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Abstract

Judicial disqualification is a necessary component to our publicly proclaimed concepts of justice and fairness that are based upon judicial decision-making by unbiased judges.

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I. Judges and Counsel

A. *Disqualification of Judges*

Judicial disqualification is a necessary component to our publicly proclaimed concepts of justice and fairness that are based upon judicial decision-making by unbiased judges. Judges, like Caesar's wife, must be above suspicion. Notwithstanding the reverence proffered by many litigants, judges definitely are not deities, but merely humans who possess attributes accordingly. There are two separate, distinct mechanisms concerning judicial qualifications. If the disqualification is pervasive, the question becomes whether the judge should continue in office or be otherwise admonished. Such matters are governed by Article V of the Florida Constitution through the Judicial Qualifications Commission. Totally different procedures are involved where a judge who otherwise is acknowledged to be fully competent is sought to be disqualified to hear a particular case.

Disqualification to hear a particular matter, although far less onerous than the Judicial Qualification Commission procedure, nevertheless poses a delicate problem for both the judge and the lawyers. Usually the situation is avoided without a formal motion by the judge through self-recusal. Sometimes a judge will recuse himself or herself without prior notification of parties; however, often a judge will either suggest a matter to the parties or act upon the oral suggestion of one of the parties and enter the appropriate order. Where formal challenge is made, some judges may grant a deficient motion simply to avoid the necessity of an appeal on a sensitive matter. Judges, however, have to balance their obligation to hear cases and to prevent litigants from "judge shopping" by using disqualification as though it were a peremptory chal-

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lenge to a prospective juror. In courts where judges are assigned randomly to cases, the statute is not intended to provide for a second or a third draw.

For lawyers, the question of whether to file a challenge is often not a simple matter. The client may favor the filing of a challenge while the lawyer may be overly cautious. Of course, if valid grounds do not exist, the lawyer should ignore the desires of the client under Judicial Administration Rule 2.060 and not file a challenge. If, on the other hand, the lawyer's reluctance is because he does not wish to offend the judge before whom other cases involving other clients are pending, the matter will have to be resolved in accordance with the lawyer's professional responsibility to this client. Even when there is an agreement between client and counsel and when valid grounds are believed to exist, caution exists for two basic reasons. It may not be successful, and perhaps there is some truth in the old adage that if one is going to shoot at the king, it is better not to merely wound him. Second, if successful, the replacement judge may cause second thoughts as to the wisdom of challenging the first judge. These, of course, are tactical matters in which the client must look to the lawyer for appropriate guidance.

The factors that influence judges' and lawyers' attitudes towards filing disqualification and granting such motions undoubtedly help to explain the relative paucity of appellate court decisions in this and last year's survey. It is a credit to the bench and bar that these potential conflicts have not created any problems with respect to the public confidence in the judicial process. Disqualification of judges is governed by Rule 1.432 and Florida Statutes Chapter 38, and is discussed in the Code of Judicial Conduct, Canon 3-C. Essentially, the presiding judge is to be disqualified when there exists a well-founded fear in the mind of the moving party that he will not receive a fair trial.[1]

An affidavit stating the facts and reasons for the belief must be filed and accompanied by a certificate of good faith.[2] However, technical noncompliance will not bar a claim which otherwise states sufficient facts to warrant a party's fear that he will not receive a fair trial by the assigned judge.[3]

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1. Fischer v. Knuck, 497 So. 2d 240 (Fla. 1986); Mt. Sinai Medical Center v. Brown, 493 So. 2d 512 (Fla. 1st. Dist. Ct. App. 1986).
2. FLA. STAT. § 38.10 (1985).
3. Caleffe v. Vitale, 488 So. 2d 627 (Fla. 4th Dist. Ct. App. 1986) (movant's failure to comply with statutory requirements that he attach to motion to disqualify

Judicial inquiry on a motion to disqualify the judge should focus on the reasonableness of the movant's belief that the judge may be biased, and not on the judge's own perception of his or her ability to act fairly.[4] Reasonable, not actual, prejudice must be established.[5] If the motion for disqualification is denied, the appropriate remedy is a petition for writ of prohibition.[6]

"A motion to disqualify shall be made within a reasonable time after discovery of the facts constituting grounds for disqualification."[7] In *Fischer v. Knuck*,[8] the Supreme Court of Florida found that a motion filed eleven days after all the testimony had been taken and five days after the judge had announced his ruling was not timely under Rule 1.432. Likewise, in *Estate of Paulk v. Lindamood*,[9] the court found the motion for disqualification untimely where it was filed well after entry of final judgment. "One of the purposes of the timeliness requirement is to avoid the adverse effect on the other party to the proceeding and the problems of a retrial with its resulting costs and delay."[10]

Recusal is deemed appropriate where a judge has played an adversarial role[11] and where he has assisted an attorney during trial.[12] Ad-

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judge a certificate of counsel that affidavit and motion were made in good faith did not require that motion to disqualify be denied).

4. *Id.*

5. *Id.* (fact that attorney representing former wife in past dissolution proceeding was actually running judge's ongoing reelection campaign would give rise to reasonable fear on husband's part that conflict of interest might exist and that he might not receive a fair trial); McKay v. McKay, 488 So. 2d 898 (Fla. 3d Dist. Ct. App. 1986) (circuit judge should have disqualified himself in case in which he was admitted formal social companion of one of the parties); Richards v. Kaney, 490 So. 2d 1299 (Fla. 5th Dist. Ct. App. 1986) *reh'g denied* (contention that prejudice was demonstrated by adverse pretrial rulings was not sufficient grounds for disqualifying judge).

6. *Caleffe*, 488 So. 2d at 627.

7. FLA. R. CIV. P. 1.432 (C).

8. *Fischer*, 497 So. 2d at 240.

9. 503 So. 2d 368 (Fla. 1st Dist. Ct. App. 1987).

10. *Fischer*, 497 So. 2d at 243.

11. Davis v. Nutaro, 510 So. 2d 304 (Fla. 4th Dist. Ct. App. 1986) (in arguing points raised in affidavit in support of motion for recusal, judge unintentionally placed herself in an adversarial role, requiring disqualification). Lake v. Edwards, 501 So. 2d 759 (Fla. 5th Dist. Ct. App. 1987) (trial judge, who attempted to review allegations of motion for disqualification exceeded proper scope of inquiry in attempting to refute the allegations and established sufficient grounds for disqualification); Stimpson Computing Scale Co., Inc. v. Knuck, 508 So. 2d 482 (Fla. 3d Dist. Ct. App. 1987) (trial judge improperly considered merits of defendant's grounds for disqualification).

verse judicial rulings, however, have not been found to be a basis for disqualification.[13] "All persons who appear in court expect to receive a determination of their cases based upon the merits of the case and not upon some extrinsic circumstances, such as friendship or enmity between judge and lawyer, or political persuasion of the judge, or his religious convictions, or his financial investments, or social contacts."[14]

The trial judge is vested with authority to reduce his ruling to writing when the matters have been tried and orally ruled upon prior to the filing of the motion for disqualification.[15] However, a judge faced with a motion for recusal should first resolve that motion before making additional rulings.[16] A successor judge who has not heard all of the evidence on the issues tried before the predecessor judge may not vacate a portion of that judge's order.[17]

B. *Counsel*

1. *Generally*

Public misconceptions on the proper role and ethical standards of lawyers, if unchecked, can cause a lessening of public confidence in the overall fairness of the judicial system. The response to such misconception has been two-fold. The Florida Bar has sought, by public service announcements and other means, to project the true ethics and good character that is enjoyed by the vast majority of Florida lawyers. As to the very small percent of Florida lawyers who have transgressed their responsibilities and obligations, the Bar has been diligent in pursuing corrective action to preclude any danger that the barrel be spoiled by a bad lawyer. To the bar's credit, the cases in general reflect examples of neglect and oversight rather than intentional wrongful deeds. The cases also reflect the diligence of the bar to enforce high standards.

The Supreme Court of Florida has exclusive jurisdiction over at-

12. Leigh v. Smith, 503 So. 2d 989 (Fla. 5th Dist. Ct. App. 1987) (allegation that judge assisted opposing attorney in trial of case by signaling when to make motion or raise objection was sufficient to warrant disqualification of judge).
13. Payton Health Care Facilities v. Estate of Campbell, 497 So. 2d 1233 (Fla. 2d Dist. Ct. App. 1986).
14. Leigh v. Smith, 503 So. 2d 989, 991 (Fla. 1987).
15. *Fischer*, 497 So. 2d at 240.
16. *Stimpson Computing*, 508 So. 2d at 482.
17. Regis Corp. v. Fusco Corp., 496 So. 2d 833 (Fla. 5th Dist. Ct. App. 1986).

torney disciplinary proceedings.[18] Its principle concerns in these proceedings are to protect the public, to warn other members of the legal profession about the consequences of similar misconduct, to impose appropriate punishment on errant lawyers and to allow for and encourage reformation and rehabilitation.[19]

The referee's findings of fact are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support.[20] The correctness of an order involving disqualification of counsel must be determined by testing it against the standards imposed by the Disciplinary Rules of the Code of Professional Responsibility.[21]

Attorney disciplinary proceedings should be maintained within a reasonable time of obtaining jurisdiction, as there is no express statute of limitations.[22]

A lawyer suspended from practice may not be granted the privilege of practicing law earlier than the time set forth in the original suspension.[23] Reinstatement proceedings may be instituted at a reasonable time, usually six to nine months prior to expiration of suspension so that the attorney will not be punished additionally by the time it takes to complete the reinstatement proceedings.[24] In considering these petitions, the Supreme Court must evaluate whether there has been strict compliance with the disciplinary order or orders, evidence of unimpeachable character, clear evidence of good reputation for professional ability, evidence of lack of malice and ill feeling toward those involved in disciplinary proceedings, personal assurances of sense of repentance and desire to conduct one's practice in exemplary fashion in the future and the restitution of funds.[25]

A public reprimand is the appropriate sanction when the attorney

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18. Bammac Inc. v. Grady, 500 So. 2d 274 (Fla. 1st. Dist. Ct. App. 1986).
19. The Florida Bar v. Sommers, 508 So. 2d 341, 343 (Fla. 1987).
20. The Florida Bar v. Neely, 502 So. 2d 1237 (Fla. 1987); The Florida Bar v. Golden, 502 So. 2d 891 (Fla. 1987); The Florida Bar v. Hooper, 507 So. 2d 1078 (Fla. 1987).
21. Ray v. Stuckey, 491 So. 2d 1211 (Fla. 1st Dist. Ct. App. 1986) (for purposes of DR 5-102(B), a lawyer who learns that he may be called as a witness other than on behalf of his client may continue representation until it is apparent that his testimony is or may be prejudicial to his client, prejudicial being sufficiently adverse to factual assertions on account of events offered on behalf of one's client).
22. The Florida Bar v. Lipman, 497 So. 2d 1165 (Fla. 1986).
23. The Florida Bar *In re* Roth, 500 So. 2d 117 (Fla. 1986).
24. *Id.*
25. The Florida Bar *In re* Whitlock, 506 So. 2d 400 (Fla. 1987).

is guilty of representing adverse parties,[26] failing to adequately pursue client's case,[27] or engaging in fraudulent and dishonest conduct.[28] Suspension is proper when the attorney engages in an unauthorized practice of law,[29] neglects legal matters,[30] possesses and uses illegal drugs,[31] or charges illegal and excessive fees.[32] Disbarment, the most extreme sanction, is recommended when the attorney has been found guilty of commingling client and attorney funds,[33] stealing client funds,[34] violating numerous counts of criminal laws,[35] or misappropriating client trust funds.[36]

Generally, an attorney who drafts documents is not a guarantor that documents will be litigation free or will accomplish everything the client might want, otherwise, attorneys would have to routinely insure their work.[37] Furthermore, attorneys are not responsible for failing to accurately predict changes on unsettled points of law.[38]

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26. The Florida Bar v. Milin, 502 So. 2d 900 (Fla. 1987).

27. The Florida Bar v. Brooks, 504 So. 2d 1227 (Fla. 1987); The Florida Bar v. Brennan, 508 So. 2d 315 (Fla. 1987).

28. The Florida Bar v. Winter, 500 So. 2d 1337 (Fla. 1987).

29. The Florida Bar v. Valdes, 507 So. 2d 609 (Fla. 1987); The Florida Bar v. Jahn, 509 So. 2d 285 (Fla. 1987); The Florida Bar v. Chase, 492 So. 2d 1321 (Fla. 1986) (allowing a non-lawyer to engage in an unauthorized practice of law, among other unprofessional activities, warranted a three-year suspension); The Florida Bar v. Dale, 496 So. 2d 813 (Fla. 1986) (Supreme Court permanently enjoined an unauthorized lawyer from describing himself as an attorney and from rendering legal advice on matters concerning real estate transactions).

