Civil Procedure

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Civil Procedure: 1993 Survey of Florida Law

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I. INTRODUCTION

The Florida Rules of Civil Procedure, and judicial interpretations of those rules, continue to change and develop as part of the never-ending struggle to secure "the just, speedy, and inexpensive determination of every action." Predictably, however, each change—no matter how thoughtfully crafted, and each new interpretation—no matter how carefully analyzed, potentially gives rise to unanticipated occasions of injustice, delay and added cost. As a result, both courts and practitioners must remain vigilant in their efforts to comport with both the spirit and the letter of the rules.

This survey provides an overview of the more significant developments in Florida procedural law over the past year. The most obvious development is the amendment to various provisions of the Florida Rules of Civil Procedure which went into effect on January 1, 1993. Part II of the survey will discuss and summarize the most important rule changes.

Part III of the survey discusses judicial decisions interpreting the rules. Not every case that refers to a procedural rule is covered in the survey. Rather, an attempt has been made to highlight those cases that: are of first impression, either resolve or give rise to conflicting interpretations, define or clarify important terms, or provide the practitioner with useful guidelines for complying with the rules. Additional commentary is provided where the holding of a particular case seems at odds with the purpose or the overall procedural framework established for Florida courts.

Finally, Part IV of the survey concludes with the author's observations on trends in Florida Civil Procedure. Because this survey is written both by and for practitioners, the author's comments and thoughts may be somewhat slanted toward a practitioner's perspective. Care has been taken, however, to balance that perspective with the concerns of the courts and judicial administrators who are ultimately responsible for interpreting and enforcing the rules.

II. AMENDMENT OF THE FLORIDA RULES OF CIVIL PROCEDURE

The Florida Supreme Court published its amendments to the Florida Rules of Civil Procedure, after reviewing and considering the quadrennial...
report of the Florida Bar Civil Procedure Rules Committee, in July 1992.\textsuperscript{3} The amendments became effective at midnight, January 1, 1993.\textsuperscript{4} Taken as a whole, the amendments are not likely to revolutionize the judicial process. Nevertheless, at least one of the amendments has a significant substantive impact, while others will influence the way in which courts and practitioners approach the various phases of litigation.\textsuperscript{5}

The first noteworthy change relates to service of process pursuant to Rule 1.070. Former Rule 1.070(d), regarding service of process on numerous defendants, was deleted in its entirety.\textsuperscript{6} In addition, Rule 1.070(i)\textsuperscript{7} was amended to emphasize that a dismissal resulting from failure to serve a defendant within 120 days after filing the initial pleading “shall not be considered a voluntary dismissal or operate as an adjudication on the merits under rule 1.420(a)(1).”\textsuperscript{8}

Rule 1.080 was revised to permit service by facsimile of pleadings and papers after the initial pleading is made.\textsuperscript{9} A copy of the pleading or paper must also be served in accordance with some other method permitted by the rule.\textsuperscript{10} Service by facsimile “occurs when the transmission is complete,”\textsuperscript{11} and a document served after five p.m. is considered served on the next business day.\textsuperscript{12} The supreme court noted that the requirement of serving a second copy by means other than facsimile is intended “to ensure that a legible copy is received.”\textsuperscript{13}

\begin{enumerate}
\item In re Amendments to the Florida Rules of Civil Procedure, 604 So. 2d 1110 (Fla. 1992).
\item Id. at 1111.
\item The most pervasive change to the rules involved the incorporation of gender-neutral language into the rules themselves. Compare id. at 1110 with In re Amendments to Rules of Civil Procedure, 458 So. 2d 245 (Fla. 1984) (reflecting transition to gender-neutral language). Although this change has no discernible effect on procedure, the deletion of recurrent references to “he” and “his” may help to promote the supreme court’s goal of fostering gender equality in Florida courts.
\item See Fla. R. Civ. P. 1.070.
\item Formerly 1.070(j).
\item Fla. R. Civ. P. 1.070(i).
\item Id. 1.080(b).
\item Id.
\item Id. (emphasis added).
\item Id.
\item Fla. R. Civ. P. 1.080(b). Two other recent rule changes reflect the supreme court’s conscious efforts to bring Florida’s judicial system into the 90’s. Specifically, Florida Rule of Judicial Administration 2.055 now requires that all papers filed in state court must be on recycled paper. Fla. R. Jud. Admin. 2.160. Rule 2.071 requires trial courts to grant requests for telephone appearances at any scheduled hearing for fifteen minutes or less. Fla.
Notices of hearing on motions must now "specify each motion or other matter to be heard" under the amendment to Rule 1.100(b). One hopes that this amendment will not affect the current practice of most attorneys. The amendment may, however, have the salutary effect of deterring those who insist on introducing and arguing matters that "just recently came to my attention" by providing the trial court with an explicit basis for refusing to hear matters not properly noticed.

An amendment to Rule 1.200(a) now permits any party to schedule a case management conference in the same manner as one would notice a hearing on a motion. A court order scheduling the management conference is no longer required. Like any notice of hearing, "reasonable" notice must be given in advance of the requested case management conference. The rule specifically requires twenty days notice in the case of a pretrial conference. While this amendment may not seem significant, Rule 1.200 has the potential to become a powerful tool if properly used to inform the court of the status of pending matters, or to enlist the court's assistance in facilitating settlement of meritorious claims. To avoid abuse of the privilege, trial court administrators should consider making express provision for conducting party-scheduled management conferences during uniform motion calendar in all but the most complex cases.

Rule 1.400, which addressed the publication of depositions, has been repealed in its entirety to conform with the suggested practice under Rule 1.310(f)(3) that deposition transcripts not be filed as a routine matter.

Rule 1.420(f) has been amended to clarify the effect of dismissal on a lis pendens filed in connection with the dismissed claim. Under the amended rule, a lis pendens is automatically dissolved if, for instance, it is related to a claim that is settled and therefore dismissed, even though other claims remain pending.

An amendment to Rule 1.431(g)(2) aligns the rule regarding peremptory challenge of alternate jurors with the provisions of Rule 1.431(d) regarding peremptory challenges generally. Prior to the amendment,
there was no provision for equalizing the number of peremptory challenges permitted when the number of parties on each side was not the same.\textsuperscript{23}

Rule 1.432 regarding disqualification of judges has been repealed in its entirety. Procedures governing the disqualification of judges can now be found in the Florida Rules of Judicial Administration.\textsuperscript{24} In one of the more significant changes to the rules, the supreme court repealed former Rule 1.442 regarding offers of judgment and replaced the former rule with directions to comply with the procedural provisions of section 768.79 of the Florida Statutes.\textsuperscript{25} This change reflects the supreme court’s prior decision in \textit{Timmons v. Combs}.\textsuperscript{26} In \textit{Timmons}, the court attempted to resolve years of conflict between the supreme court and the Florida Legislature regarding the appropriate treatment of offers of judgment by adopting section 768.79 as the governing rule.\textsuperscript{27} Only time will tell if the supreme court’s efforts have the desired effect.

Rule 1.510(c) has been amended to require timely filing of affidavits submitted in opposition to motions for summary judgment.\textsuperscript{28} Under the amended rule, opposing affidavits must be served by mail no later than five days prior to the hearing on the motion or delivered to the office of the moving party’s counsel no later than five p.m. two business days prior to the hearing.\textsuperscript{29} No court has yet been called upon to determine whether the provisions for service via facsimile pursuant to Rule 1.080(b)\textsuperscript{30} are applicable to service of opposing affidavits, or whether an illegible affidavit, “delivered” by facsimile two days prior to hearing on the motion, satisfies the requirements of this rule.

Finally, Rule 1.540(b) has been amended to eliminate the one-year time limit for filing motions for relief from judgment in situations where relief is sought in marital cases on the basis of allegedly fraudulent financial affidavits.\textsuperscript{31} Although this change affects only a limited class of litigants, the change is substantial in that it carves out an exception to the otherwise mandatory requirement that claims for relief based on “intrinsic fraud” be filed within one year from judgment.\textsuperscript{32} The amendment addresses a

\textsuperscript{23} See \textit{id.}

\textsuperscript{24} See \textit{FLA. R. JUD. ADMIN.} 2.160.

\textsuperscript{25} \textit{FLA. R. CIV. P.} 1.442.

\textsuperscript{26} 608 So. 2d 1 (Fla. 1992).

\textsuperscript{27} \textit{id.} at 3.

\textsuperscript{28} \textit{FLA. R. CIV. P.} 1.510(c).

\textsuperscript{29} \textit{id.}

\textsuperscript{30} See \textit{supra} text accompanying notes 9-13.

\textsuperscript{31} \textit{FLA. R. CIV. P.} 1.540(b).

\textsuperscript{32} See \textit{id.}
recurring problem in marriage dissolution cases in which fraudulent affidavits form the basis for property settlements, but the former spouse does not learn of the fraud until years after judgment is rendered.

III. CASES INTERPRETING THE RULES

A. Process and Service of Process

1. The “120-day” Service Requirement of Rule 1.070(i)

During the past year, most of the action in Florida’s appellate courts regarding process and service of process focused on the 120-day requirement set forth in Rule 1.070(i). This requirement provides that initial process must be served upon a defendant within 120 days after filing of the initial complaint. If service is not made within the 120-day limit, the lawsuit is dismissed without prejudice unless the plaintiff can show good cause why service was not made.

The decision on this rule with the most far-reaching implications came in Pearlstein v. King. At issue in Pearlstein was whether the 120-day service requirement applied to complaints filed prior to January 1, 1989, the effective date of the 120-day provision. The supreme court concluded that it did, approving the third district court’s ruling in Berdeaux v. Eagle-Picher Industries, Inc., and overruling conflicting decisions by the fifth and second districts. Specifically, the supreme court held that applying the 120-day service requirement to actions pending on January 1, 1989 merely required plaintiffs to serve defendants within 120 days from that date. The court characterized this interpretation of the rule as a “prospective application [which] puts no extra burden on prior filings and does not diminish the time for complying with the rule.”

33. Id. 1.070(i).
34. Id.
35. 610 So. 2d 445 (Fla. 1992).
37. Pearlstein, 610 So. 2d at 445 (overruling Partin v. Flagler Hosp. Inc., 581 So. 2d 240 (Fla. 5th Dist. Ct. App. 1991); King v. Pearlstein, 592 So. 2d 1176 (Fla. 2d Dist. Ct. App. 1992)).
38. Pearlstein, 610 So. 2d at 446.
39. Id.
In *Austin v. Gaylord*, the court concluded that, absent a showing of due diligence or good cause, the 120-day requirement of Rule 1.070(i) is mandatory. Similarly, in *Gondal v. Martinez*, the court concluded that filing an affidavit of diligent search and inquiry more than 700 days after the complaint was filed and while a 1.070(j) motion to dismiss was pending, did not constitute good cause and did not preclude dismissal.

By contrast, in *Sirianni v. Kiehne*, the appellate court reversed the trial court’s order of dismissal pursuant to Rule 1.070 because plaintiff had shown good cause for failure to serve complaint within 120 days of filing. The court construed the phrase “within that time” in Rule 1.070(i) to mean the time within which service must be made absent showing of good cause and not the period within which good cause must be shown. The court concluded that plaintiff may either seek an extension prior to expiration or may show good cause at a hearing pursuant to a motion filed after the 120-day period has expired.

2. Additional Time for Response After Service By Mail

With respect to the extra time provided by Rule 1.090(e) after service by mail, the court in *Dominguez v. Barakat*, concluded that additional time is not available for filing Rule 1.530 motions for rehearing or new trial after rendition of judgment. In *Dominguez*, the trial court entered judgment on May 24, 1991 and provided copies of the order of judgment to counsel by mail. Apparently under the assumption that Rule 1.090(e) extended the ten-day deadline for filing motions for rehearing, the non-prevailing party filed its motion eleven days after judgment. The trial court had denied the

41. *Id.* at 67. The court distinguished, for purposes of taking jurisdiction to review the nonfinal order denying the motion to dismiss, *Macke Laundry Services, Inc. v. Saintil*, 568 So. 2d 541 (Fla. 4th Dist. Ct. App. 1990) (no jurisdiction to review denial of motion to dismiss based on “untimeliness” rather than complete lack of compliance). *Austin*, 603 So. 2d at 67.
42. 606 So. 2d 490 (Fla. 3d Dist. Ct. App. 1992).
43. *Id.* at 491. The court further determined that plaintiff’s affidavit did not cure the defect in his complaint. This plaintiff failed to allege that the defendant was a nonresident, a former resident, or a person concealing his whereabouts, as required before service on the Secretary of State would establish jurisdiction over the defendant. *Id.*
44. 608 So. 2d 936 (Fla. 4th Dist. Ct. App. 1992).
45. *Id.*
46. *Id.*
47. 609 So. 2d 664 (Fla. 3d Dist. Ct. App. 1992).

The Third District Court of Appeal dismissed the appeal because the notice was not filed within thirty days of rendition of judgment.49 The court held that Rule 1.530(b), which requires motions for new trials to be made within ten days after return of a jury verdict or the filing of judgment in a non-jury action, does not provide for additional time for service by mail pursuant to Rule 1.090(e).50 Thus, for purposes of calculating the time for filing a notice of appeal, rendition of judgment is not postponed by a motion for rehearing when the motion is not served within the time prescribed by Rule 1.530.

