1985 SURVEY OF FLORIDA LAW

Civil Procedure
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Contracts
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If it Moves, Search It: California v. Carney
Applies the Automobile Exception to Motor Homes

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Work Product: The Anticipation of Litigation
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Civil Procedure

William VanDerCreek* and Kimberly L. King**

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I. Judges and Counsel

A. Disqualification of Judges

Disqualification of judges generally is governed by Rule 1.432 and Florida Statutes chapter 38. Grounds which will support a suggestion of disqualification are stated in section 38.02. Where the basis for disqualification is prejudice, an applicant must file an affidavit stating the facts and reasons for the movant’s belief that bias or prejudice exists.\(^1\)

The affidavit “shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.”\(^2\) Although the judge must determine the legal sufficiency of the motion for disqualification, she “shall not pass on the truth of the facts al-

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1. FLA. STAT. § 38.10 (1985).
2. Id.; see Parsons v. Motor Homes of America, Inc., 465 So. 2d 1285 (Fla. 1st Dist. Ct. App. 1985) (no error in judge’s refusal to recuse where motion legally insufficient for failure to allege facts and reasons for belief of bias or prejudice and failure to file certificate of counsel).
leged" in a legally sufficient motion. A judge who undertakes to controvert the asserted grounds for recusal assumes an adversarial posture, and on that basis alone is disqualified. The remedy for a judge's refusal to recuse herself is sought by petition for writ of prohibition filed in the appropriate appellate court.

The rulings made before recusal of a judge are not invalid. However, an order entered simultaneously with an order of recusal is invalid. "[A] successor judge may not modify or otherwise disturb an unappealed final order of his predecessor permanently enjoining the use of a business name . . . ." A successor judge who has not heard all the evidence may not make determinations of fact or enter final judgment except after retrial or upon stipulation of the parties to use of the record of prior proceedings as the basis for the judgment.

B. Counsel

1. Generally

The Third District Court of Appeal in Lackow v. Walter E. Heller & Co. Southeast, Inc. found that the plaintiff's counsel should have been disqualified because an appearance of professional impropriety was created, contrary to the provision of Canon 9 of the Code of Professional Responsibility, when a secretary who was employed by the defendant's counsel left the firm and went to work for plaintiff's counsel. The court noted that the defendant's firm consisted of only two lawyers, that the secretary had been primarily involved in the case and continued to be involved in the case in her employment with the plaintiff's firm.

The Fourth District Court of Appeal in Hub Financial Corp. v.

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5. See Mangina, 462 So. at 602; Gieske, 471 So. 2d at 80.
10. 466 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1985).
Olmetti\textsuperscript{11} decided that a trial court erred in allowing counsel for a corporation to “withdraw on the day of trial without granting a continuance to permit [the corporation] to obtain new counsel . . . .”\textsuperscript{12}

Florida Statutes section 454.18 guarantees the right of self-representation. The Third District Court of Appeal in Herskowitz v. Herskowitz\textsuperscript{13} quashed an order of an administrative law judge which required parties to be represented by counsel. The court distinguished another Third District case\textsuperscript{14} in which the court “prohibited self-representation to prevent abuse of court proceedings and interference with the orderly process of judicial administration.”\textsuperscript{15}

2. Attorney's Fees

(a) Frivolous Actions

Section 57.105, Florida Statutes,\textsuperscript{16} is designed to discourage frivolous civil litigation by permitting courts to award fees against losing parties who bring meritless actions.\textsuperscript{17} Attorney’s fees statutes are narrowly construed.\textsuperscript{18} The Florida Supreme Court in Whitten v. Progressive Casualty Insurance Co.\textsuperscript{19} upheld the constitutionality of the statute and identified incipient district court standards for use by trial courts in determining whether to award fees under the statute. The action must be found “so clearly devoid of merit both on the facts and

\begin{itemize}
  \item 11. 465 So. 2d 618 (Fla. 4th Dist. Ct. App. 1985).
  \item 12. \textit{Id.} at 619.
  \item 13. 466 So. 2d 8 (Fla. 3d Dist. Ct. App. 1985).
  \item 15. \textit{Herskowitz}, 466 So. 2d at 9.
  \item 16. \textsc{Fla. Stat.} § 57.105 (1985) provides: “The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.”
  \item 18. The rationale supporting narrow construction has been based on a premise that such statutes are “in derogation of the common law.” \textit{See Whitten}, 410 So. 2d at 505. However, the Florida Supreme Court in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), stated that this premise is “historically incorrect,” and that the statutes rather are exceptions to a general American rule that “attorney fees may be awarded by a court only when authorized by statute or by agreement of the parties.” \textit{Id.} at 1147-48.
  \item 19. 410 So. 2d at 501.
\end{itemize}
the law as to be completely untenable."\textsuperscript{20} A frivolous attempt to create a controversy justifies such a finding.\textsuperscript{21} The statute "may not be extended to every case and every unsuccessful litigant."\textsuperscript{22} "Merely losing, either on the pleadings or by summary judgment, is not enough to invoke the operation of the statute."\textsuperscript{23} The entire action, not merely a portion of it, must be meritless.\textsuperscript{24}

Fees may not be awarded under section 57.105 merely because "events during the course of a lawsuit ... reveal that the litigation is not sustainable."\textsuperscript{25} Fees may not be awarded against a party who merely defends a judgment on appeal.\textsuperscript{26} Where an action is voluntarily dismissed as to some parties, but the action raised justiciable issues against them, those dismissed may not recover fees under the statute.\textsuperscript{27}

In a case of first impression, the Fourth District in \textit{Ferrara v. Caves}\textsuperscript{28} stated that fees may be awarded against an intervenor under section 57.105. The case arose when three town commissioners sought to have enjoined and declared void a recall petition which had been initiated against them. Although the commissioners originally sued the deputy town clerk and the town, the person who initiated the recall petition was granted leave to join as an indispensable party. The trial court granted summary judgment in favor of the commissioners on the ground that the recall petitions were legally insufficient. The court also awarded fees against the losing parties, which included the intervenor, under section 57.105. The district court reversed the award of fees.

\textsuperscript{20} \textit{Id.} (quoting Allen v. Estate of Dutton, 384 So. 2d 171, 175 (Fla. 5th Dist. Ct. App.), petition for review denied, 392 So. 2d 1373 (Fla. 1980) (emphasis in original)).

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.} (citing City of Deerfield Beach v. Oliver-Hoffman Corp., 396 So. 2d 1187 (Fla. 4th Dist. Ct. App.), petition for review denied, 407 So. 2d 1104 (Fla. 1981)).

\textsuperscript{23} \textit{Id.} at 504 (citing \textit{City of Deerfield Beach and Allen}).

\textsuperscript{24} Glover v. School Board of Hillsborough County, 462 So. 2d 116 (Fla. 2d Dist. Ct. App. 1985).


\textsuperscript{26} McNee v. Biz, 473 So. 2d 5 (Fla. 4th Dist. Ct. App. 1985).

\textsuperscript{27} Poliard v. Zukoff, 482 So. 2d 399 (Fla. 3d Dist. Ct. App. 1985); accord Simmons v. Schimmel, 476 So. 2d 1342 (Fla. 3d Dist. Ct. App. 1985), petition for review denied, 486 So. 2d 597 (Fla. 1986) (voluntary dismissal of one of the party defendants not related to merits of case but rather for strategic purpose; error to award fees where issue of negligence was raised against party who was dismissed).

\textsuperscript{28} 475 So. 2d 1295 (Fla. 4th Dist. Ct. App.), petition for review denied, 479 So. 2d 118 (Fla. 1985).
stating that the standard that must be met to win a summary judgment is not the same as that required to support a finding of frivolousness, which must be supported by competent substantial evidence.\textsuperscript{29} The district court found that although the parties eventually reached a stipulation that the recall petition was legally insufficient and the intervenor accordingly lost on the merits, the intervenor had raised a justiciable issue of law which precluded an award of fees. The district court expressed concern that a contrary result might have a chilling effect on Florida's recall mechanisms.

The Fifth District affirmed an award of fees against a plaintiff who initiated an action for ejectment and trespass against one whom he erroneously believed was the owner of adjoining property.\textsuperscript{30}

(b) \textit{Frivolous Appeals}

Florida Statutes section 57.105 has been invoked by district courts in awarding fees as penalties for frivolous appeals.\textsuperscript{31} In \textit{Menkes v. Menkes}\textsuperscript{32} the district court awarded appellate attorney's fees because it regarded as "completely frivolous" a challenge to an equitable distribution of marital assets which was "plainly within the discretion of the trial court under the \textit{Canakaris}\textsuperscript{33} doctrine."\textsuperscript{34} The Third District also awarded fees against an insurer whose arguments on appeal were characterized by the court as "patently frivolous."\textsuperscript{35}

The Fifth District in \textit{Beasley v. Beasley}\textsuperscript{36} warned that motions for fees under section 57.105 would be "favorably entertained"\textsuperscript{37} in appeals relating to alimony awards where no record or stipulated statement was presented to the reviewing court. That court subsequently acted on its warning and awarded appellate attorney's fees where an appellant chal-
lenged a trial court's order increasing child support payments. No record was made of the trial court proceedings. The appellant did not take advantage of Rule 9.200(b)(3), which permits appellants to submit "statement[s] of the evidence or proceedings from the best available means, including . . . recollection." The district court characterized the appeal as "spurious" because without a transcript or a Rule 9.200(b)(3) statement, the court had nothing upon which to evaluate the trial court's factual determination. The Fifth District seems to have disregarded the permissive nature of Rule 9.200(b)(3), and under penalty of section 57.105 has required that either a transcript or a Rule 9.200(b)(3) statement be presented on appeal.

(c) Wrongful Acts

Fees may be awarded to "an innocent party drawn into litigation with a third party by the wrong of another party." Glace and Radcliffe, Inc. v. City of Live Oak involved a suit by a surety on a performance bond against the city and an engineering firm after a general contractor defaulted on a sewage construction project. The city prevailed on its cross-claim for indemnity against the firm, which a jury found was negligent in its work on the project. The district court affirmed an award of fees to the city. Similarly, in Auto-Owners Insurance Co. v. Hooks, the district court affirmed an award of fees to a party who was forced to defend title to a car because of a prejudgment writ of replevin which was wrongfully obtained.

(d) Fee Contracts

Agreements that the prevailing party's fees shall be paid by the losing party are indemnificatory in nature. As such, the amount of the fee awardable is the lesser of the amount agreed to by the prevailing

40. Id.
41. Nicholason, 468 So. 2d at 312.
43. Id.
44. 463 So. 2d 468 (Fla. 1st Dist. Ct. App. 1985).
party and her attorney or the amount which has actually been paid. That amount must be reasonable; that is, it must not be "excessive" within the meaning of that term in Florida's Code of Professional Responsibility. Where the actual fee is found excessive, the court should award a reasonable fee. Contractual provisions governing attorney's fees are strictly construed.

Fees may not be awarded under a contract against a partner who was not a party to the contract which created the partnership contract. Fees may be awarded under contract to one who defended a suit which was voluntarily dismissed. Fees may be awarded under the "common fund rule" only in the absence of a controlling contract or statute and only where certain criteria are met. Fees ordinarily may not be awarded where no basis for an award is pleaded or proved.

The First District Court of Appeal in Cheek v. McGowan Electric

46. Id.; accord Pezzimenti v. Cirou, 466 So. 2d 274 (Fla. 2d Dist. Ct. App.), review dismissed sub nom. Musca v. Cirou, 475 So. 2d 695 (Fla. 1985).

47. Id.; see Florida Code of Professional Responsibility DR 2-106(b); accord Ennia Schadeverzekering, N.V. v. Buzinski, 468 So. 2d 541 (Fla. 4th Dist. Ct. App. 1985); see also Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) (discussing lodestar process).


49. Id.


51. Dunn, 462 So. 2d at 109.

52. Hurley, 461 So. 2d at 283-84.

53. The court in Estate of Hampton v. Fairchild-Florida Constr. Co., 341 So. 2d 759, 761 (Fla. 1976), stated that attorney's fees may be awarded to a prevailing party from a fund created or brought into court through an attorney's services. The Fourth District, in a second Hurley decision, 480 So. 2d 104, 107-108 (Fla. 4th Dist. Ct. App. 1985), recited a five-part test which must be satisfied for the rule to apply:

1. The existence of a fund over which the court has jurisdiction and from which fees can be awarded;
2. The commencement of litigation by one party which is terminated successfully;
3. The existence of a class which received, without otherwise contributing to the lawsuit, substantial benefits as a result of the litigation;
4. The creation, preservation, protection or increase of the fund as a direct and proximate result of the efforts of counsel for that party;
5. A reasonable relationship between the benefit established and the fees incurred.

Supply Co.\textsuperscript{55} ruled that fees may be awarded under a contract after final judgment even though the claim for fees was not presented to the jury. This ruling conflicts with decisions in the Second, Third, and Fifth Districts in which those courts held that claims for fees under contract are elements of damages which require determination by the jury.\textsuperscript{68}

The Fifth District affirmed an award of fees in a section 1983 suit\textsuperscript{57} on a post-judgment motion to tax costs where there was no prayer for fees in the original complaint.\textsuperscript{58} The court stated that the federal statute gives courts discretion to award fees to prevailing parties as part of the costs of litigation, and that costs, as opposed to damages, need not be pleaded.\textsuperscript{59}

The Second District reversed awards against losing parties' attorneys where the awards were not authorized by statute, contract, or the common fund rule and where the awards were ordered as penalties for improper attorney conduct.\textsuperscript{60}

The attorney general provides free representation to circuit court judges in suits for damages alleging that judicial immunity should not apply because a judge acted "in the clear absence of jurisdiction."\textsuperscript{61} The Fifth District affirmed a trial court's ruling that the fees of an attorney privately retained by a judge to defend a suit against him may

\begin{itemize}
\item 55. 483 So. 2d 1373 (Fla. 1st Dist. Ct. App. 1985).
\item 56. \textit{Id.} at 1380-81. The First District certified this question as one of great public importance:
\begin{quote}
Where attorney's fees are pled in a successful suit for recovery pursuant to a promissory note, and the note provides that the maker shall pay "reasonable attorney's fees," may the proof of such fees be presented for the first time after final judgment pursuant to a motion for attorney's fees by the prevailing party?
\end{quote}
\textit{Id.} at 1381.
\item 59. \textit{Bauman}, 475 So. 2d at 1327.
\item 60. \textit{See} American Bank v. Hooven, 471 So. 2d 657 (Fla. 2d Dist. Ct. App. 1985) (where trial court found attorney's conduct which lead to mistrial was not contemptous, no authority to award fees and expenses as sanction); Israel v. Lee, 470 So. 2d 861 (Fla. 2d Dist. Ct. App. 1985) (no authority to hold attorney personally liable for appellate attorney's fees of prevailing opposing party, even when contempt rulings against client and attorney were jointly appealed).
\item 61. Salit v. Ising, 464 So. 2d 687, 688 (Fla. 5th Dist. Ct. App. 1985).
\end{itemize}
not be awarded under section 57.105 against the losing party. The court did not decide whether the attorney general could be awarded fees under section 57.105.

In *C.U. Associates, Inc. v. R.B. Grove, Inc.* the Florida Supreme Court found that a prevailing party in a mechanic's lien action may be entitled to fees under section 713.29, Florida Statutes, only where the party recovers an amount greater than a prior settlement offer. The court distinguished Rule 1.442, which provides only for awards of costs incurred after an offer of judgment where the amount recovered by the party who rejected an offer does not exceed the amount offered.

The Fifth District in *George v. Northcraft* decided that although one who accepts an offer of judgment under Rule 1.442 may be regarded as a "prevailing party" under a contractual provision entitling that party to fees, where an accepted offer makes no reference to fees, the party is precluded from later seeking them. The court noted that such fees are unliquidated and are part of the prevailing party's damages. Thus, where the offer does not reserve to the accepting party a right to seek fees, any claim for fees is deemed included in the claim for damages, which was satisfied by the offer and acceptance of judgment.

II. Pleadings

A. Generally

A complaint must make specific allegations of fact to support the elements of a cause of action. It is improper to draft a complaint so that subsequent counts incorporate by reference all the paragraphs of all the preceding counts.

62. *Id.* at 689.
63. *Id.* at n.2.
64. 472 So. 2d 1177 (Fla. 1985).
65. FLA. STAT. § 713.29 (1981).
66. *C.U. Assocs.*, 455 So. 2d at 1110.
67. *Id.*; see FLA. R. CIV. P. 1.442.
68. 476 So. 2d 758 (Fla. 5th Dist. Ct. App. 1985).
69. *Id.* at 759.
70. See, e.g., Reddish v. Smith, 468 So. 2d 929 (Fla. 1985) (complaint alleging liability of state agency for personal injury inflicted by escaped prisoner insufficient as matter of law on elements of causation and foreseeability; insufficient allegations of fact on claim of impropriety and bad faith).
71. Frugoli v. Winn-Dixie Stores, Inc., 464 So. 2d 1292 (Fla. 1st Dist. Ct. App.)
The Florida Supreme Court in *Tamiami Trail Tours, Inc. v. Cotton* found that the second count in a two-count pleading was fatally defective for misjoinder of claims and parties. Two plaintiffs sued a common defendant and his employer. The first count of the complaint alleged tortious interference with a business relationship enjoyed by one of the plaintiffs. The second count consisted of the other plaintiff's allegation of battery. The court found that the causes of action were separate and the plaintiffs' interests not identical. The misjoinder was not cured through incorporation by reference of the first count in the second.

Rule 1.190(b) provides that pleadings may be amended to conform to the evidence. It further provides that issues not presented by the pleadings but nonetheless tried by the parties are to be treated as if raised in the pleadings although no formal amendment was made.

### B. Counterclaims

Counterclaims generally are governed by Rule 1.170. A counterclaim may be stricken and dismissed as a sanction for failure to furnish discovery. An order dismissing a compulsory counterclaim is nonfinal and not reviewable by interlocutory appeal. An order denying a motion for leave to amend a counterclaim is also nonfinal and nonreviewable. The Fifth District Court of Appeal in *Allie v. Ionata* (cause dismissed, 469 So. 2d 749 (Fla. 1985)).