30. The Florida Bar v. Graves, 508 So. 2d 344 (Fla. 1987); The Florida Bar v. Sharman, 504 So. 2d 1236 (Fla. 1987).

31. The Florida Bar v. Holtsinger, 505 So. 2d 1329 (Fla. 1987); The Florida Bar v. Rosen, 495 So. 2d 180 (Fla. 1986) (an attorney convicted on federal felony charges of knowingly and intentionally possessing cocaine with intent to distribute was subject to a three-year suspension of membership in the State Bar).

32. The Florida Bar v. Lowe, 508 So. 2d 6 (Fla. 1987).

33. The Florida Bar v. Bookman, 502 So. 2d 893 (Fla. 1987).

34. The Florida Bar v. Tunsil, 503 So. 2d 1230 (Fla. 1986).

35. The Florida Bar v. Lopez-Castro, 508 So. 2d 10 (Fla. 1987) (convictions on eleven counts of violating criminal laws in connection with efforts to invest proceeds from marijuana smuggling operation warrants disbarment).

36. The Florida Bar v. Weissman, 508 So. 2d 327 (Fla. 1987).

37. Daytona Development Corp. v. McFarland, 505 So. 2d 464 (Fla. 2d Dist. Ct. App. 1987).

38. Kaufman v. Stephen Cohen P.A., 507 So. 2d 1152 (Fla. 3d Dist. Ct. App. 1987).

2. *Attorneys Fees*

Significant changes are evolving with respect to the awarding of attorneys fees. In contested cases, the simplistic approach of an automatic percentage or casual testimony from another attorney as to reasonable fees is being replaced by a more formulistic and substantive approach catering to a large extent upon bonus. In short, the process in the Florida Courts is becoming similar to that employed by their federal brethren.

The taxing of attorneys fees is done in derogation of the common law; there is no jurisdiction to do so absent an applicable statute or rule,[39] or where an attorney creates or brings a special fund into the court.[40] "A prevailing party in any civil action shall be awarded a reasonable attorney's fee if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party."[41] A frivolous action, justifying such an award, is one so devoid of merit both on the facts and the law as to be completely untenable, and not merely an action that is unsuccessful or likely to be unsuccessful.[42] Attorney fees are not to be assessed where a justiciable issue was initially presented, even though the action was not subsequently maintained[43] or where a viable issue still exists.[44]

To further the policy of avoiding multiplicity of suits, the trial court should determine the reasonable amount of attorney fees.[45] When a prevailing party has properly pled entitlement to attorney's fees pursuant to the terms of a contract, proof of fees may be presented for the first time after final judgment through a motion for attorney's fees.[46] However, attorney's fees cannot properly be awarded where the attorney who performed the services does not personally testify to support the award;[47] or where the tests are based solely upon the attorney's time sheet, without hearing testimony in support of the fee or the rea-

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39. Stump v. Foresi, 486 So. 2d 62 (Fla. 4th Dist. Ct. App. 1986)
40. Department of Health and Rehabilitative Services v. Johnson, 485 So. 2d 880 (Fla. 2d Dist. Ct. App. 1986).
41. FLA. STAT. § 57.105 (1985).
42. Xerox Corp. v. Sharifi, 502 So. 2d 1003 (Fla. 5th Dist. Ct. App. 1987).
43. Brown v. U.S. Marble, 505 So. 2d 1103 (Fla. 4th Dist. Ct. App. 1987).
44. Bashure v. Estate of Paulk, 498 So. 2d 525 (Fla. 1st Dist. Ct. App. 1986).
45. Kozich v. Kozich, 501 So. 2d 1386 (Fla. 4th Dist. Ct. App. 1987).
46. Parham v. Price, 486 So. 2d 34 (Fla. 1st Dist. Ct. App. 1986).
47. *In re* One 1972 Volvo Vehicle, 489 So. 2d 1240 (Fla. 4th Dist. Ct. App. 1986).

sonableness of the time expended for the fee amount.[48] While it is better practice to plead attorney fees, the party is not required to plead them where they are allowed by statute.[49]

A default judgment only admits entitlement to liquidated damages.[50] A request for attorneys fees following a default, which is characterized as a request for unliquidated damages, may not be resolved by the court without allowing the party against whom the fees are to be assessed an opportunity to be heard as to the amount to be awarded.[51] Where one party takes a voluntary dismissal, the opposing party is the prevailing party for the purposes of an attorney's fee award.[52] Where an offer of judgment is silent as to attorney fees, entitlement to the fees is to be determined by the trial court independently of the merits.[53] It is not proper to order one party to pay the other's attorney's fees as a sanction for sham pleadings.[54]

The federal lodestar method of determining attorneys fees applies only to fees imposed ancillary to a primary action against a non-client either under common-law principles or pursuant to statutory authorization.[55] The purpose of the method is to protect third parties from excessive awards over which they have no contractual or adversarial role.[56] The factors required to compute a reasonable fee using the lodestar formula are set out in *Florida Patient's Compensation Fund v. Rowe*.[57]

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48. Clark v. Squire, Sanders & Dempsey, 495 So. 2d 264 (Fla. 3d Dist. Ct. App. 1986).

49. Greiner Engineering Sciences Inc. v. Commercial Center Dev. Corp., 508 So. 2d 525 (Fla. 5th Dist. Ct. App. 1987).

50. Scott v. Revels, 491 So. 2d 1230 (Fla. 2d Dist. Ct. App. 1986).

51. FLA. R. CIV. P. 1.440(c); Gold v. M & G Services, Inc., 491 So. 2d 1297 (Fla. 3d Dist. Ct. App. 1986).

52. Stuart Plaza, Ltd. v. Atlantic Coast Dev. Corp. of Martin County, 493 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1986).

53. Seminole Colony Inc. v. Stanko, 501 So. 2d 195 (Fla. 4th Dist. Ct. App. 1987).

54. Ruppel v. Gulf Winds Apts. Inc., 508 So. 2d 534 (Fla. 2d Dist. Ct. App. 1987).

55. Stabinski, Funt & DeOliviera v. Law Offices of Frank H. Alvarez, 490 So. 2d 159 (Fla. 3d Dist. Ct. App. 1986); Massey v. Watson, 508 So. 2d 740 (Fla. 2d Dist. Ct. App. 1987).

56. *Stabinski*, 490 So. 2d at 159.

57. 472 So. 2d 1145 (Fla. 1985), (In computing the fee, the trial judge should:
1. determine the number of hours reasonably expended on the litigation;
2. determine the reasonable hourly rate for the type of litigation;
3. multiply the result of (1) and (2), and when appropriate;
4. adjust the fee on the basis of the contingent nature of the litigation or

In *Lake Tippencanoe Owner's Association, Inc., v. Hanover*,[58] the calculation for attorneys fees could not include multiplication of the "lodestar factor" due to the fact that the case did not qualify for an enhanced fee, as there was no contingency risk factor to be considered. Failure of the trial court to express on the record specific findings regarding the hourly rate, number of hours expended and any appropriate enhancement or reduction factors requires reversal of award.[59]

II. Pleadings

Pleading issues continue to generate a number of appeals. Although the federal pleading rules are similar to Florida's, there appear proportionately fewer pleadings cases decided by the United States Court of Appeals for the Eleventh Circuit than by the Florida Appellate Court.

Rule 1.050, governing the commencement of actions, states that "every action of a civil nature shall be deemed commenced when the complaint or petition is filed."[60] Tendering a correct filing fee is not a precondition to filing a complaint.[61] Therefore, in *Outboard Marine Domestic International Sales Corporation v. Florida Stevedoring Corporation*,[62] the complaint was deemed filed when originally received and clocked in by the clerk of the lower court, though it was subsequently returned because of an insufficient filing fee check.

A trial court is not required to consider affidavits if they are not timely filed.[63] Affirmative defenses to a complaint may be raised in a responsive pleading, unless the basis for the defense appears on the face of the complaint or the defense is statutorily-specified as one that may

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the failure to prevail on the claims.);
Appalachian Inc. v. Ackmann, 507 So. 2d 150 (Fla. 2d Dist Ct. App. 1987); St. Mary's Hosp. Inc. v. Sanchioni, 511 So. 2d 617 (Fla. 4th Dist. Ct. App. 1987).

58. 494 So. 2d 226 (Fla. 2d Dist. Ct. App. 1986).

59. Alston v. Sundeck Products Inc., 498 So. 2d 493 (Fla. 4th Dist. Ct. App. 1986).

60. FLA. R. CIV. P. 1.050.

61. Outboard Marine Domestic Int'l Sales Corp. v. Florida Stevedoring Corp, 483 So. 2d 823 (Fla. 3d Dist. Ct. App. 1986).

62. 483 So. 2d 823 (Fla. 3d Dist. Ct. App. 1986).

63. Von Zamft & GMMR v. South Florida Water Management Dist., 489 So. 2d 779 (Fla. 2d Dist. Ct. App. 1986) (trial court not required to consider affidavits filed and served by mail on Friday before Monday hearing absent motion for continuance to permit additional time for filing of affidavits).

be raised by motion.[64] The statute of limitations is an affirmative defense;[65] however, where it appears on the face of a prior pleading, it may be asserted as a ground for a motion to dismiss.[66] Where fraud is pleaded as an affirmative defense, allegations relating thereto should be specific and facts constituting fraud clearly stated.[67] Rule 1.190 governs the amending and supplementing of pleadings. The rules require that leave to amend a complaint be freely granted when justice so requires, and that it should be denied when the privilege has been abused, or when it is clear that the pleading cannot be amended to state a cause of action,[68] or when diligence during discovery is lacking.[69] An amendment to a timely filed pleading relates back to the date of filing of the original pleading where a party is not correctly described,[70] but not where a separate party has been added to the pleadings.[71]

A pleading states a cause of action if it contains a short, plain statement of the ultimate facts which informs the defendant of the nature of the cause against him.[72] Even if a party improperly labels a cause of action or fails to properly frame one, the complaint will not be dismissed if it states facts sufficient to support a cause of action.[73] Where an issue is neither presented by the pleadings nor litigated by the parties, a decree adjudicating such an issue is voidable on appeal.[74] However, when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as

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64. In re Estate of Hammer, 511 So. 2d 708 (Fla. 4th Dist. Ct. App. 1987).

65. Fla. R. Civ. P. 1.110(d); Hofer v. Ross, 481 So. 2d 939 (Fla. 2d Dist. Ct. App. 1986); Waters v. Nu-Car Carriers, Inc., 500 So. 2d 224 (Fla. 1st Dist. Ct. App. 1986).

66. Fla. R. Civ. P. 1.140(b); *Hofer*, 481 So. 2d 939.

67. Fla. R. Civ. P. 1.120(b); Steigman v. Danese, 502 So. 2d 463 (Fla. 1st Dist. Ct. App. 1987).

68. Fla. R. Civ. P. 1.190(a); Dryden Waterproofing, Inc. v. Bogard, 488 So. 2d 672 (Fla. 4th Dist. Ct. App. 1986).

69. San Martin v. Dadeland Dodge, Inc., 508 So. 2d 497 (Fla. 3d Dist. Ct. App. 1987).

70. Lindsey v. H.H. Raulerson Jr. Memorial Hosp., 505 So. 2d 577 (Fla. 4th Dist. Ct. App. 1987).

71. *Id.*

72. Bolton v. Smythe, 432 So. 2d 129 (Fla 5th Dist. Ct. App. 1983).

73. Xamnad Inc. v. Patio Cafe, Inc., 486 So. 2d 699 (Fla. 4th Dist. Ct. App. 1986).

74. Fla. R. Civ. P. 1.190(b); Brady v. Jones, 491 So. 2d 1272 (Fla. 2d Dist. Ct. App. 1986).

if they had been raised in the pleadings.[75] A cross-claim is dependent upon an original or primary action to support it.[76] Unlike third party actions, the rules do not require service of a cross-claim by summons, but contemplate service as provided by Rule 1.080. Where such cross-claim defendant has not answered or otherwise appeared, then a summons would be appropriate. Likewise, a cross-claim which is not a separate pleading under Rule 1.100(a) but is a part of the answer, is not effective against a co-defendant if not served prior to dismissal. In *Lopez v. Brown*,[77] it was found that a cross-claim did not survive dismissal of the original proceeding where it was made in the same pleading as the initial answer but not served prior to the dismissal.

A court cannot modify any judgment unless an issue of modification is properly presented to it by appropriate proceedings and each party is given an opportunity to be heard on the issue.[78] A motion for judgment on the pleadings must be decided wholly on the pleadings without the aid of outside matters.[79] Such a motion is only proper if, on undisputed facts, the trial court could conclude that the moving party is entitled to judgment as a matter of law.[80]

The rule against splitting causes of action requires that all relief arising out of a single transaction or event be sought and recovered in one action.[81] The rule is founded on the policy reason that finality establishes and promotes greater stability in the law, avoids vexatious and multiple lawsuits arising out of a single incident and is consistent with the absolute necessity of bringing litigation to an end.[82] In *Thermofin Inc. v. Woodruff*,[83] the Fourth District Court of Appeal found that the relief sought in a second action should have been brought in the original proceeding where it was filed by the same party

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75. Rahaim v. City of Jacksonville, 504 So. 2d 1323 (Fla. 1st Dist Ct. App. 1987); FLA. R. CIV. P. 1.190(b).