B. Pleadings and Motions

1. Proper Treatment of Affirmative Defenses

In Diaz v. Bravo,51 the court reiterated the well-settled rule that res judicata, estoppel and laches are affirmative defenses as defined by Rule 1.110(d), and are therefore not properly raised in a Rule 1.140 motion to dismiss. Similarly, in Warwick v. Post,52 the court found that the trial court improperly determined the affirmative defense of res judicata on defendant’s motion to dismiss. The court further held that it was improper to dismiss the case for failure to state a cause of action under Rule 1.140(b), even where the defendant claimed that the case had already been resolved pursuant to binding arbitration.53

2. Requirements for Third-Party Complaint Under Rule 1.180

More detailed analysis was required by the court in Rupp v. Philpot,54 to resolve an issue arising under the Rule 1.180 third-party practice provi-
sions. Rule 1.180 permits a defendant to serve a summons and complaint in a third-party action for indemnity, contribution or subrogation.\(^{55}\) In reviewing a final summary judgment order entered in favor of a third party defendant, the *Rupp* court analyzed the following language from Rule 1.180(a):

> At any time after commencement of the action a defendant may have a summons and complaint served on a person not a party to the action who is or may be liable to the defendant for all or part of plaintiff's claim against the defendant and may also assert any other claim that arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim.\(^{56}\)

The court concluded that use of the word "and" permitted non-related claims to be raised in addition to, but not in the absence of, an underlying claim for indemnity, contribution or subrogation.\(^{57}\) Accordingly, the court affirmed summary judgment in favor of the third-party defendant where the third-party complaint did not allege any of the above causes of action.\(^{58}\)

3. Amended and Supplemental Pleadings Under Rule 1.190

Rule 1.190(a) provides that leave to amend pleadings "shall be freely given when justice so requires."\(^{59}\) In a series of cases decided during the past year, Florida appellate courts have re-emphasized that motions to amend should be granted unless doing so would somehow prejudice the opposing party. For example, in *Walker v. Nolke*,\(^{60}\) the court found that the trial court abused its discretion in failing to permit an amendment over what amounted to a scrivener's error. In *Caduceus Self Insurance Fund v. Sacred Heart Hospital*,\(^{61}\) the court held that one amendment to a complaint does not constitute abuse of the amendment privilege, and that the trial court erred in dismissing plaintiff's complaint with prejudice.\(^{62}\) Similarly, in *Thompson v. Publix Supermarkets, Inc.*,\(^{63}\) the appellate court reversed an

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55. FLA. R. CIV. P. 1.180(a).
56. *Rupp*, 619 So. 2d at 1048 (quoting FLA. R. CIV. P. 1.180(a)) (emphasis added).
57. *Id.* (citing Leggiere v. Merrill Lynch Realty/Fla., Inc., 544 So. 2d 240, 241 (Fla. 2d Dist. Ct. App. 1989)).
58. *Id.*
59. FLA. R. CIV. P. 1.190.
60. 614 So. 2d 655 (Fla. 5th Dist. Ct. App. 1993).
62. *Id.*
63. 615 So. 2d 796 (Fla. 1st Dist. Ct. App. 1993).
order dismissing the plaintiff's claim with prejudice after only one amend-
ment. In this case, the plaintiff sought and obtained leave to file an
amended complaint to add a new defendant. The new defendant moved to
dismiss the amended complaint for failure to state a cause of action. The
trial court granted the motion and dismissed plaintiff's complaint with
prejudice. The trial court also denied plaintiff's motion for rehearing and
motion to file a second amended complaint. The appellate court reversed,
stating that, absent exceptional circumstances, requests for leave to amend
pleadings should be granted and all doubts should be resolved in favor of
allowing the amendment. "[R]efusal to allow amendment...[is] an abuse
of discretion unless [the amendment would clearly] prejudice opposing
party; the privilege to amend has been abused; or amendment would be fute.
In Anson, Inc. v. Deutsch, similar considerations prompted reversal
of an order denying a defendant's motion to amend her answer and
affirmative defenses. The court concluded that the trial court erred in
denying defendant's motion for leave to amend when the case was not yet
scheduled for trial and where plaintiff would not have been prejudiced by
the amendment.

The "relation back" provisions of Rule 1.190(c) received attention in
Schachner v. Sandler. The court reviewed an order stating that appel-
ellant's amended complaint did not relate back to the date of the original plea-
ding. The initial complaint named various corporations as plaintiffs in a
professional malpractice action against attorneys. Appellant was specifically
mentioned as owner of corporations but not named as plaintiff. Later, the
complaint was amended to include appellant as a plaintiff. Defendants
moved to dismiss on grounds that appellant's claim was time barred, and the
trial court granted the motion. On appeal, the court stated that the Rule
1.190(c) relation back provision should be liberally interpreted. Moreover, the court determined that defendants were not prejudiced because the
initial complaint provided fair notice of "kindred interest" between the
original and subsequently added plaintiffs. Accordingly, the court concluded
that appellant's claim related back to the date of the initial complaint, and
was therefore not time barred.

64. Id. at 797 (citations omitted).
65. 613 So. 2d 65 (Fla. 4th Dist. Ct. App. 1993).
66. Id.
67. 616 So. 2d 166 (Fla. 4th Dist. Ct. App. 1993).
68. Id. at 168.
69. Id.
Finally, in *Stewart v. Purina Mills, Inc.*, the court concluded that a pro se defendant should have been permitted to amend his original answer to include a demand for jury trial. Curiously, neither the trial court nor the appellate court concluded that no amendment was needed, despite the fact that the plaintiff ultimately filed an amended complaint in response to which defendant timely served a responsive pleading including a demand for jury trial. Under Rule 1.430(b), a party may demand jury trial within ten days after service of "the last pleading directed to such issue." Therefore, the plaintiff's amended complaint was undoubtedly "a pleading directed to" the issues for which defendant sought trial by jury, a fact that should have obviated the need for defendant to amend any prior pleading to include the demand.

4. Requirements for Interpleader Actions Under Rule 1.240

In *Motzkin v. Shearson Lehman Bros.*, the court reversed the trial court's dismissal of an interpleader brought by a broker to resolve conflicting claims by a father and his daughter to proceeds from sale of bond. The trial court ruled that the father could bring separate, subsequent action against daughter. The appellate reversed, finding that this case presented a classic interpleader situation as defined by Rule 1.240. Moreover, the court concluded that where the facts so closely comport with the provisions of the rule, the broker need not demonstrate all common law elements of interpleader action.

5. Substitution of Parties Under Rule 1.260

An interesting question regarding the time for motions to substitute parties pursuant to Rule 1.260 was raised in *Musician's Exchange Downtown Cafe, Inc. v. Mercede City Center, Inc.* This was an action by a tenant against its landlord over issues involving condition and use of leased premises. After the lawsuit was filed, the tenant declared bankruptcy under Chapter 7. Thereafter, the bankruptcy trustee moved to reinstate the action against the landlord and to substitute itself for the tenant in the original

70. 615 So. 2d 876 (Fla. 5th Dist. Ct. App. 1993).
71. Id. at 877.
72. See id.
73. Fla. R. Civ. P. 1.430(b).
74. 611 So. 2d 592 (Fla. 4th Dist. Ct. App. 1993).
75. Id. at 593.
76. 613 So. 2d 134 (Fla. 4th Dist. Ct. App. 1993).
action. Both motions were denied on the grounds that the motions were not filed within ninety days of tenant's bankruptcy. The trial court apparently misread the ninety-day time limitation set forth in 1.260(a), regarding service of substitution motion after filing suggestion of death, as also applying to the transferred interests provisions of 1.260(c). The appellate court reversed the order denying the motion to substitute parties, reasoning that the reference in 1.260(c) to "service of the motion" refers only to method of service set forth in 1.260(a), but not to the time limits set forth in 1.260(a). The court noted that federal bankruptcy law provides trustees with two years in which to continue pending action on behalf of the debtor, and that the trustee's motions in this case were both timely filed under federal law.77

6. Requirements for Ordering Separate Trial Under Rule 1.270

In Norris v. Paps,78 the court reviewed for abuse of discretion an order pursuant to Rule 1.270(b) severing defendants' compulsory counterclaim for fraud from the underlying mortgage foreclosure action. Significantly, defendants raised the issue of fraud by way of affirmative defense, as well as by way of counterclaim. The mortgagee moved for judgment on the pleadings because defendants admitted in their answer that they executed a note and mortgage and failed to make payments. The trial court ordered the counterclaim severed and entered judgment for plaintiff on the mortgage. On appeal, the court held that the trial court did not have discretion to defer the jury trial on factual issues raised in the counterclaim, especially where the same fact issues were presented by way of affirmative defense.79 Otherwise, the trial court would in effect be entering judgment on the pleadings without resolving the affirmative defense of fraud, or by resolving the fraud issue without having heard any evidence. Although severance of compulsory counterclaims may sometimes be permissible, severance should not be granted if an affirmative defense and a counterclaim raise interrelated fact questions.80

77. Id. at 135; see 11 U.S.C. § 108 (1988).
78. 615 So. 2d 735 (Fla. 2d Dist. Ct. App. 1993).
79. Id. at 737.
80. Id.
C. Discovery

1. Scope of Discovery

Recent appellate decisions regarding discovery rules fall into two broad categories: the appropriate scope of discovery and the appropriate sanctions for failure to comply with discovery. Decisions rendered over the past year show a surprising consistency in favor of the party from whom discovery is sought. Whether this alignment signals a trend against abusive discovery practices or is, instead, the result of pure coincidence remains to be seen.

The decision in *Krypton Broadcasting, Inc. v. MGM-Pathe Communications Co.*\(^1\) presents some interesting ramifications for both courts and practitioners. In an action involving film distribution rights, plaintiff MGM served interrogatories seeking, *inter alia*, exhaustive biographical information (employment and residence histories, social security numbers, dates and place of birth, etc.) for a variety of people, including some, such as defendant Krypton's stockholders, who had "no discernible relationship to the issues of the case."\(^2\) Another interrogatory sought "any other information useful or necessary for the location of all persons who are believed or known by defendant KRYPTON . . . [and] its attorneys . . . to have any knowledge" of various matters.\(^3\) MGM further requested documents evidencing any communication between Krypton and any person or entity concerning the subject matter of the lawsuit. It also asked in interrogatories for detailed written summaries of documents that were also subject to requests to produce. Krypton objected on a variety of grounds, including relevance, vagueness, and attorney-client privilege. The trial court, while limiting the time frame of the requested information from ten years to six years, otherwise overruled the objections and ordered Krypton to respond.\(^4\)

Approximately three weeks after this order, Krypton served its answer, affirmative defenses and counterclaims. Krypton denied having assumed obligations under the contracts as alleged, raised defenses of custom-in-trade, unconscionability and estoppel, and sought declaratory relief, damages for injury to its trade reputation, and specific performance. Because the new issues in Krypton's responsive pleading were not introduced until after the trial court's order compelling discovery, Krypton contended on appeal that the appellate court must limit its inquiry into MGM's discovery requests to

\(^{2}\) *Id.* at D1094.
\(^{3}\) *Id.* at D1093.
\(^{4}\) *Id.*
the issues raised in MGM’s complaint. Krypton also argued that the trial court erred in overruling its other objections.

The appellate court first rejected Krypton’s argument that the discovery requests must be limited to issues raised in MGM’s complaint. In so doing, the court was forced to distinguish *Jerry’s South, Inc. v. Morran*, which held that “[w]hen considering a petition for writ of certiorari, this court considers the record as it existed at the time the complained of discovery order was entered.” The court observed that the discovery order in *Jerry’s South* involved financial records of a former party, and thus came at a time when the issues had been considerably narrowed. By comparison, the court noted that in the instant case, “the issues in litigation expanded significantly” after the trial court entered its discovery order, and concluded that the discovery requests must be viewed in light of those expanded issues. While the distinction drawn between this case and *Jerry’s South* is somewhat strained, the court’s conclusion has the expedient and practical effect of permitting resolution of all issues pending at the time the appeal is heard.

The court next addressed the substance of Krypton’s objections and concluded that MGM’s discovery requests, taken as a whole, were “a classic ‘fishing expedition’ and were clearly calculated for harassment.” The court also noted that at least some of the interrogatories and document requests were so broad as to include documents and information protected by attorney-client and other privileges. Accordingly, the court held that the trial court’s order compelling discovery was “a substantial departure from the essential requirements of law,” and ordered MGM’s discovery requests stricken in their entirety, albeit without prejudice to conduct further discovery in accordance with Rule 1.280. The court then went one step further, ordering MGM to file all future requests with the trial court, and, in the event of an objection, placing upon MGM the burden of demonstrating that its requests were within the scope of Rule 1.280. The court so held because MGM’s request sought voluminous, privileged and extraneous information which constituted a clear abuse of the discovery process.

85. *Id.*
86. 582 So. 2d 803 (Fla. 1st Dist. Ct. App. 1991).
87. *Id.* at 804.
89. *Id.* at D1094.
90. *Id.*
91. *Id.*
92. *Id.*
Furthermore, the court suggested that "the trial court may, at MGM's expense, appoint a special master" for the purpose of resolving future discovery disputes.\textsuperscript{93}

The legal basis for these final two requirements is unclear. The requirement that MGM pay the cost of a special master appears to be a prospective sanction, one that does not permit the trial court to exercise discretion or judgment in assessing the validity or appropriateness of any objections Krypton might raise to future discovery requests, or to determine when and if one party should bear more than its proportionate share of the expense of resolving disputes. As this case demonstrates, Krypton was not immune from making its own unsuccessful discovery arguments. Nonetheless, the cost of resolving future disputes is placed solely on MGM. Although Rule 1.380 permits sanctions for failing to comply with discovery, the rule does not seem to contemplate sanctions merely for serving objectionable discovery requests, and certainly does not contemplate open-ended sanctions that can be influenced, and perhaps controlled, by one's opponent.

Perhaps even less legally defensible is the court-mandated burden shift from the party objecting to discovery to the party propounding discovery. It is well settled in Florida that the party who objects to discovery requests bears the burden of proving that the requests are in fact objectionable on some grounds.\textsuperscript{94} By contrast, the court in this case has reversed the traditional burdens by requiring the party seeking discovery (MGM) to prove that its discovery requests were proper simply because the party seeking to avoid discovery (Krypton) filed an objection.

It is doubtful that these two clearly punitive aspects of the court's decision would withstand further scrutiny. Nonetheless, the message sent by the First District Court of Appeal is unmistakable: harassing, abusive discovery requests that look more like fishing expeditions than attempts to uncover relevant facts will not be looked upon favorably, and will be met with judicial rebukes and costly sanctions.