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1985).
72. 463 So. 2d 1126 (Fla. 1985).
73. *Id.* at 1128.
74. *Id.*
75. *Cf.* Wassil v. Gilmour, 465 So. 2d 566 (Fla. 3d Dist. Ct. App. 1985) (where statute of limitations barred action on oral loan contract and subsequent promises to repay created new causes of action, plaintiff failed to raise this theory at trial and defendant's failure to object to testimony about the promises did not justify amendment under the rule where the testimony was relevant on other grounds and thus not objectionable); 99 Broadcasting Co., Inc. v. Crider, 10 Fla. L. Weekly 1157 (Fla. 4th Dist. Ct. App. May 8, 1985) (error to permit amendment at close of evidence based on theory of damages suggested by witness whose name did not appear on witness list) (motion for rehearing filed May 20, 1985).
80. 466 So. 2d 1108 (Fla. 5th Dist. Ct. App.), *cause dismissed*, 469 So. 2d 749 (Fla. 1985).
examined the extent of recovery obtainable through the defense of recoupment raised in response to a counterclaim. Ionata sued Allie for rescission and restitution on real estate contracts on grounds of fraud and breach of fiduciary duty. Allie prevailed on an affirmative defense that the applicable statute of limitations had run and maintained a counterclaim for the unpaid balance on purchase money notes for the property. Ionata defended against the counterclaim by raising the defense of recoupment in a "counter-counterclaim" on the basis of constructive fraud. The Fifth District decided that the defense of recoupment was permissible. Although the statute of limitations barred Ionata from initiating an action based on constructive fraud, Ionata was free to raise the fraud as a defense to Allie's counterclaim. However, the court was persuaded by a decision of the Third District and decided that Ionata's recovery should be limited by the amount sought by Allie in his counterclaim. The court acknowledged conflict with Cherny v. Moody, in which the First District permitted affirmative recovery on a counterclaim in recoupment although the claim would have been time-barred as an independent action. The Fifth District certified the question to the supreme court.

A timely amendment to a counterclaim (or any other pleading) that asserts a claim or defense that "arose out of the conduct, transaction or occurrence set forth . . . in the original pleading" relates back to the time of the original pleading. "Even where there is a change in the legal theory upon which the action is brought, or in the legal description of the rights to be enforced, the amendment relates back if it is based on the same factual situation." The Second District reviewed a case in which a plaintiff sought discharge of a mechanic's lien and the defendant timely brought a counterclaim seeking foreclosure on the lien. The counterclaim was dismissed with leave to amend. An amended counterclaim was filed later than the twenty days within which a lienor must show cause why the lien should not be discharged.

81. *Id.* at 1111-13.
83. 413 So. 2d 866 (Fla. 1st Dist. Ct. App. 1982).
84. "Does the running of the statute of limitation on an independent cause of action bar the recovery of an affirmative judgment in recoupment on a compulsory counterclaim?" *Id.* at 869.
85. FLA. R. CIV. P. 1.190(c).
as required by Florida Statutes section 713.21(4). The district court noted that a "counterclaim seeking to foreclose [a] mechanic's lien is a proper means to avoid cancellation of the lien" under the statute, and found that the show cause requirement was satisfied and the lien improperly discharged by the trial court because the amended counterclaim related back.

The plaintiff in Quality Coffee Service, Inc. v. Tallahassee Coca-Cola Bottling Co. sued for breach of contract and the defendant counterclaimed for breach of contract and express warranty. With leave of the court, the defendant amended its counterclaim to allege fraud and civil theft, and demanded a jury trial. The First District Court of Appeal quashed the trial court's order denying a jury trial. The court began its well-reasoned analysis by observing that a demand for a jury trial must be made in compliance with Rule 1.430(b), or else the right to trial by jury is waived. When leave is given to amend a counterclaim and new issues triable of right by jury are presented by the amendment, "the time for demand of jury trial is revived, despite an initial waiver." When the original complaint is in equity and the counterclaim injects a legal issue, the legal issue may be tried separately before a jury unless the legal issue is so "similar or related to" the equitable issue that the finding of fact in the equitable proceeding would "bind the legal fact finder" and thus operate to "deprive the legal counterclaimant of his right to trial by jury." The district court found that the factual elements common to causes of action based on breach of contract and warranty, fraud, and civil theft entitled the defendant to jury trial on all the issues raised by its counterclaim.

III. Parties, Witnesses, and Jurors

A. Parties

Rule 1.210(a) provides that a nominal beneficiary under a contract may prosecute in its own name, even though it is not the real party in interest. The Third District Court of Appeal in Corat Interna-

88. Wen-Dic, 463 So. 2d at 1188.
89. 474 So. 2d 427 (Fla. 1st Dist. Ct. App. 1985).
90. Fla. R. Civ. P. 1.430(d).
91. Quality Coffee Serv., 474 So. 2d at 429.
92. Id. at 429.
93. Id.
tional, Inc. v. Taylor" accordingly reversed a trial court's ruling that a party who was not the real party in interest could not properly prosecute an action in its own name. A consignor shipped goods under a C.I.F. (shipment) contract. Title passed to the consignee upon delivery to the carrier. The consignee bore the risk of loss. The consignor caused insurance on the goods to be purchased in its own name. Some of the goods were destroyed during shipment. The consignor paid for replacement of the goods and sued on the insurance contract. The trial court entered summary judgment for the insurer because the consignor was not the real party in interest under the insurance contract. The district court reversed on the basis of Rule 1.210(a). The Florida rule differs from its federal counterpart, Rule 17(a), which requires that "[e]very action shall be prosecuted in the name of the real party in interest."

Rule 1.260(a)(1) permits substitution of parties within ninety days after service of notice of the death of a party. The ninety day period may be extended upon a showing of excusable neglect, inadvertance, or mistake. The Fourth District Court of Appeal in Stroh v. Dudley held that "Rule 1.260(a)(1) does not require mandatory, non-discretionary dismissal even in light of the terminology 'shall be dismissed as to the deceased party.'" The court reversed an order dismissing a counterclaim with prejudice for failure to timely substitute a personal representative after the death of a counterclaimant. In a dissenting opinion, Judge Downey expressed his view that the mandatory language of the rule should be followed unless "the party has procured an extension of time prior to expiration of the ninety days or unless he can bring himself within the purview of Rule 1.540(b). . . ."

The individual members of a partnership are generally regarded as indispensable parties to an action brought in behalf of the partnership, because "[e]ach partner is deemed to have an interest in the chose in

94. 462 So. 2d 1186 (Fla. 3d Dist. Ct. App.), petition for review denied, 471 So. 2d 44 (Fla. 1985).
95. Fed. R. Civ. P. 17(a); see Corat Int'l, 462 So. 2d at 1187 n.2.
98. Id.
99. Id.
100. Id. at 232 (Downey, J., dissenting).
action . . . "101 This rule protects defendants from exposure to the possibility of multiple suits and liability arising from the same claim.102 The composition of the partnership may be such that the rationale supporting treatment of the partners as indispensible parties is inapplicable as, for example, where claims by or against some of the partners are time-barred.103 The composition of a partnership is a question of fact which may not be resolved by a trial judge on a directed verdict.104

B. Witnesses

The common law rule permitting sequestration of witnesses has not been codified in the Florida Statutes or adopted as a rule of court.105 The rule is invoked "to avoid the coloring of a witness' testimony by that which he has heard from other witnesses who have preceded him on the stand."106 The Third District Court of Appeal in Del Monte Banana Co. v. Chacon107 decided that a new trial was required where an attorney attempted to impeach the credibility of a witness by cross-examining him about a suspected violation of the rule. The district court stated that the attorney had usurped the function of the trial court by determining whether the rule was violated and what remedy was appropriate.108 The court outlined the procedure which should be followed when a witness' compliance with the court's order is questioned.109

In a pretrial order, a court may limit the names of the witnesses


102. DeToro, 483 So. 2d at 721.


104. See DeToro, 483 So. 2d at 721-22.


106. Id. at 1170.

107. Id. at 1167.

108. Id. at 1170-71; see also Florida Code of Professional Responsibility DR 7-108(G): "A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge."

109. See Del Monte, 466 So. 2d at 1171.
who may be called. For example, the court may order the parties to exchange witness lists and forbid testimony by unlisted witnesses. This pretrial practice serves as an aid to case management. It also serves as a discovery function in that disclosure of witnesses helps prevent unfair surprise and "trial by 'ambush.'" The Third District Court of Appeal in Capital Bank v. G & J Investments Corp. decided that a new trial was necessary where an expert witness was permitted to testify although his identity had not been disclosed, as was required by a pretrial order. The expert, who was a handwriting analyst, presented damaging testimony about a sequence of events which was determinative of liability on a negotiable instrument. The court found that the party against whom the testimony was offered was prejudiced by the testimony because the party was unprepared to conduct cross-examination of the witness. The court further found that the party was unable "to cure the prejudice ... and that [the] noncompliance with the pretrial order was not in good faith."

The Fourth District Court of Appeal decided in 99 Broadcasting Co. v. Gulfstream Broadcasting Co. that a party should not have been permitted to amend its pleadings to add a new issue in conformity with testimonial evidence of a witness whose name did not appear on a witness list. The list had been furnished without a court order. The court reasoned that the outcome of the case may have been affected because the jury may have based its verdict on the new theory of damages raised by the witness. The district court directed the trial court on remand to order the parties to stipulate to the witnesses they would call.

C. Jurors

1. Jury Selection

Florida Statutes chapter 913 and Rule 1.431 provide for peremptory challenges and challenges of jurors for cause. Neither the rule

110. See generally FLA. R. CIV. P. 1.200.
112. 468 So. 2d 534 (Fla. 3d Dist. Ct. App. 1985).
113. Id. at 535.
115. FLA. STAT. § 913.08 (1985); FLA. R. CIV. P. 1.431(d).
116. FLA. STAT. § 913.03 (1985); FLA. R. CIV. P. 1.431(c).
nor the statute states the time for making a peremptory challenge in civil actions. However, in a criminal trial, the “defendant has a right to retract his acceptance and object to a juror at any time before the juror is sworn.” There is conflict among the districts over whether in a civil action the “trial court [may] require the parties to exercise all of their peremptory challenges simultaneously in writing where the original panel has been thoroughly examined and challenges for cause exercised, and there remain sufficient members to comprise a jury after all peremptory challenges have been exhausted.” The Third District has approved this method and twice certified the question to the supreme court. The Fourth District has disapproved the method, opining that the trial court “must permit either party to exercise any remaining peremptory challenges at any time before the jury is sworn.”

The First District in *Video Electronics, Inc. v. Tedder* reviewed a trial court’s limitation of the use of backstrikes in the jury selection process. The court permitted only one round of backstrikes before swearing some members of the jury panel. Counsel were not permitted to use peremptory challenges after the full panel was obtained. The district court found this procedure was contrary to the “better practice” recommended in *King v. State* and operated to deny the parties the effective and intelligent use of their peremptory challenges. The court stated that the better practice is to permit counsel to consider the panel as a whole when exercising peremptory challenges. Finding that unnecessary limitations on the use of peremptory challenges had brought many cases before the appellate courts, the court in *Video Electronics* announced a rule intended to guide trial courts in the exercise of their discretion over the jury selection process: “[W]henever a trial court exercises its discretion to . . . determine whether potential jurors should be sworn before the entire panel is selected . . . , the record should reflect substantial reasons therefore arising from excep-

117. Dobek v. Ans, 475 So. 2d 1266 (Fla. 4th Dist. Ct. App. 1985); accord King v. State, 461 So. 2d 1370 (Fla. 4th Dist. Ct. App. 1985); see Fla. R. Crim. P. 3.310. The exercise of this right is known as “backstriking.” Dobek, 475 So. 2d at 1267.
119. Id. (quoting Ter Keurst v. Miami Elevator Co., 453 So. 2d 501, 501 (Fla. 3d Dist. Ct. App. 1984)).
120. Dobek, 475 So. 2d at 1268.
122. 125 Fla. 316, 169 So. 747 (1936).
123. *Video Electronics*, 470 So. 2d at 8.
124. Id.
tional circumstances in the particular case.”125 The court certified the
question to the supreme court.126

The Fourth District in *Battle v. Safeway Insurance Co.*127 cautioned trial courts “to be certain that prospective jurors are selected on purely a random basis. The jurors themselves should play no role in determining whether they are called to the box.”128 In another case, that court cautioned that “the impartiality of the finders of fact is an absolute prerequisite to our system of justice. Close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality.”129

The Third District in *City of Miami v. Cornett*130 decided that “both parties may challenge the alleged improper use of peremptory challenges to exclude from jury service prospective jurors solely on the basis of race.”131 The court thus adopted the rule of the criminal case of *State v. Neil*132 for application in civil actions. The court reasoned that the right to jury trial afforded by the Florida Constitution133 would be meaningless without a requirement that the jury be impartial.134

2. Post-Trial Interviews of Jurors

Rule 1.431(g) provides that a party who believes grounds exist to challenge a verdict may move the court for an order permitting interview of jurors to find out whether the verdict is subject to challenge.135 The rule requires that the movant state the grounds for the challenge.

125. *Id.*
126. *Id.* at 9.
127. 468 So. 2d 462 (Fla. 4th Dist. Ct. App. 1985).
128. 468 So. 2d 463.
130. 463 So. 2d 399 (Fla. 3d Dist. Ct. App. 1985).
131. 463 So. 2d 399.
132. 457 So. 2d 481 (Fla. 1984).
134. *Cornett,* 457 So. 2d at 402.
135. *See also FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY* EC 7-29; *id.* DR 7-108(D).
The movant must allege specific facts and the challenge must not be based on matters which "inhere in the verdict," but rather must be based on matters that are "extrinsic to the verdict." 136 For example, an allegation that a juror misunderstood the verdict is inadequate. 137 An allegation that jurors improperly considered the finances of tortfeasors is likewise inadequate. 138 However, an allegation that a bailiff improperly told the jurors that they could not communicate with the judge is adequate. 139 Notice and hearing on the motion are required. 140

IV. Jurisdiction Over the Person

A. Service of Process on Natural Persons

Process and service of process generally are governed by Florida Statutes chapter 48 and Rule 1.070. Proper service effected through compliance with the applicable statute is necessary for a court to obtain personal jurisdiction over a defendant. 141 Process may be served by the local sheriff or his appointee, 142 or by a court-appointed server. 143 When a return of service is regular on its face, 144 a presumption of

137. See id.
140. Fla. R. Civ. P. 1.431(g).
141. See, e.g., Smith v. Import Birds, Inc., 461 So. 2d 1026 (Fla. 4th Dist. Ct. App. 1985). While service on nonresident defendants in compliance with an applicable statute and rule is sufficient to satisfy the notice component of the process due those defendants under the fourteenth amendment, plaintiffs of course must have proper bases for asserting that a Florida court or a federal court applying Florida law should have jurisdiction over the persons of the nonresidents. The United States Supreme Court in Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985), decided that plaintiffs who sue under a provision of Florida's long-arm statute, Fla. Stat. § 48.193(1)(g), through which the legislature has attempted to confer jurisdiction over nonresidents who breach contracts in this state, must show more than mere facial compliance with the statute. In addition, plaintiffs must satisfy the constitutional due process requirements stemming from International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny. See generally Note, Due Process Limits the Reach of Florida's Long-Arm Statute in Bringing Contract Defendants to the Home of the Whopper, 14 Fla. St. U.L. Rev. 127 (1986).
144. The return of execution of process is governed by Fla. Stat. § 48.21 (1985)
valid service arises which may be overcome by clear and convincing evidence.\textsuperscript{145}

The Third District Court of Appeal was twice faced with challenges to service on the ground that the persons served were not "residing" at the defendants' usual places of abode within the meaning of section 48.031(1).\textsuperscript{146} The court in Magazine v. Bedoya\textsuperscript{147} decided that a mother-in-law enjoying a six week stay at the defendant's residence satisfied the statutory requirement. However, in Montano v. Montano\textsuperscript{148} the court found that the presumption of valid service was overcome where evidence showed process was served at the defendant's residence upon a visitor who spoke no English.

Service of process not only determines jurisdiction over the person, but may also determine venue. "When two actions between the same parties are pending in different circuits, jurisdiction lies in the circuit where service of process is first perfected."\textsuperscript{149} The Second District Court of Appeal in Radice Corp. v. Sound Builders, Inc.\textsuperscript{150} examined a rather complicated chronicle of events to determine where service was first effected when opposing parties filed suits very close in time in different circuits over the same contractual dispute. Radice's attorney had agreed to accept service on behalf of his client and had thus waived the necessity of service of process. The court ultimately determined that Sound Builders' complaint was received by Radice's attorney in the mail before service of Radice's summons was perfected. Thus, venue lay in the circuit where Sound Builders filed.

In a suit on a guaranty of payment of a promissory note, the Third

\begin{footnotes}
\item[146] FLA. STAT. § 48.031(1) provides:
Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.
\item[147] 475 So. 2d at 1035.
\item[148] 478 So. 2d 456 (Fla. 3d Dist. Ct. App. 1985).
\item[150] 471 So. 2d at 86.
\end{footnotes}
District in *Gonzalez v. Totalbank*\(^\text{151}\) found that a return of service upon one of the defendants was facially defective for failure to comply with Florida Statutes section 48.21.\(^\text{152}\) The court further found that a general appearance by an attorney retained by another of the defendants did not operate to waive objection to lack of personal jurisdiction by a defendant who had not engaged the attorney's services.

Section 48.171 provides that substituted service on nonresident motor vehicle owners may be effected on the secretary of state as agent for that defendant. The Fourth District Court of Appeal in *Journell v. Vitanzo*\(^\text{153}\) found that a complaint which alleged that the defendant was a Florida resident and did not allege concealment of whereabouts was facially insufficient to permit service on the secretary of state as agent.

**B. Service of Process on Corporations**

Service of process on corporations generally is governed by Florida Statutes section 48.081.\(^\text{154}\) The Fifth District Court of Appeal in *Space Coast Credit Union v. First*\(^\text{155}\) found that a final default judgment was void because jurisdiction was not perfected. The server, who was an employee of a firm engaged in the subpoena service business, was not authorized under section 48.021 to serve process. Further, the service did not comply with section 48.081 because it was made on a low-level employee with no attempt in the first instance to serve higher-level corporate functionaries.