76. FLA. R. CIV. P.1 1.170(g).

77. 492 So. 2d 1174 (Fla. 2d Dist. Ct. App. 1986).

78. *Brady*, 491 So. 2d at 1272.

79. J & J Utility Co., Inc. v. Windmill Village by the Sea, 485 So. 2d 36 (Fla. 4th Dist. Ct. App. 1986) (trial court, in deciding that the issues were in fact the same in both cases and dismissing complaint on basis that issues were res judicata, impermissibly reviewed and relied on matter outside the pleadings of the case).

80. Continental Ins. Co. v. Parkins, 502 So. 2d 524 (Fla 3d Dist. Ct. App. 1987).

81. Thermofin, Inc. v. Woodruff, 491 So. 2d 344 (Fla. 4th Dist. Ct. App. 1986); Schimmel v. Aetna Casualty and Sur. Co., 506 So. 2d 1162 (Fla. 3d Dist. Ct. App. 1987).

82. *Schimmel*, 506 So. 2d at 1162.

83. 491 So. 2d 344 (Fla. 4th Dist. Ct. App. 1986).

in the same court, involved the same parties, and arose out of identical facts and circumstances, but involved a different remedy. Likewise, where a defendant has a claim against the plaintiff that arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim, the defendant must plead his claim as a compulsory counterclaim.[84] Consolidation is appropriate where there is a possibility of inconsistent verdicts and the interest of judicial economy outweighs any prejudice which might arise from delay caused thereby.[85]

III. Parties, Witnesses and Jurors

A. *Parties*

Rule 1.210, governing parties to a lawsuit, provides that "every action may be prosecuted in the name of the real party in interest. . . ."[86] Accordingly, the Fourth District Court of Appeal in *DeToro v. Dervan Investments, Ltd. Corp.*,[87] held that DeToro, an agent who acted at all times on behalf of Dervan Investment Corporation, was not the real party in interest to a suit for breach of fiduciary relationship and breach of land option contract against the real estate agents (and attorney who represented the investment company), where DeToro and Dervan Investment Corp. asserted the same claims against real estate agents and attorney. A party need not be named in the pleadings to be called as an adverse party, so long as the party occupies an adverse position at trial to the calling party and could have been named as an adverse party.[88]

B. *Witnesses*

Exclusion of witnesses is a drastic remedy for the failure to comply with a pretrial order requiring that witnesses be listed, and the remedy should be invoked only under the most compelling circumstances.[89] However, unlisted witnesses can properly testify where their testimony

84. City of Haines City v. Allen, 509 So. 2d 982 (Fla. 2d Dist. Ct. App. 1987).
85. U-Haul Co. of Northern Florida Inc. v. White, 503 So. 2d 332 (Fla. 1st Dist. Ct. App. 1986).
86. Fla. R. Civ. P. 1.210(a).
87. 483 So. 2d 717 (Fla. 4th Dist. Ct. App. 1985).
88. Botte v. Pomeroy, 497 So. 2d 1275 (Fla. 4th Dist. Ct. App. 1986).
89. Conde v. Marlo Navigation Co., Ltd., 495 So. 2d 847 (Fla. 3d Dist. Ct. App. 1986).

is solely for impeachment or rebuttal.[90]

A person who can shed no light on the issues of a case does not have to testify at a deposition or trial.[91] The party questioning the witness has the burden of demonstrating to the court via his reasoning process based on facts and inferences that there is a logical connection between the information sought and the possibly relevant evidence. The possibility that the questioning might lead to relevant and admissable evidence is insufficient.[92]

The trial court has authority to restrict the testimony of the expert witness to the subject matter timely revealed in discovery, thereby precluding opinions as to matters which were not revealed.[93] The trial court may also exercise its discretion in deciding whether to award expert witness fees,[94] and may base the fee on its experience, its observation of the witness' testimony, and its review of the record, so long as the amount is not of such magnitude as to indicate grossly excessive charges.[95]

C. *Jurors*

1. *Jury Selection*

Rule 1.431, governing the right to jury trial, provides for peremptory challenges[96] and challenges for cause.[97]

"Each party is entitled to three peremptory challenges of jurors."[98] Counsel cannot be deprived of the use of all their peremptories nor can their right to use them be curtailed until the jury is sworn.[99] Although the procedure for jury selection has traditionally been a discretionary function of the trial judge, the court must allow counsel to exercise challenges singularly, alternately, and orally so that before counsel exercises a peremptory challenge, he has before him a full panel from

90. *Id.*
91. Kridos v. Vinskus, 483 So. 2d 727 (Fla. 4th Dist. Ct. App. 1985).
92. *Id.*
93. Sayad v. Alley, 508 So. 2d 485 (Fla. 3d Dist. Ct. App. 1987).
94. Tuerk v. Allstate Ins. Co., 498 So. 2d 504 (Fla. 3d. Dist. Ct. App. 1986).
95. Manuel v. Manuel, 498 So. 2d 1369 (Fla. 1st Dist. Ct. App. 1986).
96. FLA. R. CIV. P. 1431(d).
97. FLA. R. CIV. P. 1.431(c).
98. FLA. R. CIV. P. 1.431(d).
99. Ter Keurst v. Miami Elevator Co., 486 So. 2d 547 (Fla. 1986).

which a challenge is to be made.[100] The trial court cannot require both parties to exercise all of their peremptory challenges simultaneously in writing.[101] Where counsel fails to exhaust his peremptory challenges, it is not error to deny additional peremptory challenges where prosecution and defense simultaneously request a peremptory challenge for a prospective juror.[102] Absent exceptional circumstances, a trial judge may not selectively swear individual jurors prior to the opportunity of counsel to view as a whole the entire panel from which peremptory challenges are to be made.[103] Objections to the improper use of peremptories must be raised prior to the jury's being sworn.[104]

Challenge for cause is provided where "the juror is called or has any interest in the action or has formed or expressed any opinion or is sensible of any bias or prejudice concerning it. . . ."[105] In *Sikes v. Seaboard Coast Line Railroad Co.*,[106] the First District Court of Appeal held that it was error to deny the challenge where one of the jurors knew one of the attorneys associated with Seaboard's attorney's law firm on a friendly basis.

A new trial may be required where jury selection proves to be prejudicial.[107]

2. *Post-Trial Interviews of Jurors*

Florida, like most jurisdictions, seeks to minimize the losing side from trying the jury in an effort to uncover jury misconduct. Permission of the court is required at least as to parties and their counsel. In celebrated cases, the press appears free to conduct voluntary interviews, which of course could be used by a party as basis for a motion for their

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100. Tedder v. Video Electronics, Inc., 491 So. 2d 533 (Fla. 1986).
101. *Ter Keurst*, 486 So. 2d 547.
102. Howell v. State, 494 So. 2d 305 (Fla. 1st Dist. Ct. App. 1986).
103. *Tedder*, 491 So. 2d at 533.
104. State v. Castillo, 486 So. 2d 565 (Fla. 1986) (presenting issue of improper use of peremptories for first time on motion for mistrial, after jury is sworn, is not timely).
105. FLA. R. CIV. P. 1.431 (c)(1).
106. 487 So. 2d 1118 (Fla. 1st Dist. Ct. App. 1986).
107. Perl v. K-Mart Corp., 493 So. 2d 542 (Fla. 3d Dist. Ct. App. 1986) (plaintiff's voir dire question, as to whether juror had ever been party in lawsuit, and response of juror, who stated his company had been sued once but he did not recall any other involvement in litigation when in fact juror and his company had been involved in litigation at least 20 times, was concealment of material fact on voir dire examination not due to plaintiff's negligence; therefore, new trial was required).

own interview.

The decision to allow jury interviews is within the trial court's discretion and its decision should not be disturbed on appeal absent an abuse of discretion.[108] This rule is founded on the policy permitting litigants or the public from invading the privacy of the jury room and in protecting jurors - who have performed a vital public function - from harassment by unhappy litigants.[109] Jurors interviews are proper only in cases involving matters extrinsic to the verdict, such as arrival at verdict by lot or quotient,[110] improper contact,[111] or misconduct[112] of a juror, but an investigation of the jury's subjective decisionmaking process is not permissible.[113] The trial court is not allowed to respond to jury questions where deliberations have begun and parties and counsel are absent.[114] Specific prejudice will be presumed as a matter of law where a trial judge, without permission of the parties, enters a room with a deliberating jury for an ex parte "off the record" communication, even if the purpose of the communication is purportedly unrelated to the issue in the case.[115] An alternate juror's presence and active participation in jury deliberations creates a fundamental, reversible error, requiring a new trial.[116]

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108. Preast v. Amica Mutual Ins. Co., 483 So. 2d 83 (Fla. 2d Dist. Ct. App. 1986) (decision, in personal injury action, to allow jury interview was not abuse of discretion when movants supported motion with affidavit of juror's sister, stating that damages had been determined by lot, which is clearly illegal).

109. Snook v. Firestone Tire & Rubber Co., 485 So. 2d 496 (Fla. 5th Dist. Ct. App. 1986).

110. *Preast*, 483 So. 2d at 83.

111. South v. Palm Bay Club, Inc., 486 So. 2d 31 (Fla. 3d Dist. Ct. App. 1986) (trial court did not abuse its discretion in negligence action by refusing to declare mistrial on basis that counsel for defendant had improper contact with juror where communication had nothing to do with merits of case and trial judge questioned juror and was assured by her that such contact would not affect her decision).

112. *Snook*, 485 So. 2d at 496; Orange County v. Fuller, 502 So. 2d 1364 (Fla. 5th Dist. Ct. App. 1987) (absent sufficient allegations of juror misconduct relating to matters which are extrinsic to verdict, inquiry into deliberations of jury is prohibited).

113. *Snook*, 485 So. 2d at 496.

114. Life From the Sea, Inc. v. Levy, 502 So. 2d 473 (Fla. 3d Dist. Ct. App. 1987).

115. Hernandez v. Charles E. Virgin M.D., P.A., 505 So. 2d 1369 (Fla. 3d Dist. Ct. App. 1987).

116. Eickmeyer v. Dunkin Donuts of America, Inc., 507 So. 2d 1193 (Fla. 3d Dist. Ct. App. 1987).

IV. Jurisdiction Over the Person

A. *Generally*

Subject matter jurisdiction, unlike jurisdiction over the person, arises solely by virtue of law. Therefore, it cannot be created by waiver, acquiescence or agreement of the parties, by error or inadvertence of the parties or counsel, by power by the court,[117] or by contract between the parties.[118] Indeed, in respect to jurisdiction over the person, any objections to jurisdiction are waived if not timely presented.[119] Whether it be a filing of preliminary motion under Rule 1.140 or if no motion is filed, a responsive pleading, this first step by a party must raise the issue of personal jurisdiction, otherwise it is waived.[120] The same is true of defects in service.[121]

Although jurisdictional amount - because it pertains to subject matter jurisdiction - may be raised at any time, the text is not based upon recovery. In determining whether the jurisdictional amount is met, the trial court is required to discern whether the jurisdictional amount of damages was pled in good faith, not whether the evidence presented at trial established such a recoverable amount.[122]

Entry of summary final judgment and denial of rehearing divests the court of jurisdiction to further amend the complaint.[123] Once par-

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117. Florida Export Tobacco Co. Inc. v. Dep't of Revenue, 510 So. 2d 936 (Fla. 1st Dist. Ct. App. 1987).

118. Publix Super Markets Inc. v. Cheesbro Roofing, Inc., 502 So. 2d 484 (Fla. 5th Dist. Ct. App. 1987).

119. O.A. Winburn v. First Florida Nat'l Bank of Live Oak, 490 So. 2d 220 (Fla. 1st Dist. Ct. App. 1986); Finkelstein v. Southeast Bank, N.A., 490 So. 2d 976 (Fla. 4th Dist. Ct. App. 1986) (trustees waived challenge to trial court's jurisdiciton over family trust due to bank's failure to sue trustees in capacity as trustees when trustees failed to raise issue on motion to dismiss conplaint or on a motion to disolve temporary restraining order and when trustees agreed to entry of temporary restraining order that precluded dissipation of principal of trust).

120. Cumberland Software Inc. v. Great American Mortgage Corp., 507 So. 2d 794 (Fla. 4th Dist. Ct. App. 1987).

121. Meyer v. Roesel, 482 So. 2d 444 (Fla. 2d Dist. Ct. App. 1986); Cummings v. Palm Beach Marble & Tile, Inc., 497 So. 2d 711 (Fla. 4th Dist. Ct. App. 1986) (defendant waived objection to insufficiency of service of process where defendant invoked jurisdicion of court by filing cross-claim asking for affirmative relief).

