imposing Fees and Costs.</i> Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.</p>
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**RULE 1.201. COMPLEX LITIGATION – NEW**

(a) OMITTED

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

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

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

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

(C) the likelihood of settlement;

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

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

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

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

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

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

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

[Remainder of Rule OMITTED ]

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

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

**RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY**

(a) Discovery Methods.

[OMITTED ]

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

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Indemnity Agreements. A party may obtain discovery of the existence and contents of any agreement under which any person may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or to reimburse a party for payments made to satisfy the judgment. Information concerning the agreement is not admissible in evidence at trial by reason of disclosure.

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

[OMITTED (4)-(6) and (c)]

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

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

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

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

(a) REQUIRED DISCLOSURES. [OMITTED]

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

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

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

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

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

**(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or**

**(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).**

[OMITTED (3) – (5) and (c) – (e)]

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

(1) *Conference Timing.* OMITTED.

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities

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

[OMITTED (e) – (g)]

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

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

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

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

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

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

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

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

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

Remainder of Rule *OMITTED*

**RULE 1.340. INTERROGATORIES TO PARTIES**

(a)-(b) OMITTED

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

(d) Effect on Co-Party. OMITTED

(e) Service and Filing. OMITTED

**RULE 33. INTERROGATORIES TO PARTIES**

(a)-(c) OMITTED

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

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

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

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

(b) Procedure. Without leave of court the request may be served on the plaintiff after commencement of the action and on any other party with or after service of the process and initial pleading on that party. The request shall set forth the items to be inspected, either by individual item or category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection or performing the related acts. The party to whom the request is directed shall serve a written response within 30 days after service of the request, except that a defendant may serve a response within 45 days after service of the process and initial pleading on that defendant. The court may allow a shorter or longer time. For each item or category the response shall state that inspection and related activities will be permitted as requested unless the request is objected to, in which event the reasons for the objection shall be stated. If an objection is made to part of an item or category, the part shall be specified. When producing documents, the producing party shall either produce them as they are kept in the usual course of business or shall identify them to correspond with the categories in the request. *A request for electronically stored information may specify the form or forms in which electronically stored information is to be produced. If the responding party objects to a requested form, or if no form is specified*

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

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

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

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

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) PROCEDURE.

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

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

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

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

(2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or – if the request was delivered under Rule 26(d)(2) – within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of*

<p><i>in the request, the responding party must state the form or forms it intends to use. If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.</i> The party submitting the request may move for an order under rule 1.380 concerning any objection, failure to respond to the request, or any part of it, or failure to permit the inspection as requested.</p> <p>(c)-(d) OMITTED</p>	<p><i>Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.</i></p> <p><i>(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:</i></p> <p><i>(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;</i></p> <p><i>(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and</i></p> <p><i>(iii) A party need not produce the same electronically stored information in more than one form.</i></p> <p>(c) NONPARTIES. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.</p>
<p><b><u>RULE 1.380. FAILURE TO MAKE DISCOVERY; SANCTIONS</u></b></p> <p>(a) OMITTED</p> <p>(b) If, <i>after being ordered to do so by the court</i>, a deponent fails to be sworn or to answer a question <i>or produce documents</i>, the failure may be considered a contempt of the court.</p> <p>(c)-(d) OMITTED</p> <p><i>(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:</i></p> <p><i>(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or</i></p> <p><i>(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:</i></p> <p><i>(A) presume that the lost information was unfavorable to the party;</i></p> <p><i>(B) instruct the jury that it may or must presume the information was unfavorable to the party; or</i></p>	<p><b><u>RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS</u></b></p> <p>(a)-(d) OMITTED</p> <p><i>(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:</i></p> <p><i>(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or</i></p> <p><i>(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:</i></p> <p><i>(A) presume that the lost information was unfavorable to the party;</i></p> <p><i>(B) instruct the jury that it may or must presume the information was unfavorable to the party; or</i></p> <p><i>(C) dismiss the action or enter a default judgment.</i></p> <p>(f) OMITTED</p>

<i>(C) dismiss the action or enter a default judgment.</i>	
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**RULE 1.410. SUBPOENA**

(a)-(b) OMITTED

(c) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents ***(including electronically stored information)***, or tangible things designated therein, but the court, on motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion on the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, documents, or tangible things. ***If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A person responding to a subpoena may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue costs or burden. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought or the form requested is not reasonably accessible because of undue costs or burden. If that showing is made, the court may nonetheless order discovery from such sources or in such forms if the requesting party shows good cause, considering the limitations set out in rule 1.280(d)(2). The court may specify conditions of the discovery, including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery.*** A party seeking a production of evidence at trial which would be subject to a subpoena may compel such production by serving a notice to produce such evidence on an adverse party as provided in rule 1.080. Such notice shall have the same effect and be subject to the same limitations as a subpoena served on the party.

(d)-(h) OMITTED

**RULE 45 SUBPOENA**

(d) PROTECTING A PERSON SUBJECT TO A SUBPOENA.  
(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.  
(2) *Command to Produce Materials or Permit Inspection.*  
**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.  
**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:  
(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.  
(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.  
(3) OMITTED  
(e) DUTIES IN RESPONDING TO A SUBPOENA.  
(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:  
**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.  
**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or

	<p>forms.</p> <p><b><i>(C) Electronically Stored Information Produced in Only One Form.</i></b> The person responding need not produce the same electronically stored information in more than one form.</p> <p><b><i>(D) Inaccessible Electronically Stored Information.</i></b> The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.</p> <p>Remainder of Rule 45 OMITTED</p>
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**RULE 1.285. INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS**

(a) Assertion of Privilege as to Inadvertently Disclosed Materials. Any party, person, or entity, after inadvertent disclosure of any materials pursuant to these rules, may thereafter assert any privilege recognized by law as to those materials. This right exists without regard to whether the disclosure was made pursuant to formal demand or informal request. In order to assert the privilege, the party, person, or entity, shall, within 10 days of actually discovering the inadvertent disclosure, serve written notice of the assertion of privilege on the party to whom the materials were disclosed. The notice shall specify with particularity the materials as to which the privilege is asserted, the nature of the privilege asserted, and the date on which the inadvertent disclosure was actually discovered.

(b) Duty of the Party Receiving Notice of an Assertion of Privilege. A party receiving notice of an assertion of privilege under subdivision (a) shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material. The party receiving the notice shall also promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule. That party shall also take reasonable steps to retrieve the materials disclosed. Nothing herein affects any obligation pursuant to R. Regulating Fla. Bar 4-4.4(b).

(c) Right to Challenge Assertion of Privilege. Any party receiving a notice made under subdivision (a) has the right to challenge the assertion of privilege. The grounds for the challenge may include, but are not limited to, the following:

- (1) The materials in question are not privileged.
- (2) The disclosing party, person, or entity lacks standing to assert the privilege.
- (3) The disclosing party, person, or entity has failed to serve timely notice under this rule.
- (4) The circumstances surrounding the production or disclosure of the materials warrant a finding that the disclosing party, person, or entity has waived its assertion that the material is protected by a privilege.

Any party seeking to challenge the assertion of privilege shall do so by serving notice of its challenge on the party, person, or entity asserting the privilege. Notice of the challenge shall be served within 20 days of service of the original notice given by the disclosing party, person, or entity. The notice of the recipient's challenge shall specify the grounds for the challenge. Failure to serve timely notice of challenge is a waiver of the right to challenge.

(d) Effect of Determination that Privilege Applies. When an order is entered determining that materials are privileged or that the right to challenge the privilege

**FED. R. EVID. 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER**

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

- (1) would not be a waiver under this rule if it had been made in a federal proceeding; or
- (2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

- (1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client

<p>has been waived, the court shall direct what shall be done with the materials and any copies so as to preserve all rights of appellate review. The recipient of the materials shall also give prompt notice of the court's determination to any other party, person, or entity to whom it had disclosed the materials.</p>	<p>communications; and (2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.</p>
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## APPENDIX 3-3

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL  
CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA.  
CIRCUIT CIVIL DIVISION "AF"

Plaintiff,

vs.