\textit{In re Estate of Ransburg}\textsuperscript{95} is another case in which the court addressed itself to determining the proper scope of discovery directed to a party. After filing a petition to revoke probate which included a prayer for attorney's fees, the estate's beneficiaries served a production request seeking documents related to the petitioners' attorney's fees. Petitioners objected on the grounds of relevancy, work product, and attorney-client privilege. The

\begin{itemize}
\item \textsuperscript{93} Krypton, 18 Fla. L. Weekly at D1094.
\item \textsuperscript{94} See, e.g., Charles Sales Corp. v. Rovenger, 88 So. 2d 551, 554 (Fla. 1956).
\item \textsuperscript{95} 608 So. 2d 49 (Fla. 2d Dist. Ct. App. 1992).
\end{itemize}
trial court ordered production of complete copies of the requested records for in camera inspection and "sanitized" copies for the beneficiaries. The appellate court declined to address the work product and attorney-client privilege objections, limiting its discussion solely to the question of relevancy. The court first observed that, in Stockman v. Downs, the Florida Supreme Court had held that claims for attorney's fees must be pleaded—a ruling which forces parties seeking reimbursement of fees to raise the issue early on in the proceedings. However, it does not necessarily follow that discovery of actual fees or fee arrangements is appropriate, or even relevant, in the initial phases of the lawsuit. The court analogized the claim for attorney's fees to a claim for an accounting, recognizing that discovery in an accounting action is typically bifurcated, with that part of the discovery related to the actual accounting deferred until it is determined whether any party is entitled to an accounting. The court concluded that "under normal circumstances," discovery related to attorney fee claims should similarly be bifurcated with discovery pertaining to both fee agreements and the amount of fees deferred until the end of the underlying proceedings—after entitlement to attorney’s fees have been decided.

Beyond the discussion of the proper scope of discovery set forth in Krypton and Ransburg, the court in Crandall v. Michaud, addressed the scope of discovery directed to non-party witnesses. In Crandall, an independent medical examiner ("IME") sought certiorari review of an order which both denied his motion for a protective order and compelled him to produce all patient reports (with patient names "whited out") prepared for any defense law firm or insurance company during the previous two years. The IME's motion for protective order was based on the grounds that the requested information was confidential and privileged, that disclosure would violate his patient's statutory privacy rights, that the information sought was irrelevant, and that production would be unduly burdensome and oppressive. Plaintiff, obviously seeking evidence of the

96. Id. at 50.
97. 573 So. 2d 835 (Fla. 1991).
98. In re Estate of Ransburg, 608 So. 2d at 51 (citing Stockman, 573 So. 2d at 835).
99. Id.
100. 603 So. 2d 637 (Fla. 4th Dist. Ct. App. 1992).
101. An example of one court’s refusal to permit inquiry into a physician’s potential bias through discovery of confidential patient records, Winn-Dixie Stores, Inc. v. Miles, 616 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1993), is discussedinfra at notes 133-38 and accompanying text.
IME's potential bias, argued that it would be unduly burdened and unable to effectively present its case without the requested information.\textsuperscript{102} The appellate court approached the issue using the "balancing test" set forth in \textit{North Miami General Hospital v. Royal Palm Beach Colony, Inc.},\textsuperscript{103} and \textit{Rasmussen v. South Florida Blood Service, Inc.},\textsuperscript{104} and further considered whether disclosure of the requested reports would violate the patient privacy and confidentiality provisions of section 455.241 of the Florida Statutes.\textsuperscript{105} Turning first to the statutory issue, the court questioned whether masking patient names would sufficiently protect their privacy interests in compliance with section 455.241. The court acknowledged that similar evidence had been held discoverable in other cases such as \textit{McAdoo v. Ogden},\textsuperscript{106} but distinguished those cases on the ground that the IME was required to produce invoices sent to defense lawyers and insurers, but was not required to produce the patient records themselves.\textsuperscript{107} Without squarely answering the statutory question it had earlier posed, the court concluded that the information contained in the requested patient records went beyond what was relevant to the question of the IME's potential bias.\textsuperscript{108} Moreover, the court concluded that requiring the IME to review numerous files in order to locate the requested records, copy the records, mask all references to patient identity, and then copy the masked reports, imposed a burden disproportionate to the potential value of the information sought.\textsuperscript{109} In a concurring opinion, Judge Stone agreed that the trial court had departed from the essential requirements of law on the privilege and privacy issues, but emphasized that certiorari relief was not being granted on the grounds of undue burden.\textsuperscript{110}

2. Examination of Persons: Waiver of Patient-Psychotherapist Privilege

In \textit{Sykes v. St. Andrews School},\textsuperscript{111} the court exercised certiorari jurisdiction to review an order requiring a parent to release her own

\textsuperscript{102} \textit{Crandall}, 603 So. 2d at 638.
\textsuperscript{103} 397 So. 2d 1033 (Fla. 3d Dist. Ct. App. 1981).
\textsuperscript{104} 500 So. 2d 533 (Fla. 1987).
\textsuperscript{105} \textit{Crandall}, 603 So. 2d at 638-39.
\textsuperscript{106} 573 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1991).
\textsuperscript{107} \textit{Crandall}, 603 So. 2d at 639.
\textsuperscript{108} \textit{id}.
\textsuperscript{109} \textit{id} at 639-40.
\textsuperscript{110} \textit{Id} at 640 (Stone, J., concurring).
\textsuperscript{111} 619 So. 2d 467 (Fla. 4th Dist. Ct. App. 1993).
psychiatric records in the suit she brought as next friend on behalf of her daughter. Initially, both parents brought suit against St. Andrews and a number of individual defendants for damages related to an alleged sexual battery of their daughter. In addition to seeking damages for emotional harm to the daughter, the original complaint sought recovery for emotional and mental harm to the mother. The mother was examined by defendants’ psychiatric expert who in turn was deposed by plaintiff’s attorneys. Defendants subsequently filed a motion to compel the mother to authorize the release of her previous psychiatric records. At a hearing on this motion, the mother’s attorney made clear that the mother’s separate claims were being abandoned. Nonetheless, the court ordered the mother to authorize the release of the requested records.112

On appeal, the mother contended that the trial court’s order was a departure from the essential requirements of law in that it violated the psychotherapist-patient privilege set forth in section 90.503 of the Florida Statutes. Defendants argued that the privilege does not apply where the mental condition of the party is an element of the party’s claim.113 Defendants contended in the alternative that under Rule 1.360(b)(2) of the Florida Rules of Civil Procedure, the deposition of the defendants’ psychiatric expert effectively waived any privilege the mother may have had “regarding the testimony of every other person who has examined or may thereafter examine that party concerning the same condition.”114 In analyzing the privilege/waiver provisions of the statute in conjunction with the rule, the appellate court stated that a party could not use “the privileges as both a sword and a shield.”115 In other words, a party may not, on the one hand, seek to recover damages related to emotional or mental conditions while, on the other hand, invoke the privilege to thwart its opponent from discovering facts regarding those same conditions. In this case, however, the court concluded that the mother dropped her sword when she abandoned her independent claim.116 In addition, the court determined that, notwithstanding the language of Rule 1.360(b)(2), the mother had not “irrevocably” waived her privilege by deposing the defendants’ expert.117 Rather, the court concluded that the waiver provision of the rule was only effective to

112. *Id.* at 467-68.
113. *Id.*
114. *Id.* at 468-69.
115. *Id.* at 469.
116. Sykes, 619 So. 2d at 469.
117. *Id.*
the extent that the examined "condition" continued to be relevant as an essential element of a pending claim.118

3. Discovery Sanctions

Although discovery abuse has become the scourge of both practitioners and courts, recent cases involving sanctions for failure to comply with discovery have generally been sympathetic to the party who allegedly failed to comply with the discovery rules. One notable exception to this apparent trend occurred in McCormick v. Lomar Industries, Inc.119 In that case, the trial court dismissed plaintiff's lawsuit as a sanction for failing to respond to a request for production of documents for 134 days after the request was served, and for failing to comply with two intervening court orders compelling plaintiff's response. The second order compelling production was entered during a hearing on March 21, 1989, which plaintiff's counsel did not attend. The order required plaintiff to produce the requested documents by March 24, 1989 or "face 'unduly harsh penalties.'"120 On April 3, 1989, plaintiff filed a response to the discovery request. On April 10, 1989, the court entered an order striking plaintiff's pleadings and awarding attorneys fees to defendant. The appellate court affirmed, noting that plaintiff's conduct went beyond mere "'foot dragging'" and evidenced a "'deliberate and contumacious disregard of the court's authority'"—a "'deliberate thumbnosing at the court and the rules of civil procedure.'"121 The court also noted that while the plaintiff did respond prior to the court's order imposing sanctions, the order striking plaintiff's pleadings and awarding fees was nothing more than a "confirmation" of the court's oral pronouncement during the March 24, 1989 hearing.122

While McCormick may seem like a godsend to any attorney who has wasted time and effort seeking to compel recalcitrant parties and their counsel to comply with lawful discovery requests and to any court faced with repeated motions to compel responses to the most basic discovery, the opinion is difficult to reconcile with the Fourth District Court of Appeal's

118. Id.
119. 612 So. 2d 707 (Fla. 4th Dist. Ct. App. 1993).
120. Id. at 708 (quoting the trial court's order).
121. Id. at 708-09 (quoting U.S.B. Acquisition Co. v. U.S. Block Corp., 564 So. 2d 221, 222 (Fla. 4th Dist. Ct. App. 1990)); cf. Turner v. Marks, 612 So. 2d 610 (Fla. 4th Dist. Ct. App. 1992) (upholding order striking pleadings after two years of failure to comply with discovery requests).
122. McCormick, 612 So. 2d at 709.
opinion in *Wildwood Properties, Inc. v. Archer of Vero Beach, Inc.*[^123] *Wildwood Properties* also involved striking claims as a sanction for failing to make discovery. The sanctioned party, the defendant, did not attend a continued deposition on March 9, 1991, at which time opposing counsel informed the defendant’s attorney that he would move to strike defendant’s pleadings for failing to appear. The motion to strike was presented for the first time at the close of argument during a hearing on a previously set motion for summary judgment.[^124] The trial court reserved ruling on the motion to strike, but twenty days later, with no intervening hearing or opportunity for defendant to appear, granted the motion. On appeal, defendant’s attorney objected to the motion to strike because he had received it for the first time at that hearing, and accordingly, had not informed his client to be present. The appellate court reversed, stating that “[a] party to be sanctioned for discovery violations must first be given notice and an opportunity to be heard and offer mitigating or extenuating evidence as to why discovery did not take place.”[^125] Failure to provide such notice and opportunity, the court held, constitutes a violation of due process.[^126]

As stated previously, the broad holding in *Wildwood Properties* is difficult to reconcile with the same court’s opinion in *McCormick*, filed less than five months earlier. Recall that in *McCormick*, the harshest of all possible discovery sanctions was imposed virtually sua sponte. Admittedly, the trial court in *McCormick* had previously ordered a response to a particular discovery request on two prior occasions, and had warned that failure to respond would result in “unduly harsh penalties.” Nonetheless, the court did not afford the sanctioned party an opportunity either to be heard or to offer mitigating or extenuating evidence prior to striking its pleadings. Significantly, the order striking the pleadings was the first sanction imposed by the court; all prior orders simply imposed deadlines for compliance with discovery requests. More importantly, the sanctioned party had, in fact, complied with the discovery request prior to entry of the court’s order. At worst, the party would have been required to offer extenuating evidence for its failure to timely comply, but not for its total failure to comply. Obviously, the facts in *Wildwood Properties* do not lend themselves as

[^123]: 621 So. 2d 691 (Fla. 4th Dist. Ct. App. 1993).
[^124]: *Id.* This type of “ambush litigation” should be precluded by the recent changes to Rule 1.100(b). *See supra* note 14 and accompanying text.
[^125]: *Id.* at 692 (citing Kuechenberg v. Creative Interiors, Inc., 424 So. 2d 145, 146 (Fla. 4th Dist. Ct. App. 1982)).
[^126]: *Id.*
neatly to the characterization of "deliberate thumbnosing" as did the facts in McCormick. Nonetheless, entitlement to due process protection should not turn on the degree of sympathy with which the court views a particular litigant. If an opportunity to appear and be heard is required under Wildwood Properties, it would seem that the sanctioned party in McCormick should have been provided this opportunity as well.

This view finds further support in J.E.I. Airlines, Inc. v. Britton, Cassel, Schantz & Schatzman, P.A.127 In that case, the trial court entered a pre-trial order on November 20, 1990, stating that appellant must submit to deposition on November 27, 1990 or have its complaint dismissed. Appellant did not appear as ordered, and without hearing or further proceedings, the trial court dismissed the case. The appellate court found that the trial court's order imposing the sanction of dismissal was defective in that it did not expressly find that J.E.I.'s conduct "demonstrated a deliberate and contumacious disregard of the court's authority or evidenced [sic] a willful failure to submit to discovery."128 Although the court did not address the due process issues raised by J.E.I. on appeal, it is evident that the court was influenced by the fact that neither notice nor an opportunity to present mitigating circumstances was provided prior to the court's imposing of the extreme sanction of dismissal.

Beyond any issue of procedural due process, there remains the question of proportionality in any order that forecloses a party's claim as a sanction for failure to comply with discovery requests. As the court observed in Martin v. Laidlaw Tree Service, Inc.,129 "the sanction of dismissal of a party's action is a drastic remedy which should be used only in extreme situations. . . . [T]he severity of the sanction must be commensurate with the violation . . . ."130 The Martin court acknowledged that the standard of review in discovery sanction cases is whether the trial court abused its discretion, and noted that "[i]f reasonable persons could differ as to the propriety of the action taken, there can be no finding of an abuse of discretion."131 Notwithstanding this accommodating standard, the court stated that "[i]n absence of some demonstration that the [party seeking discovery] has been prejudiced due to [his opponent's] defaults, this court..."
is reluctant to affirm such a severe sanction as dismissal.\textsuperscript{132} In view of this formulation, it seems highly unlikely that the issue in McCormick would be so prejudicial as to justify dismissal, regardless of whether the delay caused undue expense and was therefore subject to some lesser sanction.