122. Floyd v. Baxter, 508 So. 2d 549 (Fla. 1st Dist. Ct. App. 1987).

123. City of Boca Raton v. Ross Hoffman Associates Inc., 501 So. 2d 72 (Fla. 4th Dist. Ct. App. 1987).

ties are dropped from the action, in personam jurisdiction over the parties is lost and can be regained only by new service of process.[124]

B. *Service of Process on Natural Persons*

The purpose of service is to give a defendant proper notice that it is answerable to a plaintiff's claim, to advise the defendant of the nature of that claim, and to afford the defendant an opportunity to defend against the claim.[125]

Service of process cannot be "refused" by the party to whom it is directed.[126] A party cannot prevail in an argument attacking the sufficiency of service by certified mailing, in those cases where it is appropriate, when the party has taken affirmative action to avoid acceptance of the certified mailing.[127] For purposes of service of process, a party's "usual place of abode" may not be the same as the party's "residence,"[128] and this rule must be strictly complied with.[129]

When two actions between the same parties are pending in different circuits, jurisdiction lies in the circuit where service of process is first perfected.[130] Absent a valid long-arm statute, a judgment in personam against a nonresident who does not enter a voluntary general appearance or otherwise waive personal service can only be predicated upon jurisdiction over the person acquired by service of process within the state.[131]

C. *Service of Process on Corporations*

A plaintiff seeking to obtain jurisdiction over a nonresident defendant carries the initial burden of alleging sufficient jurisdictional

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124. Krupa v. Mobilinium Ass'n V, 503 So. 2d 922 (Fla. 4th Dist. Ct. App. 1987).

125. American Hosp. of Miami, Inc. v. Nateman, 498 So. 2d 444 (Fla. 3d Dist. Ct. App. 1986).

126. Cuthill & Eddy v. Sheriff of Seminole County, 494 So. 2d 512 (Fla. 5th Dist. Ct. App. 1986).

127. Fields v. Turlington, 481 So. 2d 960, 962 (Fla. 4th Dist. Ct. App. 1986).

128. Stern v. Gad, 505 So. 2d 531 (Fla. 3d Dist. Ct. App. 1987).

129. Milanes v. Colonial Penn Ins. Co., 507 So. 2d 777, 778 (Fla. 3d Dist. Ct. App. 1987).

130. Southeast Bank, N.A. v. Krombach, 496 So. 2d 1002, 1005 (Fla. 5th Dist. Ct. App. 1986).

131. State of Florida Health & Rehabilitative Services v. Wright, 489 So. 2d 1148, 1149 (Fla. 2d Dist. Ct. App. 1986).

facts to bring the case within the purview of the state's long-arm statute.[132] Once plaintiff meets this burden, the defendant must submit evidence by sworn affidavits to contest allegations of the complaint.[133] Strict construction of the Florida long-arm statute is required.[134]

Before a state court may acquire personal jurisdiction over a foreign corporation, the foreign corporation must have initiated some minimum contact with the foreign state, so that maintenance of the suit does not offend traditional notions of fair play and substantial justice.[135] For there to be minimum contacts, it is necessary that there be some act by which the foreign corporation purposely avails itself of the privilege of conducting activities within the state, thus invoking the benefits and protection of its laws.[136] Ownership of real estate in Florida by itself does not constitute a "business" or "business venture"

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132. Aminoff and Co., Inc. v. Storrington Corp., 503 So. 2d 1290, 1292 (Fla. 2d Dist. Ct. App. 1987).

133. *Id.*

134. W.C.T.V. Ry Co. v. Szilagyi, 511 So. 2d 727, 728 (Fla. 3d Dist. Ct. App. 1987).

135. Aetna Life & Casualty Co. v. Therm-o-Disc, Inc., 488 So. 2d 83, 86 (Fla. 1st Dist. Ct. App. 1986).

136. Norwest Bank Minneapolis, N.A. v. American Continental Ins. Co., 493 So. 2d 101 (Fla 4th Dist. Ct. App. 1986) (national banking association with offices only in Minnesota and which has assigned mortgages on condominiums located in Florida as result of solicitation of Minnesota mortgage worker, and which had never carried on business in Florida, lacked sufficient minimum contacts under long-arm statute to be subject to court's personal jurisdiction in mortgage insurer's declaratory judgment action concerning coverage for claims made by banks); Herman v. Sunset Commercial Bank, 481 So. 2d 98 (Fla. 3d Dist. Ct. App. 1986) (failure to make payment in Florida as guarantor of note in default, as required by guaranty contract, did not constitute sufficient minimum contacts to permit exercise of long-arm jurisdiciton over guarantor); Meyer v. Auto Club Ins. Ass'n., 492 So. 2d 1314 (Fla. 1986) (Florida lacked jurisdiction over insured's claim against insurer for medical and lost wage benefits stemming from automobile accident which occurred in Florida where, at time of accident, insured and insurer were both nonresidents and insurer had no contacts with Florida); Damoth v. Reinitz, 485 So. 2d 881, 883 (Fla. 2d Dist. Ct. App. 1986) (vendor's ownership of real property in state was deliberate, nonfortuitous, and continuous act, through which vendor purposely availed himself of benefits and protections of state and local law and obliged himself to pay property taxes, so that he could reasonably foresee being brought into state court to litigate a suit relating to option on property, which could not have come into being but for his ownership of that property, establishing sufficient "minimum contacts" to bring him within personal jurisdiction of state courts without offending traditional notions of fair play and substantial justice); American Vision Center, Inc. v. Nat'l Yellow Pages Directory Service, Inc., 500 So. 2d 642 (Fla. 2d Dist. Ct. App. 1986).

within the meaning of Florida Statutes Section 48.181.[137] Florida Statutes Sections 48.181 and 48.193 require that there be a "connexity" between the cause of action and the defendant corporation's activities within the state.[138]

The doctrine of forum nonconvenience cannot be used to deprive the state of jurisdiction to entertain an action between two foreign corporations both licensed to do business in the state, with places of business in the state,[139] or in a suit by a state resident injured in the foreign corporation's out-of-state motel.[140]

D. *Constructive Service of Process*

Substituted service of process statutes require strict compliance.[141] To support such service of process on a defendant, the complaint must allege the jurisdictional requirements prescribed by statute[142] and establish the threshold requirement of the inability to effectuate personal service.[143] A failure to do so should result in granting a motion to quash service.[144] The statutory requirements are not satisfied where service of process is made by delivering the summons and complaint on an agent lacking authority to accept service.[145]

The Fifth District Court of Appeal in *Knabb v. Morris*,[146] found

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137. Sun State Associates, Ltd., v. Continental Illinois Nat'l Bank & Trust Co. of Chicago, 481 So. 2d 543, 544 (Fla. 2d Dist. Ct. App. 1986).

138. Hertz Corp. v. Abadlia, 489 So. 2d 753 (Fla. 4th Dist. Ct. App. 1985) (in view of failure to allege where lease agreement was entered into and that cause of action arose out of foreign corporation's activities in Florida, complaint did not demonstrate any connection between cause of action and corporation's business activities, rendering jurisdictional allegations of complaint insufficient to invoke long-arm jurisdiction).

139. Nat'l Aircraft Service, Inc. v. New York Airlines, Inc., 489 So. 2d 38, 39 (Fla. 4th Dist. Ct. App. 1986).

140. Nylund v. Motel 6, Inc., 490 So. 2d 216 (Fla. 4th Dist. Ct. App. 1986).

141. Knabb v. Morris, 492 So. 2d 839, 841 (Fla. 5th Dist. Ct. App. 1986); Sunblest Products Inc. v. Vroom Enterprises Inc., 508 So. 2d 770, 771 (Fla. 5th Dist. Ct. App. 1987).

142. Ferguson v. McWilliams, 483 So. 2d 509 (Fla. 4th Dist. Ct. App. 1986); *see*, Drake v. Scarlav, 353 So. 2d 961, 965 (Fla. 2d Dist. Ct. App. 1978).

143. Palomino v. Federal Nat'l Mortgage Ass'n., 504 So. 2d 445 (Fla. 3d Dist. Ct. App. 1987).

144. *Ferguson*, 483 So. 2d 509 (Fla. 4th Dist. Ct. App. 1986).

145. McCauley v. Bruder & Sons, Inc., 486 So. 2d 30 (Fla. 3d Dist. Ct. App. 1986).

146. 492 So. 2d 839, 841 (Fla. 5th Dist. Ct. App. 1986).

that failure to utilize obvious and available leads to locate the defendant showed a lack of due diligence on the part of the plaintiff in effectuating substituted service of process. The public policy reason behind the rule is the interest in seeing that a defendant has his day in court in accordance with due process requirements.[147] In *Gloucester Engineering, Inc. v. Mendoza*,[148] the Third District Court of Appeal found that the plaintiff's failure to timely file an affidavit in compliance with the statute invalidated service of process.

If constructive service of process on a nonresident defendant must by used, only in rem or quasi in rem jurisdiction is conferred upon the court.[149] Therefore, where personal service is not made, service of process on a nonresident made through the Secretary of State is invalid when based solely on ownership of real property within Florida.[150] Substituted service is improper on a resident where there is no allegation or evidence that the defendant was a nonresident or was concealing his whereabouts.[151] Service of process by publication, pursuant to Florida Statutes Section 49.011, is not available for a suit to recover judgment on a promissory note.[152]

V. Venue

It is generally recognized that the plaintiff has the prerogative to initially select venue[153] and need not plead or prove its appropriateness.[154] The defendant bears the burden of proving that venue is improper.[155] Rule 1.140(b) recognizes improper venue as a defense and requires that "the grounds on which any of the enumerated defenses are based . . . shall be stated specifically and with particularity in the

147. *Id.*

148. 489 So. 2d 141 (Fla. 3d Dist. Ct. App. 1986).

149. Bedford Computer Corp. v. Graphic Dress Inc., 484 So. 2d 1225, 1227 (Fla. 1986).

150. Blackmon v. Blackmon, 487 So. 2d 1131, 1132 (Fla 3d Dist. Ct. App. 1986).

151. Insolia v. Wagie, 505 So. 2d 696 (Fla. 4th Dist. Ct. App. 1987).

152. Meiliunas v. O'Leary, 483 So. 2d 509 (Fla. 4th Dist. Ct. App. 1986).

153. Eth-Wha, Inc. v. Blankenship, 483 So. 2d 872, 873 (Fla. 2d Dist. Ct. App. 1986); Chrysler Credit Corp. v. Laliberty, 506 So. 2d 67, 68 (Fla. 1st Dist. Ct. App. 1987).

154. Flick Mortgage Co. v. Microtel, Inc., 486 So. 2d 697, 698 (Fla. 4th Dist. Ct. App. 1986); Fine v. Carney Bank of Broward County, 508 So. 2d 558 (Fla. 4th Dist. Ct. App. 1987).

155. *Meiliunas*, 483 So. 2d at 509; *Chrysler*, 506 So. 2d at 67.

responsive pleading or motion."[156]

Change of venue is within the discretion of the trial court and, absent a showing of abuse of that discussion, the trial court's ruling will not be reversed.[157] "When any action is filed laying venue in the wrong county, the court may transfer the action in the manner provided in Rule 1.170(j) to the proper court in any county where it might have been brought in accordance with the venue statutes."[158] When improper venue is alleged, transfer of the case is preferable to dismissal.[159] And when the court transfers the case, it cannot simultaneously rule on the merits.[160] Furthermore, in a multi-count suit or a suit involving claims and counterclaims, the court cannot change venue of only a portion of the lawsuit.[161] A misjoinder, of course, could result in a severance and then a transfer of a severed claim.

For venue purposes, a tort claim is deemed to have accrued "where the last event necessary to make the defendant liable for the tort took place."[162] The last event occurs when the harmful force, set in motion by the defendant's negligence, first takes effect on the body or the property of the plaintiff.[163] In a cause of action for libel, this means that the action accrues in the county or counties where the publication is distributed or placed on sale.[164] In *Tucker v. Fianson*,[165] the cause of action for legal malpractice accrued, under Florida Statutes Section 47.011, at the location where the attorney's asserted negligence impacted upon the client's economic interests, although the wrongful act occurred in another place. For contract actions, venue lies in the county where the contract is entered into, where payments are made, where business is carried on,[166] or where the contract was breached.[167] Venue

156. FLA. R. CIV. P. 1.140(b).
157. J.C. Armstrong v. Times Publishing Co., 481 So. 2d 41, 43 (Fla. 1st Dist. Ct. App. 1986); Florida Patient's Compensation Fund v. Florida Physician's Ins. Reciprocal, 507 So. 2d 778 (Fla. 3d Dist. Ct. App. 1987).
158. FLA. R. CIV. P. 1.060 (b).
159. City of North Port v. Faust, 489 So. 2d 45 (Fla. 2d Dist. Ct. App. 1986).
160. *Id.*
161. New Holland, Inc. v. Trunk, 511 So. 2d 746 (Fla. 5th Dist. Ct. App. 1987).
162. Beckles v. Grover, 496 So. 2d 993 (Fla. 2d Dist. Ct. App. 1986).
163. *Id.*
164. *J.C. Armstrong*, 481 So. 2d at 43.
165. 484 So. 2d 1370, 1371 (Fla. 3d Dist. Ct. App. 1986).
166. Fitzgerald v. Westinghouse Credit Corp., 498 So. 2d 657 (Fla. 5th Dist. Ct. App. 1986); Valiant Air Command Inc. v. Frank K. Collins Assoc., 500 So. 2d 577, 578 (Fla. 5th Dist. Ct. App. 1986).
167. United Bank of Pinellas v. Farmers Bank of Malone, 511 So. 2d 1078, 1080

is often changed where there is inconvenience to one of the parties, as in the majority of witnesses being located in a jurisdiction other than the one where the action is presently being brought.[168]

Any objection to venue is waived by the failure of a party to raise it in a timely fashion.[169] However, the possibility of waiver prescribed by Rule 1.140(l) does not come into play until the filing of the motions under subdivisions (b), (e) and (f) of that rule, or in the absence of such motions, the filing of a responsive pleading.[170] In *Beckles v. Grover*,[171] a failure to attach venue at the same time as filing a motion for continuance did not constitute a waiver of a venue objection, when the motion was brought because the case was not at issue.