CASE NO.: 50 CA XXXX MB

Defendant.  
\_\_\_\_\_ /

### **STANDING ORDER ON ELECTRONICALLY STORED INFORMATION DISCOVERY**

The Court understands that Plaintiff designated on Form 1.997 (Civil Cover Sheet) this matter constitutes a business tort, products liability matter, professional malpractice, antitrust/trade regulation, business transaction, intellectual property, shareholder derivative action, securities litigation or trade secrets, and *sua sponte*, pursuant to Fla.R.Civ.P. 1.200, hereby **ORDERS and ADJUDGES**:

1. Plaintiff shall serve this Order upon counsel for Defendant within 20 days of the first appearance of counsel for Defendant, and shall schedule a meet and confer with counsel for Defendant within 60 days of such service.

2. At the meet and confer, both counsel for Plaintiff and Defendant shall be prepared to discuss in detail, and will actually discuss:

- a. Whether this matter should be considered Complex Litigation pursuant to Rule 1.201, including the factors in Rule 1.201(2) as to which there is mutual agreement;
- b. The identity, employment position and employment address of electronically stored information (ESI) custodians who exist for each of their respective clients;
- c. The structure of each of their client's respective computer systems and a descriptive identification of all relevant software, including the

identity and number of servers, computers, electronic devices and email accounts that may contain relevant information or information that would potentially lead to the discovery of admissible evidence in this matter;

- d. The existence and nature of ESI preservation policies, whether, when, and how a litigation hold was placed on ESI, the possibility of agreements regarding the extent to which ESI should be preserved, the form in which such evidence should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources;
- e. The need for an ESI disclosure clawback agreement beyond Fla.R.Civ.P. 1.285;
- f. The scope, estimated cost, and estimated time for completion of ESI discovery required for the claims/counterclaims alleged in accordance with Fla.R.Civ.P. 1.280; and,
- g. Whether any ESI issues may significantly protract this litigation, and if so, how such issues may be most efficiently mitigated.

3. Counsel for the Parties shall jointly prepare and file a short Notice of Compliance confirming they have met the requirements of Para. 1 and 2 of this Order. If the Report is filed within 15 days of the meet and confer, counsel for the parties need take no further action to comply with this Order, absent further motion by the parties or order of this Court. If the Notice of Compliance is not filed within 15 days of the meet and confer, Plaintiff shall notice a Case Management Conference pursuant to 1.200(a) for Uniform Motion Calendar to address the specific issues that have resulted in the lack of compliance.

**DONE AND ORDERED** in Chambers at West Palm Beach, Florida on

\_\_\_\_\_, 20\_\_\_\_\_.

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**EDWARD L. ARTAU**, Circuit Judge

## APPENDIX 3-4

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### STIPULATION ESTABLISHING ELECTRONIC DISCOVERY PROTOCOL

#### I. DEFINITIONS

A. **"Electronically stored information:"** or **"ESI,"** as used herein, means and refers to computer generated information or data of any kind, stored in or on any storage media located on computers, file servers, disks, tape or other real or virtualized devices or media. Non limiting examples of ESI include:

- Digital Communications (e.g., e-mail, voice mail, instant messaging, tweets, etc.);
- E-Mail Server Stores (e.g., Lotus Domino .NSF or Microsoft Exchange .EDB);
- Word Processed Documents (e.g., Word or WordPerfect files and drafts);
- Spreadsheets and tables (e.g., Excel or Lotus 123 worksheets);
- Accounting Application Data (e.g., QuickBooks, Money, Peachtree data);
- Image and Facsimile Files (e.g., .PDF, .TIFF, .JPG, .GIF images);
- Sound Recordings (e.g., .WAV and .MP3 files);
- Video and Animation (e.g., .AVI and .MOY files);
- Databases (e.g., Access, Oracle, SQL Server data, SAP, other);
- Contact and Relationship Management Data (e.g., Outlook, ACT!);
- Calendar and Diary Application Data (e.g., Outlook PST, blog entries);
- Online Access Data (e.g., Temporary Internet Files, History, Cookies) ;
- Presentations (e.g., PowerPoint, Corel Presentations);
- Network Access and Server Activity Logs;
- Project Management Application Data;
- Computer Aided Design/Drawing Files; and
- Backup and Archival Files (e.g., Veritas, Zip, .GHQ).

B. **"Native data format"** means and refers to the format of ESI in which it was generated and/or as used by the producing party in the usual course of its business and in its regularly conducted activities.

C. **"Metadata"** means and refers to information about information or data about data, and includes, without limitation: (i) information embedded in or associated

with a native file that is not ordinarily viewable or printable from the application that generated, edited, or modified such native file which describes the characteristics, origins, usage and/or validity of the electronic file and/or (ii) information generated automatically by the operation of a computer or other information technology system when a native file is created, modified, transmitted, deleted or otherwise manipulated by a user of such system.

**D. "Static Image"** means or refers to a representation of ESI produced by converting a native file into a standard image format capable of being viewed and printed on standard computer systems.

**E. "Documents"** includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data, data records or data compilations-stored in any medium (including cloud-based or cloud sourced media) from which information can be obtained.

**F. "Media"** means an object or device, real or virtualized, including but not limited to a disc, tape, computer or other device, on which data is or was stored.

## **II. SEARCH TERMS FOR ELECTRONIC DOCUMENTS**

The parties agree that they will cooperate in good faith regarding the disclosure and formulation of appropriate search methodology, terms and protocols in advance of any ESI search. With the objective of limiting the scope of review and production, and thereby reducing discovery burdens, the parties agree to meet and confer as early as possible, and in advance of any producing party search commencement, to discuss, *inter alia*:

- Search methodology (Boolean, technology assisted review)
- Pre-search-commencement disclosure of all search terms, including semantic synonyms. Semantic synonyms shall mean without limitation code words, terms,



phrases or illustrations, acronyms, abbreviations, or non-language alphanumeric associational references to relevant ESI, or information that may lead to relevant ESI

- Search protocol (algorithm selection, etc.)
- Post-search error sampling and sampling/testing reports.

The parties will continue to meet and confer regarding any search process issues as necessary and appropriate. Nothing in this protocol, or the subsequent designation of any search terms, shall operate to limit a party's obligations under the Federal Rules of Civil Procedure and applicable decisional authority to otherwise search for and produce any requested non-privileged relevant evidence, or information that could lead to relevant evidence. This ESI protocol does not address or resolve any other objection to the scope of the parties' respective discovery requests.

### **III. FORMAT OF PRODUCTION**

**A. Native File Format.** The parties agree that production will be made in native format, as the ESI exists on the producing party's computer system. Where structured data (e.g., data from a database) is requested, appropriate queries will be used to extract relevant data from any such database, which data shall match specified criteria, and returning specified fields, in a form and format that is verifiably responsive and readable by the use of commonly available tools. If a producing party asserts that certain ESI is inaccessible or otherwise unnecessary or inadvisable under the circumstances, or if the requesting party asserts that, following production, certain ESI is not reasonably usable, the parties shall meet and confer with their respective technology experts to discuss resolving such assertions. If the parties cannot resolve any such disputes after such a meet and confer has taken place, the issue shall be presented to the Court for resolution.

**B. Document Image Format.** Unless otherwise agreed to in writing by a requesting party, ESI shall be produced in native data format, together with all associated metadata. In such cases where production in native format is not possible or advisable (e.g., redacted documents), native format files shall be converted to static images and each page thereof saved electronically as a single-page "TIFF" image that reflects how the source document would have appeared if printed out to a printer attached to a computer viewing the file. Accompanying this TIFF shall be a multipage text (.TXT) file containing searchable text from the native file, and the metadata as discussed later in this document. Load files of the static images should be created and produced together with their associated static images to facilitate the use of the produced images by a document management or litigation support database system. If voluminous TIFF production is anticipated, the parties shall meet and confer to determine how such production is to be made reasonably usable by the requesting party. The parties shall meet and confer to the extent reasonably necessary to facilitate the import and use of the produced materials with commercially available document management or litigation support software.