One final case on the topic of discovery explores the circumstances in which a non-party who prevails on a discovery-related motion is entitled to recover attorney’s fees pursuant to Rule 1.380 of the Florida Rules of Civil Procedure. In Winn-Dixie Stores, Inc. v. Miles,\textsuperscript{133} the defendant in a slip and fall case sought documents from a plaintiff’s treating chiropractor regarding the chiropractor’s prior treatment of other patients represented by plaintiff’s counsel, and information regarding attorneys other than plaintiff’s who had requested that the chiropractor perform medical examinations for their clients. Plaintiff moved for a protective order on the grounds of undue burden; the chiropractor submitted a supporting affidavit attesting to the burdensomeness of the request. Apparently, during the hearing on plaintiff’s motion, counsel for the chiropractor asserted his own motion, \textit{ore tenus}, for a protective order. The trial court granted the motion and awarded attorney’s fees to the chiropractor as the successful movant under Rule 1.380(a)(4).\textsuperscript{134}

Reviewing the trial court’s order for abuse of discretion, the appellate court applied the “balancing test” for expert witness discovery suggested by cases like McAdoo v. Ogden.\textsuperscript{135} The court concluded that the defendant’s request went beyond what might be relevant to the chiropractor’s potential bias, that the chiropractor’s confidentiality interests should be given substantial weight, and that the defendant had done nothing to refute the

\textsuperscript{132} Id. at 439.
\textsuperscript{133} 616 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1993).
\textsuperscript{134} Id. at 1109-10.
\textsuperscript{135} 573 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1991) (trial court must balance “the competing interests of the relevancy of the discovery information sought as impeachment information, against the burdensomeness of its production and the confidentiality interests of the doctor.”). Although the balancing test employed by the court relates to expert witness discovery, there was no suggestion that either party had listed the chiropractor as an expert witness in this case. In fact, the court expressly stated that “[the chiropractor] is not an expert witness. Rather, he is the plaintiff’s treating physician.” Miles, 616 So. 2d at 1111. Accordingly, it seems that the court could have reached the same result by referring to the medical records confidentiality requirements of section 455.241 of the Florida Statues, as qualified by the waiver provisions of Rule 1.360(b) of the Florida Rules of Civil Procedure.
chiropractor’s affidavit regarding the burdensomeness of the request. Accordingly, the court upheld the protective order.

The court also upheld the award of attorney’s fees on the grounds that the chiropractor’s ore tenus motion was sufficient to cast him in the role of a moving party for purposes of Rule 1.380(a)(4).

D. Dismissal of Actions

Cases decided pursuant to Rule 1.420, which governs voluntary and involuntary dismissal of actions, can be grouped according to four categories suggested by the rule itself: (1) voluntary dismissals and their effect on pending claims; (2) involuntary dismissals in nonjury trials where the facts and the law show that the claimant is not entitled to relief; (3) involuntary dismissals as sanctions for failure to comply with court orders; and (4) dismissal for failure to prosecute. Dismissal of a claim in the face of other pending claims presents an intriguing procedural puzzle that challenges the courts to balance plaintiff’s control over his lawsuit with considerations of judicial economy and efficiency. By contrast, recent cases involving court-ordered dismissals underscore the traditional reluctance of courts to terminate a lawsuit on grounds other than the merits.

1. Voluntary Dismissal

As to the first category of cases, the court in Layne Dredging Co. v. Regus, Inc., reviewed the propriety of a voluntary dismissal pursuant to Rule 1.420(a)(1)(A), where defendant’s motion to amend its answer to file a cross-claim against a codefendant was still pending. On appeal, the court distinguished cross-claims from counterclaims, the latter of which can survive voluntary dismissal pursuant to Rule 1.420(a)(2). The court reasoned that “[a]ny purpose the defendant . . . may have had to transfer its liability through a cross-claim . . . was nullified at the moment when [the plaintiff] accomplished the voluntary termination of its lawsuit.” Because the court believed that defendant’s cross-claim was “extinguished” by plaintiff’s voluntary dismissal, it ruled that the trial court should not have

136. Miles, 616 So. 2d at 1111.
137. Id.
138. Id.; see also Rule 1.280(c) (incorporating by reference the sanction provisions of Rule 1.380).
139. See Fla. R. Civ. P. 1.420.
140. 622 So. 2d 7 (Fla. 2d Dist. Ct. App. 1993).
141. Id. at 8.
granted the motion to amend. Both the reasoning and the result in this case are somewhat suspect. Although the court's opinion does not describe the substance of the defendant's claim against the codefendant, a cross-claim, pursuant to Rule 1.170(g), can relate to "any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of either the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." Unlike third-party claims under Rule 1.180, a cross-claim is not limited to seeking indemnity or contribution, and is not entirely dependent upon plaintiff's underlying lawsuit except, perhaps, definitionally. It therefore does not follow that dismissal of the underlying complaint necessarily resolves claims and issues that are properly raised in a cross-claim.

By comparison, the court in Our Gang, Inc. v. Commvest Securities, Inc., reversed a trial court's ruling that, due to the voluntary dismissal of the underlying complaint, it lacked jurisdiction to grant a motion for leave to file a counterclaim and cross-claim. In this case, plaintiff filed an interpleader action to determine the appropriate distribution of a portfolio account. Defendant subsequently filed a motion for leave to file a counterclaim and cross-claim against two other plaintiffs. One day before hearing on the motion, the original interpleader plaintiff voluntarily dismissed its complaint. Following Gull Construction Co. v. Hendrie, the appellate court held that voluntary dismissal was improper pursuant to Rule 1.420(a)(2) in light of the pendency of a motion to file a counterclaim, even though no counterclaim was pending at the time.

At the opposite end of the voluntary dismissal spectrum, the court in Sprague v. P.I.A. of Sarasota, Inc., reversed summary judgment in favor of defendant where plaintiff voluntarily dismissed its claim by filing and hand-delivering a copy of the notice to opposing counsel one day prior to hearing on defendant's summary judgment motion. The appellate court noted that Rule 1.420(a)(1) permits a plaintiff to "abort his lawsuit by

142. Id.
143. FLA. R. CIV. P. 1.170(g).
144. See supra notes 54-58 and accompanying text for a more detailed discussion of the requirements for a third party claim made pursuant to Rule 1.180.
145. See Cutler Ridge Corp. v. Green Springs, Inc., 249 So. 2d 91, 93 (Fla. 3d Dist. Ct. App. 1971) (dismissal of complaint was not the "predicate" for subsequent entry of summary judgment on surviving cross-claim).
146. 608 So. 2d 542 (Fla. 4th Dist. Ct. App. 1992).
147. 271 So. 2d 775 (Fla. 2d Dist. Ct. App. 1973).
148. Our Gang, 608 So. 2d at 544.
149. 611 So. 2d 1336 (Fla. 2d Dist. Ct. App. 1993).
serving "a notice of dismissal at any time before a hearing on motion for summary judgment." Because the voluntary dismissal effectively brought the lawsuit to an end, the trial court no longer had jurisdiction to enter judgment.

2. Involuntary Dismissal During Nonjury Trial

An order of involuntary dismissal at the close of plaintiff's case in chief is appropriate only where plaintiff has failed to present a prima facie case. In Banyan Corp. v. Schucklat Realty, Inc., the court reversed an order of involuntary dismissal entered in an action to collect real estate sales commissions. At trial, seller's broker moved for involuntary dismissal pursuant to Rule 1.420(b) at the close of the evidence presented by buyer's broker. The trial court granted the motion on the ground that, pursuant to section 475.42(d) of the Florida Statutes, the real estate agent representing the buyer lacked authority to enter into a binding commission agreement on behalf of her broker. On appeal, the court determined that the buyer's broker presented sufficient evidence to suggest a ratification of the agreement of its sales agent, and that in any event, Florida law provides that a broker acquires an interest in a commission agreement entered into by its sales agent regardless of the broker's knowledge of the agreement. Accordingly, the appellate court reversed, finding that the buyer's broker had presented a prima facie case, that different conclusions could be drawn from plaintiff's evidence, and that under these circumstances, involuntary dismissal against the buyer's broker was improper.

3. Dismissal as Sanction for Failure to Comply With Court Order

In Carr v. Dean Steel Buildings, Inc., the trial court ordered the parties to a construction contract dispute to conduct a physical inspection of the subject property. Approximately ten months went by without the ordered inspection being performed. Accordingly, the trial court, sua sponte, entered an order dismissing the case pursuant to Rule 1.420. While

150. Id. (quoting FLA. R. CIV. P. 1.420(a)(1)).
151. Id.
153. Id. at 1282-83 (citing Marks v. M.S.F. Management Corp., 540 So. 2d 138 (Fla. 5th Dist. Ct. App. 1989)).
154. Id. at 1281-82.
recognizing that the decision to dismiss a lawsuit for failure to comply with legitimate court orders rests within the sound discretion of the trial court, the appellate court observed that the drastic remedy of dismissal should be employed only in extreme circumstances and concluded that dismissal in this case, without notice or hearing, was too harsh a sanction. Moreover, the appellate court noted that the order dismissing the case lacked the requisite finding of willful disregard of the trial court’s order.

Kozel v Ostendorf provides the counterpoint to Carr, but raises important questions regarding the limits of the trial court’s discretion in ordering involuntary dismissal as a sanction for failure to comply with court orders. In Kozel, the plaintiff’s initial complaint was dismissed without prejudice and with leave to file an amended complaint within twenty days. The parties agreed to an additional ten day extension; however, plaintiff did not file her amended complaint for more than five months, prompting the trial court to dismiss the complaint with prejudice for failure to comply with the court’s prior order. The appellate court affirmed, noting the “extreme delay” in amending the complaint, and “the lack of any showing that the delay was solely the fault of counsel . . .”

In a lengthy dissent, Judge Altenbernd recounted Florida’s “well-established tradition of discouraging sanctions that simply cause a party to sue its lawyer for malpractice,” and decried the lack of any established framework within which the trial court’s discretion should be exercised. Judge Altenbernd suggested that such a framework “should identify the relevant factors that are typically important in making the discretionary decision” and stated that the proposed framework should be “used by all trial courts.”

Judge Altenbernd’s point was apparently well taken; the Florida Supreme Court recently quashed the majority decision in Kozel. While recognizing that the decision to impose sanctions rests within the discretion of the trial court, the supreme court observed that, “[a]lthough such broad power is vested in the trial court, it is not necessary or beneficial for that power to be exercised in all situations.” Further, in response to Judge

156. Id. at 394.
157. Id.
159. Id. at 602-03.
160. Id. at 603.
161. Id. (Altenbernd, J., dissenting).
162. Id.
164. Id. at S557 (emphasis added).
Altenbernd's request for a more objective decisional framework, the supreme court stated:

To assist the trial court in determining whether dismissal with prejudice is warranted, we have adopted the following set of factors set forth in large part by Judge Altenbernd: 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created a significant problem of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative. 165

Adherence to these factors may ultimately lead to greater consistency among trial court decisions to impose sanctions. For now, however, the guidelines set forth by the supreme court seem to invite additional litigation to determine how many of the enumerated factors must be present prior to entry of an order of dismissal, which factors carry the most weight, the degree to which any particular factor must be present, whether an evidentiary hearing is necessary to adequately assess the factors, etc. Moreover, while these factors arguably should be considered in any decision to impose sanctions, a narrow reading of Kozel would limit use of the supreme court's decisional framework only to those cases involving sanctions imposed under Rule 1.420(b). The members of the Florida Bar's Civil Procedure Rules Committee should revisit these issues in the near future, and perhaps should propose rule changes that further refine and make uniform the application of the Kozel formula.

4. Dismissal for Lack of Prosecution

In Samuels v. Palm Beach Motor Cars, Ltd. 166 defendant moved to dismiss plaintiff's complaint on October 30, 1991, on the ground that no record activity had occurred during the preceding twelve months. However, on July 17, 1991, plaintiff's counsel appeared at a court-ordered status conference and, as a result of defendant's nonappearance at the conference,
obtained a default judgment on August 13, 1991. On August 28, 1991, the default judgment was set aside pursuant to defendant’s motion.\textsuperscript{167} Despite this activity, the trial court granted defendant’s motion to dismiss. The appellate court, distinguishing \textit{Toney v. Freeman},\textsuperscript{168} reversed the dismissal.\textsuperscript{169} In \textit{Toney}, the Florida Supreme Court had held that a status order and responses thereto did not constitute record activity because the purpose of the order was to provide the trial court with information, not to advance the action.\textsuperscript{170} In \textit{Samuels}, however, the court found that a trial court order requiring appearance at a status conference is, “almost by definition . . . reasonably calculated to advance the cause toward resolution . . . ”\textsuperscript{171} The court observed that “attendance at a status conference can significantly advance a cause toward resolution, for example, by narrowing the issues to be tried or through exploration of settlement possibilities.”\textsuperscript{172} Moreover, the court noted that plaintiff had been able to obtain a default judgment by appearance at the status conference in this case.\textsuperscript{173} Accordingly, the court held that the trial court abused its discretion in dismissing plaintiff’s complaint in light of “ample record activity in this case.”\textsuperscript{174}

Similarly, in \textit{Bialy v. Stinson},\textsuperscript{175} the Fourth District Court of Appeal reversed an order of dismissal for lack of record activity. Plaintiff filed her complaint on March 1, 1990. Defendant subsequently filed a motion to dismiss. The last record activity was a re-notice of hearing filed April 25, 1990, scheduling a hearing on the motion to dismiss for June 4, 1990. Plaintiff’s counsel attended the hearing, but there was no record of any order having been entered on the defendant’s motion. “On May 13, 1991, the trial court, \textit{sua sponte}, entered a motion, notice and judgment of dismissal in accordance with Rule 1.420(e).”\textsuperscript{176} The appellate court found that the appearance of plaintiff’s counsel at a properly noticed hearing on the motion to dismiss constituted sufficient non-record activity to preclude dismissal for lack of prosecution.\textsuperscript{177}

\textsuperscript{167} Id.
\textsuperscript{168} 600 So. 2d 1099 (Fla. 1992).
\textsuperscript{169} \textit{Samuels}, 618 So. 2d at 310.
\textsuperscript{170} \textit{Toney}, 600 So. 2d at 1100.
\textsuperscript{171} \textit{Samuels}, 618 So. 2d at 311 (citing Miami Beach Awning Co. v. Heart of the City, Inc., 565 So. 2d 739 (Fla. 3d Dist. Ct. App. 1990)).
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} 617 So. 2d 349 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{176} Id.
\textsuperscript{177} Id.
Likewise, in *Pope v. Sose*,, 178 the appellate court reversed an order of dismissal for failure to prosecute where plaintiff had caused a summons to be issued to a named co-defendant within one year prior to defendant’s motion to dismiss. 179