VI. Discovery

A. *Generally*

Modern discovery rules recognize the fundamental principal that the accrual of a cause of action, regardless of its underlying nature, coincides with the injured party's discovery or duty to discover an invasion of his legal rights.[172] The purpose of these rules is to disclose items that may reasonably lead to evidence on the issues as framed in the pleadings.[173] They are not to be used for the purpose of harassment.[174] Rule 1.280 provides for "discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action" and it further states that "it is not ground for objection that the information sought will be inadmissable at trial if the information sought appears reasonably calculated to lead to the discovery of admissable evi-

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(Fla. 1st Dist. Ct. App. 1987).

168. Levy v. Hawks Cay Inc., 505 So. 2d 24 (Fla. 3d Dist. Ct. App. 1987).

169. Insurance Co. of North America v. Julien P. Benjamin Equipment Co., 481 So. 2d 511 (Fla. 1st Dist. Ct. App. 1985).

170. Beckles v. Grover, 496 So. 2d 993, 994 (Fla. 2d Dist. Ct. App. 1986).

171. *Id.*

172. Hawkins v. Washington Shores Sav. Bank, 509 So. 2d 1314, 1315 (Fla. 5th Dist. Ct. App. 1987).

173. Caribbean Security Sys., Inc. v. Security Control Sys., Inc., 486 So. 2d 654 (Fla. 3d Dist. Ct. App. 1986) (request to produce, which included request for defendant's corporate minutes, financial records, lease agreements and bank statements, were too broad in scope as to time and lacked specificity as related to issues as made by the pleadings, and were unwarranted intrusions on defendant's business, as well as burdensome).

174. *Id.* at 656.

dence."[175] The trial court possesses broad discretion in granting or refusing discovery motions and also in protecting parties against possible abuse of discovery procedures; only an abuse of this discretion will constitute fatal error.[176]

"Discovery of facts known and opinions held by experts, otherwise discoverable . . . and acquired or developed in anticipation of litigation or for trial, may be obtained . . . by interrogatories."[177] However, where an expert has been retained in anticipation of litigation, facts known or opinions held by that expert may be discovered upon a showing of exceptional circumstances under which it would be impractical to otherwise obtain the information.[178]

There is no necessity for interrogatories prior to taking a deposition of a non-expert witness.[179] Although the practice is preferable because it bolsters the ability to show need for a deposition, it also provides the attorney with information which is useful in preparing for the deposition. Parties to a suit have a right to be present at oral deposition, or generally, at each stage of the lawsuit so that no party gains a tactical advantage by excluding another party.[180] Rule 1.310(d) authorizes a party to suspend a deposition for the time necessary to make a motion for an order to compel complete answers.[181] Good cause must be shown to present or restrict the taking of depositions.[182] Discovery orders are reviewable by certiorari when a plenary appeal would not

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175. FLA. R. CIV. P. 1.280 (b)(1); Fischer v. Hofmann Wholesale Nurseries, Inc., 487 So. 2d 413, 414 (Fla. 4th Dist. Ct. App. 1986) (interrogatory in which accountant was asked to break down hours he worked for his clients was not burdensome and was discoverable where such information was relevant to claim against accountant for breach of contract and for negligence; not required to disclose names and addresses of his clients in response to interrogatory where these are not relevant to the claim); Smith v. Bloom, 506 So. 2d 1173 (Fla. 4th Dist. Ct. App. 1987).

176. Eyster v. Eyster, 503 So. 2d 340 (Fla. 1st Dist. Ct. App. 1987) on motion for rehearing and rehearing en banc; Brown v. Brown, 500 So. 2d 655 (Fla. 1st Dist. Ct. App. 1986).

177. FLA. R. CIV. P. 1.280 (b)(3)(A).

178. FLA. R. CIV. P. 1.280 (b)(3)(B); Ranpura v. Dep't of Professional Regulation, Bd. of Medical Examiners, 507 So. 2d 146 (Fla. 1st Dist. Ct. App. 1987).

179. Nuener v. Aviall, Inc., 485 So. 2d 495 (Fla. 1st Dist. Ct. App. 1986).

180. Ferrigno v. Yoder, 495 So. 2d 886 (Fla. 2d Dist. Ct. App. 1986) (trial court abused its discretion in entering order precluding each of two plaintiffs from attending the deposition of the other on the basis of defendant's asserted need to ask questions of the two independently in order to elicit candid responses).

181. Hernandez v. Charles E. Virgin, M.D., P.A., 505 So. 2d 1369, 1370 (Fla. 3d Dist. Ct. App. 1987).

182. *Id.*

preclude irreparable injury.[183]

B. *Work Product/Attorney-Client Privilege*

The work product privilege protects materials developed in anticipation of litigation.[184] This privilege continues to exist after the file is closed.[185] The burden is on the party seeking to overcome the work product objection to show a need for the documents sought and demonstrate that they are unable, without undue hardship, to obtain the equivalent by any other means.[186] Work product is subject to discovery upon a showing of need, whereas opinion work product is absolutely, or nearly absolutely, privileged.[187]

Voluntary disclosure of privileged material to a third party is inconsistent with the confidential relationship between attorney and client and thus, generally waives the attorney-client privilege.[188] Exceptions to this rule such as common interests, a joint defense, or pooled information enable litigants and their respective attorneys who share a common litigation interest to exchange information freely among themselves without fear that by their exchange they will forfeit protection of the privilege.[189]

The work-product privilege is designed to promote our adversary system by protecting attorney's trial preparations from an opposing party in litigation.[190] The "common interests privilege" relates not only to attorney-client materials, but also to an attorney's work product.[191] Waiver of the attorney-client privilege, which is designed to protect client confidentiality, does not in itself constitute a waiver of the work-product privilege, designed to protect a legal craftsman in product of

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183. Ruhland v. Gibeault, 495 So. 2d 1243, 1244 (Fla. 5th Dist. Ct. App. 1986).

184. *Id.* at 1243; Sears Roebuck & Co. v. Scott, 481 So. 2d 968 (Fla. 4th Dist. Ct. App. 1986) (incident report on slip and fall which occurred in department store was not discoverable, though such reports were routinely prepared by department store, where report was prepared pursuant to written procedure established by store's regional counsel for anticipating litigation).

185. *Ruhland*, 495 So. 2d at 1244.

186. *Id.*

187. State v. Rabin, 495 So. 2d 257, 262 (Fla. 3d Dist. Ct. App. 1986).

188. Visual Scene Inc. v. Pilkington Bros., 508 So. 2d 437, 440 (Fla. 3d Dist. Ct. App. 1987).

189. *Id.*

190. *Id.*

191. *Id.*

his labors.[192] Therefore, disclosure made in preparation for trial does not waive the work-product privilege unless it proves inconsistent with the maintenance of secrecy from disclosing to the party's adversary, thereby substantially increasing any possibility of the opposing party in obtaining such information.[193]

C. *Sanctions*

In accordance with Rule 1.380(b)(2), upon a party's failure to obey a discovery order, the court may impose sanctions, including the striking of pleadings,[194] prohibiting the introduction of evidence,[195] refusing to allow the presentation of a claim or defense,[196] or awarding attorney fees and costs.[197] The purpose for providing these sanctions is to ensure compliance with the court's discovery orders.[198] The imposition of these sanctions lies within the court's discretion and are to be employed only in extreme circumstances due to their severity.[199]

An order imposing sanctions for the failure to comply with a discovery request must recite the party's wilful failure to submit to discovery.[200] The exclusion of evidence which has not been disclosed in accordance with a pretrial order and when its use would prejudice the opposing party is similarly viewed as the rule not allowing witnesses to testify whose names have not been disclosed prior to trial.[201]

VII. Offer of Judgment

Rule 1.442, governing offers of judgment, is designed to induce a party to settle litigation and obviate the necessity of a trial.[202] "At any time more than ten days before the trial begins, a party defending

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192. *Id.*
193. *Id.*
194. Mitchem v. Grubbs, 485 So. 2d 891 (Fla. 1st Dist. Ct. App. 1986).
195. Stoner v. Verkaden, 493 So. 2d 1126 (Fla. 4th Dist. Ct. App. 1986).
196. FLA. R. CIV. P. 1.380 (b)(2)(B).
197. Dean Witter Reynolds, Inc. v. Hammock, 489 So. 2d 761 (Fla. 1st Dist. Ct. App. 1986).
198. United States Automobile Ass'n v. Strasser, 492 So. 2d 399 (Fla. 4th Dist. Ct. App. 1986) (court abused its discretion in entering default judgment as a sanction where interrogatories and request for admissions were ultimately answered).
199. *Mitchem*, 485 So. 2d at 891.
200. *Stoner*, 493 So. 2d at 1127.
201. S.N.W. Corp. v. Abraham, 491 So. 2d 1223 (Fla. 4th Dist. Ct. App. 1986).
202. Kennard v. Forcht, 495 So. 2d 924 (Fla. 4th Dist. Ct. App. 1986).

against a claim may serve an offer on the adverse party to allow judgment to be taken against him for the money or property or the effect specified in his offer with costs then accrued."[203]

In *Kennard v. Farcht*,[204] the Fourth District Court of Appeal found that the rule does not permit a party to accept an offer of judgment once trial has begun. The court felt the framers of the rule must have had the purpose of avoiding uneccessary litigation in mind "when they required *both* that the offer be made at least ten days before trial and that the offerree accept or reject within ten days. By adopting these parallel provisions, it appears that the drafters intended that the 'last window of opportunity' for settlement be the ten day period immediately before trial." The court followed cases decided under Rule 68, Federal Rules of Civil Procedure, as there are no Florida cases addressing this issue.[205] Therefore, the plaintiff who receives an offer prior to trial but waits until the trial is essentially complete before attempting to accept the offer, is prohibited from such acceptance.[206] An amended offer of judgment does not relate back to date of service of original offer of judgment and will be considered as a successive offer which must again comply with the time requirements.[207] Substantial compliance with the express time requirement for service of offer is not sufficient.[208]

VIII. Default

A default pursuant to Rule 1.380(b) should be distinguished from a default for failure to plead, which is governed by Rule 1.500. A default judgment or a sanction will be entered against a party only in the most extreme circumstances, as where there is a deliberate and contumacious disregard of the court's authority or when a violation has been committed with wilful disregard of or gross indifference to an order of the court.[209] In light of the principle that justice prefers decisions

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203. FLA. R. CIV. P. 1.442; Cheek v. McGowan Electric Supply Co., 511 So. 2d 977 (Fla. 1987).
204. 495 So. 2d 924 (Fla. 4th Dist. Ct. App. 1986).
205. *Id.* at 925.
206. *Id.*
207. *Cheek*, 511 So. 2d at 977.
208. *Id.* at 982.
209. *United States Automobile Ass'n.*, 492 So. 2d at 399; Belflower v. Cushman & Wakefield of Florida, Inc., 510 So. 2d 1130 (Fla. 2d Dist. Ct. App. 1987); Championship Wrestling from Florida Inc. v. Deblasio, 508 So. 2d 1274 (Fla. 4th Dist. Ct.

based on the merits to default judgments, the purpose of reposing in the trial court to enter a default is not to punish or penalize, but to ensure compliance with orders[210] and to speed the cause by preventing procrastination.[211]

Florida has several interrelated rules governing the various requirements for defaults: Rule 1.500, 1.080(h), 1.440(c) and 1.110(e). Rule 1.500(b) requires that if the party against whom default shall be entered "has filed or served any paper in the action, he shall be served with notice of the application for default."[212] In *J.A.R., Inc. v. Universal American Realty Corp.*,[213] a tenant's letter to the landlord, which was styled as a defense to the landlord's complaint to terminate the lease and accelerate future rentals, was sufficient to require that the tenant be served with notice of an application for default.