**C. Production of Physical Documents.** Documents or records which either were originally generated or instantiated as ESI but now only exist in physical hard-copy format, or documents or records that were originally generated in hard-copy format shall be converted to a single page .TIFF file and produced following the same protocols set forth herein or otherwise agreed to by the parties.

**D. Document Unitization.** For file or records not produced in their native format, each page of a document shall be electronically saved as an image file. If a document consists of more than one page, the unitization of the document and any

attachments and/or affixed notes shall be maintained as it existed in the original when creating the image files.

**E. Duplicates.** To the extent that exact duplicate documents (based on MD5 or SHA- I hash values) reside within a party's ESI dataset, each party is only required to produce a single copy of a responsive document or record. ESI with differing file names but identical hash values shall not be considered duplicates. Exact duplicate shall mean bit-for-bit identity with both document content together with all associated metadata. Where any such documents have attachments, hash values must be identical for both the document-plus-attachment (including associated metadata) as well as for any attachment (including associated metadata) standing alone. If requested, the parties will produce a spreadsheet identifying additional custodians who had a copy of the produced document.

**F. Color.** For files not produced in their native format, if an original document contains color, the producing party shall produce color image(s) for each such document if reasonably feasible.

**G. Bates Numbering and Other Unique Identifiers.** For files not produced in their native format, each page of a produced document shall have a legible, unique page identifier ("Bates Number") electronically "burned" onto the TIF image in such a manner that information from the source document is not obliterated, concealed, or interfered with. There shall be no other legend or stamp placed on the document image unless a document qualifies for confidential treatment pursuant to the terms of a Protective Order entered by this Court in this litigation, or has been redacted in accordance with applicable law or Court order. In the case of confidential materials as defined in a Protective Order, or materials redacted in accordance with applicable law or Court order, a designation may

be "burned" onto the document's image at a location that does not obliterate or obscure any information from the source document. Any ESI produced in native data format shall be placed in a Logical Evidence Container that is Bates numbered, or the storage device (i.e., CD, USB, hard drive) containing such files shall be so Bates numbered. For purposes of further use in depositions, discussions or any court proceedings, the hash value of any document or ESI will constitute its unique controlling identifier. Alternately, if Bates numbers per document are desired, a spreadsheet may be created providing a Bates number to hash relationship.

**H. Production Media.** Documents shall be produced on CD-ROM, DVD, external hard drive (with standard PC compatible interface), or such other readily accessible computer or electronic media as the parties may hereafter agree upon (the "Production Media"). Each item of Production Media shall include: (1) text referencing that it was produced in \_\_\_\_\_ (\*:\*\*cv\*\*\*\*), (2) the type of materials on the media (e.g., "Documents," "OCR Text," "Objective Coding," etc.), (3) the production date, and (4) the Bates number range of the materials contained on such Production Media item. The documents contained on the media shall be organized and identified by custodian, where applicable.

**I. Electronic Text Files.** For files not produced in their native format, text files for produced documents shall be produced reflecting the full text that has been electronically extracted from the original, native electronic files ("Extracted Text"). The Extracted Text shall be provided in ASCII text format and shall be labeled and produced on Production Media in accordance with the provisions of paragraph II.H above, "Production Media." The text files will be named with the unique Bates number of the

first page of the corresponding document followed by the extension ".txt."

**J. Metadata.** The parties agree that the production of Metadata produced will be provided in connection with native data format ESI requested, and includes without limitation, file, application and system metadata. Where non-native format data is produced, the following list identifies the Metadata fields that will be produced (to the extent available):

- Document number or Production number (including the document start and document end numbers). This should use the standard Bates number in accordance with those used in previous productions;
- BeginAttach;
- EndAttach;
- Title/Subject;
- Sent/Date and Time (for emails only);
- Last Modified Date and Time Created Date and Time (for E-docs);
- Received Date and Time (for emails only);
- Author;
- Recipients;
- cc;;
- bcc;;
- Source (custodian);
- Hash Value;
- File Path;
- Media (type of media that the document was stored on when it was collected);

- Page Count;
- Original File Name;
- Doc extension;
- Full Text;
- Accessed Date & Time; and
- Last Print Date.

**K. Attachments.** Email attachments and embedded files must be mapped to their parent by the Document or Production number. If attachments and embedded files are combined with their parent documents, then "BeginAttach" and "EndAttach" fields listing the unique beginning and end number for each attachment or embedded document must be included.

**L. Structured data.** To the extent a response to discovery requires production of discoverable electronic information contained in a database, in lieu of producing the database, the parties agree to meet and confer to, with an understanding of which fields are relevant, agree upon a set of queries to be made for discoverable information and generate a report in a reasonably usable and exportable electronic file (e.g., Excel or CSV format) for review by the requesting party or counsel. Upon review of the report(s), the requesting party may make reasonable requests for additional information to explain the database schema, codes, abbreviations, and different report formats or to request specific data from identified fields.

#### **IV. OBJECTIONS TO ESI PRODUCTION**

**A.** For files not produced in their native format, documents that present imaging or format production problems shall be promptly identified and disclosed to the requesting party;

the parties shall then meet and confer to attempt to resolve the problems.

**B.** If either party objects to producing the requested information on the grounds that such information is not reasonably accessible because of undue burden or cost, or because production in the requested format is asserted to be not reasonably accessible because of undue burden or cost, and before asserting such an objection, the responding party will inform the requesting party of the format in which it is willing to produce it, the nature and location of the information claimed to not be reasonably accessible, the reason(s) why the requested form of production would impose an undue burden or is unreasonably costly, and afford the requesting party 10 business days from receipt of such notice to propose an alternative means of compliance with the request. Such proposal may include alternative cost estimates for ESI discovery production, may offer a proposal for ESI discovery cost allocation, or both. Notwithstanding anything contained herein to the contrary, a producing party shall not produce ESI in a format not requested or designated by the requesting party unless (i) the parties have met and conferred, and, having been unable to resolve such format production conflict at such meet and confer session, (ii) prior to referral to and resolution of such issue by the court.

**C.** If a party believes that responsive ESI no longer exists in its original format, or is no longer retrievable, the responding party shall explain where and when it was last retrievable in its original format, and disclose the circumstances surrounding the change in status of that ESI, including the date of such status change, the person or persons responsible for such state change, the reason or reasons such ESI is no longer retrievable in that format, and whether any backup or copy of such original ESI exists, together with the location and the custodian thereof.

**V. DESIGNATED ESI LIAISON**

The parties shall identify a person ("Designated ESI Liaison") who is familiar with a party's:

**A.** Email systems; blogs; social networking systems, instant messaging; Short Message Service (**SMS**) systems; word processing systems; spreadsheet and database systems (including the database's dictionary, and the manner in which such program records transactional history in respect to deleted records); system history files, cache files, and cookies, graphics, animation, or document presentation systems; calendar systems; voice mail systems, including specifically, whether such systems include ESI; data files; program files; internet systems; and intranet systems.

**B.** Information security systems, including access and identity authentication, encryption, secure communications or storage, and other information and data protection and technology deployments, where appropriate.

**C.** Storage systems, including whether ESI storage is cloud, server based, or otherwise virtualized, and also including, without limitation, individual hard drives, home computers, "laptop" or "notebook" computers, personal digital assistants, pagers, mobile telephones, or removable /portable storage devices, such as CD-ROMs, DVDs, "floppy" disks, zip drives, tape drives, external hard drives, flash thumb or "key" drives, or external service providers.