Another example of the improper application of Rule 1.420(e) occurred in *In re Forfeiture of: 1977 Chevrolet Corvette*. 180 On October 24, 1990, the trial court entered final judgment of forfeiture in favor of the City of Auburndale after the Corvette owner apparently failed to show cause why his car should not be forfeited. Pursuant to the judgment, the city sold the Corvette. Thereafter, on December 10, 1990, the trial court entered an order setting aside the judgment. Significantly, the trial court never provided the City with notice of the order setting aside judgment; in other words, the City was unaware of any further proceedings after entry of final judgment of forfeiture and the subsequent sale of the car. On June 15, 1992, the original owner of the automobile filed a motion to dismiss for lack of prosecution. Based on the lack of record activity and the City’s failure to show good cause in writing at least five days prior to the hearing on the motion, the trial court dismissed the case for lack of prosecution. The appellate court reversed, observing that “the purpose of Rule 1.420(e) is to move the case toward resolution” and that in this case, the City reasonably believed that the case had been completely resolved. 181 Under these circumstances, the court held “that the city is not required to comply with the good cause in writing requirement” of the rule. 182

Conversely, in *Heinz v. Watson*, 183 the Fifth District Court of Appeal upheld an order of dismissal pursuant to Rule 1.420(e), at least partially on the grounds that the plaintiff failed to show good cause in writing why the case should not be dismissed at least five days prior to the hearing. 184 In this case, an amended complaint for malpractice was filed on April 27, 1990. Defendants filed their answer on October 10, 1990. Plaintiff’s counsel filed a motion for mediation conference on April 25, 1991, but the motion was never set for hearing and no mediation conference was ever held. Defendants moved to dismiss for lack of prosecution on January 28,
1992, and the trial court granted the motion, albeit without prejudice.\textsuperscript{185} On appeal, the court concluded that "a motion for mediation conference, standing alone and without any follow-up activity during the subsequent six-month period, is not record activity implemented to advance the case forward to a conclusion on the merits."\textsuperscript{186} The court stated that a notice of hearing on the motion would have constituted sufficient record activity had one been filed.\textsuperscript{187} Nonetheless, citing Norflor Construction Corp. \textit{v. City of Gainesville},\textsuperscript{188} the court characterized plaintiff's conduct as "the manifestation of 'an intention to act,' but not actual record action."\textsuperscript{189} Finally, the court noted plaintiff's failure to show good cause at least five days prior to dismissal as required by Rule 1.420(e).\textsuperscript{190} Accordingly, the court upheld the trial court's order dismissing the case.\textsuperscript{191}

In \textit{Toney v. Freeman},\textsuperscript{192} the Florida Supreme Court quashed the Fourth District Court of Appeal's decision reversing an order of dismissal and directed the court to "address the issue of whether good cause was shown for failure to prosecute."\textsuperscript{193} On remand, in \textit{Freeman v. Toney},\textsuperscript{194} the court cited \textit{Barton-Malow Co. \textit{v. Gorman Co.}},\textsuperscript{195} for the proposition that "'good cause requires some contact with the opposing party and some form of excusable conduct or occurrence which arose other than through negligence or inattention to pleading deadlines.'"\textsuperscript{196} Under this standard, the court held that the departure of a lawyer from the firm representing plaintiff, and the resultant failure of plaintiff to learn of the trial court's order requesting status advice, did not constitute good cause for failure to prosecute.\textsuperscript{197}

\textsuperscript{185} \textit{Id.} at 751-52. Although it is not clear in the appellate court's opinion, it is possible that the trial court's order created a problem for the plaintiff under the statute of repose governing medical malpractice actions. \textit{See} \textit{Fla. Stat.} \textsection 95.11(b) (1991). This might explain why plaintiff took an appeal from an order dismissing his complaint without prejudice.

\textsuperscript{186} \textit{Heinz}, 615 So. 2d at 753.

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} 512 So. 2d 266 (Fla. 1st Dist. Ct. App. 1987).

\textsuperscript{189} \textit{Heinz}, 615 So. 2d at 753.

\textsuperscript{190} \textit{Id.} at 753-54.

\textsuperscript{191} \textit{Id.} at 754.

\textsuperscript{192} 600 So. 2d 1099 (Fla. 1992).

\textsuperscript{193} \textit{Id.} at 1101.

\textsuperscript{194} 608 So. 2d 863 (Fla. 4th Dist. Ct. App. 1992).

\textsuperscript{195} 558 So. 2d 519 (Fla. 5th Dist. Ct. App. 1990).

\textsuperscript{196} \textit{Toney}, 608 So. 2d at 863-64 (citing \textit{Barton-Malow Co.}, 558 So. 2d at 521).

\textsuperscript{197} \textit{Id.}
Finally, in Diamond v. Peninsular Life Insurance Co., the trial court held that the one year provision of Rule 1.420(e) does not apply to motions for relief from judgment filed pursuant to Rule 1.540. The trial court struck appellant’s rule 1.540(b) motion and supporting affidavit because appellant never noticed the motion for hearing and no action was taken for sixteen months after the motion was filed. The appellate court observed that Rule 1.420(e) authorizes dismissal only for failure to prosecute, but “does not authorize the [trial] court to strike a motion to set aside a judgment rather than ruling on its merits.”

E. Juries and Jury Trials

Two important lines of cases developed under this topic during the past year. The first relates to waiver of the right to jury trial under Rule 1.430(d). The second pertains to post-verdict interviews of jurors pursuant to Rule 1.431(h). Both lines of cases provide considerable guidance to courts and practitioners.

1. Waiver of the Right to Jury Trial Under Rule 1.430(d)

Addressing the question of waiver of the right to jury trial, the court in Herrera v. Wee Care of Flagler County, Inc., reviewed a case involving the trial court’s discretion to grant a motion for jury trial when demand has not been made timely. The Fifth District Court of Appeal noted that plaintiff had not requested a jury trial until two years after the litigation commenced, and stated that “[w]hen a motion for jury trial is untimely, the trial court is called upon to exercise sound discretion in determining whether justice requires the granting of a motion.” In this case, the trial court, concerned with the competence of the pro se plaintiff to represent herself, conditioned its order granting jury trial on plaintiff’s continued compliance with the rules of civil procedure and orders of the court. On the day trial commenced, plaintiff and her parents apparently created a scene in the courtroom which prompted the judge to hold a non-jury trial “as it would not allow [plaintiff] to appear before a jury and cause an immediate mistri-

199. Id.
200. 615 So. 2d 223 (Fla. 5th Dist. Ct. App. 1993).
201. Id. at 224 (citing Wertman v. Tipping, 166 So. 2d 666 (Fla. 1st Dist. Ct. App. 1964)).
202. Id.
The appellate court found that in light of the circumstances, the ultimate denial of plaintiff's request for jury trial did not constitute abuse of the trial court's discretion. The court also rejected plaintiff's argument that once the trial court placed the action on the jury trial docket, plaintiff became "vested" with the right to a jury trial.

In *Independent Fire Insurance Co. v. Arvidson*, the court addressed the more technical aspects of jury trial waiver. Plaintiff filed a complaint for rescission and declaratory relief regarding an insurance policy. Defendants counterclaimed and demanded a jury trial. Plaintiff filed a notice of non-jury trial and the trial court subsequently issued an order setting the case for non-jury trial. Both parties filed unilateral pretrial statements in which they listed the issues to be determined at trial. Additionally, the defendants listed the issues raised in their counterclaim. On appeal, defendants argued that they never noticed their counterclaim for either jury or non-jury trial, although the counterclaim itself did set forth a demand for jury trial. Defendants further argued that they could not waive their right to jury trial absent some "specific and affirmative stipulation or by announcement in open court." The appellate court disagreed, concluding that by filing a pretrial statement which included their counterclaims as issues to be decided at the noticed non-jury trial, defendants had waived their right to jury trial on their counterclaim. Practitioners, beware!

2. Post-Verdict Juror Interviews Under Rule 1.431(h)

In *Rabun & Partners, Inc. v. Ashoka Enterprises, Inc.*, the Fifth District Court of Appeal quashed the trial court's order permitting post-verdict inquiry into juror deliberations. The case involved a construction dispute in which the jury returned a verdict in favor of an architect for services rendered in the design of a hotel, and a lesser verdict on the hotel owner's counterclaim for damages caused by the architect's delays. After the verdict, the hotel owner moved pursuant to Rule 1.431(h) for an interview of one of the jurors who had allegedly told the hotel owner that some jurors "refused to look at the documentary evidence" and that others "were

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203. *Id.*
204. *Id.*
205. *Herrera*, 615 So. 2d at 224.
207. *Id.* at 858.
208. *Id.*
prepared to rule against [the hotel owner] because [he] was a rich doctor and
did not need the money." The appellate court turned to the recent
Florida Supreme Court decision in *Baptist Hospital of Miami, Inc. v.
Maler* for guidance. In *Maler*, the supreme court reviewed a case
in which two jurors apparently told defendant's lawyers that while the
defendant in a medical malpractice case should have prevailed, verdict was
rendered against the defendant out of sympathy for the child plaintiff. The
supreme court upheld the quashing of the trial court's order granting a
juror interview, stating that "[t]o the extent an inquiry will elicit information
about overt prejudicial acts, it is permissible; to the extent an inquiry will
elicit information about subjective impressions and opinions of jurors, it may
not be allowed." Taking guidance from *Maler*, the Fifth District Court
of Appeal first recognized that an express agreement between two or more
jurors to ignore evidence or to otherwise disregard their oath might well
constitute the type of "overt act" into which inquiry would be appropriate
under the *Maler* standard. The court concluded, however, that there
was no indication of an express agreement between jurors, or of any other
overt act that would justify a juror interview under the rule. Rather, the
court held that even if the jury voted against the hotel owner "because he
was a rich doctor and did not need the money," this motive reflected noth-
ing but "the emotions and mental processes of the jurors, matters which
essentially inhere within the jury verdict."

The court in *Carcasses v. Julien*, reviewed the propriety of the trial
court's order limiting the scope of its post-verdict hearing on plaintiff's
allegations of juror misconduct. Plaintiff alleged that after the jury was
discharged in this medical malpractice action, one of the jurors told her that
he had spoken with his sister about the case, that his sister had undergone
similar treatment, and that his verdict had been influenced by sympathy for
the doctor's reputation. The trial court interviewed the jury pursuant to
Rule 1.431(h) but limited the scope of the interview to any non-record
information received by the juror in question. At the close of the hearing,
the court denied plaintiff's motion for a new trial. On appeal, plaintiff

210. *Id.* at 1285.
211. 579 So. 2d 97 (Fla. 1991).
212. *Rabun*, 604 So. 2d at 1285 (citing *Maler*, 579 So. 2d at 97).
213. *Maler*, 579 So. 2d at 97.
214. *Id.*
216. *Id.*
contended that the trial court should have inquired into the juror’s desire not to harm the doctor’s reputation.\textsuperscript{218} The Third District Court of Appeal rejected plaintiff’s argument, citing \textit{Maler} for the proposition that “to the extent an inquiry will elicit information about subjective impressions and opinions of jurors, it may not be allowed.”\textsuperscript{219} The appellate court determined that the trial court properly limited the scope of its hearing to information allegedly received by the subject juror from his sister, concluding that any inquiry into the juror’s “sympathy” for the doctor’s reputation “fits within the category of prohibited inquiry into the emotions and mental processes of the jurors” prohibited by section 90.607(2)(b) of the Florida Statutes.\textsuperscript{220}

In \textit{Walgreens, Inc. v. Newcomb},\textsuperscript{221} the court addressed whether information obtained from a juror in violation of Rule 1.431(h) could nevertheless provide grounds for a new trial.\textsuperscript{222} This case involved a slip and fall in which plaintiff claimed that a dangerous condition was created by Windex sprayed on the floor of the restaurant in which she fell. After a verdict for defendant, plaintiff’s counsel, who apparently could not believe the result, took it upon herself to contact one of the jurors in an attempt to find out “what went wrong.”\textsuperscript{223} As a result of her conversation with the juror, plaintiff’s counsel learned of the possibility that two jurors had conducted their own experiments with Windex and communicated their findings to other jury members.\textsuperscript{224} With respect to the communication between plaintiff’s counsel and the juror, the appellate court found that the communication violated Rule 1.431(h), which provides that a juror may not be interviewed unless the trial court so orders after notice and hearing.\textsuperscript{225}

The court also found that the communication violated Rule 4-3.5(d)(4) of

\begin{itemize}
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Id.} at 488 (quoting \textit{Maler v. Baptist Hosp. of Miami, Inc.}, 559 So. 2d 1157 (Fla. 3d Dist. Ct. App. 1989)).
\item \textsuperscript{220} \textit{Id.} at 487-88.
\item \textsuperscript{221} 603 So. 2d 5 (Fla. 4th Dist. Ct. App. 1992), \textit{review denied}, \textit{Newcomb v. Walgreens, Inc.}, 613 So. 2d 7 (Fla. 1993).
\item \textsuperscript{222} \textit{Id.} at 6. For purposes of analyzing court decisions under Rule 1.431, this discussion is limited to the court’s treatment of juror interviews. The implications of this decision of new trial motions are discussed, infra, in the section pertaining to Rule 1.530.
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{Id.} For further discussion of the parameters of the rule governing post-verdict juror interviews, and the impact of such interviews on Rule 1.530 motions for new trial, see \textit{Nationwide Mut. Fire Ins. Co. v. Tucker}, 608 So. 2d 85 (Fla. 2d Dist. Ct. App. 1992).
\end{itemize}
the Rules Regulating the Florida Bar which sets forth similar requirements.226

F. Offers of Judgment

The current version of Rule 1.442 does nothing more than incorporate by reference the procedural provisions of Florida Statutes, section 768.79 regarding offers of judgment. The former rule was repealed effective July 9, 1992.227 The new rule was added July 16, 1992, but did not become effective until January 1, 1993.228 It is unclear whether the new rule will resolve the variety of complications that have arisen around offer of judgment provisions in force at various times over the past decade. What is clear is that the new rule may have come too late to be of use to parties whose cases were decided in the past year.

Specifically, in Metropolitan Dade County v. Jones Boatyard, Inc.,229 the Florida Supreme Court accepted jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution, to resolve an apparent conflict between the Third District Court of Appeal’s decision in this case and the Second District Court of Appeal’s decision in A.G. Edwards & Sons, Inc. v. Davis.230 At issue is the retroactive application of offers of judgment, and the concomitant right to attorney’s fees, pursuant to section 768.79 of the Florida Statutes.