Substituted service of process on a corporation's designated registered agent\(^\text{156}\) is authorized by section 48.081(3). If a corporation fails to designate a registered agent as required by section 48.091, service may be made upon "any employee at the corporation's place of business."\(^\text{157}\) The Fourth District in *Sierra Holding, Inc. v. Sayner*\(^\text{158}\) decided that attempted service under this provision was ineffective because the person served in the defendant's office was not an employee.

Strict compliance with the statute is required for effective substi-
tuted service on a nonresident under section 48.161.160 The plaintiff bears the initial burden of showing compliance. "Once the defendant makes a prima facie showing of failure to comply, the burden again shifts to the plaintiff to demonstrate the statute's applicability."160 In Major Appliances, Inc. v. Mount Vernon Fire Insurance Co.,161 the Third District reviewed a plaintiff's attempted substituted service on a nonresident defendant under section 48.161(1). A notice of suit was sent by certified mail to a member of the corporation's board of directors at the address listed in the last annual report filed before the corporation was involuntarily dissolved. The returned receipt was marked "unclaimed" and "unknown." The court held that "where the nonresident defendant doing business in the state fails to file a correct address for the purpose of substituted service, plaintiff's attempt to effect service at the address furnished by the defendant is valid."162 This decision marks a departure from the strict compliance with the statute ordinarily required for effective substituted service.

C. Constructive Service of Process by Publication

Florida Statutes chapter 49 permits constructive service of process by publication when personal service cannot be had. In a dissolution of marriage action, the Fifth District Court of Appeal in Whigham v. Whigham163 decided that a trial court was without jurisdiction to adjudicate certain property rights because the published notice of action did not describe the property proceeded against, as required by section 49.08(4). Because the husband did not receive notice that his interests in property were to be adjudicated, he was denied the process due him under the Constitution.

In an action seeking foreclosure on a mortgage on real property, the Fifth District in Tompkins v. Barnett Bank164 decided that service by publication was effective although the affidavit in support of service

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160. Smith, 461 So. 2d at 1027.
161. 462 So. 2d 561 (Fla. 3d Dist. Ct. App. 1985).
162. Id. at 563.
163. 464 So. 2d 674 (Fla. 5th Dist. Ct. App. 1985).
164. 478 So. 2d 878 (Fla. 5th Dist. Ct. App. 1985).
required by sections 49.031 and 49.041 contained an incorrect mailing address. The affidavit did contain the defendants' correct residential address, which the court found was sufficient.

V. Discovery

The rule governing the scope of discovery is that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . ."\textsuperscript{166} Information may be discovered regardless of its admissibility at trial, provided that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."\textsuperscript{166} Matters are discoverable only if "relevant to the subject matter of the litigation. A matter is relevant if it tends to establish a fact in controversy or to render a proposition in issue more or less probable."\textsuperscript{169} Certiorari is the appropriate procedure for obtaining review of discovery orders, because "erroneously compelled disclosure, once made, may constitute irreparable harm which cannot be remedied by way of appeal."\textsuperscript{168}

A. Privileges

1. Attorney-Client

Matters protected by the attorney-client privilege are outside the scope of discovery.\textsuperscript{169} The court must determine whether the privilege

\textsuperscript{166}. FLA. R. CIV. P. 1.280(b)(1).

\textsuperscript{166}. Id.

\textsuperscript{167}. Oil Conservationists, Inc. v. Gilbert, 471 So. 2d 650, 654 (Fla. 4th Dist. Ct. App. 1985) (discovery of corporate books and records not relevant to action seeking imposition of statutory penalty for corporation’s denial of demand by shareholder to inspect books and records); see Baron, Melnick & Powell, P.A. v. Costa, 478 So. 2d 492 (Fla. 1st Dist. Ct. App. 1985) (error to order production of documents where no allegation or showing of relevancy to subject matter of action or relation to a claim or defense); Whitman v. Bystrom, 464 So. 2d 182 (Fla. 3d Dist. Ct. App. 1985) (post-assessment discovery of taxpayer’s financial records not relevant to issue in litigation).


\textsuperscript{169}. See FLA. R. CIV. P. 1.280(b)(1); Gross v. Security Trust Co., 462 So. 2d 580 (Fla. 4th Dist. Ct. App. 1985); Merlin v. Boca Raton Community Hosp., Inc., 479 So. 2d 236 (Fla. 4th Dist. Ct. App. 1985) (medical malpractice plaintiff’s handwritten notes “prepared for and transmitted to [his] attorney either in contemplation of or

Published by NSUWorks, 1986
protects a matter. The attorney-client privilege yields to the general requirement of disclosure found in Florida's Public Records Act, except that records in an agency attorney's litigation files reflecting a "mental impression, conclusion, litigation strategy, or legal theory" are exempted from disclosure until the conclusion of the litigation. The scopes of the discovery permissible under the Florida Rules of Civil Procedure and the Public Records Act are not coextensive.

2. Work Product

The work product privilege applies only to matters "prepared in contemplation of litigation." A mere likelihood of litigation is not sufficient. While the attorney-client privilege, if applicable, is absolute, work product may be discovered upon a showing of need and undue hardship. The Fourth District Court of Appeal in Airocar, Inc.

during the litigation and kept confidential throughout" were protected by attorney-client privilege; see also Fla. Stat. § 90.502 (1985).

170. See Gross, 462 So. 2d at 581 (court properly made in camera examination of tape to determine existence of privilege).


175. Id.

176. Fla. R. Civ. P. 1.280(b)(2) provides in part:

Subject to the provisions of subdivision (b)(3) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including his attorney, consultant, surety, indemnitor, insurer or
v. Goldman177 found that a bus driver's written report of an incident was not privileged because the record failed to show the report was made in contemplation of litigation. The court explained that because the driver was required to report every incident, if the standard were read too broadly, every document, photograph, or tangible item would be protected because every incident could conceivably result in litigation. However, because the record showed that the statements elicited from the driver by management were part of an investigation for a pending suit, those statements were protected. The court encouraged trial courts to make specific findings about whether matters were prepared in contemplation of litigation.178

The Second District has adopted a more expansive view of the work product privilege. In Florida Cypress Gardens, Inc. v. Murphy179 the court extended protection to materials in Cypress Gardens' accident investigation file which were prepared by the corporation's insurer before a claim was filed. Although the trial court found the documents and photographs "were only obtained in the 'mere likelihood of litigation,' and ordered their production,"180 the district court quashed the order on policy grounds. The court stated that a contrary result would penalize entities who were diligent in promptly investigating potential claims.181

The Third District has examined the scope of discovery of expert witnesses under Rule 1.280(b) and held that "reports prepared by experts expected to testify at trial are not protected by the work product privilege and are discoverable."182 The court noted that Rule 1.280 is derived from Federal Rule of Civil Procedure 26, which permits such discovery.183 The court agreed with a note in which the federal advisory

agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

177. 474 So. 2d 269 (Fla. 4th Dist. Ct. App. 1985).
178. Id. at 270.
180. Id. at 204.
181. Id. (citing City of Sarasota v. Colbert, 97 So. 2d 872, 874 (Fla. 2d Dist. Ct. App. 1957)); see also Winn-Dixie Stores, Inc. v. Nakutis, 435 So. 2d 307 (Fla. 5th Dist. Ct. App. 1985), petition for review denied, 446 So. 2d 100 (Fla. 1985) (grocery store's internally produced accident reports protected).
committee stated that "discovery of expert trial witnesses [is] needed for effective cross-examination and rebuttal in 'cases present[ing] intricate and difficult issues as to which expert testimony is likely to be determinative.'"\textsuperscript{184}

In a toxic shock syndrome case, the First District has held that "scientific and technical documents or tangible things prepared [by a company's in-house scientists and staff] in anticipation of litigation" may be protected as work product.\textsuperscript{185} The court further decided that certain outside research received by the company was not protected and noted that there is no academic privilege recognized in Florida.\textsuperscript{186}

3. Other Privileges

Florida also recognizes a psychotherapist-patient privilege,\textsuperscript{187} and by statute protects the proceedings of medical review committees.\textsuperscript{188} The constitutional privilege against compelled self-incrimination was involved in two cases presenting discovery issues. In \textit{Carson v. Jack-}

\textsuperscript{184} Mims, 464 So. 2d at 643. In another case dealing with discovery of experts, but not in the context of work product, the Fourth District held that "a request for admissions pursuant to Rule 1.370(a) is an inappropriate method in the first instance to obtain discovery regarding another party's expert." Continental Ins. Co. v. Cole, 467 So. 2d 309, 311 (Fla. 4th Dist. Ct. App. 1985). A party must first seek discovery through interrogatories under Rule 1.280(b)(3)(A) (discovery of experts expected to testify at trial) or proceed under subsection (b)(3)(B) (discovery of experts not expected to testify).

\textsuperscript{185} Procter & Gamble Co. v. Swilley, 462 So. 2d 1188, 1193 (Fla. 1st Dist. Ct. App. 1985).

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} See \textit{Carson v. Jackson}, 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985) (psychotherapist-patient privilege in \textit{FLA. STAT.} § 90.503(2) yields to § 415.512, which provides for abrogation of the privilege in cases involving child abuse or neglect); Hall v. Spencer, 472 So. 2d 1205 (Fla. 4th Dist. Ct. App. 1984) (tort defendant's record of alcohol abuse treatment protected by psychotherapist-patient privilege; exception under \textit{FLA. STAT.} § 90.503(4) inapplicable where defendant patient did not place his emotional condition in issue as element of defense).

\textsuperscript{188} \textit{FLA. STAT.} § 768.40(5) (1985); \textit{see} HCA of Florida, Inc. v. Cooper, 475 So. 2d 719 (Fla. 1st Dist. Ct. App. 1983) (protection of \textit{FLA. STAT.} § 768.40(4) (1983) (current version at \textit{FLA. STAT.} § 768.40(5) (1985)) not overcome where no showing of exceptional necessity or extraordinary circumstances); Suwanee County Hosp. Corp. v. Meeks, 472 So. 2d 1305 (Fla. 1st Dist. Ct. App. 1985) (proceedings and records of hospital medical staff meeting protected where requirements of \textit{FLA. STAT.} § 768.40 were satisfied).
the Fourth District Court of Appeal ruled that records of a court-ordered examination by a psychologist as a condition of probation in an unrelated criminal case were discoverable in a negligence and child-abuse action. The court reasoned that any statements to the psychologist were made with the understanding that they would be disclosed to others. Because the privilege was not asserted at the time of the session with the psychologist, the defendant's statements were not compelled. The court noted, however, that although the psychotherapist-patient privilege is abrogated as to communications dealing with child abuse, other defenses to discovery such as irrelevancy and immateriality might apply.

The Fourth District in *Austin v. Barnett Bank of South Florida, N.A.* decided that failure to produce documents under Rule 1.380(d) may be excused where a party makes a belated assertion of fifth amendment privilege. The court construed a part of the rule providing that failure to make discovery may not be excused when based on objectionability unless a protective order was sought and decided this provision should be inapplicable to objections on grounds of privileges. The court opined that "rule 1.380(d) does not require timely objection to privileged matters," and certified conflict with a decision of the First District.

In a case of importance to the increasing litigation surrounding the AIDS epidemic, the Third District decided that the identities of blood donors should be protected from discovery by a plaintiff who alleged he contracted the disease through a blood transfusion. The court in *South Florida Blood Service, Inc. v. Rasmussen* reached this conclusion by applying a balancing test under Rule 1.280(c), weighing the plaintiff's interests against the donors' privacy interests under the Federal and Florida Constitutions and the institutional and societal interests in the free flow of donated blood. The court certified the issue to the supreme court as a question of great public importance.

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189. 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985).
190. *Id.* at 1192.
191. *Id.*
192. 472 So. 2d 830 (Fla. 4th Dist. Ct. App. 1985).
194. 467 So. 2d 798 (Fla. 3d Dist. Ct. App. 1985).
195. *Id.* at 804 n.13.
B. Discovery in Aid of Execution

Rule 1.560 permits judgment creditors to obtain discovery under the rules to find assets on which to levy execution. The Fourth District Court of Appeal in *Lumpkins v. Amendola*\(^\text{196}\) found that compelled attendance at a deposition was a proper sanction against a defendant who failed to furnish discovery on a judgment awarding child support, arrearages, and attorney's fees. The Third District in *Citibank, N.A. v. Plapinger*\(^\text{197}\) decided that federal income tax returns and other financial records of partnerships in which a judgment debtor was general partner were not privileged and were discoverable. The court found that the information was relevant and "reasonably likely to disclose" assets and that the debtor had not asserted a need for protection.\(^\text{198}\)

C. Discovery on Claims for Punitive Damages

A plaintiff who properly states a factual basis to support a claim for punitive damages may discover a defendant's financial resources.\(^\text{199}\) Because the threat of such discovery might be used coercively by plaintiffs against innocent defendants to force settlement, a court in ruling on a motion for protection under Rule 1.280(c)(3) may consider "whether or not an actual factual basis exists for an award of punitive damages."\(^\text{200}\) Accordingly, in a legal malpractice action, the Fifth District in *Solodky v. Wilson*\(^\text{201}\) examined the standards governing the sufficiency of claims for punitive damages and ruled that a trial court erred in denying protection where the allegations in the complaint were insufficient.

D. Discovery Sanctions

Rule 1.380 provides that a party may move for an order compelling discovery, and provides penalties for failure to comply with a discovery order. The severity of the punishment must be commensurate with the violation.\(^\text{202}\) Sanctions enumerated in the rule include orders

\(^{196}\) 466 So. 2d 1214 (Fla. 4th Dist. Ct. App. 1985).
\(^{197}\) 461 So. 2d 1027 (Fla. 3d Dist. Ct. App. 1985).
\(^{198}\) *Id.* at 1027.
\(^{199}\) *See generally* Tennant v. Charlton, 377 So. 2d 1169 (Fla. 1979).
\(^{200}\) *Id.* at 1170.
\(^{201}\) 474 So. 2d 1231 (Fla. 5th Dist. Ct. App. 1985).
\(^{202}\) Harless v. Kuhn, 403 So. 2d 423, 425 (Fla. 1981).
striking pleadings and dismissing actions or entering judgment,\textsuperscript{203} and orders of contempt.\textsuperscript{204}

The Fifth District in \textit{Wallraff v. T.G.I. Friday's, Inc.}\textsuperscript{205} decided that a trial court may dismiss an action with prejudice as a sanction for a plaintiff's failure to appear at a deposition although no order compelling appearance has issued. Conflict with cases in the Third and Fourth Districts was certified.\textsuperscript{206}

\section*{VI. Default}

Rule 1.500 provides that a clerk or a court may enter a default "[w]hen a party against whom affirmative relief is sought has failed to file or serve any paper in the action . . . ."\textsuperscript{207} If the party "has filed or served any paper in the action," only a court may enter default, and

\textsuperscript{203} \textit{See} Pey v. Turnberry Towers Corp., 474 So. 2d 1279 (Fla. 3d Dist. Ct. App. 1985) (order striking pleadings and entry of default judgment for failure to timely file answers to interrogatories too harsh under the circumstances); Campagna Constr. Co. v. Riverview Condominium Corp., 467 So. 2d 807 (Fla. 3d Dist. Ct. App. 1985) (trial court properly struck pleadings and entered default judgment for "continued and willful" violations of discovery orders); Cedars Assocs. v. E.R. Brownwell & Assocs., 466 So. 2d 1130 (Fla. 3d Dist. Ct. App. 1985) (trial court properly struck and dismissed counterclaim as discovery sanction); Weck v. Weck, 464 So. 2d 619 (Fla. 4th Dist. Ct. App. 1985) (trial court properly struck defenses under Rule 1.380(b)(2)(C)).

\textsuperscript{204} \textit{See} Tubero v. Ellis, 472 So. 2d 548 (Fla. 4th Dist. Ct. App. 1985) (contempt citation inappropriate where element of intent not shown and defendant technically complied with order of post-judgment discovery in aid of execution by deposition); Sun-Crete, Inc. v. Sun Deck Prods., Inc., 473 So. 2d 755 (Fla. 4th Dist. Ct. App. 1985) (evidence too speculative to support amount of compensatory fine for contempt relating to discovery order).

\textsuperscript{205} 470 So. 2d 732 (Fla. 5th Dist. Ct. App. 1985).

\textsuperscript{206} \textit{Id.} at 734; \textit{see} Rashard v. Cappiali, 171 So. 2d 581 (Fla. 3d Dist. Ct. App. 1965); Reliance Builders v. City of Coral Springs, 373 So. 2d 410 (Fla. 4th Dist. Ct. App. 1979).

\textsuperscript{207} \textit{FLA. R. Civ. P.} 1.500(a); \textit{see} Building Inspection Servs. v. Olemberg, 476 So. 2d 774, 774 (Fla. 3d Dist. Ct. App. 1983) (holding that "a letter filed in a cause by an officer of a defendant corporation, advising the court that the corporation is attempting to engage an attorney to represent it, constitutes a 'paper' under Rule 1.500(a) . . . ."); \textit{FLA. R. Civ. P.} 1.500(b); Fernandez v. Colson, 472 So. 2d 868 (Fla. 3d Dist. Ct. App. 1985) ("stipulation of counsel for respective parties agreeing to a mutual restraining order which was filed as part of the record constituted a 'paper' within the meaning of" Rule 1.500(b)); Reicheinbach v. Southeast Bank, 462 So. 2d 611 (Fla. 3d Dist. Ct. App. 1985) (letter confirming agreement to extend time before foreclosure constituted a paper served).
the party "shall be served with notice of the application for default." Relief from a default judgment may be obtained under Rule 1.540(b). Florida courts espouse a liberal policy in favor of setting aside defaults and deciding causes on their merits.