"A party may plead or otherwise defend at any time before default is entered."[214] In light of this rule, the trial court cannot properly enter a default order where the defendant served an amended answer by mail on the same day the order was signed,[215] where a motion to dismiss was found to be sufficient response to a complaint,[216] where a complaint wholly fails to state a cause of action,[217] where the party completed service of responsive pleading on or before the date the default was entered,[218] and where the answer was filed prior to the default hearing, but after expiration of the time allowed for filing an

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App. 1987); Far Out Music, Inc. v. Jordan, 502 So. 2d 523 (Fla. 3d Dist. Ct. App. 1987); Trupei v. City of Lighthouse Point, 506 So. 2d 19 (Fla. 4th Dist. Ct. App. 1987); Mittleman v. Rowe Int'l, Inc., 511 So. 2d 766 (Fla. 19).

210. *United States Automobile Ass'n*, 492 So. 2d at 399.

211. Monte Campbell Crane Co. v. Hancock, 510 So. 2d 1104 (Fla. 4th Dist. Ct. App. 1987).

212. FLA. R. CIV. P. 1.500(b); Barnett Bank of South Florida, N.A. v. Picchi, 503 So. 2d 1373 (Fla. 4th Dist. Ct. App. 1987); Belcher v. Ferrara, 511 So. 2d 1089 (Fla. 3d Dist. Ct. App. 1987).

213. 485 So. 2d 467 (Fla. 3d Dist. Ct. App. 1986).

214. FLA. R. CIV. P. 1.500(c).

215. Barnett Bank of Southwest Florida, N.A. v. Anderson, 488 So. 2d 923 (Fla. 2d Dist. Ct. App. 1986).

216. Affordable Homes, Inc. v. McKinsey-Green, Inc., 509 So. 2d 407 (Fla. 1st Dist. Ct. App. 1987).

217. Sunshine Sec. & Detective Agency v. Wells Fargo Armored Services Corp., 496 So. 2d 246 (Fla. 3d Dist. Ct. App. 1986).

218. Gibraltar Serv. Corp. v. Lone and Assocs., 488 So. 2d 582 (Fla. 4th Dist. Ct. App. 1986).

answer.[219]

In deciding whether to grant a motion to set aside a default, the trial court must determine whether the defendant demonstrated that his failure to respond was excusable neglect and whether he had a meritorious defense, or whether he demonstrated due diligence in seeking relief upon learning of default.[220] Excusable neglect must be set out by affidavit or any other sworn statement setting forth facts explaining the mistake or inadvertence, whereas meritorious defenses may be shown by an unverified pleading or an affidavit.[221]

Generally, mere negligence or inattention of a party is no ground for vacating a default judgment.[222] Furthermore, illiteracy does not provide a basis to set aside a judgment on the ground of excusable neglect.[223] And, delaying a motion to set aside a default judgment for nearly one year constitutes a lack of due diligence.[224]

A default judgment precludes the defaulting party from filing any pleadings in the action other than those requesting relief from default.[225] While an order denying a motion to set aside a default judgment is a non-final order, thus precluding a petition for rehearing, the trial court is vested with inherent discretionary authority to reconsider any order entered prior to rendition of final judgment in a cause.[226]

IX. Dismissal

A. *Generally*

Dismissal of actions is generally governed by Rule 1.420. Its use as a sanction, however, is specifically permitted under Rule 1.200(c) for

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219. Haitian Community Flamingo Auto Parts Corp. v. Landmark First Nat'l Bank, 501 So. 2d 170 (Fla. 4th Dist. Ct. App. 1987).

220. *Gibralter*, 488 So. 2d at 584 (attorney's miscalculation of due date of responsive pleading due to misinterpretation of date notation as day of service on client rather than date on which client relayed process to attorney was excusable neglect for purposes of obtaining vacation of default).

221. *Id.*

222. Jax Sani Serva System, Inc. v. Burkett, 509 So. 2d 1251 (Fla. 1st Dist. Ct. App. 1987).

223. *Id.*

224. Ranger Constr. Industries v. Huff, 499 So. 2d 2 (Fla. 4th Dist. Ct. App. 1986).

225. Hines v. Hines, 494 So. 2d 297 (Fla. 3d Dist. Ct. App. 1986).

226. Arnold v. Massebeau, 493 So. 2d 91 (Fla. 5th Dist. Ct. App. 1986).

failure to attend a pretrial conference.[227] Courts have broadly interpreted the rule so as to allow dismissal for failure to comply with any legitimate order.[228] Although the court's exercise of authority is discretionary, dismissal is considered a drastic remedy which is to be used only in extreme situations.[229] Determining whether the trial court has abused its discretion in dismissing a cause of action requires weighing the severity and prejudicial effect of counsel's actions against the loss to the innocent litigant of his cause of action.[230] Usually, dismissal is improper, absent any showing of wilful or intentional disregard of the trial court's order.[231]

The power to dismiss a plaintiff's complaint may be exercised to suspend the plaintiff's right to proceed but not to serve as an adjudication on the merits.[232] Since the purpose of a motion to dismiss is to test the legal sufficiency of the pleading,[233] consideration of defendant's affirmative defenses or of the sufficiency of the evidence is irrelevant and immaterial.[234] It is inappropriate for a court to dismiss an action where it is still possible at the time of dismissal to comply with any notice requirements,[235] where improper remedies are sought,[236] or where the

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227. FLA. R. CIV. P. 1.200 (c).

228. Livingston v. State of Florida Dep't of Corrections, 481 So. 2d 2 (Fla. 1st Dist. Ct. App. 1985) (dismissal with prejudice of negligence action against Dept. of Corrections and two of its physicians for alleged negligent treatment of injury, as sanctions for lateness in serving witness and document lists, lateness in submission of instructions, verdict form and pretrial stipulation, and failure of plaintiff's counsel to attend attorney's conference, was abuse of discretion, even though plaintiff's counsel was late in complying with every date set by pretrial order, where plaintiff's counsel was in compliance with pretrial order by date of pretrial conferences).

229. *Id.*; Beauchamp v. Collins, 500 So. 2d 294 (Fla. 3d Dist. Ct. App. 1986).

230. *Livingston*, 481 So. 2d at 3.

231. Garland v. Dixie Ins. Co., 495 So. 2d 785 (Fla. 4th Dist. Ct. App. 1986) (dismissal of complaint without prejudice was too severe a sanction for failure of plaintiff's counsel to appear at scheduled pretrial conference, absent any showing of wilful or intentional disregard of trial court's order); *Beauchamp*, 500 So. 2d at 294.

232. Epps v. Hartley, 495 So. 2d 921 (Fla. 4th Dist. Ct. App. 1986) (trial court did not abuse its discretion when it refused to grant plaintiff's motion for continuance on day of trial and dismisssed the complaint; however, dismissal with prejudice was an abuse of discretion because it was far too severe a punishment to impose for plaintiff's failure to be in court when plaintiff had been on "stand-by" and definite trial time had been set only a few hours earlier).

233. Steigman v. Danese, 502 So. 2d 463 (Fla. 1st Dist. Ct. App. 1987).

234. Alexander Hamilton Corp. v. Leeson, 508 So. 2d 513 (Fla. 4th Dist. Ct. App. 1987).

235. Wemett v. Duval County, 485 So. 2d 892 (Fla. 1st Dist. Ct. App. 1986)

plaintiff fails to establish that untimeliness impaired the fairness of the proceedings or correctness of the action.[237] In *Adams v. Lieberman*,[238] it was found improper to grant a motion to dismiss where the court went beyond the four corners of the complaint by considering a prior judgment in plaintiff's favor in another case. A properly filed dismissal divests the court of jurisdiction.[239]

B. *Failure to Prosecute*

Rule 1.420(e) is not self-executing.[240] It requires action by the court or a filing of a motion to dismiss, and such action must be undertaken before there is further prosecution of the cause.[241] It is the date of filing, not the date of service, that commences and concludes the running of the one-year period (without record activity) which is required for a dismissal for failure to prosecute.[242] Filing of notice for trial,[243] paying a new filing fee,[244] filing an interrogatory requesting the names of previously undisclosed witnesses,[245] or notice of hearing,[246] or an order of an administrative judge transferring the cause from one judge to another,[247] are examples of what might constitute record activity sufficient to preclude dismissal. The notice for trial defeats a motion to dismiss even where the two motions have been filed

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(statute of limitations had not yet run, therefore, possible to comply with notice requirements).

236. Fonte v. Alvarez, 491 So. 2d 1268 (Fla. 2d Dist. Ct. App. 1986).

237. Greynolds Park Manor, Inc. v. Dep't of Health & Rehabilitative Services, 491 So. 2d 1157 (Fla. 1st Dist. Ct. App. 1986); D'Best Laundromat, Inc. v. Janis, 508 So. 2d 1325 (Fla. 3d Dist. Ct. App. 1987).

238. 507 So. 2d 716 (Fla. 1st Dist. Ct. App. 1987).

239. McCutcheon v. Tretis, 501 So. 2d 710 (Fla. 2d Dist. Ct. App. 1987).

240. Barnes v. Escambia County Employees Credit Union, 488 So. 2d 879 (Fla. 1st Dist. Ct. App. 1986); City of Miami v. Katz, 498 So. 2d 635 (Fla. 3d Dist. Ct. App. 1986).

241. Kubera v. Fisher, 483 So. 2d 836 (Fla. 2d Dist. Ct. App. 1986).

242. Scharlin v. Broward County Property Appraisal Adjustment Bd., 500 So. 2d 345 (Fla. 4th Dist. Ct. App. 1987).

243. *Kubera*, 483 So. 2d at 838; Peterzell v. James Urbach M.D., P.A., 497 So. 2d 921 (Fla. 5th Dist. Ct. App. 1986).

244. Henkel v. Chua, 507 So. 2d 791 (Fla. 4th Dist. Ct. App. 1987) (paying filing fee "was active measure intended and calculated to hasten suit to judgement").

245. Santa v. Thermo Air Service, Inc., 506 So. 2d 1170 (Fla. 3d Dist. Ct. App. 1987).

246. Grooms v. Garcia, 482 So. 2d 407 (Fla. 2d Dist. Ct. App. 1985).

247. Fisher v. Rodgers, 496 So. 2d 241 (Fla. 3d Dist. Ct. App. 1986).

simultaneously.[248]

In *Karcher v. F.W. Schinz & Associates, Inc.*,[249] the plaintiff's single interrogatory seeking the basis for certain denials made by the defendant in response to a request for admissions - both of which had been filed one year earlier - did not genuinely hasten the suit toward disposition, and therefore, did not constitute genuine record activity which precluded dismissal. A prematurely filed motion to dismiss for lack of prosecution is not the type of record activity which will toll the one-year period addressed in Rule 1.420(e) because it is not the type of activity intended and reasonably calculated to hasten the cause to judgment.[250]

A notice or a motion for trial filed at a time when the case is not at issue is a nullity and does not constitute proper record activity sufficient to defeat an otherwise valid motion to dismiss for lack of prosecution.[251] An order permitting an attorney to withdraw from the case does not constitute record activity to defeat dismissal.[252]

Non-record litigation activity may, in some cases, constitute good cause why an action should not be dismissed for an absence of record activity for one year or more.[253] However, the non-record activity must meet a standard equating with a compelling reason for failure to prosecute.[254]

X. Summary Judgment

A motion for summary judgment "shall be rendered if . . . there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."[255] However, it is necessary that the party moved against be given notice and be allowed an oppor-

248. Mitchell v. Coker Fuel, Inc., 511 So. 2d 344 (Fla. 2d Dist. Ct. App. 1987).
249. 487 So. 2d 389 (Fla. 1st Dist. Ct. App. 1986).
250. Carter v. Cerezo, 495 So. 2d 202 (Fla. 5th Dist. Ct. App. 1986); Barnett Bank of East Polk County v. Fleming, 508 So. 2d 718 (Fla. 1987); Mason v. Boyung, 502 So. 2d 27 (Fla. 2nd Dist. Ct. App. 1987).
251. Alech v. General Ins. Co., 491 So. 2d 337 (Fla. 3d Dist. Ct. App. 1986).
252. Berenyi v. Halifax Hosp. Medical Center, 498 So. 2d 655 (Fla. 5th Dist. Ct. App. 1986).
253. Bruns v. Jones, 481 So. 2d 544 (Fla. 5th Dist. Ct. App. 1986) (remanded to consider whether discovery via video taped depositions, while done without court order, constitutes sufficient nonrecord activity precluding dismissal).
254. Eisen v. Fink, 511 So. 2d 1092 (Fla. 2d Dist. Ct. App. 1987).
255. FLA. R. CIV. P. 1.510(c); Maglione Realty, Inc. v. Votrian, 509 So. 2d 1384 (Fla. 2d Dist. Ct. App. 1987).

tunity to meet the question of whether there exists a genuine issue of material fact.[256] The motion must be served at least twenty days before hearing.[257] Therefore, in *Fruhmorgen v. Watson*,[258] it was improper for the trial court to grant an oral motion for summary judgment on the day the case was set for trial.