**D.** Back up and archival systems, whether physical or virtualized, and including without limitation continuous data protection, business continuity, disaster recovery systems, whether such systems are onsite, offsite, maintained using one or more third-party vendors, or cloud based. The parties, including the designated ESI person(s), shall meet and



confer to the extent necessary to discuss the back-up routine, application, and process and location of storage media, whether the ESI is compressed, encrypted, and the type of device or object in or on which it is recorded (e.g., whether it uses sequential or random access), and whether software that is capable of rendering it into usable form without undue expense is within the party's possession, custody, or control.

**E.** Obsolete or "legacy" systems containing ESI and the extent, if any, to which such ESI was copied or transferred to new or replacement systems.

**F.** Current and historical website information, including uncompiled source code used to generate such web site information, customer information inputted by or through such current or historical web site information, and also including any potentially relevant or discoverable information contained on that or those site(s), as well as systems to back up, archive, store, or retain superseded, deleted, or removed web pages, and policies regarding allowing third parties' sites to archive client website data.

**G.** ESI erasure, modification, or recovery mechanisms, such as metadata scrubbers, wiping programs , and including without limitation other programs that destroy, repeatedly overwrite or otherwise render unreadable or uninterpretable all of or portions of real or virtualized storage media in order to render such erased information irretrievable, and all policies in place during the relevant time period regarding the use of such processes and software , as well as recovery programs that can defeat scrubbing, thereby recovering deleted, but inadvertently produced ESL

**H.** Policies regarding document and record management, including the retention or destruction of relevant ESI for any such time that there exists a reasonable expectation of foreseeable litigation in connection with such documents and records.

I. "Litigation hold" policies that are instituted when a claim is reasonably anticipated, including all such policies that have been instituted, and the date on which they were instituted.

J. The identity of custodians of relevant ESI, including "key persons" and related staff members, and the information technology or information systems personnel, vendors, or subcontractors who are best able to describe the client's information technology system. The identity of vendors or subcontractors who store ESI for, or provide services or applications to, Defendant or any person acting on behalf of Defendant; the nature, amount, and description of the ESI stored by those vendors or subcontractors; contractual or other agreements that permit Defendant to impose a "litigation hold" on such ESI; whether or not such a "litigation hold" has been placed on such ESI; and, if not, why not.

## **VI. PRIVILEGE AND WORK PRODUCT CLAIMS**

In an effort to avoid unnecessary expense and burden, the parties agree that, for documents redacted or withheld from production on the basis of attorney-client privilege, work product doctrine and/or any other applicable privilege, the producing party will prepare a summary log containing the file, system and application metadata information set forth herein, for each document, record, etc. (except for full text), to the extent such information exists.

Within a reasonable time following the receipt of such a summary log, a receiving party may identify particular documents that it believes require further explanation. The receiving party seeking further information shall explain in writing the need for such information and state precisely each document (by Bates number) for which it seeks this

information. Within fourteen (14) days of such a request, the producing party must either (i) produce a full log for the requested documents or (ii) challenge the request. If a party challenges a request for further information, the parties shall meet and confer to try to reach a mutually agreeable solution. If they cannot agree, the matter shall be brought to the Court. All other issues of privilege, including the inadvertent production of privileged or protected documents or information, shall be governed by the Protective Order entered by the Court in this litigation.

Dated: \_\_\_\_\_ By: \_\_\_\_\_

Dated: \_\_\_\_\_ By: \_\_\_\_\_

## APPENDIX 6-1

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### 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 matters 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.

## APPENDIX 7-1

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### GUIDELINES REGARDING COMPULSORY MEDICAL EXAMINATIONS CONDUCTED PURSUANT TO *FLA. R. CIV. P. 1.360(A)(1)(A)* & IF ORDERED (B), AS WELL AS 1.360(B) AND 1.390(B) & (C)<sup>541</sup>

[For counsel appearing before the Civil Divisions of the 9th Circuit Court in Orange County]

In order to assist counsel for all parties seeking to invoke the privileges and protections afforded under *Fla. R. Civ. P. 1.360*, the Court herein addresses the most frequently disputed matters that are brought before the Court.

#### “Independent” vs. Examination Requested by Defense

The examination under the Rule is a Compulsory Examination and not an Independent Examination. The physician or healthcare provider was not chosen by the Court. The examination must not be referred to in front of the jury as an “independent medical exam.”

#### Request for, Objections to and Hearings on

Requests for an examination must set forth the time, place, manner, conditions and scope of the examination as well as the name of and the qualifications of the person conducting the examination with specificity. **If examinations under these rules are requested such written request should be made no later than 70 days before the pretrial date to allow time for objections, hearings on same and an opportunity to reset the examination.** Objections to “Examination of Persons” under *Fla. R. Civ. P. 1.360(a)(1)(A)* must be filed no later than 30 days from the written request assuming service of process has occurred at least 15 days prior to the request being served. The objections must state the specific reasons for the objections. A hearing must be immediately requested on any objection filed. Failure to set the objection for immediate hearing will be deemed an “Abandonment of the Request” under the rules. Once the Plaintiff files the specific objection, the burden is on the Defendant to call up the objection for hearing if they cannot work it out.

Examinations sought under *Fla. R. Civ. P. 1.360(a)(1)(B)* [non-physical condition] must be obtained with an order from this Court, or with a written agreement of all parties. Please make certain the time, place, manner, conditions, and scope of the examination as well as the name of

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<sup>541</sup> These “Guidelines” are published to assist trial counsel with issues that routinely come before the Civil Courts involving expert examinations of injured parties and discovery of those expert opinions. Counsels are not precluded from filing the appropriate motions and obtaining a hearing before the Court on a particular case should the facts of that case, in good faith, suggest that these standard provisions should not control.

and the qualifications of the person conducting the examination are set forth with specificity. See, Maddox v. Bullard, 141 So.3d 1264 (Fla. 5th DCA July 11, 2014) [Order on psychological examination reversed because specifics were not set forth in the order including the “manner, conditions or scope of the examination thereby, in effect, giving the psychologist ‘care blanche’ ....”]

### The Examination

The date and time of the examination must be coordinated with opposing counsel. If the attorneys cannot agree on a mutually convenient date for the examination to occur within 45 days of the request, the Court, upon written motion, will pick the date without consultation with counsels’ calendars.

### **Location of Examination**

The examination should occur in the county where the case is being tried absent agreement of counsel to the contrary. An out-of-county examination must be approved by the Court after an evidentiary hearing and the proper record having been made. While requiring an in-county exam is not a hard and fast, inflexible rule, it is generally well within the Court’s discretion. See *McKenney v. Airport Rent-A-Car*, 686 So. 2d 771 (Fla. 4<sup>th</sup> DCA 1997). Generally, if an out-of-county examination is to be conducted, the transportation and loss of work expense will have to be borne by the party requesting the examination.

A plaintiff who was a resident of Florida and who has now moved out of State, or who was a guest in State may be requested to undergo a CME. Knowing that such a request is permitted under the rules and is a normal process of litigation, attorneys for the Plaintiff should notify opposing counsel when they learn that their client is going to move out of State to allow for an examination before the party moves. A request that an out-of-state examination be done if not agreed to, will require a hearing.

Multiple factors will be considered by the Court, not the least of which is whether or not opposing counsel was notified that plaintiff was permanently moving before he/she moved. While it may be an inconvenience and an expense to plaintiff to return to Florida for an examination, it is also an inconvenience and an expense to defendant to have the defendant’s examining doctor have to travel to Florida for the trial to testify. Factors such as the cooperation of Plaintiff, timeliness of the requested examination, type and availability of the physician or expert needed for the condition, whether it is an initial or subsequent or updated examination, whether it is in conjunction with a deposition or mediation that is also scheduled, and the cost as well as who will be paying the cost will be considered and evaluated. See, *Goeddel v. Davis*, 993 So.2d 99 (Fla. 5<sup>th</sup> DCA 2008) [clarifying *Tsutras* to say that the examination must be at a “reasonable place,” not that it required Plaintiff to return to forum especially after he had already come to Florida for a deposition]; See also, *Tsutras v. Duhe*, 85 So2d 979 (Fla. 5<sup>th</sup> DCA 1997) If Plaintiff is out-of-state, the CME should be coordinated with a trip to Florida either for his/her deposition or mediation. The Court can award the reasonable expense of the travel if deemed appropriate.