Reasonable doubt about whether a default should be vacated should be resolved in favor of vacation. On review of an order disposing of a motion to set aside a default, an appellant must show a gross abuse of discretion. A movant for vacation of default must show "a meritorious defense and ... a legal excuse for failure to comply with the rule." Grounds for relief include excusable neglect and meritorious defense, mistake, due diligence, inappropriate sanction,

208. FLA. R. CIV. P. 1.500(b); see Connecticut Gen. Dev. Corp. v. Guson, 477 So. 2d 665 (Fla. 5th Dist. Ct. App. 1985) (parties whose answers were stricken with leave to amend were entitled to service and hearing on motion for default); Bloom v. Palmetto Fed. Savs. and Loan Ass'n, 477 So. 2d 48 (Fla. 4th Dist. Ct. App. 1985) (error to enter default without adequate notice); Fernandez v. Colson, 472 So. 2d 868 (Fla. 3d Dist. Ct. App. 1985) (unnecessary to show excusable neglect or meritorious defense in motion to set aside and vacate where notice of application for default not given); Austin v. Papol, 464 So. 2d 1338 (Fla. 2d Dist. Ct. App. 1985) (summary judgment on counterclaim imposed as sanction for failure to appear at depositions improper without hearing on whether failure to appear was willful or in bad faith).


The court in Locklear v. Sampson, 478 So. 2d 1113 (Fla. 1st Dist. Ct. App. 1985), held that a trial court erred in denying a motion to set aside a default judgment which established paternity. The court stated that because of unknown collateral consequences flowing from an adjudication of paternity, such a judgment "should not be entered solely upon the basis of unadmitted and unproven allegations of paternity ...; rather, it should be based upon some competent, substantial evidence." Id. at 1115. The court in Hobbs v. Florida First Nat'l Bank, 480 So. 2d 153 (Fla. 1st Dist. Ct. App. 1985), decided that a party whose demand for trial was untimely because it was made after default was nevertheless entitled to a jury trial on the issue of damages because her coparties had made a timely demand.


211. Id. at 504.

212. Id.

213. See Marine Outlet v. Miner, 469 So. 2d 251, 252 (Fla. 2d Dist. Ct. App. 1985) ("[t]o justify setting aside a default, the defaulted party must show both excusable neglect and a meritorious defense"); excusable neglect shown where telephone conversation with secretary to plaintiffs' attorney lead defendant to believe plaintiffs would not seek default if answer not filed within 20 days); La Nacion Newspaper, Inc. v. Santos Rivero, 478 So. 2d 451 (Fla. 3d Dist. Ct. App. 1985) (trial court erred in refusing to set aside default where court clerk erred in filing answer after default when Rule 1.500(c) required return of papers, no engagement in dilatory tactics evident,
timely motion to set aside default and affidavit stating basis for excusable neglect filed, and answer showed meritorious defense) (subdivision (c) has been amended, effective Jan. 1, 1985, and now provides that the clerk shall file papers submitted after default and notify the party that a default has been entered); Kindle Trucking, 468 So. 2d at 502 (delay in answer caused by language in summons which was ambiguous about whether a party was served in his capacity as individual or as corporate representative constituted excusable neglect where followed by prompt motion to set aside clerk's default); Kuehne & Nagel, Inc. v. Esser Int'l, Inc., 467 So. 2d 457 (Fla. 3d Dist. Ct. App. 1985) (excusable neglect caused by office clerk's mistaken removal and storage of complaint and summons which had been on lawyer's desk); but see Doane v. O'Donnell, 467 So. 2d 424, 425 (Fla. 4th Dist. Ct. App. 1985) (Judge Letts, in dissent, criticizes treatment of clerical error as excusable neglect and chastens majority for equating "simple negligence with excusable neglect"); Kuehne & Nagel, Inc. v. Esser Int'l, Inc., 467 So. 2d 457 (Fla. 3d Dist. Ct. App. 1985) (excusable neglect caused by office clerk's mistaken removal and storage of complaint and summons which had been on lawyer's desk); but see Doane v. O'Donnell, 467 So. 2d 424, 425 (Fla. 4th Dist. Ct. App. 1985) (Judge Letts, in dissent, criticizes treatment of clerical error as excusable neglect and chastens majority for equating "simple negligence with excusable neglect"); Fratus v. Fratus, 467 So. 2d 484, 485 (Fla. 5th Dist. Ct. App. 1985) (failure of "man of little business or legal experience" to respond to papers served pursuant to long-arm statute constituted excusable neglect). Cf. Newkirk v. Florida Ins. Guar. Ass'n, 464 So. 2d 1256 (Fla. 3d Dist. Ct. App. 1985) (error to set aside default where allegations of excusable neglect and meritorious defense insufficient, and no supporting affidavit or sworn statement filed); Rhines v. Rhines, 483 So. 2d 4 (Fla. 2d Dist. Ct. App. 1985) (no excusable neglect in disregarding summons).

214. See Savela v. Fisher, 464 So. 2d 240 (Fla. 2d Dist. Ct. App. 1985) (excusable neglect found where attorneys who represented multiple defendants in same case inadvertently failed to perceive that date summonses were served on two defendants differed from date of service on another defendant); Zwickel v. KLC, Inc., 464 So. 2d 1280 (Fla. 3d Dist. Ct. App. 1985) (attorney's failure to timely file responsive pleading caused by confusion over interrelationship between a pending case and a settled companion case was excusable neglect).

215. In deciding whether an incidence of neglect is excusable, the trial court may consider as a factor the "diligence demonstrated by the movants upon learning of the default." Kindle Trucking, 468 So. 2d at 504. See Bayview Tower Condominium Ass'n v. Schweizer, 475 So. 2d 982 (Fla. 3d Dist. Ct. App. 1985) (motion to vacate insufficient for failure to show excusable neglect on part of defendant but rather of insurer in losing file; lack of due diligence found because insurer took five months to find file after learning defendant was required to file answer).

216. In a dissolution of marriage action, the court in Whiteside v. Whiteside, 468 So. 2d 407 (Fla. 4th Dist. Ct. App. 1985), held that default is an inappropriate sanction for contempt. The court stated that default is authorized only under Rules 1.380(b)(2)(C) (failure to comply with a discovery order), 1.200(b) (failure to attend a pretrial conference), and 1.500(b) (failure to plead or otherwise defend the action), and expressed concern that due process rights might be violated by a default judgment. See also Pey v. Turnberry, 474 So. 2d 1279 (Fla. 3d Dist. Ct. App. 1985) (default as sanction for untimely filing of answers too harsh where answers were due on November 1, were air expressed from Germany on October 29 and filed on November 5); Campagna Constr. Co. v. Riverview Condominium Corp., 467 So. 2d 807 (Fla. 3d Dist. Ct. App. 1985) (default as sanction for "continued and willful violations of orders of the court regarding discovery proceedings" affirmed).
lack of jurisdiction, and misrepresentation.

VII. Dismissal

A. Generally

A motion to dismiss tests whether the plaintiff’s complaint is sufficient to state a cause of action. The court must consider only the allegations within the four corners of the complaint. The complaint must contain sufficient allegations of ultimate facts which, if proven, would entitle the plaintiff to relief. The allegations are taken as true and considered in a light most favorable to the nonmoving party.

217. Metropolitan Drywall Syss. v. Dudley, 472 So. 2d 1345 (Fla. 2d Dist. Ct. App. 1985) (circuit court lacked subject matter jurisdiction to enter final default judgment because claim did not exceed $5,000); Gonzalez v. Totalbank, 472 So. 2d 861 (Fla. 3d Dist. Ct. App. 1985) (final default judgment void for lack of jurisdiction over the person).

218. See Marine Outlet v. Miner, 469 So. 2d 251 (Fla. 2d Dist. Ct. App. 1985) (failure to timely file answer constituted excusable neglect where conversations with plaintiffs’ counsel lead insurance adjuster to believe extension of time would be permitted); cf. Moore v. Powell, 480 So. 2d 137 (Fla. 4th Dist. Ct. App. 1985) (neglect inexcusable where no reasonable basis for belief that third party’s insurance carrier would handle defense).


220. Id. at 572; Home Sav’s Ass’n v. Attorney’s Title Ins. Fund, 479 So. 2d 191 (Fla. 3d Dist. Ct. App. 1985); Kupperman v. Levine, 462 So. 2d 90 (Fla. 4th Dist. Ct. App. 1985).

221. See Feagle v. Florida Power & Light Co., 464 So. 2d 1247 (Fla. 1st Dist. Ct. App. 1985) (claim for punitive damages properly dismissed for failure to allege ultimate facts); Nicholson v. Kellin, 481 So. 2d 931 (Fla. 5th Dist. Ct. App. 1985) (allegations sufficient to state cause of action in fraudulent conspiracy); Technicable Video Syss. v. Americable of Greater Miami, Ltd., 479 So. 2d 810 (Fla. 3d Dist. Ct. App. 1985) (allegations sufficient to state cause of action on third party beneficiary theory); Auto World Body & Paint, Inc. v. Sun Elec. Corp., 471 So. 2d 212 (Fla. 1st Dist. Ct. App. 1985) (“bare bones” factual allegations in counterclaims would provide basis for at least partial relief from claims of plaintiff); Kupperman, 462 So. 2d at 90 (sufficient allegations of dangerous condition in slip and fall case); Frugoli v. Winn-Dixie Stores, Inc., 464 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1985) (allegations sufficient to withdraw motion to dismiss but not sufficient to permit defendant to adequately respond; on remand, plaintiff permitted to amend under Rule 1.190); cf. Rishel v. Eastern Airlines, Inc., 466 So. 2d 1136 (Fla. 3d Dist. Ct. App. 1985) (dismissal of negligence action proper for failure to allege willful and wanton misconduct so as to overcome presumption of nonliability for injuries suffered by police officers and firemen in discharge of duties).

party.223 Any ground upon which a cause of action is stated is sufficient to preclude dismissal for failure to state a cause of action.224

Leave to amend a deficient complaint should be given unless the privilege of amendment has been abused or the face of the complaint shows the deficiency is incurable.225 Pleadings may be amended in accordance with Rule 1.190. Failure to allege a specific statutory basis for suit does not in itself subject a complaint to summary judgment of dismissal, because the basis for the action may be clarified by amendment.226

Failure to substitute a personal representative within the ninety day time limit of Rule 1.260(a) may not be fatal to a claim. The Fourth District Court of Appeal in Stroh v. Dudley227 held that the rule "does not require mandatory, nondiscretionary dismissal even in light of the terminology 'shall be dismissed as to the deceased party.'"228 The court reversed an order of dismissal, stating that the rule should be liberally construed to permit substitution of parties after ninety days where mistake, inadvertance, or excusable neglect is shown.229 In a dissenting opinion, Judge Downey criticized the majority's invocation of Rule 1.540(b)(1) to override an otherwise mandatory dismissal for failure to substitute because on the facts of the case the majority's decision was "tantamount to a holding that ignorance of the law is excusable neglect."229

The trial court must not resolve issues of fact,230 weigh evi-

225. Unitech Corp. v. Atlantic Nat'l Bank, 472 So. 2d 817 (Fla. 3d Dist. Ct. App. 1985) (trial court not divested of jurisdiction to vacate order denying rehearing on order dismissing original complaint with prejudice); Thompson v. McNeill Co., 464 So. 2d 444 (Fla. 1st Dist. Ct. App. 1985) (error to dismiss with prejudice where complaint had been amended only once and no showing privilege had been abused or that complaint was clearly unamendable).
228. Id. at 231.
229. Id.
230. Id. at 232 (Downey, J., dissenting).
231. L.M. Duncan & Sons v. City of Clearwater, 466 So. 2d 1116 (Fla. 1985) (in workers' compensation case, dismissal of third party complaint alleging right of indemnity premature where factual issue whether city was at fault unresolved).
or consider affirmative defenses in ruling on the motion.

Although a court in its discretion may use dismissal as a sanction for failure to attend a pretrial conference or for failure to abide by a legitimate order of the court, such a drastic remedy should be invoked only in extreme circumstances because it punishes the litigant for his lawyer's shortcomings.


233. N.E. at West Palm Beach, Inc. v. Horowitz, 471 So. 2d 570 (Fla. 3d Dist. Ct. App. 1985) (court may not consider affirmative defenses or sufficiency of evidence plaintiff may produce); Thomas v. Soper, 464 So. 2d 255 (Fla. 4th Dist. Ct. App. 1985) (defenses of laches, statute of limitations, and subsequent assignments improper grounds for dismissal of contract action); cf. Kulpinski v. City of Tarpon Springs, 473 So. 2d 813 (Fla. 2d Dist. Ct. App. 1985) (court may consider defense of statute of limitations on motion to dismiss where facts constituting defense are affirmatively stated on face of complaint); City of Clearwater v. United States Steel Corp., 462 So. 2d 1171 (Fla. 2d Dist. Ct. App. 1985) (defense of res judicata properly considered on motion to dismiss where stipulation permitted court to judicially notice other proceedings between parties).

234. Home Savs. Ass'n v. Attorneys' Title Ins. Fund, 479 So. 2d 191 (Fla. 3d Dist. Ct. App. 1985) (trial court properly considered provisions of contract in granting motion to dismiss) (on motion for rehearing); Kulpinski, 473 So. 2d at 814 (although statute of limitations should be raised as affirmative defense, it may be raised on motion to dismiss "only if the facts constituting the defense appear affirmatively on the face of the complaint."); City of Clearwater v. United States Steel Corp., 462 So. 2d at 1171 (although res judicata should be raised as affirmative defense, it was properly considered on motion to dismiss where parties stipulated that court should consider and take judicial notice of all other proceedings between them); Huszar v. Gross, 468 So. 2d 512 (Fla. 1st Dist. Ct. App. 1985) (in libel action, court on motion to dismiss properly decided issue whether privilege applied).

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

236. FLA. R. CIV. P. 1.380(b), 1.420(b); Livingston v. Department of Corrections, 481 So. 2d 2 (Fla. 1st Dist. Ct. App. 1985).

237. Id. The court in Livingston reversed a dismissal predicated on the failure of a lawyer to comply with the terms of a pretrial order. See also Austin v. Papol, 464 So. 2d 1338 (Fla. 3d Dist. Ct. App. 1985) (dismissal with prejudice without hearing on failure to appear at deposition reversed as too severe); Jackson v. Layne, 464 So. 2d 1242 (Fla. 3d Dist. Ct. App. 1985) (dismissal with prejudice of paternity and child support action for plaintiff's failure to comply with pretrial order requiring parties to take blood tests where plaintiff not given additional opportunity to comply reversed as too severe); cf. Wallraf v. T.G.I. Friday's, Inc., 470 So. 2d 732 (Fla. 5th Dist. Ct. App. 1985) (dismissal with prejudice as sanction under Rule 1.380(d) and 1.380(b)(2)(C) for discovery violation affirmed; court certified conflict with decision in Rashard v. Cap-
When an action is dismissed under Rule 1.420, costs are awarded against the party who sought relief. When a party voluntarily dismisses a claim under Rule 1.420(a)(1)(i) and subsequently commences another action based on the same claim against the same party, the court shall tax the costs of the claim previously dismissed against the party seeking affirmative relief pursuant to Rule 1.420(d).

In a case of first impression, the Third District in *MacArthur Dairy, Inc. v. Guillen* held that a plaintiff who voluntarily dismisses a claim, pays costs to the defendant upon recommencement of an action on the claim, and prevails in the second action may recover costs paid which the defendant would have expended had the claim not been previously dismissed. The court reasoned that the purpose of Rule 1.420(d) is to discourage the use of voluntary dismissals to abuse defendants and that the new rule would not disserve that purpose. The law in the Third District now accords the practice of federal courts of awarding expenses and costs as one of the terms and conditions of voluntary dismissal under Rule 41(a)(2).

There is conflict among the districts over whether and to what extent a trial court may grant relief from judgment under Rule 1.540(b) following voluntary dismissal under Rule 1.420(a)(1)(i). The courts have lent disparate interpretations to *Randle-Eastern Ambulance Service, Inc. v. Vasta*, in which the Florida Supreme Court ruled that "voluntary dismissal under Rule 1.420(a)(1)(i) divests the trial court of jurisdiction to relieve the plaintiff of the dismissal." The First and Second Districts appear to have taken this language at face value,
while the Third, Fourth, and Fifth Districts have distinguished *Randle-Eastern* and granted limited relief under Rule 1.540(b) after voluntary dismissal. The cases distinguishing *Randle-Eastern* indicate that some courts will consider granting any relief from voluntary dismissal obtainable by way of Rule 1.540(b)(3) short of reinstatement of an action.\(^{246}\)

Where an action is dismissed by a court sua sponte because of a clerical error in processing a court’s internal documents, the action may be reinstated pursuant to Rule 1.540(a).\(^{247}\)

\(^{246}\) See *Piper Aircraft Corp. v. Prescott*, 445 So. 2d 591 (Fla. 1st Dist. Ct. App. 1984) (plaintiff not entitled to reinstatement of action after voluntary dismissal where second suit would be time-barred by statute of limitations); *see also id.* at 594-96 (Ervin, C.J., specially concurring) (general discussion of divergencies in post-*Randle-Eastern* case law and proposal that a question be certified to the Florida Supreme Court: “Whether a voluntary dismissal divests a trial court of jurisdiction to relieve a plaintiff of such dismissal when it is alleged, pursuant to Rule 1.540(b)(3), that the dismissal was caused by the fraud, misrepresentation or other misconduct of an adverse party?” *Id.* at 596); *South Florida Nursing Servs. v. Palm Beach Business Servs.*, 474 So. 2d 1289 (Fla. 4th Dist. Ct. App. 1985) (citing *Randle-Eastern* in finding trial court erred in reinstating action even where fraud and misrepresentation were alleged); *see Anderson v. Watson*, 475 So. 2d 1315 (Fla. 2d Dist. Ct. App. 1985) (error to grant plaintiffs’ motion under Rule 1.540(b) to expunge words “with prejudice” from notice of voluntary dismissal); *Miller v. Fortune Ins. Co.*, 453 So. 2d 489 (Fla. 2d Dist. Ct. App. 1984) (plaintiff not entitled to relief from effect of voluntary dismissal where filing of notice “with prejudice” resulted from secretarial error or excusable neglect); *cf. Shampaigne Indus., Inc. v. South Broward Hosp. Dist.*, 411 So. 2d 64 (Fla. 4th Dist. Ct. App. 1982) (permitting relief from words “with prejudice,” distinguishing *Randle-Eastern* as prohibiting reinstatement of action through Rule 1.540(b)(3) but not prohibiting other relief). The court in *Shampaigne Industries* certified the following question, which the supreme court has as yet not answered: “May Florida Rule of Civil Procedure 1.540(b) be used to afford relief if a party can demonstrate that a voluntary dismissal was filed as the result of secretarial error, mistake, inadvertence or excusable neglect?” *411 So. 2d* at 367. *See Bender v. First Fidelity Savs. & Loan Ass’n*, 463 So. 2d 445 (Fla. 4th Dist. Ct. App. 1985) (following *Shampaigne Industries* on similar facts); *Atlantic Assocs. v. Laduzinski*, 428 So. 2d 767 (Fla. 3d Dist. Ct. App. 1983) (same); *Siler v. Lumbermens Mut. Casualty Co.*, 420 So. 2d 357, 358 n.2 (Fla. 5th Dist. Ct. App. 1982) (error to deny relief from effect of “voluntary dismissal with prejudice” on basis of *Randle-Eastern* because that case does not apply to dismissal of a party but only of action itself; suggesting that *Randle-Eastern* does “not hold that proper grounds for relief under Rule 1.540 from a notice of voluntary dismissal can never be alleged.”); *Commerce & Indus. Ins. Co. v. Wellenreiter*, 475 So. 2d 1302 (Fla. 5th Dist. Ct. App. 1985) (citing *Randle-Eastern* in finding trial court erred in reinstating action after voluntary dismissal where plaintiff failed to present evidence of damages on cross-claim and moved to dismiss to avoid adverse ruling on defendant’s motion for directed verdict).