In its opinion in Jones Boatyard, Inc. v. Metropolitan Dade County, the Third District Court of Appeal held that section 768.79 applied only to offers of judgment made in actions accruing on or after July 1, 1986, the effective date of the statute.231 The supreme court reviewed the language of the statute in question as construed in Mudano v. St. Paul Fire & Marine Insurance Co.232 and observed that under Chapter 768:

"NEGLIGENCE" is divided into three parts. Part III, "DAMAGES," contains sections 768.71 through 768.81. Section 768.71, entitled "Applicability; conflicts," provides, in part:

226. Walgreens, 603 So. 2d at 6.
227. See Timmons v. Combs, 608 So. 2d 1, 3 (Fla. 1992).
228. See In re Amendments to Florida Rules Civil Procedure, 604 So. 2d 1110 (Fla. 1992).
229. 611 So. 2d 512 (Fla. 1993).
This part applies only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date. The supreme court in Metropolitan Dade County concluded that by its own terms, section 768.79 does not apply to offers of judgment in actions accruing before the referenced date. In A.G. Edwards, the Second District Court of Appeal was faced with the issue of retroactive application of the provisions of Florida Statutes, section 45.061 regarding offers of settlement.  The court concluded that the statute was applicable to causes of action accruing before its effective date because "the operative event, the only event crucial to operation of the statute, is the making of an offer of settlement." The supreme court tacitly approved this interpretation in Leapai v. Milton.

In Metropolitan Dade County, the supreme court resolved the apparent conflict in the interpretation of the two statutes by observing that "section 768.79 is part of an integrated statutory scheme . . . [which] by its plain language attaches the right to attorney's fees to the underlying cause of action." By contrast, the court interpreted section 45.061 as giving rise to its own independent cause of action for sanctions, one which does not rely on the underlying lawsuit. Specifically, the court stated that section 45.061 "exists as a distinct independent statute under the civil procedure chapter of the Florida Statutes." Accordingly, the court approved both the Third District Court of Appeal's interpretation of the retroactive

233. Metropolitan Dade County, 611 So. 2d at 513 (citing Mudano, 543 So. 2d at 876). The "Damages" provisions now constitute Part II of chapter 768. Formerly, Part II of the chapter set forth provisions governing Medical Malpractice Claims and Related Matters. These provisions have since been repealed or renumbered as part of chapter 766.

234. Id. at 514
235. 559 So. 2d at 236.
236. Id. at 237 (quoting Hemmerle v. Bramalea, Inc., 547 So. 2d 203, 204 (Fla. 4th Dist. Ct. App. 1989)).
237. 595 So. 2d 12 (Fla. 1992).
238. Metropolitan Dade County, 611 So. 2d at 514.
239. Id.
240. Id. In 1990, the Legislature amended section 45.061(6), limiting its applicability to causes of action accruing prior to October 1, 1990. Ch. 90-119, § 22 1990 Fla. Laws 370, 381 (amending FLA. STAT. § 45.061 (1991)). This amendment was apparently undertaken to eliminate some of the confusion surrounding the existence of separate statutory provisions for offers of settlement (section 45.061) and offers of judgment (section 768.79), and a third provision under then existing Rule 1.442 that failed to either fully incorporate or fully reconcile the different requirements of the two statutes.
application of section 768.79 and the Second District Court of Appeal’s interpretation of retroactive application of section 45.061. Moreover, the supreme court mildly chided the plaintiff for not anticipating the different interpretations, stating that plaintiff’s counsel “had or should have had the expertise to analyze section 768.79 and discover the possible inapplicability of section 768.79 in the case sub judice and the likely need to file under section 45.061.”

While the supreme court’s statutory interpretation may be valid, the result in this case seems to unnecessarily elevate form over substance. The provisions of section 45.061 and section 768.79 are substantially similar, with the notable exception of the label (section 46.051 or section 768.79) placed by the offeror on his offer to settle the lawsuit. Both statutes reflect the spirit and purpose of Rule 1.442, which is “to encourage defendants to acquiesce in claims discovered during litigation to be meritorious and to shift to the claimant the financial burden of carrying on litigation beyond the point where an appropriate offer of judgment on the merits is made.” In fact, the supreme court has treated the two types of statutory “offers” as interchangeable variations on the theme established by the rule. Specifically, in Leapai, the supreme court addressed the constitutionality of offers of settlement pursuant to section 45.061, and stated that “[t]he offer of judgment process is not a new subject to us.

Given that the two statutory provisions under consideration promote the purposes of Rule 1.442 in all its various incarnations, and further, that some version of the rule was both in effect and valid at the time plaintiff’s offer was made, the supreme court’s disparate treatment seems hypertechnical and yields a result contrary the primary goal of the rules of civil procedure: promoting the “just, speedy, and inexpensive determination of every action” through early resolution of lawsuits and the efficient administration of justice. The Legislature’s effective repeal of section 45.061 for causes of action accruing after October 1, 1990 and its modification of section 768.79 to clarify that defendants, as well as plaintiffs, are entitled to recover under the statute, has now paved the way for the supreme court to ignore section 45.061 and to adopt in toto the procedural provisions of section 768.79, thus

241. Metropolitan Dade County, 611 So. 2d at 514.
242. Id.
244. See, e.g., The Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989).
245. Leapai, 595 So. 2d at 15 (emphasis added).
resolving the on-going conflict between the various provisions. While these changes came to late to be of any use to the parties in this case, one hopes that future litigants will no longer be required to anticipate a plethora of different interpretations of Florida's offer of judgment law.

On a somewhat less preachy note, in *Liebling v. Florida Energy Management, Inc.*, a personal injury case, the defendant made an offer of judgment in the amount of $5,001.00 sixty days prior to trial. Plaintiff rejected the offer. A jury subsequently found the defendant solely negligent and awarded plaintiff property damage in the amount of $1,237.39, but found that plaintiff had not met the threshold requirements of section 627.737(2) of the Florida Statutes for establishing bodily injury. The trial court awarded defendant costs pursuant to Rule 1.442(h), but permitted the plaintiff, as the prevailing party, pursuant to section 57.041 of the Florida Statutes, to offset costs incurred prior to service of the offer of judgment. The appellate court reversed the Rule 1.442 award noting that the trial court failed to make an express finding that plaintiff's rejection of the offer of judgment was "unreasonable." The court, citing *State Farm Mutual Automobile Insurance Co. v. Lathrop*, held that a party's rejection of an offer of judgment must explicitly be found to have "caused an unreasonable delay and needless increase in the cost of litigation," in addition to violating the percentage requirements imposed by the rule.

The court also reversed the trial court's limitation on the plaintiff's section 57.041 claim to costs incurred prior to service of the settlement offer. The court noted that plaintiff was the prevailing party and that section 57.041 entitles a prevailing party to recover all taxable costs without regard to the effect of a rejected offer of judgment.

In *Royal Caribbean Corp. v. Modesto*, the Third District Court of Appeal determined that the offer of judgment provisions of section 768.79 of the Florida Statutes are applicable in Jones Act cases brought in state court. The court first observed that the award of attorneys' fees "as a component of maintenance and cure is traditionally within the equitable

246. 619 So. 2d 441 (Fla. 2d Dist. Ct. App. 1993).
247. *Id.* at 443.
248. *Id.*
250. *Liebling*, 619 So. 2d at 443 (citing *State Farm*, 586 So. 2d at 1127).
251. *Id.*
252. *Id.*
jurisdiction of the courts” in admiralty actions. Additionally, the court stated that Florida’s offer of judgment provisions, like rules governing mediation, pertain to the state’s control of the judicial process, rather than to the substantive elements of Jones Act claims. Accordingly, the court held that “[b]ecause Florida’s rules relating to offers of judgment are an integral part of this state’s management of its courts’ proceedings and do not conflict with federal admiralty law,” the award of attorneys’ fees pursuant to section 768.79 is proper in a Jones Act case.

Two recent cases create an apparent conflict regarding how specific an offer of judgment must be to satisfy the requirements of Rule 1.442. In State Farm Life Insurance Co. v. Bass, plaintiff served an offer of judgment in the sum of $64,000 (his insurance policy limit) “exclusive of costs and attorneys’ fees . . . [which] would be agreed to or determined by the court at a later date.” On appeal, the Third District Court of Appeal held that the offer was insufficient to support an award of costs and fees, observing that Rule 1.442(c)(2) required the offer of judgment to state “the total amount of the offer.” Insofar as the offer did not specify a particular amount for costs and attorneys’ fees, the court concluded that the defendant would have been unable “to determine the acceptability of the offer.” Rejection of the offer, therefore, did not expose the defendant to liability for plaintiff’s fees and costs.

In apparent contrast to Bass, the Fifth District Court of Appeal concluded in Hellman v. City of Orlando that an offer of judgment made pursuant to section 768.79 and Rule 1.442 in the sum of $8,500.00 plus costs provided a sufficient basis for the later award of costs and fees. The court turned for guidance to its recent decision in Williams v. Brochu, in which it held that “the statutory term "judgment obtained" [in section 768.79] means the amount of the judgment for damages awarded by the jury for the cause of action being tried and does not include taxable costs or attorneys’ fees . . . .” The court then analyzed the meaning of the term “offer” in section 768.79 and similarly determined that “an offer

254. Id. at 520 (citing Vaughan v. Atkinson, 369 U.S. 527 (1962)).
255. Id.
256. Id.
258. Id. at 909.
259. Id. at 910.
261. 578 So. 2d 491 (Fla. 5th Dist. Ct. App. 1991).
262. Hellman, 610 So. 2d at 104 (quoting Williams v. Brochu, 578 So. 2d 491 (Fla. 5th Dist. Ct. App. 1991)).
should be construed as including all damages 'which may be awarded in a final judgment.' Based upon this formulation, the court concluded that because reference in section 768.79 to "judgment obtained" does not include taxable costs "incidental to a jury's consideration of a damage award," an offer of judgment need not assign a dollar amount to such costs. The court therefore found the plaintiff's offer of judgment valid and remanded the case for further proceedings.

The two cases are perhaps reconcilable because, unlike section 768.79 (which also requires an offer to "state its total amount"), then-existing Rule 1.442 did not define an offer of judgment as "including all damages which may be awarded in a final judgment." Accordingly, the type of analysis employed in Jones Boatyard, upholding both interpretations because they are based on different, albeit substantially similar provisions, may be appropriate. While this result would be of little comfort to parties who have made indefinite offers of judgment under former Rule 1.442, it would have the salutary effect of closing a potential loophole in the new rule, which incorporates section 768.79 by reference. The loophole is created by requiring the offering party to accurately predict the amount of fees that may eventually be incurred as a result of an opponent's intransigence. This requirement would give rise to the possibility that a party who in good faith makes an offer of judgment on the merits of her claim will be precluded from recouping costs and fees if she overestimates the amount of fees that might be incurred in prosecuting her case to final resolution. The same loophole could allow a party to escape the sanctions contemplated by the rule, despite the fact that the party caused and contributed to further needless litigation by refusing an offer of judgment.

An interpretation that permits this loophole to exist would thwart the very purpose of the rule, which is to place the burden of future costs and fees on litigants who are unwilling to concede to meritorious claims. It makes eminently more sense for an offer of judgment to be limited to the amount a party expects to pay or receive as a result of the primary claim(s) made in the lawsuit, and to leave the question of fees and costs for later determination by the court. Thus, even if the supreme court eventually approves the Third District Court of Appeal's interpretation of former Rule 1.442 in Bass, it should adopt the Fifth District Court of Appeal's construc-

263. Id.
264. Id.
265. Id.
tion of section 768.79 for all cases involving the current version of Rule 1.442.

G. Directed Verdict

In Elmowitz v. Gloria E. Zimmerman, Revocable Trust, the Third District Court of Appeal reviewed a directed verdict rendered in favor of a third party defendant. Reiterating the well-settled standard for directed verdicts that the trial court "[m]ust view the evidence adduced and every conclusion therefrom in a light most favorable to the non-moving party, resolving every conflict and inference for that party," the court found that the record evidence conflicted in material respects and that the jury should have been allowed to consider the conflicting evidence and enter a verdict accordingly. The most interesting aspect of this case is that after the trial court entered a directed verdict in favor of the third party defendant, the jury eventually determined that the third party defendant was fifteen percent liable for the third party plaintiff's damages. This verdict doubtless influenced the appellate court's decision.

H. Default Judgment

In a series of cases, various district courts of appeal underscored the trial court's duty to terminate litigation through entry of default judgment only in the most extreme cases. For example, in Tufo v. Oxford Resources Corp., the Fourth District Court of Appeal reversed a default judgment in favor of the plaintiff where the plaintiff failed to serve defendant's counsel with notice of its motion for default or its motion for entry of final default judgment.

In Carr v. Glass-Tech Corp., the Third District Court of Appeal likewise reversed a default judgment because of service improprieties. In Lenhal Realty, Inc. v. Transamerica Commercial Finance Corp., the court set aside a default judgment against defendants on the grounds that defendants had filed a motion to dismiss, which, while untimely, was filed before the trial court's order entering default judgment was filed with the clerk of the court.

266. 610 So. 2d 52 (Fla. 3d Dist. Ct. App. 1992).
267. Id. at 53.
269. 614 So. 2d 1227 (Fla. 3d Dist. Ct. App. 1993).
270. Id. at 1227-28.
The well settled rule that default judgment is not appropriate where a party fails to appear at trial was reiterated in *Turner Properties, Inc. v. Marchetta*. In *Turner Properties*, the Third District Court of Appeal stated that “[n]onappearance by defendants does not relieve the plaintiff of its obligation to introduce evidence on liability, and is not a basis for entry of a default.”

In *Electric Engineering Co. v. General Electric Canada, Inc.*, the Third District Court of Appeal found that a misdirected transfer of the complaint from defendant’s registered agent to defendant, who, unbeknownst to its registered agent had changed its address, constituted excusable neglect and good grounds for setting aside a default.

Finally, in *Carazo v. Status Shipping, Ltd.*, the Second District Court of Appeal reversed the default entered against defendants despite defendants’ failure to appear at a court ordered case management conference and failure to comply with the court’s order to serve their answer to plaintiff’s amended complaint within ten days. The appellate court stated that while it did “not condone” the behavior of defendants’ counsel, the behavior did not rise to the level of “flagrant, persistent, willful, or otherwise aggravated violation” of the trial court’s order. While Rule 1.200 permits the trial court to “take any . . . appropriate action” in response to a party’s failure to attend a pretrial conference, the sanction of default was disproportionate to the complained of conduct on the part of defendants and their attorneys. Accordingly, the court reversed the trial court’s order entering default.