The purpose of a summary judgment motion is to determine whether there is sufficient evidence to justify a trial.[259] It should not be granted until the facts have been sufficiently developed to enable the court to be reasonably certain that there is no genuine issue as to material fact.[260] In so deciding the court may look beyond the pleadings.[261]

The motion is premature when there has been insufficient time for discovery or when objections to interrogatories and motions to produce are pending.[262] A summary judgment motion stated in general terms is insufficient to place the other party on notice of issues of fact or law which would be argued at a hearing.[263]

The party moving for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact.[264] The opposing party must then come forward with counter-evidence sufficient to reveal a genuine issue.[265] Rule 1.510(b) permits a motion for summary judgment at any time and there is no requirement that the motion be preceded by an answer presenting affirmative defenses.[266] If a party is moving for summary judgment prior to an answer being filed by the defendant, that party has the burden of conclusively establishing that no answer which the defendant might properly serve could present a genuine issue of material fact, rather than merely disproving defenses

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256. Fruhmorgen v. Watson, 490 So. 2d 1032 (Fla. 2d Dist. Ct. App. 1987).
257. Fla. R. Civ. P. 1.510 (c).
258. 490 So. 2d 1032, 1033 (Fla. 2d Dist. Ct. App. 1987).
259. Davis v. Lyall & Lyall Veterinarians, P.A., 506 So. 2d 1072 (Fla. 5th Dist. Ct. App. 1987).
260. Singer v. Star, 510 So. 2d 637 (Fla. 4th Dist. Ct. App. 1987).
261. DeAtley v. McKinley, 497 So. 2d 962 (Fla. 1st Dist. Ct. App. 1986) (trial court can consider affirmative defenses raised in defendant's affidavits in opposition to summary judgment motion, although not properly pled).
262. *Singer*, 510 So. 2d at 639.
263. Locke v. State Farm Fire and Casualty Co., 509 So. 2d 1375 (Fla. 1st Dist. Ct. App. 1987).
264. Zabrani v. Riveron, 495 So. 2d 1195 (Fla. 3d Dist. Ct. App. 1986); DeMesme v. Stephenson, 498 So. 2d 673 (Fla. 1st Dist. Ct. App. 1986).
265. *Zabrani*, 495 So. 2d at 1199; *DeMesme*, 498 So. 2d at 675.
266. Coral Ridge Properties Inc. v. Plaza Del Mar Ass'n. Inc., 503 So. 2d 414 (Fla. 1987).

ultimately raised in the answer.[267]

Rule 1.510(e) provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[268] The trial court is not required to consider documents submitted by a summary judgment opponent where they are not timely filed, are not in the form of affidavits, and do not specifically allege that they are based on personal knowledge and in no way establish that the persons speaking therein are competent to testify to the matters stated.[269] In *Nous v. All State Pipe Supply Co.*,[270] the First District Court of Appeal held that an affidavit containing a statement by an officer of the plaintiff that the allegations in the complaint were true and that he had personal knowledge, was insufficient to support a motion for summary judgment. The factual basis of affiant's knowledge need not be set out in affidavit for summary judgment unless an affiant is shown to be in a position that would necessarily involve possession of a factual basis for assertions.[271]

If the record reflects the possibility of a genuine issue of material fact[272] or an answer pleads a sufficient legal defense, it is improper to enter judgment on pleadings in favor of the plaintiff.[273] It is also improper to enter summary judgment where no notice or motion was made[274] or where it is based upon releases given in a prior litigation involving similar issues by the party against whom summary judgment was granted, or where the affirmative defense or release had never been asserted in the pleadings.[275] It is not contradictory to reverse a summary judgment granted for the defendant and to later affirm a subsequent directed verdict for the defendant.[276]

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267. Valhalla, Inc. v. Carbo, 487 So. 2d 1125 (Fla. 4th Dist. Ct. App. 1986).
268. Fla. R. Civ. P. 1.510 (e).
269. *DeMesme*, 498 So. 2d at 673.
270. 487 So. 2d 1204 (Fla. 1st Dist. Ct. App. 1986).
271. Carter v. Cessna Finance Corp., 498 So. 2d 1319 (Fla. 4th Dist. Ct. App. 1986).
272. Frazier v. Schenck, 503 So. 2d 444 (Fla. 2d Dist. Ct. App. 1987).
273. Horta v. Flanigan's Enterprises Employees Credit Union, Inc., 488 So. 2d 657 (Fla. 3d Dist. Ct. App. 1986).
274. Gildred v. Alverde, 500 So. 2d 307 (Fla. 3d Dist. Ct. App. 1986).
275. Playa Del Mar Ass'n v. Florida Power & Light Co., 481 So. 2d 943 (Fla. 4th Dist. Ct. App. 1985).
276. Sylvester v. City of Delray Beach, 486 So. 2d 607 (Fla. 4th Dist. Ct. App. 1986) (postures at the times of the two motions are different as are the considerations; with summary judgment all proper pleadings of the non-movant are taken to be true,

XI. Directed Verdict

A directed verdict is appropriate only when evidence and all reasonable inferences therefrom fail to prove the plaintiff's case,[277] reasonable men could not arrive at a contrary determination,[278] and a jury could therefore not lawfully find for the plaintiff.[279] If the evidence is conflicting[280] or reasonable people could differ as to the conclusions or inferences to be drawn,[281] the matter is properly before the jury and the verdict should not be disturbed.[282] The trial and appellate courts must view the evidence in a light most favorable to the non-moving party, resolving every conflict and inference in favor of that party.[283] A trial court is not privileged to disregard evidence admitted at trial when considering a motion for directed verdict, since all evidence admitted before the jury must be considered when ruling on the motion.[284]

A motion for directed verdict must be made at the close of all the evidence, otherwise the court is deemed to have submitted the action to the jury.[285] A failure to move for a directed verdict also results in a waiver of the right to have the trial court consider a motion for judgment not withstanding the verdict.[286]

XII. Res Judicata/Collateral Estoppel

In order for a final judgment to bar further litigation based upon principles of res judicata or claim preclusion, the judgment must reflect the "identity of" the thing sued for, the cause of action, the persons or

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but at time of directed verdict, the non-movant has presented all of his evidence).

277. Alvarez v. Dade County School Board, 482 So. 2d 542 (Fla. 3d Dist. Ct. App. 1986) (directed verdict improper in light of conflicting evidence).

278. American Auto v. Tehrani, 508 So. 2d 365 (Fla. 1st Dist. Ct. App. 1987).

279. Rosa v. Florida Coast Bank, 484 So. 2d 57 (Fla. 4th Dist. Ct. App. 1986).

280. Jennings v. Ray, 484 So. 2d 1267 (Fla. 5th Dist. Ct. App. 1986).

281. *Rosa*, 484 So. 2d at 57.

282. *Id.*

283. Leasing Service Corp. v. American Motorists Ins. Co., 496 So. 2d 847 (Fla. 4th Dist. Ct. App. 1986); Sears Roebuck & Co. v. McKenzie, 502 So. 2d 940 (Fla. 3d Dist. Ct. App. 1987) *Tehrani*, 508 So. 2d at 365.

284. Singer v. Barboa, 497 So. 2d 279 (Fla. 3rd Dist. Ct. App. 1986) (quoting, Southeastern Fire Ins. Co. v. Kings Way Mortgage Co., 481 So. 2d 530 (Fla. 3d Dist. Ct. App. 1985).

285. FLA. R. CIV. P. 1.480 (b).

286. *Dean Witter*, 489 So. 2d 761 (Fla. 1st Dist. Ct. App. 1986); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Anderson, 501 So. 2d 635 (Fla. 1st Dist. Ct. App. 1987).

parties of the action, and the quality in the person for or against whom the claim is made.[287] Res judicata is an affirmative defense that must be pled.[288] Merely mentioning a prior proceeding is not sufficient proof that the question presented in any subsequent litigation has been previously adjudicated.[289]

The doctrine of collateral estoppel, however, applies where two causes of action are different and parties in both suits are identical,[290] in which case, the judgment in the first case only estops the parties from litigating in the second suit issues common to both actions that were actually adjudicated in prior litigation.[291] Some Florida cases use the term estoppel by verdict to refer to collateral estoppel or what, perhaps, is better described as issue preclusion. Estoppel by judgment usually means either a res judicata bar or claim preclusion, but some courts and parties have used the wrong label or treated the concepts as interchangeable - which they are not. It is essential that the question common to both causes of action was actually adjudicated, and in the face of any doubt, that doubt must be resolved in favor of the full consideration of the substantive issues of the litigation and against the rigid application of any principle that would defeat the ends of justice.[292]

The doctrine of estoppel against inconsistent positions provides that a party who assumed a certain position in a legal proceeding may not thereafter assume a contrary position.[293] The modern view espoused by the United States Supreme Court relaxes the concept of mutuality in respect to collateral estoppel both when invoked defensively[294] or

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287. Hittel v. Rosenhagen, 492 So. 2d 1086 (Fla. 4th Dist. Ct. App. 1986); Keesee v. Estate of Neely, 498 So. 2d 1026 (Fla. 2d Dist. Ct. App. 1986); Neidhart v. Pioneer Fed'l Savings and Loan Ass'n., 498 So. 2d 594 (Fla. 2d Dist. Ct. App. 1986).

288. Hoke v. Fort Lauderdale Bd. of Adjustment, 486 So. 2d 698 (Fla. 4th Dist. Ct. App. 1986).

289. *Id.*

290. City of Tampa v. Lewis, 488 So. 2d 860 (Fla. 2d Dist. Ct. App. 1986); Argerenon v. St. Andrews Cove I Condominium Ass'n Inc., 507 So. 2d 709 (Fla. 2d Dist. Ct. App. 1987).

291. *Hittel*, 492 So. 2d at 1086; Skidmore, Owings and Merrill v. Volpe Const. Co., Inc., 511 So. 2d 642 (Fla. 3d Dist. Ct. App. 1987).

292. *Hittel*, 492 So. 2d 1086 (Fla. 4th Dist. Ct. App. 1986); Nationwide Mut. Fire Ins. Co. v. Race, 508 So. 2d 1276 (Fla. 3d Dist. Ct. App. 1987); *Neidhardt*, 498 So. 2d at 594.

293. McCurdy v. Collis, 508 So. 2d 380 (Fla. 1st Dist. Ct. App. 1987).

294. Blonder-Tongue Lab., Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

offensively.[295]

The entry of a final judgment or order is the common element that invokes the doctrines of both res judicata and collateral estoppel.[296] In *Accent Realty of Jacksonville, Inc. v. Crudele*,[297] the Third District Court of Appeals held that an order granting mandamus was not final, since the order contemplated the performance of additional judicial labor in the form of an evidentiary hearing. A denial, without an opinion, of a petition for writ of certiorari,[298] or a dismissal for lack of prosecution[299] or as a sanction,[300] does not constitute an adjudication on the merits so as to invoke either doctrine. An order or judgment that is only voidable constitutes a bar to later litigation for res judicata purposes, unless the order or judgment is reversed, in which event no bar may be claimed under it.[301]

XIII. New Trial

Rule 1.530 governs the granting of new trials and motions for rehearing. It provides that "all orders granting new trials shall specify the specific grounds therefore."[302] In *Fambrano v. Devanesan*,[303] the trial court failed to comply with this rule because the trial court's order merely contained an "incantation of conclusory statement that the punitive damage award was excessive as a matter of law and shocked judicial conscience and that the jury must have based their award on matters outside evidence or upon passion or prejudice." A motion for new trial is often granted in cases in which counsel expressed a personal opinion during closing argument as to the truth of evidence and credibility of witnesses.[304]

Unlike orders granting new trial, the trial court need not specify

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295. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979).

296. Accent Realty of Jacksonville, Inc. v. Crudele, 496 So. 2d 158 (Fla. 3d Dist. Ct. App. 1986).

297. 496 So. 2d 158 (Fla. 3d Dist. Ct. App. 1986).

298. *Id.*

299. Southwinds Riding Academy v. Schneider, 507 So. 2d 782 (Fla. 3d Dist. Ct. App. 1987).

300. Ligan v. Zayre Corp., 511 So. 2d 404 (Fla. 3d Dist. Ct. App. 1987).

301. Combustion Engineering Inc. v. Cote, 505 So. 2d 533 (Fla. 1st Dist. Ct. App. 1987).

302. Fla. R. Civ. P. 1.530 (f).

303. 484 So. 2d 603 (Fla. 4th Dist. Ct. App. 1986).