\(^{247}\) *Underwriters at Lloyd’s of London v. Rolly Marine Serv., Inc.*, 475 So. 2d
The Second District in *Laursen v. Filardo*\(^{248}\) held that where the wrong person is named defendant in a tort action timely commenced, and the parties stipulate to dismissal with prejudice as to that party and that the plaintiff would be permitted to file an amended complaint naming others as defendants, the trial court erred in dismissing the action for lack of jurisdiction based on the running of the statute of limitations where the order of dismissal stated that the amended complaint was deemed filed at the time of dismissal. The district court found the amended complaint was properly filed with the court under Rule 1.080(e).\(^{249}\) The First District in *Corcoran v. Federal Land Bank*\(^{250}\) found error when a trial court dismissed a counter cross-claim where the same claim was pending in an action in federal court. The district court noted that a stay or abatement of a case in one court is the appropriate remedy in instances of concurrent jurisdiction pending determination of the claim in the court where jurisdiction first attached.

**B. Failure to Prosecute**

Rule 1.420(e) provides that an action shall be involuntarily dismissed for failure to prosecute when there has been no record activity for a period of one year.\(^{251}\) The one-year period is computed by excluding the day of the last record activity and including the day the motion to dismiss is filed. Thus, in *Zentmeyer v. Ford Motor Co.*,\(^{252}\) the Fifth District found that where the last record activity was an order filed

\(^{248}\) 468 So. 2d 251 (Fla. 2d Dist. Ct. App. 1985).
\(^{249}\) Id. at 252.
\(^{250}\) 470 So. 2d 54 (Fla. 1st Dist. Ct. App. 1985).
\(^{251}\) FLA. R. CIV. P. 1.420(e) provides:

> All actions in which it appears on the face of the record that no activity by filing of pleadings, order of court or otherwise has occurred for a period of one year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least five days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than one year shall not be sufficient cause for dismissal for failure to prosecute.

\(^{252}\) 464 So. 2d 673 (Fla. 5th Dist. Ct. App. 1985).
October 6, 1982, the one year period began to run on October 7, 1982, and a motion to dismiss for failure to prosecute filed on October 6, 1983, was one day premature.

The record activity must be calculated to move the cause toward conclusion, although "[w]here activity is facially sufficient, as opposed to merely passive, e.g., a name change . . . [or] substitution of counsel, . . . a court cannot inquire further as to how well the activity advances the cause."

Record activity sufficient to preclude a dismissal under Rule 1.420(e) includes notice of deposition, although the deposition was never taken; a two-question interrogatory propounded to the defendant; settlement with one of the plaintiffs; a notice to produce; and filing a notice of hearing.

Before granting a motion to dismiss under Rule 1.420(e), the trial court must hold an evidentiary hearing to determine whether good cause is shown so that the action should remain pending. The standard applied to determination of good cause on the issue of failure to prosecute is more strict than that of excusable neglect on the issue of whether a default judgment should be vacated. Good cause "must include a showing of contact with the opposing party during the one-year period and some form of excusable conduct or happening other than negligence or inattention to deadlines." The First District Court of Appeal in Paedae v. Voltaggio catalogued several examples of cir-
circumstances where good cause was not shown. Abatement and removal of a case from the active case docket by order of the court is good cause. When an action is stayed as to one of the defendants by federal bankruptcy law, the action may not be dismissed as to any of the defendants for failure to prosecute. The trial court may not dismiss for lack of prosecution where the plaintiff gives notice of readiness for trial and then takes no further action during a one-year period, because it is the trial court's responsibility to enter an order setting the trial date. However, a plaintiff's failure to file any pleading in response to a trial court's notice preceding order of dismissal justifies an order of dismissal.

VIII. Summary Judgment

Rule 1.510(c) provides that a party may upon motion be granted a summary judgment if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Florida Supreme Court in Moore v. Morris summarized the gloss it has placed on the rule:

[A] party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought . . . . A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law . . . . If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it . . . .

264. See id. at 769.
268. Govayra v. Straubel, 466 So. 2d 1065, 1066 (Fla. 1985).
270. 475 So. 2d 666 (Fla. 1st Dist. Ct. App. 1985).
271. Id. at 668 (citations omitted). The supreme court in Moore overturned a summary judgment for the defendants in a medical malpractice case where a factual issue remained about when the applicable statute of limitations began to run. Id. at
The standard of review is less deferential to the trial court on a summary judgment, which is based only on a written record, than it is when the court has heard witnesses or reached a decision after weighing conflicting evidence.\textsuperscript{272}

The burden is on the movant to demonstrate an absence of genuine issue of material fact and his entitlement to judgment as a matter of law.\textsuperscript{273} Once the movant has shown that no issue of material fact exists, the burden shifts to the opposing party to produce counterevidence which reveals a genuine issue of material fact.\textsuperscript{274} Trial courts should give a strict reading to the movant's filed papers, and a liberal reading to those of the opposing party.\textsuperscript{275}

Where affirmative defenses are raised, a plaintiff seeking summary judgment must overcome the defenses by presenting evidence which disproves the facts alleged or establishes that the defenses are legally insufficient.\textsuperscript{276}

Parties may submit affidavits, depositions, and answers to interrog-

\textsuperscript{668-70; see also Celotex Corp. v. Copeland, 471 So. 2d 533, 539 (Fla. 1985) (question of when the “creeping-disease” of asbestosis manifested itself for purposes of statute of limitations is question of fact which may not be resolved by summary judgment).}

\textsuperscript{272.} Savage-Hawk v. Premier Outdoor Prods., Inc., 474 So. 2d 1242 (Fla. 2d Dist. Ct. App. 1985).

\textsuperscript{273.} City of Live Oak v. Arnold, 468 So. 2d 410 (Fla. 1st Dist. Ct. App. 1985).


http://nsuworks.nova.edu/nlr/vol10/iss3/15
atories in support of their relative positions on a motion for summary judgment. In Cary v. Keene Corp., the First District reversed a summary judgment after finding that the trial court should not have excluded the plaintiff's affidavit, which contradicted his earlier deposition testimony. The court noted the rule that a party may not create an issue of fact by repudiating or contradicting his own deposition testimony by affidavit. However, the court found that this case fit under an exception to that rule providing that an affidavit which presents a credible explanation for the discrepancy may be sufficient to establish that a factual issue is before the court. The First District in Marlar v. Quincy State Bank reversed a summary judgment where the trial court erroneously relied on an affidavit which was not served and filed by the movant at least twenty days before the hearing, as required by Rule 1.510(c). The rule is designed to provide the opposing party an opportunity to prepare a challenge to the factual basis of the motion. The court found the affidavit was not authorized by Rule 1.510(e), holding that, under the rule, "a movant may file supplemental affidavits less than twenty days prior to the summary judgment hearing only upon written stipulation and agreement by the adverse party affected or upon leave of court granted by written order after written application, notice to the adverse party, and the opportunity for a hearing."

If the provisions of a contract are susceptible of different inferences, summary judgment is inappropriate where the inferences must be resolved by determination of fact. Summary judgment is appro-


279. Id. at 853.


282. Id. at 1233.

283. Id.

284. See Baughner v. Banker's Life Co., 471 So. 2d 675 (Fla. 2d Dist. Ct. App. 1985) (summary judgment for insurer reversed where different inferences could be drawn from provisions of life insurance contract and amount of death benefits payable);
priate where "no interpretation of the undisputed material facts would support a finding of liability."^288

IX. Directed Verdict

A motion for directed verdict must be made at the close of all the evidence or the opportunity is waived.^288 An exception is made where there is a total lack of evidence to support the verdict.^287 When there is evidence in the record about which reasonable people could differ, a jury issue of liability or damages is raised and the motion may not properly be granted.^288 The evidence must be considered in a light most

Miranda v. Julian, 463 So. 2d 327 (Fla. 5th Dist. Ct. App. 1985) (summary judgment reversed where contract contained latent ambiguity); Master Antenna Syss. v. Number One Condominium Ass’n, 466 So. 2d 426 (Fla. 4th Dist. Ct. App. 1985) (ambiguity in master television system contracts precluded summary judgment); cf. Tampa Port Auth. v. Tampa Barge Servs., Inc., 463 So. 2d 557 (Fla. 2d Dist. Ct. App. 1985) ("[m]ere contractual ambiguity does not necessarily preclude summary judgment”; summary judgment affirmed where evidence showed parties had given same interpreta-

285. Clark v. Lumbermans Mut. Ins. Co., 465 So. 2d 552 (Fla. 1st Dist. Ct. App. 1985) (summary judgment for defendant affirmed on negligence suit arising from diving accident on canoe trip; defendant sustained its burden of showing there was no evidence to indicate a breach of duty causing injury); Brown v. Winn-Dixie Montgomery, Inc., 469 So. 2d 155 (Fla. 1st Dist. Ct. App. 1985) (summary judgment for employer proper where Worker’s Compensation Act provided exclusive remedy precluding suit alleging battery and intentional infliction of mental distress where male supervisor was alleged to have grabbed employee’s breast); cf. Robbins v. Department of Natural Resources, 468 So. 2d 1041 (Fla. 1st Dist. Ct. App. 1985) (summary judgment for defendant DNR in diving accident case improper where DNR failed to conclusively establish facts going to element of defense of assumption of risk and failed to demonstra-

286. The court in Waltman v. Prime Motor Inns, Inc., 480 So. 2d 88, 90 (Fla. 1985), articulated the general rule that "one who submits his cause to the trier of fact without first moving for directed verdict at the end of all evidence has waived the right to make that motion.”


288. See Fayden v. Guerrero, 474 So. 2d 320 (Fla. 3d Dist. Ct. App. 1985) (conflicting evidence about liability); R.A. Jones & Sons v. Holman, 470 So. 2d 60

http://nsuworks.nova.edu/nlr/vol10/iss3/15
favorable to the nonmovant. A directed verdict is improper if any record evidence would support a jury verdict. A directed verdict is proper where the record does not support a jury issue, as where the evidence and all reasonable inferences which might be drawn from it point to but one possible conclusion. A directed verdict is proper where there is no evidence to support a party’s position, no rebuttal of a legal presumption, no recognized legal theory upon which liabil-


See id.


Tozier v. Jarvis, 469 So. 2d 884 (Fla. 4th Dist. Ct. App. 1985) (presumption of negligence which attaches to driver of rear vehicle in rear-end collision not
ity could be predicated,\textsuperscript{295} where the defendant’s conduct was not the legal cause of injury,\textsuperscript{296} or where the minimum legal standard of culpability was not met.\textsuperscript{297}

X. Res Judicata

The doctrine of res judicata is invoked as an affirmative defense\textsuperscript{298} to bar a suit where substantially the same claim or cause of action has rebutted).

\textsuperscript{295} NN Investors Life Ins. Co. v. Professional Group, Inc., 468 So. 2d 532 (Fla. 3d Dist. Ct. App. 1985) (Florida does not recognize tort of economic duress).

\textsuperscript{296} See Florida Power and Light Co. v. Lively, 465 So. 2d 1270 (Fla. 3d Dist. Ct. App. 1985) (no duty or breach of duty on part of utility where airplane collided with electrical lines, as accident was not foreseeable); Caranna v. Eades, 466 So. 2d 259 (Fla. 2d Dist. Ct. App. 1985) (no duty of city to inspect vertical openings in balcony railings through which child fell).

In Snow v. Nelson, 475 So. 2d 225 (Fla. 1985), the supreme court decided that a directed verdict was proper where the evidence would not support a finding of parental liability for a child’s tortious conduct under the restrictive rule of Gissen v. Goodwill, 80 So. 2d 701 (Fla. 1955). \textit{See generally} Note, Liability of Parents for Negligent Supervision of Their Minor Children, 12 FLA. ST. U.L. REV. 935 (1985); Note, Parental Liability for the Torts of Their Minor Children: Limits, Logic & Legality, 9 NOVA L.J. 205 (1984).

\textsuperscript{297} The supreme court in Como Oil Co., v. O’Loughlin, 466 So. 2d 1061 (Fla. 1985), held that a directed verdict was proper on a claim for punitive damages where the trial court found the evidence showed only gross negligence of the defendant. The court stated that “the degree of negligence necessary for punitive damages is willful and wanton misconduct equivalent to criminal manslaughter.” \textit{Id.} at 1062. In a separate opinion, Justice Shaw, joined by Justice Ehrlich, stated that the lines drawn between the relative degrees of negligence are indistinct and are matters of public policy. These justices thought the evidence was sufficient in that case to preclude a directed verdict. \textit{Id.} at 1063.

The court in Winn-Dixie Stores, Inc. v. Robinson, 472 So. 2d 722 (Fla. 1985), held that a directed verdict on the issue of punitive damages was improper on the evidence presented in a malicious prosecution action. The court decided that the higher standard of negligence necessary to support a finding of vicarious liability for punitive damages under Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981), was inapplicable because the allegations, proof, and jury verdict were predicated on a theory that the corporate defendant, rather than an agent, “acted with malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others . . . .” \textit{Id.} at 723.

\textsuperscript{298} City of Clearwater v. United States Steel Corp., 469 So. 2d 915 (Fla. 2d Dist. Ct. App. 1985) (defense of res judicata properly raised in motion to dismiss where parties stipulated that court should take judicial notice of earlier proceedings between them).
been finally adjudicated in a prior proceeding.\textsuperscript{299} The doctrine is applicable only where the suits involve overlapping identities of "the thing sued for . . . , the causes of action . . . , [the] persons and parties . . . , [and] the quality or capacity of the persons for or against whom the claim is made."\textsuperscript{300} The prior adjudication must have been final.\textsuperscript{301}

The First District Court of Appeal in \textit{Thomson v. Petherbridge}\textsuperscript{302} ruled that the doctrine operated to bar a suit where an earlier action to reform and enforce payment on a note was dismissed with prejudice for lack of consideration, although the subsequent action was brought to enforce the underlying debt rather than the note itself. The court stated that the doctrine applies where the causes of action are "substantially the same," and that the "[i]dentity of causes of action is defined by similarity of the facts essential to the maintenance of both actions."\textsuperscript{303} The court found that both actions involved identical facts because the suit on the debt was necessarily predicated on the same debt contract adjudicated unenforceable in the earlier action.\textsuperscript{304}

Because "a partnership is not a legal entity apart from the members composing it,"\textsuperscript{305} a summary final judgment for the partners in their capacity as individuals may operate through the doctrine of res judicata to bar a subsequent suit designating those individuals as partners in a partnership.\textsuperscript{306}

A party may be estopped from pleading res judicata upon taking

\begin{itemize}
\item \textsuperscript{299} Thomson v. Petherbridge, 472 So. 2d 773, 774 (Fla. 1st Dist. Ct. App. 1985).
\item \textsuperscript{300} Husky Indus., Inc. v. Griffith, 422 So. 2d 996, 999 (Fla. 5th Dist. Ct. App. 1982), quoted in Thomson, 472 So. 2d at 775.
\item \textsuperscript{301} Thomson, 472 So. 2d at 774.
\item \textsuperscript{302} See id. at 775; State v. LaPlante, 470 So. 2d 832, 834 (Fla. 2d Dist. Ct. App. 1985) (doctrine inapplicable where "no clear cut former adjudication"); Falkner v. Amerifirst Fed. Savs. and Loan Assoc., 467 So. 2d 746 (Fla. 3d Dist. Ct. App. 1985) (trial court correctly entered judgment of dismissal on ground of res judicata where no rehearing or appeal was timely sought from earlier order of dismissal).
\item \textsuperscript{303} Thomson, 472 So. 2d at 775 (quoting Pumo v. Pumo, 405 So. 2d 224, 226 (Fla. 3d Dist. Ct. App. 1981)).
\item \textsuperscript{304} Id. at 775.
\item \textsuperscript{305} Ohio Casualty Ins. Co. v. Fike, 304 So. 2d 136, 137 (Fla. 4th Dist. Ct. App. 1974).
\item \textsuperscript{306} See Olympian West Condominium Ass'n v. B.K., Inc., 467 So. 2d 413 (Fla. 3d Dist. Ct. App. 1985). Thus, the absence of the fourth "identity" under the test of Thomson, 472 So. 2d at 775, does not prevent application of the doctrine at least in the context of a partnership although the suits name the same persons in different capacities.
\end{itemize}
inconsistent positions in separate suits where the opposing party would be injured. The Fifth District in *Wooten v. Rhodus* decided that it would be unfair to give res judicata effect to a dissolution judgment so as to bar a subsequent suit brought by Wooten to determine his interest in real property owned as tenants in common at the time of dissolution. In the dissolution action, Rhodus had moved to dismiss Wooten's counterclaim through which Wooten had sought to have his rights in the property adjudicated. Rhodus asserted that the court lacked jurisdiction to determine the interests in the property and that the determination should be made in a subsequent partition suit. Wooten acquiesced by dropping his counterclaim. When Wooten later brought a partition suit, Rhodus raised the defense of res judicata, arguing that the interests were adjudicated by the dissolution judgment. Finding that Rhodus' contrary positions in court would operate unfairly to deny Wooten his day in court, the district court disallowed the defense and ordered the case tried on its merits.