I. Summary Judgment

Four cases decided by the Fourth District Court of Appeal during the past year reemphasize the necessity of negating issues raised by way of affirmative defense in order to obtain summary judgment. For instance, in *Elkins v. Barbella*, the court noted that the moving party’s affidavit supported only the allegations in her complaint, and that the movant had done nothing more than to “merely den[y]” her opponent’s affirmative defense.

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273. *Id.* at 507.
275. *Id.* at 52.
277. *Id.* at 1330.
278. *Id.*
279. *Id.*
defenses. Based upon this record, the court stated that "[o]nce again we reverse a summary judgment because the moving party failed to disprove opposing affirmative defenses or establish that they were insufficient as a matter of law." 

In Crago v. Citibank, the same court reversed summary judgment in a mortgage foreclosure case, observing that the mortgagor failed to disprove one defendant’s contention that title to the mortgaged property had been obtained from him under duress. The Fourth District Court of Appeal again reversed summary judgment in Pile v. Geltex Trading Corp. because "plaintiff failed to disprove opposing affirmative defenses or establish that said defenses were insufficient as a matter of law." The court also noted that the defendant apparently had not been served with copies of the Motion for Summary Judgment or the Notice of Hearing on the motion.

Finally, in Doss v. Steger & Steger, P.A., the court reversed final summary judgment where the moving party "failed to negate appellant’s affirmative defense." In addition, the court commented on the fact that the affidavit submitted in support of the motion failed to comply with both the procedural and substantive requirements of Rule 1.510(c), in that it consisted almost entirely of inadmissible hearsay statements.

The subject of affidavits was also raised in Silva v. Hernandez, albeit for different reasons. In Silva, the supreme court addressed a direct conflict between the Third District Court of Appeal’s interpretation of Rule 1.510(c) regarding service of opposing affidavits, and the Second District Court of Appeal’s interpretation in Burton v. GOV Contracting Corp. At issue was whether an affidavit submitted in opposition to a motion for summary judgment must be filed at least one day prior to hearing on the motion. The supreme court approved the approach taken in Burton,

281. Id. at 727.
282. Id.
284. 610 So. 2d 738, 739 (Fla. 4th Dist. Ct. App. 1993).
285. Id.
286. Id.
287. 613 So. 2d 136 (Fla. 4th Dist. Ct. App. 1993).
288. Id. at 137 (citing Solimine v. Numerica Sav. Bank, 587 So. 2d 505 (Fla. 4th Dist. Ct. App. 1991)).
289. Id.
290. 612 So. 2d 1377 (Fla. 1993).
291. 552 So. 2d 293 (Fla. 2d Dist. Ct. App. 1989).
292. Silva, 612 So. 2d at 1377.
which held that Rule 1.510(c) "only requires that opposing affidavits be served at least one day prior to the day of the hearing." The supreme court observed that Rule 1.510 does not require the opposing affidavit to be filed at any specific time, and stated that filing is proper at any time prior to the actual hearing, even if such filing takes place on the same day as the hearing.

In *Heritage Real Estate & Development Co. v. Gaich*, the Fifth District Court of Appeal provided guidance as to the proper application of the summary judgment rule in a case involving a pending counterclaim. Citing prior decisions from the Third, Fourth and Fifth Districts, the court held that under Rule 1.510,

[T]here are two ways to deal with a pending counterclaim. First, a trial court can enter partial summary judgment for a plaintiff and then take evidence on the counterclaim or, in the alternative, enter final summary judgment on the complaint but "stay" its execution pending resolution of the counterclaim.

Logically, these alternatives should equally be available to a defendant seeking summary judgment on its counterclaim where issues in the complaint remain pending.

One other case involving the procedural aspects of summary judgment motions deserves mention. In *Kozich v. Hartford Insurance Co.*, the court determined that a trial court is without discretion to determine whether to hold a hearing on a motion for summary judgment. Perhaps following the lead of local federal courts, the trial court entered an order setting forth procedures and deadlines for various filings related to defendant's motion for summary judgment, and stated that the "[c]ourt will advise the parties in the event a hearing is required." After all parties had submitted briefs on the motion, the trial court entered judgment without hearing. On appeal, the court noted that Rule 1.510(c) specifically provides for a hearing, and does not admit any discretion on the part of the trial court to

293. *Id.* (emphasis added).
294. *Id.*
295. 620 So. 2d 1118 (Fla. 5th Dist. Ct. App. 1993).
296. *Id.* at 1119.
determine whether such hearing is required. Accordingly, the order entering summary judgment was reversed and the case remanded for purposes of holding the hearing required by Rule 1.510(c).

J. Motions for Rehearing and New Trial

In Walgreens, Inc. v. Newcomb, the court addressed whether information obtained from a juror in violation of Rule 1.431(h) could nevertheless provide grounds for a new trial. This case involved a slip and fall in which plaintiff claimed that a dangerous condition was created by Windex sprayed on the floor of the restaurant in which she fell. An informal juror interview revealed that two jurors may have impermissibly conducted their own Windex experiments and related their findings to the remaining jurors. Based upon this information, the trial court granted plaintiff's motion for a new trial. On appeal, the court noted that while this type of juror conduct would normally support a motion for new trial, the information regarding the impermissible experiment had been obtained by plaintiff's counsel in violation of Rule 1.431. The court reasoned that "[a] party ought not be able to obtain relief by violating the Rules when the relief could not be obtained by compliance with the Rules." Accordingly, the court reversed the trial court's order granting a new trial and remanded the case for entry of judgment consistent with the original verdict.

The supreme court's opinion in Keene Bros. Trucking, Inc. v. Pennell resolved a direct conflict between the decision of the Second District Court of Appeal in that case and the supreme court's earlier decision in Frazier v. Seaboard System Railroad, which dealt with simultaneous entry of orders granting motions for new trial and for

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300. Id.; cf. S.D. Fla. LR 7.1.B ("No hearing will be held on motions unless set by the court.").
301. Id.
303. For purposes of analyzing court decisions under Rule 1.530, this discussion is limited to the court's treatment of plaintiff's motion for new trial. Issues regarding juror interviews are discussed, supra, in section E2 pertaining to Rule 1.431.
304. Walgreens, 603 So. 2d at 6.
305. Id.
306. 614 So. 2d 1083 (Fla. 1993).
308. 508 So. 2d 345 (Fla. 1987).
judgment notwithstanding the verdict. The supreme court acknowledged that its \textit{Frazier} opinion did characterize such orders as "mutually inconsistent."\footnote{309} The court also observed that \textit{Frazier} expressly contemplated the possibility of the mutually inconsistent orders being entered "in the alternative" to promote judicial economy.\footnote{310} The supreme court concluded that the trial court in this case had properly considered and decided the motions for new trial and judgment notwithstanding the verdict in the alternative.\footnote{311}

The resolution of this conflict did not, however, dispose of all issues raised on appeal because the trial court had also declared a mistrial prior to discharging the jury.\footnote{312} The practitioner should take special note of the bright-line test established to clarify apparent confusion regarding the timing and resultant treatment of mistrial orders. First, the court observed that "[t]he legal effect of a mistrial is the equivalent of there having been no trial at all."\footnote{313} Accordingly, an order of mistrial entered before the jury is discharged is a non-appealable order that removes the court's authority to reinstate a verdict or to enter a judgment notwithstanding the verdict. By contrast, an order granting a mistrial entered after the jury is discharged operates as a motion for new trial. The court determined that the appropriate demarcation between these alternatives is the discharge of the jury, rather than the less easily ascertainable point at which the jury verdict is "rendered."\footnote{314}

The practitioner should also take note of one other case that indirectly involves new trial motions pursuant to Rule 1.530. In \textit{Dominguez v. Barakat},\footnote{315} the court held that Rule 1.530(b) requires motions for new trials to be made within ten days after return of a jury verdict or the filing of judgment in a nonjury action. The rule does not, however, provide for additional time for service by mail pursuant to Rule 1.090(e).\footnote{316} Thus, the court held that for purposes of calculating the time for filing a notice of appeal, rendition of judgment is not postponed by a motion for rehearing when the motion is not served for eleven days after entry of judgment.

\footnotesize{\begin{itemize}
\item 309. \textit{Keene Bros. Trucking}, 614 So. 2d at 1084.
\item 310. \textit{Id.}
\item 311. \textit{Id.} at 1085.
\item 312. \textit{See id.}
\item 313. \textit{Id.}
\item 314. \textit{Keene Bros. Trucking}, 614 So. 2d at 1085.
\item 315. 609 So. 2d 664 (Fla. 3d Dist. Ct. App. 1992).
\item 316. \textit{See FLA. R. CIV. P. 1.530.}
\end{itemize}}
notwithstanding the fact that notice of the final judgment is provided to counsel by mail.\textsuperscript{317}

K. Relief from Judgment

Courts and practitioners alike continue to grapple with the appropriate circumstances under which a motion for relief from judgment pursuant to Rule 1.540 can be raised. A series of cases decided in the past year shed considerable light on the proper application of the rule. For example, in Rolfs v. First Union National Bank of Florida,\textsuperscript{318} the court addressed the trial court's denial of a Rule 1.540 motion to vacate final judgment of foreclosure on the grounds that the mortgagor had not filed the original note and mortgage with the trial court.\textsuperscript{319} The appellate court emphasized the well-settled rule of law that motions for relief from judgment are no substitute for a proper appeal, and concluded that “the error, if any, was reviewable by plenary appeal from the final judgment.”\textsuperscript{320}

Similarly, in A.W. Baylor Plastering, Inc. v. Mellon Stuart Co.,\textsuperscript{321} plaintiff moved for relief from judgment claiming that the trial court was mistaken in the law it relied upon in dismissing plaintiff's complaint.\textsuperscript{322} On appeal, the court first observed that orders denying motions for relief pursuant to Rule 1.540 are nonfinal, and accordingly, that briefs must be filed within fifteen days from notice of appeal from such orders.\textsuperscript{323} In this case, appellant's initial brief was filed more than two months after its notice of appeal. Recognizing that appeals should not normally be dismissed on the basis of “inadvertent procedural omission[s],”\textsuperscript{324} the court nevertheless dismissed the appeal because it was evident that the plaintiff's Rule 1.540 motion was impermissibly filed as a substitute for appellate review or a

\textsuperscript{317} Dominguez, 609 So. 2d at 664.
\textsuperscript{318} 604 So. 2d 1269 (Fla. 4th Dist. Ct. App. 1992).
\textsuperscript{319} The original documents had been produced for the mortgagor's inspection, and had been presented to the trial court at the hearing on the mortgagee's motion for summary judgment, but had not actually been “filed” with the court. \textit{Id.} at 1270.
\textsuperscript{320} \textit{Id.}
\textsuperscript{321} 611 So. 2d 108 (Fla. 5th Dist. Ct. App. 1992).
\textsuperscript{322} The trial court dismissed the complaint because plaintiff, a corporation, filed a complaint that was not signed by an attorney licensed to practice law in the State of Florida. The trial court denied plaintiff's motion to amend the complaint on the grounds that such a complaint could only be stricken, not amended. \textit{Id.} at 109.
\textsuperscript{323} \textit{Id.}
\textsuperscript{324} \textit{Id.}
motion for rehearing pursuant to Rule 1.530, either of which would have been appropriate in this case.\textsuperscript{325}

By comparison, the court in Nichols v. Hepworth\textsuperscript{326} held that two separate motions for relief under Rule 1.540 were proper. Initially, the defendant in a mortgage foreclosure action moved for relief from summary judgment based upon lack of notice of the motion, the hearing on the motion, and judgment entered on the motion. The relief was requested nearly one year after judgment had been entered. The trial court characterized the motion for relief as one for rehearing, and denied the motion without explanation. Due to excusable neglect, defendant's counsel was unaware of the order denying the motion until well after the time for filing an appeal had run. Accordingly, the defendant filed a second motion pursuant to Rule 1.540 seeking relief from the order denying defendant's first motion for relief. The trial court denied this motion as "successive."\textsuperscript{327}

The appellate court reversed, observing that the initial motion could not have been one for rehearing pursuant to Rule 1.530 since it had been filed nearly one year after judgment was entered.\textsuperscript{328} Moreover, the court concluded that the initial motion did not challenge the summary judgment on its merits, but rather sought relief due to mistake or inadvertence related to the lack of notice received by the defendant of the motion for summary judgment and subsequent proceedings thereon.\textsuperscript{329} Finally, the court held that the two motions were not successive, reasoning that "[a]n order entered under 1.540 may itself be subject to relief under the same rule when, as here, the motions do not seek relief from the same order and are based on different grounds."\textsuperscript{330}

In Davidson v. Lenglen Condo Ass'n,\textsuperscript{331} the court also found a motion for relief under Rule 1.540 proper. In this case, plaintiff reached settlement with one of the defendants and filed a notice of voluntary dismissal, which, inadvertently, failed to limit dismissal to the settling defendant. The plaintiff subsequently filed a corrected notice and a motion to strike the

\textsuperscript{325} Id. at 109-10.
\textsuperscript{326} 604 So. 2d 574 (Fla. 4th Dist. Ct. App. 1992).
\textsuperscript{327} Id. at 575.
\textsuperscript{328} Id.
\textsuperscript{329} Id.
\textsuperscript{330} Id. at 576; see also Bermuda Atlantic Line, Ltd. v. Florida E. Coast Ry. Co., 622 So. 2d 489 (Fla. 1st Dist. Ct. App. 1993) (abuse of discretion to deny relief from judgment where party was not properly served its attorney's motion to withdraw, order granting the motion, or notice of pretrial conference).
\textsuperscript{331} 602 So. 2d 687 (Fla. 4th Dist. Ct. App. 1992).
original notice and substitute the corrected notice. The trial court denied the motion. On appeal, the court acknowledged that plaintiff's motion to strike and substitute did not indicate the cause of the mistake, but determined that the affidavit submitted by the plaintiff's counsel in support of the notice provided sufficient information to support granting of the requested relief.\footnote{332}{Id. at 689.}

In \textit{Gold v. Wohl},\footnote{333}{617 So. 2d 409 (Fla. 4th Dist. Ct. App. 1993).} the court reviewed a set of circumstances singularly deserving of post-judgment relief. In this case, a virtual comedy of errors resulted in the trial court's dismissal of a case in which both parties fully complied with all court orders, and in which neither party sought, desired or agreed to dismissal. In its initial brief, appellant contended that the trial court abused its discretion in failing to grant relief pursuant to Rule 1.540 where it was clear and undisputed that the court had made a mistake in dismissing the case. The appellate court noted that appellee filed a one page brief stating that he "is in concurrence with the brief filed by appellant."\footnote{334}{Id. at 410.} The court suggested that "[w]hen the lawyers for the adversary parties agree that a mistake has happened and immediately and unambiguously notify the trial court that she is in error as to both her notation and recollection," the trial court should give serious consideration to the possibility of a mistake which makes relief appropriate under Rule 1.540.\footnote{335}{Id.}

Two other cases were not so easily resolved by the appellate courts. In \textit{Mangham v. Jenks},\footnote{336}{610 So. 2d 85 (Fla. 1st Dist. Ct. App. 1992).} the appellate court was unable to determine whether the trial court had reserved jurisdiction over the parties in an action to abate a nuisance. Consequently, the appellate court could not ascertain whether the defendant was entitled to relief pursuant to Rule 1.540(b)(5) on the grounds of full performance and satisfaction of the judgment entered against her.\footnote{337}{Id. at 86.} Similarly, in \textit{Department of Health & Rehabilitative Services \textit{v. Schein}},\footnote{338}{616 So. 2d 598 (Fla. 4th Dist. Ct. App. 1993).} the appellate court, unable to ascertain from the record whether an order granting a motion for relief pursuant to Rule 1.540 was agreed to by the parties, stated that, absent agreement, the relief should not be granted because there was no evidence to support the moving party's
claim. Obviously, trial counsel are not the only ones who sometimes have difficulty with this rule; the cautious practitioner should therefore make every effort to have the trial court clarify the basis for its orders granting or denying the relief requested.