### **Persons Who May Be Present at the Examination**

One of Plaintiff's counsel or a representative thereof, a videographer, a court reporter, an interpreter, if necessary, and/or if a minor, a parent or guardian, may attend the compulsory medical examination. *See Broyles v. Reilley*, 695 So. 2d 832 (Fla. 2d DCA 1997). Audio tape recordings are also permitted by Plaintiff. *See Palank v. CSX Transp. Inc.*, 657 So. 2d 48 (Fla. 4<sup>th</sup> DCA 1995). No other persons may attend without specific order of the Court. **Plaintiff's counsel will notify, in writing within 7 days of the examination, the names, relationship to the plaintiff, and number of persons who will be present so that an examining room of sufficient size can be reserved.** The presence of these third parties is premised upon a requirement that they will not interfere with the doctor's examination. *See Bacallao v. Dauphin*, 963 So. 2d 962 (Fla. 3d DCA 2007). **To that end, no person present may interrupt, enter or leave the examining room during the examination, or vocalize in any matter.** No communication vocally, in writing, or in any other manner may occur between or amongst the party being examined and anybody else in the examining room except the examiner or individuals that she/he deems necessary for the examination.

### **Number of Examinations**

Generally, a party will be limited to one examination in a specialty. A second examination will only be allowed upon good cause being shown. *Royal Caribbean Cruises, Ltd. V. Cox*, 974 So2d 462 (Fla. 3<sup>rd</sup> DCA 2008). However, when there are multiple defendants, from separate accidents, and the allegation alleges that the injuries from the three accidents are "indivisible and superimposed upon one another and the plaintiff is unable to apportion her damages between them" each defendant may be entitled to a separate CME. *Goicochea v. Lopez*, 39 Fla. L. Weekly D1245b (Fla. 3<sup>rd</sup> DCA June 11, 2014) [noting that plaintiff had "pitted codefendant against codefendant."]

### **Videotape and Stenographic Record of Examination**

As noted above, a person being examined may be accompanied by a videographer, certified court reporter, and/or interpreter. The recordings are the property of the legal representative of the person being examined and are not discoverable without further order of this Court. The party requesting the examination is not permitted to record or video tape the examination.

### **Items and Information to Be Brought**

The person being examined is not required to bring any medical records, diagnostic films or studies or aids or reports with him/her.<sup>542</sup> *See Franklin v. Nationwide Mut. Fire Ins. Co.*, 566 So.

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<sup>542</sup> If the original records, films or other diagnostic aids are in the actual possession of the party, or his/her guardian, being examined, those records would have to be produced at the time of the examination upon proper written request.

2d 529 (Fla. 1<sup>st</sup> DCA 1990) (requesting party must obtain records through normal discovery process). *See also Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855 (Fla. 1994) (proper for injured party to sign appropriately limited release for out-of-state medical records where subpoenas have been ignored). The person being examined should have a form of identification to verify their identity if requested. If a patient information sheet was forwarded to counsel for the party to be examined at least 7 business days before the date for the examination, the party to be examined should bring the completed information sheet with them.

**Written intake forms or histories that are deemed necessary by the examiner must be provided to counsel for the party to be examined no later than 7 days prior to the exam.** These forms can be reviewed by counsel and completed by the party to be examined and **must be brought to the office of the examiner on the day of the exam.** The examining physician may question the party about entries made on the form regarding medical issues. *See Bozman v. Rogers*, 640 So. 2d 180 (Fla. 1<sup>st</sup> DCA 1994) (court could require party being examined to provide all “appropriate” information by filling out forms and answering questions at CME).

The party being examined will not be required to provide information as to when or why they retained counsel. Further, while they will not be required to respond to questions regarding who was at fault in the accident, they will need to respond to inquiry from the healthcare provider regarding the mechanics of the accident and their body movements within the vehicle or at the time of the incident. They will be required to provide their medical history without limitation as to time frame and a work history with regard to the physical attributes and activities of their present and past occupations and hobbies.

If the person to be examined is not fluent in English and if the examiner is not fluent in the language of the person being examined a certified interpreter must be utilized to interpret the examination. The expense of the interpreter will be borne by the party requesting the examination.

### **Limitations on Examination**

The examiner will be limited to non-invasive procedures unless a prior order from the court has been obtained and will further be limited to the extent of the examination that was set forth in the “Request for Examination” and/or Order allowing the examination. Neither an examination nor subsequent opinions resulting from the examination outside of the examiner’s specialty will be permitted.

### **Times for the Examination**

While an expert’s time is valuable, so is the time of the party who is being examined. The party being examined should arrive no later than 15 minutes before the start time of the examination. Examinations which have been scheduled for a specific time should commence within 30 minutes of that time. The party who was to be examined will be free to leave the examiner’s office if she/he has not been called in for the examination after having waited for 30 minutes from the published start time of the examination.

## **Expert Reports and Anticipated Discovery and Testimony**

### **Subpoenas**

Retained experts must be produced for discovery deposition without the necessity of a subpoena. If specific items are to be brought to the deposition by the retained expert witness, opposing counsel must be notified well in advance of the deposition.

All experts should be under subpoena for trial. The Court cannot force a witness to appear who is not under subpoena.

### **Written Reports**

Pursuant to *Fla. R. Civ. P.* 1.360(b) a “**detailed written report**” will be issued by the examining physician or healthcare provider **and provided to all counsel no later than 14 business days after the day of the examination.** As noted in the rule, “...if an examiner fails or refuses to make a report, the court may exclude the examiner’s testimony if offered at the trial.”

The party requesting the examination shall also provide to opposing counsel, at the time the examination is scheduled, no less than three dates when the examiner will be available for oral deposition. Should any of the dates be within 14 days of the examination the above referred to report shall be provided to deposing counsel no later than 5 days before the deposition date.

No report under *Fla. R. Civ. P.* 1.360 will be admissible at trial absent a stipulation by the parties.

### **Opinions Not Contained in Written Reports**

Experts rendering opinions under this rule will be prohibited from expressing opinions, diagnostic impressions, causation opinions and other conclusions that are not contained within the written report. Any changes of opinions or conclusions based on new information must be made known to opposing counsel immediately, a revised or supplemental report provided and dates for updated depositions must also be provided. At trial, failure to have taken all immediate, timely and reasonable steps to advise opposing counsel of changes in experts opinions or conclusions will mitigate against allowing such testimony. *See Office Depot v. Miller*, 584 So. 2d 587 (Fla. 4<sup>th</sup> DCA 1991).

### **Expert Fees and Charges**

The Court will not require counsel to tender fees for discovery or trial testimony in advance of or as a condition of the examiner appearing. However, the Court does require full payment to be remitted to the examiner no later than 10 business days from receipt of the invoice from the examiner’s office.

The retaining party is free to compensate an expert witness any amount they deem appropriate or any amount which they have agreed by contract to pay. The Court will only require opposing

counsel to pay a reasonable fee for the time reserved or the time used whichever is less. If counsel and the examiner can agree on such a fee, that fee will apply. If no agreement can be reached, the Court will, upon proper motion and hearing and notice to all parties of interest, including the examiner, establish a reasonable fee for the services. In some cases, this may involve an evidentiary hearing as to the reasonable amount of the fee and the time expended. Be sure to advise the Judicial Assistant as to how much time will be needed. See *Fla. R. Civ. P.* 1.390(c)

We gratefully acknowledge that these Guidelines were prepared by the Honorable John Kest and adopted, with minor changes, by the 9<sup>th</sup> Circuit Court Civil Division.

## APPENDIX 7-2

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**FORM ORDER ON**  
**MOTIONS TO COMPEL COMPULSORY MEDICAL EXAMINATIONS**

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.:

,

Plaintiff(s),

vs.

,

Defendant(s).