Where a "motion merely renews the allegations upon which relief was previously denied, the doctrine of *res judicata* precludes relitigation of the issue presented." The doctrine of res judicata operates to bar relief from final judgment under Rule 1.540(b) even where there is a change in the controlling rule of law in a later unrelated case.

Where the verdict for a plaintiff in a personal injury suit does not apportion responsibility for damages among joint tortfeasors, the doctrine operates to bar a subsequent suit against one jointly liable. Thus, the Second District Court of Appeal in *Roberts v. Rockwell International Corp.* affirmed a summary judgment for the manufacturer of a saw which injured the plaintiff's hand, where the plaintiff had earlier recovered in a negligence action against the county whose ambulance transporting the plaintiff had broken down enroute to the hospital. The plaintiff had "affirmatively argued to the jury that apportionment was not possible." Because the plaintiff failed to obtain a

308. 470 So. 2d 844 (Fla. 5th Dist. Ct. App. 1985).
312. *Id.*
313. *Id.* at 506.
special verdict finding the damages apportionable, the court reasoned that the defendants were joint tortfeasors, and the adjudication of the liability of one precluded a subsequent adjudication as to the other who was not named in the earlier suit.

**XI. Stays and Injunctions**

**A. Stays**

Removal of a civil action to federal district court is governed by federal statute.\(^{314}\) Claims over which federal courts have original jurisdiction are removable. Nonremovable claims joined with removable claims may be decided by a federal court through its pendent jurisdiction.\(^{315}\) The plaintiffs in *Sunshine State Service Corp. v. Dove Investments*\(^ {316}\) filed suit in state court on a claim over which the federal courts did not have concurrent jurisdiction. Defendants filed counterclaims and also filed claims in federal district court predicated on federal statutes. Not all the defendants in the state action were named in the federal action. Defendants invoked the pendent jurisdiction of the federal court by joining the counterclaims. The defendants then moved to stay the proceedings in the state court. The motion was granted and the Fifth District reversed. The district court extrapolated a rule from an opinion of the Florida Supreme Court\(^ {317}\) providing that “a stay of a subsequently filed action in a court of concurrent jurisdiction involving the same parties and same subject matter is appropriate.”\(^ {318}\) The district court applied the rule even though the courts did not have concurrent jurisdiction and found that the conditions of the rule were not met because the parties were not identical. The court further found that the stay should not have been granted because, as a general rule in matters of concurrent jurisdiction, the court whose jurisdiction is first invoked has exclusive jurisdiction over the cause.

The court in *Cole v. Douglas*\(^ {319}\) quashed a trial court’s order staying part of a complaint first filed in state court and five years later filed in federal court. The court characterized the filing in federal court as a


\(^{315}\) 28 U.S.C. § 1441(c).

\(^{316}\) 468 So. 2d 281 (Fla. 5th Dist. Ct. App.), petition for review denied, 478 So. 2d 53 (Fla. 1985).

\(^{317}\) Wade v. Clower, 114 So. 548 (Fla. 1927).

\(^{318}\) *Sunshine State*, 468 So. 2d at 283 (emphasis in original deleted).

\(^{319}\) 464 So. 2d 229 (Fla. 4th Dist. Ct. App. 1985).
dilatory tactic\textsuperscript{320} and said that "stays should be rare, and the circumstances of each case should be scrutinized carefully to preclude manipulation of the state and federal court systems."\textsuperscript{321}

In \textit{Robinson v. Royal Bank of Canada},\textsuperscript{322} the Fourth District reached an opposite conclusion in a case in which a Canadian court had prior and concurrent jurisdiction over an essentially identical action. The trial court should have "decline[d] jurisdiction as a matter of comity."\textsuperscript{323}

\textbf{B. Injunctions}

The Second District Court of Appeal in \textit{Lingelbach's Bavarian Restaurants, Inc. v. Del Bello}\textsuperscript{324} analyzed the procedure for obtaining a temporary injunction under Rule 1.610(a) and decided that the remedy is appropriately sought through a verified motion for preliminary injunction. The nonmovant argued that under \textit{Deanza Corp. v. Vonoftororio}\textsuperscript{325} injunctive relief must be sought by "pleading" rather than "motion."\textsuperscript{326} The court concluded that an amendment\textsuperscript{327} had harmonized Florida’s rule with its counterpart, Federal Rule of Civil Procedure 65(a)(2), which provides that injunctive relief is sought by "application for a preliminary injunction." The district court reasoned that under Florida Rule 1.100(b), an application for relief is made by motion; therefore, a motion, rather than a pleading, is the proper mechanism for seeking temporary injunctive relief under Rule 1.610. The court went on to find that the motion itself did not contain the allegations customarily required to gain injunctive relief, and that the motion, notice, and hearing combined to make the procedure by which relief was granted fair.

\begin{itemize}
\item 320. \textit{Id.} at 231.
\item 321. \textit{Id.}
\item 322. 462 So. 2d 101 (Fla. 4th Dist. Ct. App. 1985).
\item 323. \textit{Id.} at 102.
\item 324. 467 So. 2d 476 (Fla. 2d Dist. Ct. App.), \textit{petition for review denied}, 476 So. 2d 674 (Fla. 1985).
\item 325. 393 So. 2d 1146 (Fla. 4th Dist. Ct. App. 1981).
\item 326. \textit{Id.} at 1146-47.
\item 327. \textit{In re} Rules of Civil Procedure, 391 So. 2d 165 (Fla. 1980).
\end{itemize}
XII. Costs and Interest

A. Costs

1. Generally

Section 57.041 of the Florida Statutes provides that "[t]he party recovering judgment shall recover all his legal costs and charges which shall be included in the judgment . . . ."\(^{328}\) Nevertheless, a trial court has discretion whether to award costs after judgment.\(^{329}\) The party against whom costs are to be taxed must be given opportunity to challenge the items claimed as costs by presenting argument and evidence.\(^{330}\) Parties need not specifically plead costs, as they do not constitute part of the relief sought from damages claimed.\(^{331}\) Courts take a liberal view of the time when a motion for trial costs may be filed.\(^{332}\)

Costs incurred in an appeal "shall be taxed in favor of the prevailing party unless the court orders otherwise."\(^{333}\) A motion for appellate costs must be filed within thirty days after the appellate court’s mandate issues.\(^{334}\) The standard of review of a trial court’s ruling on a motion to tax costs is one of a clear showing of abuse of discretion.\(^{335}\)

Costs of depositions may be taxed against a losing party if the depositions "serve a useful purpose, even though not introduced into evidence."\(^{336}\) Where the terms of a settlement agreement between parties to the original action require the parties to pay their own costs, a third party defendant who also asserts a derivative claim as a counter-

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\(^{328}\) FLA. STAT. § 57.041 (1985).

\(^{329}\) Goslin v. Racal Data Communications, Inc., 468 So. 2d 390 (Fla. 3d Dist. Ct. App.), petition for review denied, 479 So. 2d 117 (Fla. 1985).


\(^{331}\) City of Palm Bay v. Bauman, 475 So. 2d 1322, 1327 (Fla. 5th Dist. Ct. App. 1985).

\(^{332}\) "[A] motion to tax costs may be filed at various times, before or after judgment, and even after an appeal of the judgment has been taken, so long as the motion is filed within a reasonable time after the appeal is concluded." Id. (attorney’s fees taxable as costs pursuant to federal statute although motion for fees made after entry of final judgment and no prayer for fees was stated in complaint).

\(^{333}\) FLA. R. APP. P. 9.400(a).

\(^{334}\) Id.; see Thornburg v. Pursell, 476 So. 2d 323, 324 (Fla. 2d Dist. Ct. App. 1985).

\(^{335}\) Goslin, 468 So. 2d at 392 (no abuse of discretion in denying motion to tax costs of trial transcript).

claim may not be taxed with costs which are required to be paid under the agreement. Costs paid by a plaintiff upon recommencement of an action voluntarily dismissed may be recovered to the extent of the costs the defendant would have expended had the claim not been previously dismissed.

Rule 1.442 provides that where the amount recovered by a successful plaintiff does not exceed the amount of a properly served offer of judgment, the plaintiff must pay the costs incurred by the defendant after the offer was made. Separate offers from multiple defendants may not be aggregated; rather, the rule applies only when the plaintiff fails to recover an amount greater than the highest single offer.

The First District in Douglas v. Wilson decided that the trial court erred in awarding a joint judgment for costs under Rule 1.420(d) to the extent of costs incurred in preparing to defend one count which stated a cause of action by only one of the plaintiffs. The Second District in American Bank of Lakeland v. Hoover found that a trial court erred in taxing as costs the defendant's attorney's fees and travel expenses as a sanction against the plaintiff for misconduct of its attorney. The trial court found the objectionable conduct directly resulted in a mistrial, at substantial cost to the opposing parties. The district court reasoned that such a sanction is improper where the attorney is not accused or found guilty of contempt.

2. Expert Witnesses

The supreme court in Travieso v. Travieso held that "pursuant to Section 92.231, expert witness fees, at the discretion of the trial court, may be taxed as costs for a lawyer who testifies as an expert as

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338. See MacArthur Dairy, Inc. v. Guillen, 470 So. 2d 747 (Fla. 3d Dist. Ct. App. 1985); see also supra notes 238-43 and accompanying text.
340. Thornburg, 476 So. 2d at 324.
342. See also Okuboye v. Hubert Rutland Hosp., 466 So. 2d 342 (Fla. 2d Dist. Ct. App.), petition for review denied, 476 So. 2d 674 (Fla. 1985) (physician who successfully defended malpractice suit not entitled to indemnity from joint tortfeasor hospital for attorney's fees and costs where record showed plaintiff attempted to prove active rather than passive negligence).
344. 474 So. 2d 1184 (Fla. 1985).
to reasonable attorney's fees."\textsuperscript{345} The court expressed its preference that attorneys so testify as a courtesy and expect compensation only "where the time required for preparation and testifying is burdensome."\textsuperscript{346} In a separate opinion, Justice Ehrlich noted the mandatory language "shall be allowed a witness fee"\textsuperscript{347} and disagreed with the majority's treatment of that provision as permissive.\textsuperscript{348} He nevertheless agreed with the majority that a lawyer called to testify about fees generally should do so without charge as a courtesy. Justice Overton, in dissent, would have modified the principle that a court must hear expert testimony before awarding attorney's fees. He suggested that the determination whether testimony was needed might be left to the attorneys and trial court. The Justice reasoned that testimony about the value of other experts' services is not required, and that testimony about attorney's fees may unnecessarily add to the cost of litigation.\textsuperscript{349}

The \textit{Travieso} decision served as the basis for the decision by the Second District in \textit{Straus v. Morton F. Plant Hospital Foundation, Inc.}\textsuperscript{350} The district court added its gloss by construing the holding in \textit{Travieso} as making the "award of such expert fees discretionary only where the testifying attorney expert does not expect to be compensated for that testimony."\textsuperscript{351} Thus, if an attorney testifies as an expert with the expectation of compensation, the trial court must tax her fee as a cost.

The First District in \textit{Digital Systems of Florida, Inc. v. Committee}\textsuperscript{352} affirmed a denial of the plaintiff's motion for costs where the expert fees were not broken down in such a manner that any charges not properly includable as costs would be revealed.\textsuperscript{353} The same court

\begin{enumerate}
\item \textsuperscript{345} \textit{Id.} at 1185 (emphasis added).
\item \textsuperscript{346} \textit{Id.} at 1186.
\item \textsuperscript{347} \textit{FLA. STAT.} \textsection{} 92.231 (1983) (emphasis added).
\item \textsuperscript{348} \textit{Travieso}, 474 So. 2d at 1187 (Ehrlich, J., concurring in part and dissenting in part).
\item \textsuperscript{349} \textit{Id.} at 1188 (Overton, J., dissenting).
\item \textsuperscript{350} 478 So. 2d 472 (Fla. 2d Dist. Ct. App. 1985).
\item \textsuperscript{351} \textit{Id.} at 473.
\item \textsuperscript{352} 472 So. 2d 533 (Fla. 1st Dist. Ct. App. 1985), \textit{petition for review denied}, 482 So. 2d 348 (Fla. 1986).
\item \textsuperscript{353} In an administrative order, the Florida Supreme Court has issued guidelines for taxation of costs in civil actions. The guidelines address taxation of costs of expert witnesses and comment on whether certain of those costs should be taxable. \textit{See Statewide Uniform Guidelines for Taxation of Costs in Civil Actions in Reeser v. Boats Unlimited, Inc.}, 432 So. 2d 1346, 1349 n.2 (Fla. 4th Dist. Ct. App. 1983), \textit{reprinted in Florida Rules of Court} 559 (West 1986).
\end{enumerate}
in *Thursby v. Reynolds Metal Co.* found no abuse of discretion in the trial court's order taxing expert witness costs, although no evidence was presented showing the time the experts actually spent in preparation of their testimony. The court reasoned that the trial court's knowledge of the length and the nature of the testimony given enabled it to determine a reasonable fee. Also, the fees taxed did not appear grossly excessive to the appellate court.

**B. Interest**

1. *Prejudgment Interest on Pecuniary Losses*

   Prejudgment interest is an element of pecuniary damage which, when properly pled, is awarded as a matter of right in actions for damages to property. The policy behind awarding prejudgment interest is to encourage settlement of claims. "[P]rejudgment interest is not recoverable on awards for personal injury." The supreme court in *Argonaut Insurance Co. v. May Plumbing Co.* held that "when a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss." The court thus resolved a conflict among the districts over whether prejudgment interest should be awarded on unliquidated claims for damages. The Fourth District had held that prejudgment interest...
interest could not be awarded where the presence of a comparative negligence claim created uncertainty about the award of damages. The claim was viewed as unliquidated and therefore incapable of supporting an award of interest. The First District had adopted a “better rule” providing that “for the purpose of assessing prejudgment interest, a claim becomes liquidated and susceptible of prejudgment interest when a verdict has the effect of fixing damages as of a prior date.”

The supreme court approved the view of the First District and quashed the decision of the Fourth District, but decided the case on the basis of two nineteenth-century decisions from which the court had not receded. In reannouncing the law of prejudgment interest, the supreme court removed from the province of the jury any consideration of interest in finding the amount of damages. Rather, “[o]nce a verdict has liquidated damages as of a date certain,” the trial judge or clerk is to do the mathematical computation of interest according to section 687.01 of the Florida Statutes. The rule of Argonaut Insurance has since been applied by the district courts.

2. Interest on Interpleaded Funds

Generally, no interest is allowable on funds deposited with a court. However, interest is allowable on disputed funds which a court has ordered deposited in an interest-bearing account. “[I]nterest earned on interpled and deposited funds follows the principal and

365. See Argonaut, 474 So. 2d at 214-15.
366. Id. at 215.
369. Id. at 849.
shall be allocated to whomever is found entitled to the principal." 370  
Thus, the Third District in Burnett v. Brito 371 decided that a defendant real estate broker was liable to a prevailing plaintiff for interest on money advanced to the broker where the broker delayed in complying with a court order to deposit the money in an interest-bearing account.

XIII. Relief from Judgment

Rule 1.540 provides for relief from judgments, decrees, or orders on bases which include clerical mistakes, mistakes, inadvertence, excusable neglect, 372 newly discovered evidence, 373 fraud, 374 voidness, 375 sat-

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370. Id.
372. Williams v. Roundtree, 464 So. 2d 1293 (Fla. 1st Dist. Ct. App. 1985) (relief granted from effect of failure to timely file notice of appeal on bases of clerical error and excusable neglect where judicial assistant gave erroneous information about date decision was rendered; trial court would be permitted to set aside judgment and re-enter at later date to permit timely perfection of appeal).
373. Kline v. Belco, Ltd., 480 So. 2d 126 (Fla. 3d Dist. Ct. App. 1985), petition for review denied, 491 So. 2d 278 (Fla. 1986) (new trial ordered on basis of new evidence of tax records which controverted false testimony of adverse witness whose testimony had damaged plaintiff's credibility).
374. See generally DeClaire v. Yohanan, 453 So. 2d 375 (Fla. 1984); Comment, Rule 1.540(b), Florida Rules of Civil Procedure: In Search of an Equitable Standard for Relief from Fraud, 12 FLA. ST. U.L. REV. 851 (1985); see Gomez v. Espinosa, 466 So. 2d 1201 (Fla. 3d Dist. Ct. App. 1985) (error to grant relief under rule on basis of extrinsic fraud upon the court by misrepresentation where unsuccessful party not prevented from participating in action, or on intrinsic fraud where alleged fraudulent conduct in the proceeding did not pertain to the issues tried; Rule 1.540 may not be used as substitute for appeal to attack ruling on jurisdiction); Streater v. Stampes, 466 So. 2d 397 (Fla. 1st Dist. Ct. App. 1985) (motion to vacate adjudication of paternity based on intrinsic fraud — perjury — must be brought within one year; under Rule 1.540(b) relief predicated on intrinsic fraud may not be obtained after one year through provision of rule authorizing independent action; however, extrinsic fraud may be raised under rule later than one year); Weitzman v. F.I.F. Consultants, Inc., 468 So. 2d 1085, 1087 n.3 (Fla. 3d Dist. Ct. App.), petition for review denied, 479 So. 2d 117 (Fla. 1985) (discussing time for bringing motion under Rule 1.540(b) for relief from intrinsic and extrinsic fraud).
375. See generally DeClaire, 453 So. 2d at 375; Whigham v. Whigham, 464 So. 2d 674 (Fla. 5th Dist. Ct. App.), petition for review denied, 475 So. 2d 696 (Fla. 1985) (void judgment may be attacked at any time under Rule 1.540(b)); Kuehne & Nagel, Inc. v. Esser Int'l, Inc., 467 So. 2d 457 (Fla. 3d Dist. Ct. App. 1985) (error to deny motion to vacate default under Rules 1.500(d) and 1.540(b) on evidence which showed one day delay in filing answer was caused by excusable neglect when lawyer's clerk mishandled complaint and summons); Palmer v. Palmer, 479 So. 2d 221 (Fla. 5th Dist.
satisfaction, or inequity of prospective application.