304. S.H. Investment & Development Corp. v. Kincaid, 495 So. 2d 768 (Fla. 5th Dist. Ct. App. 1986).

the grounds for granting a rehearing in a non-jury case.[305] Furthermore, in these cases, additional testimony may be taken on any or all issues for full development of essential facts so that the trial judge may render a more accurate judgment.[306] And the trial court, if convinced of having committed an error, may correct that error on motion for rehearing.[307]

XIV. Costs and Interest

A. *Costs*

The awarding of costs, as a compensatory monetary award to the winning party, is an attempt to minimize some of the expenses of litigation.[308] Although Section 57.041 of the Florida Statutes enables the prevailing party to recover certain legal costs and charges,[309] it has been recognized that this is a discretionary matter for the trial court.[310]

Keeping the costs of litigation within reasonable bounds is essential to the proper administration of justice.[311] The rule in Florida is to disallow taxation of costs for discovery depositions in preparation for trial[312] and requests for production,[313] where they serve no useful purpose in determining issues before the trial court.[314] The cost of deposition can be recovered, even if not offered into evidence at trial, if it served a useful propose.[315] However, simply stating that one has relied upon the discovery depositions is insufficient to tax costs.[316] Fees and trial subpoenas for witnesses cannot be taxed as costs if the witnesses do not attend court to testify.[317] In regards to disciplinary proceedings, any amount assessed against the Bar, including witness fees, must be

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305. Crum v. State, 507 So. 2d 759 (Fla. 1st Dist. Ct. App. 1987).
306. Wynocker v. Wynocker, 500 So. 2d 555 (Fla. 2d Dist. Ct. App. 1986).
307. *Id.*
308. Otis Elevator Co. v. Bryan, 489 So. 2d 1189 (Fla. 1st Dist. Ct. App. 1986).
309. FLA. STAT. § 57.041 (1985).
310. Salisbury Construction Corp. v. Mitchell, 491 So. 2d 308 (Fla. 4th Dist. Ct. App. 1986).
311. Caceres v. Physicians Protective Trust Fund, 489 So. 2d 869 (Fla. 3d Dist. Ct. App. 1986).
312. *Otis*, 489 So. 2d at 1189.
313. *Caceres*, 489 So. 2d at 869.
314. *Id.*
315. *Otis*, 489 So. 2d at 1189.
316. *Id.*
317. *Caceres*, 489 So. 2d at 869.

taxed to the attorney when the attorney is found guilty of the charges brought against him.[318]

Rule 1.442 provides that "if the judgment finally obtained by the adverse party is not more favorable than the offer, he must pay the costs incurred after the making of the offer."[319] A "Judgment finally obtained" means a judgment which has disposed of the case and become final after all rights to appellate review have been exhausted.[320] The Third District Court of Appeal, in *Kay v. Bricker*,[321] held that all costs incurred after the attorney's settlement offer in the malpractice action were to be borne by the client where the judgment after set-off was not more favorable that the offer. The provisions in Rule 1.442 are grounded upon the public policy of avoiding trials and ensuing appeals by the imposition of cost sanctions.[322]

B. *Prejudgment Interest*

Prejudgment interest is appropriate when the underlying recovery is compensatory in nature, but not when it is penal, since its purpose is to compensate the aggrieved party for the wrongful deprivation of the use of his money.[323] The failure to plead prejudgment interest, however, does preclude such an award.[324] It is not recoverable in personal injury actions[325] or in usurious transactions.[326] Lack of contractual privity is irrelevant in determining entitlement to prejudgment interest.[327] This award is proper against a city where the city has waived its sovereign immunity from interest.[328]

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318. The Florida Bar v. Lehrman, 485 So. 2d 1276 (Fla. 1986); The Florida Bar v. Golden, 502 So. 2d 891 (Fla. 1987).

319. FLA. R. CIV. P. 1.442.

320. Cheek v. McGowan Electric Supply Co., 483 So. 2d 1373 (Fla. 1st Dist. Ct. App. 1985).

321. 485 So. 2d 486 (Fla. 3d Dist. Ct. App. 1986).

322. *Cheek*, 483 So. 2d at 1373.

323. First American Bank & Trust v. Windjammer Time Sharing Resort, Inc., 483 So. 2d 732 (Fla. 4th Dist. Ct. App. 1986).

324. Getelman v. Levey, 481 So. 2d 1236 (Fla. 3d Dist. Ct. App. 1985).

325. Cooper v. Aetna Casualty & Surety Co., 485 So. 2d 1367 (Fla. 2d Dist. Ct. App. 1986).

326. FLA. STAT. § 687.04 (1981).

327. Florida Steel Corp. v. Adaptable Developments Inc., 503 So. 2d 1232 (Fla. 1986).

328. City of Cooper City v. P.C.H. Corp., 496 So. 2d 843 (Fla. 4th Dist. Ct. App. 1986).

For purposes of assessing prejudgment interest, "a claim becomes liquidated and susceptible of prejudgment interest when the verdict has the effect of fixing damages as of a prior date."[329] In *Wong v. New Prospect Enterprises*,[330] the Fifth District Court of Appeal found that the trial court had improperly denied recovery of prejudgment interest in a suit for breach of contract. "Since the case was decided below, the Florida Supreme Court has held that when a verdict liquidates damages on a plaintiff's out-of-pocket pecuniary losses, the plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of loss."[331]

XV. Relief From Judgment

Relief from final judgment is an ancillary proceeding governed by Rule 1.540, which provides that "the court may relieve a party or his legal representative from a final judgment, decree, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence. . .; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) judgment or decree is void; and (5) judgment or decree has been satisfied . . . or it is no longer equitable that the judgment or decree should have prospective application."[332]

The rule is essentially verbatim the Federal Rule 60(b) without the latter's clause. The rule serves as a mechanism to correct inadvertent decisions which are the result of oversight, neglect or accident, or to correct mistakes made in the ordinary course of litigation.[333]

The trial court can correct its non-final order[334] or reconsider any of its interlocutory rulings[335] prior to final judgment. Relief is inappropriate where the order is not final, not itself subject to appeal or re-

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329. Taylor v. New Hampshire Ins. Co. of Manchester, 489 So. 2d 207 (Fla. 2d Dist. Ct. App. 1986); Ferrell v. Ashmore, 507 So. 2d 691 (Fla. 1st Dist. Ct. App. 1987); Chiado v. Rauch, 497 So. 2d 945 (Fla. 1st Dist. Ct. App. 1986).
330. 488 So. 2d 647 (Fla. 5th Dist. Ct. App. 1986).
331. *Id.*
332. FLA. R. CIV. P. 1.540 (b).
333. Owen v. State, 483 So. 2d 453 (Fla. 1st Dist. Ct. App. 1986).
334. Bing v. A.G. Edwards & Sons, Inc., 498 So. 2d 1279 (Fla. 4th Dist. Ct. App. 1986).
335. Bettez v. City of Miami, 510 So. 2d 1242 (Fla. 3d Dist. Ct. App. 1987).

lief,[336] and *is* subject to a pending rehearing motion.[337] The test to determine whether an order is final or interlocutory in nature is whether the case has been disposed of by an order and whether any question remains open for judicial determination.[338] Essentially, a final decree marks the end of judicial labor.[339]

A meritorious defense is a precondition to any relief herein.[340] Therefore, in *Napco Paints, Inc. v. LaPorte (U.S.), Inc.*,[341] the third district held that the defendant was not entitled to relief where his motion was unsworn, failed to set forth any facts of an alleged meritorious defense, and adduced no affidavits, evidence or testimony in support thereof. Failure to be informed by one's spouse about the receipt of a summons and complaint does not establish excusable neglect under this rule.[342] Nor does failure to file defensive pleadings or to appear at a motion for attorney's fees, since neither are legally required.[343]

Failure to reverse jurisdiction so as to award injunctive relief after a final judgment awarding damages has been entered, does not result in mistake, inadvertence or excusable neglect.[344] Failure to receive notice of hearing entitles a party to relief from judgment.[345] A judgment entered without due service of process[346] or a judgment entered upon a

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336. Servotech Inc. v. Atlantic Cent. Corp., 497 So. 2d 1341 (Fla. 5th Dist. Ct. App. 1986).

337. Johnson v. Feeney, 507 So. 2d 722 (Fla. 3d Dist. Ct. App. 1987).

338. Prime Orlando Properties Inc. v. Dep't of Business Regulation, 502 So. 2d 456 (Fla. 1st Dist. Ct. App. 1986).

339. *Id.* at 459.

340. Napco Paints, Inc. v. LaPorte, Inc., 490 So. 2d 1023 (Fla. 3d Dist. Ct. App. 1986).

341. *Id.*

342. Orlando Partners, Ltd. v. Classic Tour Lines, 492 So. 2d 1117 (Fla. 3d Dist. Ct. App. 1986) (affidavit by wife stating she had been served with summons and complaint and told her husband about receipt of such papers, and that she received notice of hearing on motion for entry of default but forgot to mention it to her husband until after time for hearing had passed, and husband's affidavit concurring with wife's except that he did not recall wife's telling him about receipt of summons and complaint did not establish excusable neglect justifying vacation of default entered against husband and wife).

343. Niki Unlimited, Inc. v. Legal Services of Greater Miami, 483 So. 2d 46 (Fla. 3d Dist. Ct. App. 1986).

344. Valdes v. Planned Investment Ass'n. Inc., 490 So. 2d 1067 (Fla. 3d Dist. Ct. App. 1986).

345. Hammett v. Hammett, 510 So. 2d 632 (Fla. 3d Dist. Ct. App. 1987).

346. Falkner v. Amerifirst Federal Savings & Loan Ass'n., 489 So. 2d 758 (Fla. 3d Dist. Ct. App. 1986) (trial court obligated to grant relief from judgment dismissing

matter entirely outside the issues made by the pleadings is void.[347] Therefore, as a matter of law and in compliance with Rule 1.540, the trial court is obligated to grant relief from a void final judgment.[348] Failure to comply with Rule 1.080 service requirements has been held to constitute grounds for liberal application of Rule 1.540(b) relief from judgment.[349]

The trial court has limited jurisdiction to correct clerical substantive errors,[350] although generally the trial court may correct only simple clerical mistakes.[351] In *Hutton v. Sussman*,[352] the court found that a party was entitled to relief where a judge made the mistake of forgetting to deduct the amount of damages due to plaintiff's own negligence from the verdict. The key factor in determining whether a judicial order may be remedied by this rule is whether or not the court reached a decision under the intentional or purposeful exercise of its judicial function.[353] If the pronouncement reflects a deliberate choice on the part of the court, the act is judicial.[354]

Divestment of jurisdiction is a substantive change, not merely a correction or omission, and thus not within the proper realm of a *nunc pro tunc order*.[355] A trial court has jurisdiction to determine whether it has jurisdiction to grant relief in a proceeding under Rule 1.540.[356] However, the pendency of an appeal from final judgment removes the trial court's jurisdiction to grant a motion to vacate judgment or to deem the judgment satisfied.[357] The trial court is without jurisdiction to grant a party relief from tactical errors because Rule 1.540(b), which provides that the court shall have jurisdiction in very limited circumstances, does not allow the exercise of jurisdiction in cases of tactical

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complaint, where plaintiffs did not receive notice of hearing on motion to dismiss until after hearing).

347. Freshwatter v. Vetter, 511 So. 2d 1114 (Fla. 2d Dist. Ct. App. 1987).

348. *Falkner*, 489 So. 2d at 758.

349. *Owen*, 483 So. 2d at 453 (copy of all orders or judgments to be transmitted to all parties).

350. Miller v. Fortune Ins. Co., 484 So. 2d 1221 (Fla. 1986).

351. FLA. R. CIV. P. 1.540 (2); Frisard v. Frisard, 497 So. 2d 885 (Fla. 4th Dist. Ct. App. 1986).

352. 504 So. 2d 1372 (Fla. 3d Dist. Ct. App. 1987).

353. *Id.*

354. *Id.*

355. Hunter v. Hunter, 487 So. 2d 1160 (Fla. 5th Dist. Ct. App. 1986).

356. *Miller*, 484 So. 2d at 1221.

357. Georges v. Insurance Technicians, Inc., 486 So. 2d 700 (Fla. 4th Dist. Ct. App. 1986).

error. "A trial judge is deprived of jurisdiction, not by the manner in which the proceeding is terminated, but by the sheer finality of the act, whether judgment, decree, order or stipulation, which has concluded litigation. Once the litigation is terminated and the time for appeal has run, that action is concluded for all time."[358] The exercise of jurisdiction to set off one judgment against another is not a matter of right, but is one falling within the court's discretion.[359]

A motion for relief from judgment "shall be made within a reasonable time . . . not more than one year after the judgment, decree, order or proceeding was entered or taken."[360] A general limitation to this rule is where there is a finding of extrinsic fraud and therefore no longer equitable for the judgment to have prospective application.[361]

358. *Miller*, 484 So. 2d at 1223.

359. Gimbel v. Int'l Mailing and Printing Co. Inc., 505 So. 2d 631 (Fla. 4th Dist. Ct. App. 1987).

360. FLA. R. CIV. P. 1.540 (b).

361. Palm Beach County v. Boca Development Associates, Ltd., 485 So. 2d 449 (Fla. 4th Dist. Ct. App. 1986); First Florida Bank N.A. v. Shafer, 503 So. 2d 459 (Fla. 2d Dist. Ct. App. 1987).