\_\_\_\_\_ /

**ORDER REGARDING RULE 1.360 EXAMINATION**<sup>543</sup>

Pursuant to Florida Rule of Civil Procedure 1.360 (“Examination of Persons”), Defendant(s) counsel has notified Plaintiff(s) counsel that the Plaintiff, \_\_\_\_\_ is requested to present for a noninvasive medical examination as follows:

Examiner:

Address:

Date:

Time:

Scope:

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<sup>543</sup> This Order is subject to modification based upon the unique circumstances of each case, upon motion of any party.



**THE FOLLOWING CONDITIONS ARE TO BE OBSERVED BY ALL PARTIES INVOLVED:**

1. This examination is not a deposition so the examiner shall be limited to that information reasonably necessary to conduct the specialty-appropriate examination and evaluation, including a brief medical history as well as present complaints. The examination is to be limited to the specific medical or psychological conditions in controversy and unless modified by another court order, such examination will be the only exam for the specific conditions or issues in controversy (without limiting the possibility of multiple specialties). No invasive testing shall be performed without informed consent by the Plaintiff/examinee, or further Order of court.

2. The examinee will not be required to complete any forms upon arrival at the examiner's office. The examinee will furnish the doctor with name, address, and date of birth. Questions pertaining to present medical complaints, mechanism of injury and prior/subsequent similar injuries involved in this action are permitted, limited to the areas of complaints. Questions pertaining to "fault" such as facts and circumstances as to how the injury complained of occurred, when the Plaintiff hired his/her attorney, who referred the Plaintiff to any doctor, and what the Plaintiff told his attorney, investigators, witnesses or treating physicians or other health care providers are not permitted.

3. It shall be the defense attorney's responsibility to provide the examiner with all medical records, imaging studies, test results, and the like, which the defense wants the examiner to review and rely upon as part of the examination. Unless he or she has exclusive control of any original records or imaging studies, Plaintiff shall not be required to bring anything to the exam other than valid identification (eg. Driver's License, Official Florida Identification Card or government-issued Passport).

4. Plaintiff is permitted to have his/her attorney (and spouse, or parent, or other representative) present for the examination, provided that only one of these listed non-attorney persons may attend. Such persons may unobtrusively observe the examination, unless the examiner or defense

counsel establishes a case-specific reason why such person's presence would be disruptive, and that no other qualified individual in the area would be willing to conduct the examination with such person present. In the case of a neuropsychological exam, all observers shall watch and listen from an adjacent room if available, or by video feed. If the examination is to be recorded or observed by others, the request or response of the examinee's attorney shall include the number of people attending, their role, and the methods of recording.

5. Plaintiff's counsel (or a representative) may videotape the examination and/or also send a court reporter and/or a videographer to the examination, provided that they do not interfere with the examination.

6. Neither Defendant's attorney nor any of Defendant's representatives may attend, observe, record or video the exam. Only if the video is identified as impeachment material for use at trial may the defense counsel obtain a copy. The medical examiner shall not be entitled to any payment of an additional fee or accommodation fee from the Plaintiff or his/her counsel, simply because of the presence of legally permitted third parties.

7. If a videotape or digital recording is made of the examination by counsel for Plaintiff, it is considered work-product, and neither the defense nor the examiner is entitled to a copy, unless and until same is designated as (or reasonably expected to become) trial evidence, subject to discovery only upon a showing of need and undue hardship.

8. The examining physician shall prepare a detailed written reporting setting forth all of the examining physician's findings, including all tests made, diagnoses and conclusions. The report of the examiner shall be sent to Plaintiff's counsel, as required by Rule 1.360(b), within 30 days of the examination unless otherwise agreed between counsel for the parties or ordered by the court due to special circumstances.

8a. If the examination involves neuropsychological testing: In addition to the report, the examiner

shall provide all raw data, including copies of all notes, tests, test results, scoring and test protocols, to Plaintiff's treating or retained psychologist or neuropsychologist, who must return them to the defense examiner at the conclusion of this case.

9. All protected health information generated or obtained by the examiner shall be kept in accordance with HIPPA requirements and shall not be disseminated by the examiner or defense counsel to any other person or entity not a party to this case without a specific order from this court.

10. The defense doctor shall not be identified as "independent", "appointed by the court" or the like. The examination shall be referred to as a "Compulsory Medical Examination."

11. Plaintiff shall not be required to wait any longer than thirty (30) minutes for the compulsory examination to begin from the start time referenced above. Likewise, the Compulsory Medical Examination doctor is not required to wait any longer than thirty (30) minutes from the start time referenced above for the Plaintiff to arrive. If there is an emergency by either the physician or the Plaintiff, each person shall immediately notify their respective legal representative with the reason for the need to reschedule.

12. Defense counsel must provide the examiner with a copy of this Order and explain the need for the examiner's compliance.

DONE AND ORDERED at, Palm Beach County, Florida, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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CIRCUIT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

**COUNSEL LIST**

# APPENDIX 11-1

## SELECTED “FRAUD ON THE COURT” CASES

The following chart summarizes how Florida’s district courts of appeal have addressed circuit-court findings concerning allegations of fraud on the court. The chart contains representative cases in the various district courts affirming the sanction of dismissal, reversing the sanction of dismissal, and reversing the denial of sanctions for fraud on the court. While all the district courts follow the same basic law for the sanction of dismissal for fraud on the court, the decision on a case-by-case basis and district by district basis has nuance that is worthy of considering when faced with a case involving the issue. The chart also permits the reader to quickly search for factually similar cases.

CASE	RULING	UPHELD?	NOTES
<b>SANCTIONS AFFIRMED</b>			
<b>FIRST DCA</b>			
<i>Wallace v. Keldie</i> , 249 So. 3d 747 (Fla. 1st DCA 2018)	Dismissal	Affirmed	Personal-injury plaintiff’s “patently false” testimony that was intended to “fraudulently conceal” his medical history – a core issue in the case – warranted dismissal with prejudice. The attempt to conceal information so pertinent and critical to the claim could not be considered anything less than an “unconscionable scheme calculated to interfere” with the proper adjudication of the matter
<i>Hutchinson v. Plantation Bay Apartments, LLC</i> 931 So. 2d 957 (Fla. 1st DCA 2006)	Dismissal	Affirmed	Failure to disclose past attack by dog and pre-existing symptoms rose to level of effort to stymie discovery on central issue amounting to fraud.
<i>Distefano v. State Farm Mut. Auto. Ins. Co.</i> , 846 So. 2d 572 (Fla. 1st DCA 2003)	Dismissal	Affirmed	Plaintiff gave false deposition testimony by not disclosing <i>subsequent</i> accident and prior treatment and symptoms that were central to case; faulty memory not an excuse under these facts; this case has been cited in later cases.
<b>SECOND DCA</b>			
<i>ICMfg &amp; Assoc., Inc. v. Bare Board Grp., Inc.</i> , 238 So. 3d 326	Dismissal	Affirmed	Parties intentionally concealed and altered evidence central to the issues in the litigation and repeatedly and