Clerical mistakes "may be corrected by the court at any time on its own initiative or on the motion of any party . . . ." The characterization given an error is determinative of the proper mode of relief. "Clerical" errors may be remedied at any time under Rule 1.540(a). Where a written order does not accurately reflect the terms of a settlement agreement announced in open court, the error is clerical and may be remedied under that rule. Errors of "inadvertance," which result from a court's failure to order something it meant to order, may be remedied through timely motion under Rule 1.540(b). "Judicial" errors arise when a court intentionally orders something which is legally erroneous. This kind of error must be remedied through direct appeal. The Fourth District Court of Appeal in *In re Estate of Beeman* announced a test for distinguishing clerical from judicial error as "whether or not the court reached a decision in the intentional or purposeful exercise of its judicial function. If the pronouncement reflects a deliberate choice on the part of the court, the act is judicial; errors of this nature are to be cured by appeal.

A related question arises in the consideration of what error may be remedied through Rule 1.540. Some courts have ruled that substantive change in a judgment may not be effected through the rule. This conclusion is reached by equating the labels "substantive error" and "judi-

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377. See Weitzman, 468 So. 2d at 1085 (on motion for relief under Rule 1.540(b)(5), district court remanded for cancellation of record of judgment obtained through stock fraud scheme, where perpetrator of fraud purchased and was assigned the judgment and sought to enforce it against defrauded party).


380. See Mills v. Mills, 353 So. 2d 954 (Fla. 1st Dist. Ct. App. 1978) (trial court's failure to rule on attorney's fees remediable upon timely motion under Rule 1.540(b)).

381. See Marks, 475 So. 2d at 274 n.2.

382. 391 So. 2d 276 (Fla. 4th Dist. Ct. App. 1980).

383. Id. at 281, quoted in Pompano Atlantis Condominium Assoc. v. Marlino, 415 So. 2d 153, 154 (Fla. 4th Dist. Ct. App. 1982) (tardy motion for clarification under Rule 1.540 could not be treated as motion for relief under Rule 1.540 because the error attempted to be remedied was judicial and not clerical or inadvertent).
cial error.” Thus the Second District Court of Appeal in *Clearwater Oaks Bank v. Plumtree* \(^{384}\) decided that a nunc pro tunc judgment amending an order relating to fees was void because the trial court was without jurisdiction. The district court stated that a substantive change in a judgment must be pursued under Rule 1.530(g), and not under Rule 1.540; the court followed with a statement that “[t]he remedies permitted through Rule 1.540 do not apply to judicial errors.” \(^{385}\) While the latter statement is generally accepted as true, it does not follow that all substantive inaccuracies in a judgment stem from judicial error. Further, such an approach introduces definitional problems into the equation, for after a court decides that the criteria in Rule 1.540(b) are met, it must determine whether a proposed change would alter the substance of the judgment. Because *any* change to a judgment may be viewed as substantive, the reach of Rule 1.540(b) would thus be so severely circumscribed as to render it of no practical use. Rule 1.530(g) expressly provides that it “does not affect the remedies in Rule 1.540(b).” Where a party meets the restrictive criteria for relief under Rule 1.540(b), a court’s ability to fashion a remedy should not be further affected by a limiting notion of substance.

The Fourth District Court of Appeal in *Peters v. Peters* \(^{386}\) has taken the better view by stating that errors in the substance of an order may not be corrected through Rule 1.540(a), but may be corrected upon timely motion under Rule 1.540(b). The court indicated that it would have permitted correction of a contempt order to change the amount of child support arrearages had a motion under the latter rule been timely filed. \(^{387}\) A need for relief in that case arose because the judgment was predicated on incorrect financial information given by a governmental agency.

The court must, of course, have jurisdiction to grant relief. Thus, where a motion for relief is not brought under Rule 1.540(b)(1)-(3) within “one year after the judgment, decree, order or proceeding was entered or taken,” the court is without jurisdiction to grant relief under the rule. \(^{388}\) Although Rule 1.540(b) provides that motions under sub-

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385. Id. at 1025.
387. Id. at 841.
388. *See Marks*, 475 So. 2d at 274 (where a judgment debtor went bankrupt several years after a settlement and agreed final judgment was entered, and plaintiff moved to “correct and amend” judgment to add other names as judgment debtors, relief could not be obtained under Rule 1.540(b) because motion was untimely); *cf.*
section (b)(1), (2), and (3) must be made within one year, motions under subsection (b)(4) and (5) must be made "within a reasonable time." The requirement of reasonableness of time may no longer be applicable to motions alleging voidness for lack of jurisdiction. The Fifth District in Whigham v. Whigham explained that "a void judgment may be attacked 'at any time' because such judgment creates no binding obligation upon the parties, is legally ineffective, and is a nullity. Relief from judgment obtained through fraud upon a court may be sought later than one year by an independent action. 

The applicable standard of review of a grant or denial of relief under the rule is one of gross abuse of discretion. An order setting aside a judgment must be supported by a basis in the record. Under Rule 1.540, relief may be sought from a settlement, offer of judgment, or summary judgment. Relief may not be obtained merely because of a change in an applicable rule of law.

Chang v. Chang, 469 So. 2d 829 (Fla. 5th Dist. Ct. App. 1985) (divorce judgment entered in 1969 could be attacked by motion filed in 1982 alleging voidness for lack of jurisdiction because of ineffective service of process).

389. 464 So. 2d 674 (Fla. 5th Dist. Ct. App.), petition for review denied, 476 So. 2d 696 (Fla. 1985).

390. Id. at 676.

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


394. See Vantage Broadcasting Co. v. WINT Radio, Inc., 476 So. 2d 796 (Fla. 1st Dist. Ct. App. 1985) (error to deny defendant relief under Rule 1.540(b) where evidence failed to establish that his attorney had authority to settle claim); Mortgage Corp. of America v. Inland Constr. Co., 463 So. 2d 1196 (Fla. 3d Dist. Ct. App.), petition for review denied, 475 So. 2d 694 (Fla. 1985) (error to deny motion to vacate judgment made during pendency of appeal where parties reached settlement).

395. See BMW of North America, Inc. v. Volkswagen South, Inc., 471 So. 2d 585 (Fla. 4th Dist. Ct. App. 1985), petition for review denied, 484 So. 2d 7 (Fla. 1986) (no error in denial of relief from offered judgment which contained unilateral mistake as result of inexcusable lack of due care).

396. See Ratner v. Garson, 475 So. 2d 1294 (Fla. 3d Dist. Ct. App. 1985) (motion for relief from final summary judgment modifying indemnity agreement proper under 1.540(b)(5); however, no genuine issue of fact shown).

I. Introduction

The Florida Supreme Court during the Survey period of January 1 through November 30, 1985, decided cases involving a wide variety of contracts: insurance, antenuptial, employment, sale of goods, sale of real property, mortgage, option and settlement. The variety of clauses considered was also broad: covenants not to compete, due-on-sale, choice of law, and others.

Insofar as one emerges at all, two themes are discernible. First, the court appears strongly inclined to enforce contracts as the parties have written them. In 1985 it enforced contracts according to their literal terms despite lower court cases of long-standing, despite statutes that purported to amend such contracts, and in the face of public policy arguments of considerable force.

Second, a lawyer trained in the common law tradition will be surprised at the extent to which the cases reflect the growing impact of statutes on private contracts. Nearly half of the thirteen cases discussed in this article raised substantial statutory issues.

II. Contracts, Fraud and Duties to Disclose

Fraud, although a tort, is probably the most frequent ground upon which cancellation of a contract is sought.¹ Rules concerning fraud may be changed either by judicial decision or by legislation. The 1985 Florida cases include examples of both means. Two cases in this area
concern a contracting party's duty to disclose material facts to the other party to the transaction. In a third, the court reduced the standard of proof necessary to establish fraud.

A. Creation of a Duty to Disclose Material Defects: Johnson v. Davis

As recently as 1982, a Florida district court had upheld the traditional rule, generally called caveat emptor, that the seller of a home could remain silent as to material defects in the home without fear of liability. In Johnson v. Davis, the Florida Supreme Court unanimously imposed a new duty on the seller of a home: the duty to disclose to a purchaser material defects in the home. Where the new duty is not fulfilled, a purchaser injured by the seller's silence will have a cause of action in "fraudulent concealment."4

The case under review was brought by the Davises, the purchasers of the defendants' home. The Johnsons' home was three years old when in 1982, they entered into a contract with the Davises to sell it for over $300,000. The contract was signed and the Davises paid the $5,000 to the Johnsons. Before the next, larger down payment was made, Mrs. Davis noticed some ceiling stains and some buckling and peeling in the house, all suggesting water damage. When questioned, Mr. Johnson explained that these resulted from several causes, none having to do with the roof or water damage. The Johnsons assured the Davises that there were no problems with the roof.

The Davises then made an additional payment. Several days later Mrs. Davis discovered water "gushing" from at least five areas of the ceiling and windows, including the light fixtures. The roof in fact was full of "problems." The Davises sought rescission of the contract on the grounds of fraud and misrepresentation.

The court had little difficulty in finding that the Johnsons had committed fraud by representing that there were "no problems" with the roof. Since the second down payment had been made after this misrepresentation, traditional rules of fraud applied and restitution was granted.

3. 480 So. 2d 625 (Fla. 1985).
4. Id. at 629.
5. Id. at 626.
The more difficult question was whether the Davises should be able to recover the $5,000 payment made before the misrepresentation. The issue required the court to reconsider the traditional Florida rule that the seller of a home has no affirmative duty to disclose “latent material defects” to a buyer.

Like most common law jurisdictions, Florida had traditionally imposed liability for affirmative acts of deceit and harm (misfeasance) but not for simply remaining silent (nonfeasance). In *Johnson*, however, the court observed that both misfeasance and nonfeasance could result in a false belief and were therefore equally “violative of the principles of fair dealing and good faith. . . .”

Finding earlier Florida cases relying on caveat emptor “unappetizing,” the court noted that numerous other jurisdictions — including California, Illinois, and New Jersey — had rejected the caveat emptor tradition and imposed a duty on the seller of a home to disclose latent material defects. The court decreed that Florida should join these states, and accordingly laid down a new rule: “[W]here the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.”

The court added, “This duty is equally applicable to all forms of real property, new and used.” That is, both the developer-builder and the individual owner have the same obligation toward a purchaser.

Having formulated its new rule of law, the court held that the Davises were entitled to the return of the initial $5,000 deposit since “the Johnsons were aware of roof problems prior to entering into the contract of sale and receiving the $5,000 deposit payment.”

B. Antenuptial Agreements and the Duty to Disclose: *Stregack v. Moldofsky*

The result could hardly have been more different in *Stregack v. Moldofsky*. Here the supreme court held not only that prospective

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6. *Id.* at 628.
7. *Id.*
8. *Id.* The court referred specifically to *Banks*, 413 So. 2d at 851, and *Ramel*, 135 So. 2d at 876.
9. 480 So. 2d at 629.
10. *Id.*
11. 474 So. 2d 206 (Fla. 1985).
spouses in Florida have no duty of disclosure when entering into antenuptial agreements, but — more astoundingly — that even concealment or active misrepresentation will not invalidate such an agreement. That is, no cause of action exists by which a surviving spouse can seek to set aside an antenuptial agreement on the ground of fraud in the inducement.

Before their marriage, the Moldofskys had both signed a written agreement in which each waived all rights in the other’s estate. Mr. Moldofsky made no provisions for his wife in his will, inserting only a reference to the antenuptial agreement. When her late husband’s will was admitted to probate, Mrs. Moldofsky filed both for an elective share and cancellation of their antenuptial agreement. Mrs. Moldofsky alleged her husband had committed fraud at the time the agreement was signed by claiming that he had no assets when he in fact possessed assets worth approximately $250,000.12

The supreme court precluded Mrs. Moldofsky from pursuing her fraud action by strictly applying Florida Statute section 732.02, which provides that no disclosure of assets need be made before entering into an antenuptial agreement: “No disclosure shall be required for an agreement, contract, or waiver executed before marriage.”13 The statute was clear enough on its face, but the Third District Court of Appeal had held that one loophole existed — that disclosure itself need not be made but, where it was, it must be made truthfully.14 Mrs. Moldofsky alleged not that her husband had remained silent (failed to disclose) but that he had affirmatively misled her (made a false disclosure).

The supreme court brushed aside this distinction, saying that such an interpretation would reward the “silent spouse” but punish a spouse who “attempts” some disclosure.15 The court further stated that the legislative intent was clear: in Florida there is to be no duty of disclos-

12. Id.
13. FLA. STAT. § 737.702(2) (1983). The reader should note that the statute makes quite opposite provisions for postnuptial agreements: “Each spouse shall make a fair disclosure to the other of his or her estate if the agreement, contract or waiver is executed after marriage.” Id. (emphasis added).
14. See Moldofsky v. Stregack, 449 So. 2d 918, 920 (Fla. 3d Dist. Ct. App. 1984) (reversed in the case under discussion): “A would-be spouse is under no duty to make any disclosure. . . . The statute, however, cannot and should not protect one who voluntarily averts the truth and thereby misleads a party into contracting the marriage.”
15. 474 So. 2d at 207.
ure — truthful or otherwise — concerning antenuptial agreements.

Finally, the court did describe one ground upon which an antenuptial agreement could still be set aside in Florida. Where the surviving spouse had been misled as to the nature of the document being signed — for example, a marriage license application instead of an antenuptial agreement — cancellation of the antenuptial agreement may be sought.¹⁶

In a case of lesser significance, *Evered v. Edsell*,¹⁷ the court again faced a surviving spouse's challenge to an antenuptial agreement and again dismissed the suit. In this case, Mrs. Edsell sought to have an antenuptial agreement set aside on the ground of overreaching. The crucial issue here was the applicability of the Second District's *Lutgert* presumption. Under *Lutgert v. Lutgert*,¹⁸ once a spouse has submitted certain evidence suggesting unfairness,¹⁹ a presumption of undue influence or overreaching comes into existence. The presumption shifts the burden to the other spouse to show voluntariness. The supreme court held that *Lutgert* had no applicability in probate proceedings, apparently accepting petitioners' argument that such a presumption is not warranted in light of section 732.702.²⁰

Clearly, the court construes section 732.702 as a virtually impervious shield protecting antenuptial agreements from subsequent attack. In *Edsell*, as in *Moldofsky*, the court cited *Estate of Roberts*²¹ for the proposition that such an agreement may be set aside only on such narrow grounds as coercion, incompetence, or a signature "otherwise improperly obtained."²²

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¹⁶. *Id.* (citing *Estate of Roberts*, 388 So. 2d 216 (Fla. 1980)).  
¹⁷. 464 So. 2d 1197 (Fla. 1985).  
¹⁸. 338 So. 2d 1111 (Fla. 2d Dist. Ct. App. 1976). By its own terms, *Lutgert* had previously applied only to antenuptial agreements contested in a dissolution of marriage.  
¹⁹. Specifically, the spouse must: (1) demonstrate that an antenuptial agreement benefited one party in a grossly disproportionate manner, and (2) submit evidence that the circumstances surrounding the execution of the agreement were coercive. *Id.* at 1115-16.  
²⁰. 464 So. 2d at 1198.  
²¹. 388 So. 2d 216, 217 (Fla. 1980).  
²². 464 So. 2d at 1199 n.2.
C. Standard of Proof in a Fraud Case: Wieczorck v. H & H Builders, Inc.

The parties had already settled the case, but the supreme court nonetheless retained jurisdiction over Wieczorck v. H & H Builders, Inc. in order to clarify a murky but highly significant area of law: the standard of proof applicable in a fraud action. Specifically, the question presented was whether in an action seeking equitable relief, fraud need be proven by only a preponderance of the evidence or by clear and convincing evidence.

The court chose the former standard. Fraud, in Florida, need be proven only by a preponderance or the “greater weight” of the evidence, not necessarily by “clear and convincing” evidence. The Wieczorck opinion is cryptic and scarcely addresses the rationale for this decision. The court did, however, cite and rely on the 1981 case of Rigot v. Bucci, in which it had adverted briefly to the historical development of differing standards for actions at law and actions in equity. The Rigot court found that, since the “law and equity sides of the court” had been merged in modern times, there was no longer “sound reason” for a distinction concerning the proof requisite to establish fraud.

As Justice Overton noted in his dissent in Wieczorck, the holding represents a “substantial modification of a well-established rule of law.” Justice Overton also stressed the potential practical disadvantages of the newly-clarified rule. The traditional requirement of “clear and convincing evidence” in equity was based upon “the need for strength and reliability of written agreements in the market place.” The older rule had also recognized that equitable remedies with respect to written documents — cancellation, reformation, rescission — are

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23. 475 So. 2d 227 (Fla. 1985).
24. The court had created uncertainty by its own conflicting pronouncements in the past. Id. at 228. In 1971, in Rigot v. Bucci, 245 So. 2d 51 (Fla. 1971), the court held that “only a preponderance or greater weight of the evidence is required to establish fraud, whether the action is at law or in equity.” Id. at 53. Much more recently, however, the court had stated that “proof of fraud must be by clear and convincing evidence.” Canal Authority v. Ocala Mfg., Ice and Packing Co., 332 So. 2d 321, 327 (Fla. 1976).
25. 475 So. 2d at 228.
26. 245 So. 2d at 51.
27. Id. at 52-53.
28. 475 So. 2d at 228 (Overton, J., dissenting).
generally regarded as "much harsher" than the award of mere damages.\textsuperscript{29}

The dissenting justice predicted unfortunate consequences would flow from the new standard, urging that "the strength, reliability, and viability of written documents" in property and commercial transactions would be substantially weakened.\textsuperscript{30}

II. Commercial Contracts: Parties' Choice of Law, Private Limitations Period and Public Policy

The case of \textit{Burroughs Corp. v. Suntogs of Miami, Inc.}\textsuperscript{31} is of interest for at least two reasons. First, it has important implications for the Florida lawyer drafting a commercial contract for an interstate transaction. The second reason is related: \textit{Burroughs} presented the supreme court with the year's only major Uniform Commercial Code issue.