Two recent cases analyze the concept of a "void" judgment under Rule 1.540(b)(4). In Patton v. Department of Health & Rehabilitative Services, the appellant sought to set aside a default and final judgment entered against him in a paternity suit. The default and final judgment were entered as sanctions for appellant’s failure to cooperate in discovery. Plaintiff contended that the trial court’s order lacked the specific findings of willful or deliberate refusal to obey a court order required by the supreme court in Commonwealth Federal Savings & Loan Ass’n v. Tubero, and that the absence of such findings rendered the judgment “void” pursuant to Rule 1.540(b)(4), thus entitling him to relief. The court first concluded that the trial court’s failure to set forth express findings of willful disobedience did not render its judgment void, but merely incapable of review. The court next observed that appellant’s arguments necessarily related to events that transpired prior to rendition of judgment, and had no bearing on the timeliness of his post-judgment motion for relief. Finally, the court concluded that regardless of any infirmities in the trial court’s order of final judgment, appellant’s motion for relief came more than one year after that judgment, and was therefore improper under the provisions of Rule 1.540.

The question of “void” judgments was addressed more squarely in Department of Transportation v. Bailey. In this case, the Department of Transportation (“Department”) appealed from a judgment which provided for prejudgment interest in violation of the express provisions of Florida Statutes, section 768.28(5), which limits waiver of sovereign immunity with respect to punitive damages and prejudgment interest. The Department’s first Rule 1.540 motion for relief from judgment referred to section 768.28, but failed to directly raise the question of the trial court’s subject

339. Id. at 599.
341. 569 So. 2d 1271 (Fla. 1990).
342. Patton, 620 So. 2d at 1109.
343. Id.
344. Id.
345. Id.
347. Id.; see also FLA. STAT. § 768.28(5) (1985).
matter jurisdiction to award prejudgment interest. The trial court denied the motion. In its second motion for relief, the Department presented a detailed argument regarding the court’s lack of subject matter jurisdiction to award prejudgment interest. This motion was also denied.

At the outset, the appellate court recognized that the award of prejudgment interest was clearly erroneous, rendering the trial court’s judgment void. However, the court also acknowledged the strong policy against entertaining successive motions pursuant to Rule 1.540 in which the movant alleges matters that either were or should have been raised in prior motions, and observed that the Department’s first motion raised the issue of subject matter jurisdiction, even if indirectly. Nevertheless, because the court could not determine from the record the basis for the trial court’s denial of the Department’s first motion, it held that the denial had no res judicata effect on the issue of subject matter jurisdiction. Accordingly, the court found that the Department’s second motion was “not strictly repetitive,” and therefore should not have been denied.

Two final cases draw a razor-sharp line at the outer bounds of the relief available under Rule 1.540. In the first case, Viscomi v. Viscomi, the court held that allegations made by a former wife in a complaint for modification of final dissolution of marriage that her ex-husband fraudulently concealed assets prior to entry of a final judgment of dissolution at best constituted intrinsic fraud, and must therefore be raised by a Rule 1.540(b) motion for relief from judgment. Since the allegations were not raised for more than a year after the judgment was rendered, the fraud claims were untimely.

In the second case, Lamb v. Leiter, the court upheld the propriety of an “independent action” commenced to vacate a final judgment of

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348. Bailey, 603 So. 2d at 1386-87.
349. Id. at 1387. The appellate court pointed out that the Department should have taken a direct appeal from the final judgment. Id. Having failed to do so, and having subsequently failed to timely file a notice of appeal from the trial court’s order denying its first motion for relief from judgment, the Department would ordinarily have been stuck with the result even though it was contrary to law. Id. Thus, the significance of the propriety of the Department’s second motion for relief.
350. Id.
351. Bailey, 603 So. 2d at 1387.
353. Id. at 147.
354. Id. Rule 1.540(b) was amended effective January 1, 1993 to eliminate the one-year time limit in marital cases involving fraudulent financial affidavits.
dissolution and set aside property settlement. The former wife alleged that
the initial settlement was procured through coercion, duress and deceit. The
trial court entered judgment against the former wife on the grounds that her
allegations consisted of intrinsic fraud, were not brought within one year of
the final judgment, and therefore did not comply with Rule 1.540(b)(3). On
appeal, the court determined that the former husband's alleged use of
coercion and duress to prevent his former wife from "litigating child
custody, alimony and property division issues" constituted the type of
extrinsic fraud defined by Rule 1.540(b)(4). Accordingly, the judgment
was reversed and the case remanded for resolution of the former wife's
independent action on the merits, even though the action was brought more
than three years after the initial final judgment was rendered.

L. Injunctions

In Denison v. Denison, the court reviewed the trial court's order
modifying an injunction obtained pursuant to divorce proceedings. Appellee
had obtained an ex parte injunction to prevent his exclusion from the
operation of the family business and to curtail appellant's operation of the
business. Appellants moved to dissolve or modify the injunction. The
trial court conducted six days of hearings on the motion, listening to
seventeen hours of testimony from appellee and extensive cross-examination
of appellee's witnesses. At the close of appellee's presentation, appellants
moved for involuntary dismissal of the injunction on the grounds that
appellee had not presented sufficient facts to support its issuance. After
extensive argument on the motion by counsel, but without further proceed-
ings in which appellants could present evidence on their behalf, the trial
court entered an order modifying the injunction.

On appeal, the court stated that on appellant's motion for involuntary
dismissal, "the trial court's duty [was] to determine whether a prima facie
case has been made for relief, not to weigh the credibility of the witness-
es." Based upon the record presented, the court determined that the
trial court had impermissibly weighed the evidence in arriving at its decision
to modify the injunction. Because "[d]ue process requires an oppor-

356. Id. at 635.
357. Id.
359. The appellants included appellee's son, the business itself, and the business's board
of directors.
360. Denison, 603 So. 2d at 116.
361. Id.
tunity to be heard,” the trial court erred by modifying the injunction “without giving the appellants an opportunity to be heard on their side of the case.”

Considering that appellant’s motion for involuntary dismissal was premised exclusively on appellee’s failure to present sufficient facts to support issuance of the injunction, it is curious that the appellate court found fault with the fact that the trial court considered only appellee’s evidence in its tacit denial of appellant’s motion for involuntary dismissal. Obviously, additional evidence from appellants would have no bearing on whether appellee met his burden of presenting a prima facie case. Thus, reference to the appropriate standard on a motion for involuntary dismissal seems inapposite. With respect to the trial court’s order modifying the injunction, however, the appellate court correctly determined that appellant should have been given the opportunity to present their evidence pursuant to Rule 1.610(a)(2).

In Schiller v. Miller, the court affirmed a temporary restraining order prohibiting one of the parties from disposing of four pieces of jewelry, including a 5.8 carat diamond ring, and limiting the opposing party’s bond to $1,000. Citing Esposito v. Horning, the court observed that while injunctions are not normally issued for retention of personal property, an injunction may properly be issued where the property is “unique” and where the party seeking the injunction demonstrates that there is no adequate remedy at law. Although it appeared that appellee might have an adequate claim for damages in the event the jewelry was misappropriated, the appellate court, relying on the trial court’s findings of the unique nature of the jewelry and the difficulty in ascertaining its value, declined to rule that the trial court had abused its discretion in issuing the injunction.

M. Miscellaneous Rules and Decisions

Objections to the report and recommendations of a special master pursuant to Rule 1.490(h) were the subject of Barnett Bank of Martin County, N.A. v. RGA Development Co. The appellate court held that the entry of an order on a special master’s report and recommendations less

362. Id.
363. 621 So. 2d 481 (Fla. 4th Dist. Ct. App. 1993).
364. 416 So. 2d 896 (Fla. 4th Dist. Ct. App. 1982).
365. Schiller, 621 So. 2d at 482.
366. Id.
than ten days after the report and recommendations are served constitutes reversible error because Rule 1.490(h) provides parties with ten days to file exceptions after service of the report and recommendations.\textsuperscript{368} The court also concluded that the "acceptance of benefits" doctrine is inapplicable in appeals from trial court orders that are not final adjudications on the merits.\textsuperscript{369} In a concurring opinion, Judge Polen suggested that there may be certain circumstances other than final judgments in which the "acceptance of benefits" doctrine may be applicable, although this case did not give rise to such circumstances.\textsuperscript{370}

In \textit{National American Insurance Co. v. Charlotte County},\textsuperscript{371} the court reviewed an order denying a motion filed pursuant to Rule 1.550(b) for stay of state court proceedings pending resolution of a prior declaratory judgment action filed in federal court. Citing \textit{Wade v. Clower},\textsuperscript{372} \textit{Schwartz v. DeLoach},\textsuperscript{373} and \textit{State v. Harbour Island, Inc.},\textsuperscript{374} the court noted that a subsequently filed state court action should ordinarily be stayed until resolution of a pending federal case that involves substantially the same issues.\textsuperscript{375} The court recognized that a motion for stay may be denied "upon a showing of the likelihood of undue delay in the disposition of the prior action," but concluded that no such delay was threatened in this case.\textsuperscript{376}

Last, but not least, in \textit{Avril v. Civilmar},\textsuperscript{377} the court exercised its certiorari jurisdiction to review a trial court order imposing sanctions pursuant to Rule 1.720(b) and 1.730(c) for failure to negotiate in good faith during court-ordered mediation. The trial court ordered the parties to attend mediation approximately eighty days after service of the complaint upon the defendant. The defendant’s attorney and a representative of defendant’s insurance company attended the mediation in accordance with Rule 1.720(b)(2)-(3). Stating that they had not had sufficient time to conduct discovery, defendant’s representatives claimed they were unable at that time to offer anything more than $1,000 to settle the case. Thereafter, the plaintiffs moved for sanctions and the trial court granted the motion.

\textsuperscript{368} \textit{Id.} at 1259.
\textsuperscript{369} \textit{Id.}
\textsuperscript{370} \textit{Id.} at 1260 (Polen, J., concurring).
\textsuperscript{371} 611 So. 2d 1284 (Fla. 2d Dist. Ct. App. 1992).
\textsuperscript{372} 114 So. 548 (Fla. 1927).
\textsuperscript{373} 453 So. 2d 454 (Fla. 2d Dist. Ct. App. 1984).
\textsuperscript{374} 601 So. 2d 1334 (Fla. 2d Dist. Ct. App. 1992).
\textsuperscript{375} \textit{National Am. Ins. Co.}, 611 So. 2d at 1285.
\textsuperscript{376} \textit{Id.}
\textsuperscript{377} 605 So. 2d 988 (Fla. 4th Dist. Ct. App. 1992).
On appeal, the court noted that Rule 1.730(b) allows sanctions “only for failing to appear at a duly noticed mediation conference,” and that Rule 1.730(c) provides for sanctions only if a party fails to perform pursuant to a mediation agreement. The court concluded that any “mischief” in this case was attributable to plaintiffs’ “rush into mediation before their carrier had completed their reasonably necessary discovery.” The court therefore reversed the award imposing sanctions.

On its face, the court’s opinion is both sensible and just, and in full accordance with the express provisions of the cited rules of civil procedure. However, the broad holding in this case invites the worst type of bad faith “participation” in mediation conferences, in direct contravention of the spirit and purpose of the mediation rules. Prior to so literally limiting the meaning of the phrase “failure to attend,” the court should perhaps have referred to analogous provisions in the rules governing discovery sanctions. Specifically, Rule 1.380(a)(3) defines “failure to answer” as any evasive or incomplete answer, in order to give full effect to the purpose of the discovery rules. Similarly, one can envision many scenarios in which a party’s bad faith during mediation is tantamount to a failure to attend. If the courts are unable to read a similar provision into Rule 1.720, the Florida Bar’s Committee on the Rules of Civil Procedure should consider including an express provision in the future.

IV. CONCLUSION

Given the tremendous amount of time and resources expended, sometimes needlessly, on litigation related to discovery, it is heartening to see the courts cracking down on discovery abuse by keeping close tabs on the proper scope of discovery and by imposing sanctions on litigants who resist or ignore proper discovery requests. It is likewise heartening to have renewed confirmation of the Florida judiciary’s traditional reluctance to resolve matters on grounds other than the merits. This confirmation is somewhat clouded, however, by the often inconsistent exercise of the trial courts’ discretion in awarding the extreme sanctions of striking pleadings, dismissal, and default. The Florida Supreme Court’s adoption of the guidelines suggested by Judge Altenbernd’s dissenting opinion in Kozel v.
Ostendorf is a significant step toward the restoration of consistency in this area.

Both the Florida Supreme Court and the Legislature are to be commended for their cooperative efforts to resolve the confusion surrounding offers of judgment. The supreme court should also be commended for taking steps, such as gender-neutral language and service by facsimile, that help our judicial system keep step with ever changing times.