(Fla. 2d DCA 2017)			willfully violated their discovery obligations.
<i>Ramey v. Haverty Furniture Cos. Inc.</i> , 993 So. 2d 1014 (Fla. 2d DCA 2008)	Dismissal	Affirmed	The court stated that the evidence concerning Mr. Ramey's conduct demonstrated clearly and convincingly that the plaintiff sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability 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 trial court properly exercised its discretion in imposing the severe sanction of dismissal for the clearly established severe misconduct of fraud on the court.
<b>THIRD DCA</b>			
<i>Pino v. CGH Hosp., Ltd.</i> , 278 So. 3d 251, (Fla. 3d DCA 2019), <i>rev. denied</i> , 2019 Fla. LEXIS 2287 (Fla. Nov. 25, 2019)	Dismissal	Affirmed	The trial court conducted a comprehensive evidentiary hearing and, after considering transcripts, surveillance recordings, and live testimony, dismissed the case based upon findings that appellant grossly misrepresented the nature and extent of her injuries, as evidenced by indisputable recorded surveillance, repudiated her prior sworn testimony explicating the alleged location and material circumstances of the disputed accident, and fabricated evidence to support her theory of prosecution. The "falsehoods" bear directly on the central issues in controversy, namely liability and damages.
<i>Obregon v. Rosana Corp.</i> , 232 So. 3d 1100 (Fla. 3d DCA 2017)	Dismissal	Affirmed	Slip and fall case where plaintiff intentionally failed to disclose her previous injuries, reason for being on disability, and important insurance information. Appellate court agreed dismissal of pleadings was appropriate.
<i>Willie-Koonce v. Miami Sunshine Transfer &amp; Tours Corp.</i> , 233 So. 3d 1271	Dismissal	Affirmed	Passenger brought negligence action against corporation that she hired to driver her to cruise ship dock. Passenger's complaint dismissed with prejudice for her fraud upon the court

(Fla. 3d DCA 2017)			in lying under oath about her ability to walk without a cane or limp and ability to carry heavy items.
<i>Diaz v. Home Depo USA, Inc.</i> , 196 So. 3d 504 (Fla. 3d DCA 2016)	Dismissal	Affirmed	Personal injury claim where the trial court conducted an evidentiary hearing and entered a 17-page order demonstrating that the plaintiff engaged in a pattern of fraudulent misconduct designed to bolster her claims and compromise the defense by lying about prior injuries that were the true source of her pain.
<i>Middleton v. Hager</i> , 179 So. 3d 529 (Fla. 3d DCA 2015)	Dismissal	Affirmed	The trial court properly rejected the magistrate judge's finding that the plaintiff's lies and misrepresentations fell "just short" of establishing deliberate scheme to subvert the judicial process. The plaintiff lied under oath on several occasions regarding the cause of her injuries, which was a key aspect of the litigation, and lied that her inaccurate statements were the result of poor memory or confusion.
<i>Faddis v. City of Homestead</i> , 121 So. 3d 1134 (Fla. 3d DCA 2013)	Dismissal	Affirmed	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."
<i>Empire World Towers, LLC v. Cdr Créances</i> , 89 So. 3d 1034 (Fla. 3d DCA 2012)	Dismissal	Affirmed	Trial court made specific factual findings supported by clear and convincing evidence that Defendants attempted to defraud the court and conceal ownership interests by: (1) producing fabricated corporate documents; (2) committing perjury in affidavits and depositions; and (3) suborning the perjury of material witnesses and providing them with scripts of lies to repeat under oath; supported by overwhelming clear and convincing evidence.
<i>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.

<b>FOURTH DCA</b>			
<i>Bryant v. Mezo</i> , 226 So. 3d 254 (Fla. 4th DCA 2017)	Dismissal	Affirmed	Plaintiff brought negligence action against defendant alleging back and back injuries due to collision. Plaintiff intentionally failed to disclose prior worker's compensation claims for cervical spine injury and that she had been treated for severe back and neck pain in the past. Where repeated fabrications undermine the integrity of a party's entire case, a dismissal for fraud upon the court is proper.
<i>Herman v. Intracoastal Cardiology Ctr.</i> , 121 So. 3d 583 (Fla. 4th DCA 2013)	Dismissal	Affirmed	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.
<i>Bass v. City of Pembroke Pines</i> , 991 So. 2d 1008 (Fla. 4th DCA 2008)	Dismissal	Affirmed	Patient's unexplained inconsistencies in discovery answers about prior medical problems and having been in a prior case (albeit a divorce) meant that reasonable minds could differ on the remedy, so trial judge affirmed.
<i>McKnight v. Evancheck</i> , 907 So. 2d 699 (Fla. 4th DCA 2005)	Dismissal	Affirmed	Extent of misrepresentation and concealment of prior injuries set forth in prison records justified dismissal.
<b>FIFTH DCA</b>			
<i>Saenz v. Patco Trans. Inc.</i> , 969 So. 2d 1145 (Fla. 5th DCA 2007)	Dismissal	Affirmed	Whether dismissal was an appropriate sanction for concealment of prior medical issues presented a close question for DCA, but they affirmed the sanction as being in sound discretion of trial judge.
<i>Brown v. Allstate Ins. Co.</i> , 838 So. 2d 1264 (Fla. 5th DCA 2003)	Dismissal	Affirmed	Plaintiff in PI case knowingly and intentionally concealed his lack of employment at the time of the accident; misrepresentation was central to the issue of lost wages and that issue was an integral part of his claim.
			"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



<p><i>Cox v. Burke</i>, 706 So. 2d 43 (Fla. 5th DCA 1998)</p> <p>*Cox case is frequently cited as authority in cases involving dismissal for fraud on the court.</p>	Dismissal	Affirmed	discovery that either appear calculated to evade or stymie discovery on issues central to her case. The integrity of the civil litigation process depends on truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way. Although Cox insists on her constitutional right to have her case heard, she can, by her own conduct, forfeit that right. This is an area where the trial court is and should be vested with discretion to fashion the apt remedy. While this court might have imposed a lesser sanction, the question in this case is close enough that we cannot declare the lower court to have abused its discretion."
<b>DENIAL OF SANCTIONS REVERSED</b>			
<p><i>Hanono v. Murphy</i>, 723 So. 2d 892 (Fla. 3d DCA 1998)</p>	Denial of motion to dismiss	Reversed and case dismissed	Plaintiff found guilty of perjury for testimony in the very case in which dismissal was sought; trial judge ruled that case should go before jury; DCA reversed because of fraudulent attempts to subvert the process.
<b>AWARD OF SANCTIONS REVERSED</b>			
<b>FIRST DCA</b>			
<p><i>Wells Fargo Bank, N.A. v. Reeves</i>, 92 So. 3d 249 (Fla. 1st DCA 2012)</p>	Dismissal	Reversed	Mortgage foreclosure case dismissed for allegedly fraudulent allegations in the complaint regarding ownership of the paper at issue; assertions in a motion to dismiss the complaint do not provide an evidentiary basis for finding fraud upon the court.
<p><i>Johnson v. Swerdzewski</i>, 935 So. 2d 57 (Fla. 1st DCA 2006)</p>	JNOV	Reversed	Dental malpractice case in which Defendant moved for directed verdict based on fraudulent answers to pretrial discovery that were uncovered during cross-examination; court deferred ruling until after verdict and granted JNOV for fraud on court; REVERSED because review of dismissal for fraud prior to trial (abuse of discretion) is not equivalent to standard of review for JNOV; review is far less deferential to trial judge once jury verdict is entered.

<b>SECOND DCA</b>			
<i>Duarte v. Snap-on Inc.</i> , 216 So. 3d 771 (Fla. 2d DCA 2017)	Dismissal	Reversed	Lawsuit involving personal injuries sustained in vehicle accident. Trial court dismissed case with prejudice as sanction for motorist's fraud upon the court. However, the inconsistencies between the motorist's examination under oath and deposition two years later did not amount to fraud warranting dismissal.
<i>Pena v. Citizens Prop. Ins. Co.</i> , 88 So. 3d 965 (Fla. 2d DCA 2012)	Dismissal	Reversed in favor of fees and costs sanction	Affidavits submitted by Plaintiffs in opposition to summary judgment were false hampering the presentation of Defendant's procedural defense; fraud was proven, but dismissal with prejudice too severe where liability was admitted.
<i>Kubel v. San Marco Floor &amp; Wall, Inc.</i> , 967 So. 2d 1063 (Fla. 2d DCA 2007)	Dismissal	Reversed	Plaintiff's husband got report from treater with info inconsistent with wife's testimony and gave it to his lawyer; report by treating doctor was then changed at request of plaintiffs. Defendant failed to produce clear and convincing evidence of fraud; issue best managed on cross at trial.
<i>Laschke v. R. J. Reynolds Tobacco Co.</i> , 872 So. 2d 344 (Fla. 2d DCA 2004)	Dismissal	Reversed	Plaintiff in tobacco case asked oncologist to put in records that smoking caused her cancer then denied doing so on deposition; dismissal too stringent, as this thwarted effort would not hamper defense.
<b>THIRD DCA</b>			
<i>Perez v. SafePoint Ins. Co.</i> , 299 So. 3d 1087 (Fla. 3d DCA 2019)	Dismissal	Reversed	Trial Court dismissed an insurance claim case involving water damage to a home based on inaccurate assertions in an affidavit signed by the plaintiff/insured. The Third DCA held that dismissal was too severe a sanction where the plaintiff was an elderly, unsophisticated, and not thoroughly conversant in English and the affidavit in question was prepared by her attorney. When the record demonstrates that a party's attorney accounts for the lapse, the courts generally seek to avoid the harsh result of dismissal which can result in the sins of the attorney being visited upon the client.
			There was not clear and convincing

<i>Martinez v. Bank of New York Mellon</i> , 198 So. 3d 911 (Fla. 3d DCA 2016)	Dismissal	Reversed	evidence that the mortgagor lied and committed perjury with an intent to deceive the court. It was also a denial of due process to refuse mortgagor's counsel the ability to put a witness on the stand to testify regarding the lies and perjury allegedly committed.
<i>Lerner v. Halegua</i> , 154 So. 3d 445 (Fla. 3d DCA 2014)	Order striking pleadings	Reversed and Remanded	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
<i>E.I. DuPont De Nemours &amp; Co. v. Sidran</i> , 140 So. 3d 620 (Fla. 3d DCA 2014)	Order striking pleadings	Reversed and remanded for new trial	Trial court did not base findings of fraud on the court on evidence of record and findings were inconsistent with 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>Gilbert v. Eckerd Corp. of Fla., Inc.</i> , 34 So. 3d 773 (Fla. 3d DCA 2010)	Dismissal	Reversed	Premises liability case; Plaintiff claimed lost wages from a company she never worked for according to deposition testimony. Evidence on employment was conflicting, so trial judge should have held a hearing and made findings to resolve inconsistency; but if matter would not meet summary judgment standards, then it is not proper for dismissal.
<i>Ibarra v. Izaguirre</i> , 985 So. 2d 1117 (Fla. 3d DCA 2008)	Dismissal	Reversed	Discovery response did not reveal prior slip and fall in which there was no attorney and no case filed. The alleged inconsistencies were more likely misinterpretation and not fraud, and could be better handled with impeachment and vigorous cross examination.
<i>Bertrand v. Belhomme</i> , 892 So. 2d 1150 (Fla. 3d DCA 2005)	Dismissal	Reversed	Plaintiff claimed defendant took inconsistent position re ownership of funds in dispute in prior bankruptcy and divorce case; judge dismissed for fraud; DCA held that plaintiff will not be

			denied day in court, there was no concealment in this case; inconsistencies can be used to impeach.
<b>FOURTH DCA</b>			
<i>Beseler v. Avatar Prop. &amp; Cas. Ins. Co.</i> , 291 So. 3d 137 (Fla. 4th DCA 2020)	Dismissal	Reversed	Insureds appealed the trial court's dismissal of their property insurance lawsuit for fraud upon the court. The Fourth DCA reversed the order dismissing their claim and remand for further proceedings, holding that the trial court abused its discretion in dismissing the suit because any inconsistencies between the insureds' statements regarding the cause of damage were not significant enough to warrant dismissal. These inconsistencies could have been well managed through impeachment and other less severe sanctions.
<i>Stein v. Defren</i> , 247 So. 3d 24 (Fla. 4th DCA 2018)	Dismissal	Reversed	Trial court failed to make findings of fact in its order granting dismissal as a sanction. An order granting a dismissal or default for fraud on the court must include express written findings 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.
<i>Smith v. Brinks, Inc.</i> , 133 So. 3d 1176 (Fla. 4th DCA 2014)	Dismissal	Reversed and Remanded	Trial court failed to provide an adequate order granting dismissal for fraud on the court because it did not include express written findings demonstrating that the trial court had carefully balanced the equities and supporting conclusion that the moving party had clearly and convincingly implemented a deliberate scheme calculated to subvert the judicial process.
<i>Cherubino v. Fenstersheib and Fox, P.A.</i> , 925 So. 2d 1066 (Fla. 4th DCA 2006)	Dismissal	Reversed	Legal malpractice case in which most of the inconsistencies attributed to plaintiffs occurred in the underlying automobile action; not clear and convincing evidence of scheme to defraud in the malpractice case.
			Plaintiff who failed to recall neck injury from five years prior to accident argued

<p><i>Cross v. Pumpco, Inc.</i>, 910 So. 2d 324, (Fla. 4th DCA 2005)</p>	<p>Dismissal</p>	<p>Reversed</p>	<p>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>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><b>FIFTH DCA</b></p>			
<p><i>Niehaus v. Dixon</i>, 237 So. 3d 478 (Fla. 5th DCA 2018)</p>	<p>Dismissal</p>	<p>Reversed and Remanded</p>	<p>The trial court found eight instances of fraud perpetrated by the plaintiff that warranted dismissal. Appellate court determined that two of those instances did not amount to clear and convincing evidence of fraud (changing testimony during trial and not providing evidence of prior injuries despite never being asked). Case remanded for trial court to determine if the remaining six instances of fraud provided a basis for dismissal.</p>
<p><i>Bosque v. Rivera</i>, 135 So. 3d 399 (Fla. 5th DCA 2014)</p>	<p>Dismissal</p>	<p>Reversed</p>	<p>The record did not establish that motorist engaged in a deliberate scheme to subvert the judicial process by failing to disclose a prior car accident and failing to disclose prior chiropractic treatment.</p>
<p><i>Guillen v. Mai So Vang</i>, 130 So. 3d 1144 (Fla. 5th DCA 2014)</p>	<p>Dismissal</p>	<p>Reversed</p>	<p>The plaintiff was caught on DVD performing activities that she claimed she could not perform after being injured by the defendant. Trial court dismissed case with prejudice. However, inconsistent testimony, nondisclosure, poor recollection, and even lying is insufficient to support dismissal for fraud. This is a credibility issue for the jury to decide and was not a calculated scheme to impede the</p>

			defense.
<a href="#"><u>Gautreaux v. Maya, 112 So. 3d 146, (Fla. 5th DCA 2013)</u></a>	Dismissal	Reversed	Plaintiff alleged primary continuing injury from the accident was migraine headaches and falsely stated, in her deposition and to a post-accident treating physician, that she had never had headaches before the accident. However, inconsistency and even lying, is insufficient to support a dismissal for fraud, and, may be managed and best resolved by bringing the issue to the jury's attention through cross-examination.
<i>Ford Motor Co. v. Stimpson</i> , 115 So. 3d 401 (Fla. 5th DCA 2013)	Struck pleadings and relief from judgment	Reversed	Product liability case wherein trial court granted Rule 1.540(b)(3) motion, struck affirmative defenses, and entered judgment on liability. Appellate court held there was insufficient evidence of fraud on the court and trial court abused its discretion.
<i>Bologna v. Schlanger</i> , 995 So. 2d 526 (Fla. 5th DCA 2008)	Dismissal	Reversed	Dismissal in Plaintiff PI case (alleged fraud re lack of disclosure of prior treatment) reversed because there could have been confusion due to broad questioning, plaintiff's interrogatory answers led the defense to the truth, and the judge did not hold an evidentiary hearing. Did not meet <i>Cox v. Burke</i> test (see <i>Cox</i> case below).
<i>Villasenor v. Martinez</i> , 991 So. 2d 433 (Fla. 5th DCA 2008)	Dismissal	Reversed	Question of whether inconsistencies argued intentional fraudulent conduct, forgetfulness, result of a limited command of the English language, or efforts to unlawfully live and work in the country, trial court erred in dismissing with prejudice without evidentiary hearing.