Specifically, \textit{Burroughs} set up a conflict between two provisions of Florida law. A provision of the Florida UCC permits contracting parties to agree that the law of another state will apply to their transaction; another Florida statute specifically prohibits the parties from contractually diminishing the Florida period of limitation of actions. What happens when the parties choose the law of another state and then agree, in accordance with the laws of that state, to a diminished limitations period?

The Burroughs Corporation, a Michigan entity, had sold computer equipment to a Florida clothing manufacturer, Suntogs of Miami. The written sales contract stipulated, \textit{inter alia}, that the law of Michigan would govern the effect and interpretation of the contract. It also contained a two-year limitation of action provision, as is specifically sanctioned by Michigan law.\textsuperscript{32}

Suntogs subsequently found that the computers did not function as expected, and eventually ceased using them. It did not, however, bring its suit against Burroughs within two years of the accrual of its cause of action, as required by the contract. Thus, its contractual cause of action would be dismissed if the Florida courts upheld the validity of the choice of Michigan law and, in particular the two-year limitations

\textsuperscript{29} \textit{Id.} at 229.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} 472 So. 2d 1166 (Fla. 1985).
\textsuperscript{32} \textit{Id.} at 1167 (citing MICH. COMP. LAWS, § 440.2725 (1970)).
period grounded in Michigan legislation.

Each party was able to marshall Florida law to its support. On the one hand, Burroughs invoked Florida commercial legislation which explicitly permits parties to choose the law of another state so long as that state bears a "reasonable relation" to the transaction.\textsuperscript{33} The provision was facially applicable here, as Michigan was clearly "reasonably related" to the contract. And, its law unquestionably permitted parties to choose a two-year limitations period.

Suntogs, on the other hand, relied on two Florida statutes in support of its position that the court should deny enforcement of the contractual limitations clause. One provision renders void any contractual limitations period shorter than that provided by the applicable Florida statute of limitations;\textsuperscript{34} the applicable statute, in turn, provides for a five-year limitations period.\textsuperscript{35}

Faced with these conflicting results, the district court plausibly held that (a) the choice of Michigan law in general was permissible, but that (b) the Florida statute of limitations embodied a "strong public policy" and therefore took precedence in Florida over the more flexible Michigan provisions.\textsuperscript{36}

The supreme court reversed and ruled the shorter period enforceable. In order to reach this result, the court first turned to a rather elaborate test for identifying "strong public policies."\textsuperscript{37} Applying it to the

\textsuperscript{33} \textbf{FLA. STAT.} § 671.105(1) (1975) is part of the Florida version of the Uniform Commercial Code. That section provides: "[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." (Emphasis added).

This "party authority" principle has been approved by the Florida Supreme Court in Morgan Walton Properties, Inc. v. Int'l City Bank & Trust Co., 404 So. 2d 1059 (Fla. 1981), and Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507 (Fla. 1981).

\textsuperscript{34} \textbf{FLA. STAT.} § 95.03 (1975) renders void any contractual limitations period shorter than that provided by the applicable statute of limitations.

\textsuperscript{35} \textbf{FLA. STAT.} § 95.11(2)(b) (1975), provides a five-year limitations period for actions based on written contracts.

\textsuperscript{36} See Suntogs of Miami, Inc. v. Burroughs Corp., 433 So. 2d 581, 584 (Fla. 3d Dist. Ct. App. 1983), rev'd, 472 So. 2d at 1166 (holding that § 95.03 expresses a "strong public policy" of the State of Florida, so as to prevail over the "party autonomy").

\textsuperscript{37} \textit{Burroughs}, 472 So. 2d at 1168. The court had previously elaborated and applied this test in \textit{Continental Mortgage}, 395 So. 2d at 509-10.

The \textit{Burroughs} court found that the legislation on limitations periods failed every part of the test for a "strong public policy." Primary among the criteria used for identi-
statutes at issue, the court held that the limitations provisions of Florida law do not embody a "strong policy."  

The court did not, however, end its analysis there. It added that the Florida limitations provisions "must be read in pari materia with other [Florida] laws," in particular commercial legislation. In permitting parties to choose the laws of another state to govern their rights and duties, the legislature "recognized the need for parties to interstate commercial transactions to know in advance which state's laws were to apply. . . . This advance knowledge serves to reduce confusion and encourage quicker, easier resolutions." The court held, then, that the contractual provision shortening the period for bringing a suit was fully enforceable in Florida.

By virtue of its adoption of the Uniform Commercial Code, Florida law had previously granted to parties to a contract for the sale of goods the right to have their contract interpreted according to the law of a state bearing a "reasonable relationship" to the transaction. Through Burroughs, the court has made clear that parties may adopt the limitations provisions of such a state as well.

III. Insurance Contracts

A. Unconstitutional Impairment of Contracts: State Farm Mutual Automobile Insurance Co. v. Gant

The Supreme Court invoked the prohibition against the impairment of contracts contained in the Florida Constitution in State Farm Mutual Automobile Insurance Co. v. Gant. In consequence, it upheld the strict terms of an automobile insurance policy and refused to apply a Florida statute purportedly changing the terms of the policy.

The parties in Gant were a well-known insurance company and the holders of two insurance policies. Defendant State Farm insured the Gants' automobiles under two separate policies. By their express terms,
the policies forbade "stacking" of uninsured motorist coverage — that is, cumulating the coverage of both policies in recovering for a single automobile accident.

The Gants sought to overcome the language of the two contracts by relying on a Florida legislative enactment\(^{43}\) which allows an insured to cumulate ("stack") uninsured motorist coverage. State Farm pointed out that the legislation had not come into effect until after the policies were issued. Since stacking would greatly increase the company's liability to the Gants, State Farm argued that the legislation impaired its obligations of contract in violation of the Florida Constitution.\(^{44}\)

The potential effect of the legislation on State Farm's obligations was substantial. If the policies were enforced according to their terms, State Farm would owe the Gants nothing, having already paid the maximum recovery allowable on one of the policies.\(^{45}\) However, if the post-policy legislation were applied, the coverage would stack and the company would be liable for an additional $30,000 to $100,000.\(^{46}\)

The supreme court held that the Florida Constitution prohibited application of the newly-amended statute to the contracts in issue. Any other result would "violate the constitutional restriction on the impairment of contracts" by subjecting State Farm to a "loss exposure" entirely unforeseeable at the time it had issued the two policies.\(^{47}\)

The Gant case does not break new ground in Florida law, as the impairment-of-obligations clause has been applied before under conceptually similar circumstances.\(^{48}\) Its immediate interest lies, of course, in the application of the clause to this particular type of insurance policy. More generally, perhaps, Gant has a fascination of its own as an example of that relatively rare breed, a true impairment of the obligations of a contract.

\(^{43}\) The legislation at issue consisted of an amendment, effective October 1, 1980, to Fla. Stat. § 627.4312. Prior to the effective date of this amendment, stacking was prohibited.

\(^{44}\) Fla. Const. art. I, § 10, provides: "Prohibited laws. — No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

\(^{45}\) 478 So. 2d at 26.

\(^{46}\) A secondary issue of the proceeding below was whether the uninsured motorist coverage of the second policy should be $100,000 per accident or the $30,000 listed. The Gants alleged that they had not knowingly rejected the higher limit. Id.

\(^{47}\) 478 So. 2d at 27.

\(^{48}\) The court found that Gant was controlled by its earlier decision in Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978) (then-new anti-stacking statute inapplicable to insurance policy which specifically provided for stacking).
B. Breach of Notice Clauses: Bankers Insurance Co. v. Macias

The Macias case, like Gant, is certain to gladden the hearts of Florida insurance counsel. In Bankers Insurance Co. v. Macias, the Florida Supreme Court held that a presumption of prejudice to an insurance company arises when an insured fails to give timely notice of an accident to the company, in breach of the policy's express terms.

Ms. Macias personal injury policy required that she give her insurer notice of an auto accident within a stated period. She was injured in an accident in 1980, but the insurer was not notified until Ms. Macias brought a declaratory judgment against it two years later.

The supreme court ruled that in Florida the insurer is presumed to have been prejudiced when the insured has not complied with the notice requirement of an insurance contract. Under this presumption, the burden is placed on the insured to rebut the presumption — in other words, to show that no prejudice to the insurer has occurred. Since plaintiff Macias failed to present any evidence on the prejudice issue, judgment had properly been entered against her.

Apart from this primary holding, two additional features of the opinion are noteworthy. First, the court acknowledged that its decision was contrary to the "modern trend" under which breach of the notice clause is disregarded except where the insurer can show that "substantial prejudice" resulted. Here the court particularly noted the purpose of the notice provision — to enable the insured to conduct a "timely and adequate investigation of all circumstances surrounding the accident." Plaintiff Macias, through her failure to give notice, had deprived State Farm of the opportunity to conduct any investigation into her claims.

The court also indulged in a bit of dicta based on the classic contract distinction concerning "conditions precedent" to a contractual obligation and "conditions subsequent." Very different procedural consequences flow depending on what type of condition has been breached. According to the court, the party seeking to avoid a condition precedent, such as a notice requirement, should have the burden of showing

49. 475 So. 2d 1216 (Fla. 1985).
50. Id. at 1218.
51. Id. ("If the insured breaches the notice provision, prejudice to the insurer will be presumed, but may be rebutted by a showing that the insurer has not been prejudiced by the lack of notice."). Id.
52. Id. (citing Annot., 32 A.L.R. 4TH 151 (1984)).
lack of prejudice if he or she has failed to fulfill the condition. This rule was, of course, applied to Macias.

The rule is otherwise, the court added, for a condition subsequent — for example, the cooperation clause of an insurance policy. There, the party seeking to avoid liability (an insurer, for example) will bear the burden of affirmatively showing prejudice due to the other party’s failure to fulfill the condition subsequent.

C. Intended verses Incidental Beneficiaries: Metropolitan Life Insurance Co. v. McCarson

The greatest significance of Metropolitan Life Insurance Co. v. McCarson unquestionably sounds in tort, for here the Florida Supreme Court recognized for the first time the tort of intentional infliction of emotional distress. A supreme court dictum on the contracts issue, however, may come as “a surprise and disappointment” in future contracts cases in the State.

Briefly, the court in McCarson said that in Florida dependents covered by a group medical insurance policy are “incidental” and not intended beneficiaries of the insurance contract. A dependent who is wrongfully denied coverage under such a policy will, therefore, have no independent cause of action against the insurer.

IV. Contractual Issues and Employees

The supreme court decided two cases involving contracts of employment. In the first, it dealt with the contract status of special employees supplied by a temporary agency, and the second with temporary injunctions upholding covenants not to compete.

A. Contract Status of Employee Supplied by Temporary Agency: Booher v. Pepperidge Farm, Inc.

The case of Booher v. Pepperidge Farm, Inc. stands alone in this

53. Macias, 475 So. 2d at 1217-18.
54. Id. at 1218.
55. 467 So. 2d 277 (Fla. 1985).
56. Id. at 281 (Shaw, J., concurring in part and dissenting in part).
57. Id. at 278-80 (“It is axiomatic in contract law that an incidental beneficiary cannot enforce the contract.”). Id.
58. 468 So. 2d 985 (Fla. 1985).
article as the sole case in which the supreme court held ineffective the express language of a contract. Faced with the question whether a temporary employee was an “employee” for worker’s compensation purposes, the court held that the facts and circumstances surrounding the employment take precedence over contractual language designed to determine the issue.

The plaintiff, Mr. Booher, had sued Pepperidge Farm in tort for injuries he sustained while working as a temporary employee on Pepperidge Farm’s premises. The company’s ordinary employees would, of course, be barred from bringing such a suit due to the worker’s compensation statute. However, Mr. Booher had been provided to Pepperidge Farm as a temporary employee by Dixie Driving Service, an agency in the business of providing employees on a temporary basis.

Mr. Booher insisted he was employed by Dixie and not by Pepperidge Farm. He relied in great part on the written agreement between the agency and Pepperidge Farm, which provided that Mr. Booher would remain the agency’s employee “for all purposes.” If enforced, the contractual language would permit the suit against Pepperidge Farm to go forward.

The supreme court found that, regardless of the language used in the contract, Mr. Booher had consented to an implied contract of hire with Pepperidge Farm and thus became its employee for purposes of the worker’s compensation statute. Here, “[t]he actual employment relationship” should control. Neither the written contract nor the subjective intent of the parties could overcome the facts.

Although it affirmed the lower court’s decision, the supreme court pointedly did not adopt that forum’s suggestion that virtually any temporary employee is barred from suing his special employer for on-the-job injuries. Rather, the supreme court appears to have retained the test previously established in the cases for determining the question. Under that test, the primary issue is whether the temporary employee has consented, expressly or impliedly, to a contract of hire with the non-agency employer. Booher does not amend the earlier case law.

59. Florida’s Worker’s Compensation statute limits an employer’s liability to payment of worker’s compensation benefits. FLA. STAT. § 440.11 (1985).
60. See Pepperidge Farm v. Booher, 446 So. 2d 1132, 1132-33 (Fla. 4th Dist. Ct. App. 1984), rev’d, 468 So. 2d at 985.
61. 468 So. 2d at 985.
62. See Booher, 446 So. 2d at 1133.
63. See, e.g., Shelby Mut. Ins. Co. v. Aetna Ins. Co., 246 So. 2d 98, 101 (Fla. 1971); Stuyvesant Corp. v. Waterhouse, 74 So. 2d 554 (Fla. 1954). See also Rainbow
but establishes instead that the facts of the case will prevail over any attempt by the employers to control the outcome through their written agreement.

B. **Temporary Relief for Violation of Covenant Not to Compete: Capraro v. Lanier Business Products, Inc.**

In *Capraro v. Lanier Business Products, Inc.* the court approved a presumption of "irreparable injury" to an employer seeking temporary relief against a former employee who violates a covenant not to compete. Thomas Capraro, the defendant, had been employed by plaintiff Lanier Business Products. His written contract with Lanier contained a covenant that Capraro would not engage in "competition" with Lanier for one year after leaving their service. Subsequent to leaving Lanier, Capraro violated the terms of the covenant and Lanier sought a temporary injunction.

Underlying the lawsuit was a Florida statute sanctioning covenants not to compete and permitting enforcement by injunction. In preliminary proceedings, Lanier adequately alleged a valid covenant and breach by Capraro. The remaining pre-trial issue was whether "irreparable injury" could be presumed or whether Lanier had to shoulder the burden of proving such injury in order to have Capraro enjoined from pursuing his new employment.

The supreme court affirmed the lower court's holding that irreparable injury to Lanier would be presumed. To force the employer to wait until irreparable injury had occurred, said the court, would often "defeat the purpose" of both the covenant and the action. Where suit is brought on an anti-competition covenant, "[i]mmediate injunctive relief is [of] the essence."

Justice Overton's dissent is valuable in that it points out the degree to which Florida law will protect an anti-competition agreement, in derogation of the common law rule. Defendant Capraro, for example, had sold only one kind of product for Lanier and his sales territory had

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64. 466 So. 2d 212 (Fla. 1985).
66. 466 So. 2d at 213.
67. Id.
68. Id. at 213-14 (Overton, J., dissenting).
been confined to just one Florida county. The covenant in issue not only prohibited Capraro from selling an entire array of products, but also designated a five-county area as prohibited territory. Nonetheless, the temporary injunction was issued.

Given the equities of this particular case, Justice Overton thought that "At the very least, the employer should be required to prove that irreparable harm will result to his business if a former employee is allowed to work in a new territory not serviced by him in his prior employment." The justice also entered a plea that the legislature "modify or repeal" the state's law so that judges would be free to apply proper equitable principles to anti-competition agreements such as this one.69

V. Miscellaneous

Several other cases decided by the court during the Survey period are worthy of mention both for their individual holdings and as illustrations of the court's strong tendency to enforce contracts as written.

A. Due-on-Sale Clause in a Mortgage: Weiman v. McHaffie

In Weiman v. McHaffie70 the Florida Supreme Court held that a due-on-sale clause in a mortgage is enforceable in Florida. In order to reach this result, the court was required to disapprove the earlier Lockwood rule that a due-on-sale clause was enforceable only if the mortgage lender could show impairment of security resulting from the sale to another party.71 The Lockwood rule requiring impairment of security prior to enforcement was based on a balancing of equities and public policy.

The supreme court appeared to agree with none of the reasoning

69. Id. at 214. Justice Overton had made the same plea, namely, that the legislature modify or repeal § 542.33, in an earlier case. See Keller v. Twenty-Four Collection, Inc., 419 So. 2d 1048, 1050-51 (Fla. 1982) (Overton, J., dissenting).

70. 470 So. 2d 682 (Fla. 1985). Note that the court in Weiman also answered a question certified to it by the First District Court of Appeal involving the applicability in Florida of the provision concerning due-on-sale clauses of the federal Garn-St. Germain Depository Institutions Act, Pub. L. No. 97-320. 12 U.S.C. §§ 1701 et seq. (1982). Not only is that portion of the opinion beyond the scope of this article, but the court's holding in Weiman that such clauses are enforceable in Florida renders its discussion of Garn-St. Germain essentially academic.

behind Lockwood. Rather, it thought that the application of the impairment rule might enable an individual mortgagor to avoid a reasonable contract provision, and thus work an injustice to a given mortgage lender.\textsuperscript{72} Apart from creating unfairness at the individual level, the court predicted that judicial refusal to enforce due-on-sale clauses could also result in a shortage of mortgage money in Florida, with negative consequences for both buyers and sellers in the state and for the economy of Florida as a whole.\textsuperscript{73}

At least one other case on the court's 1985 calendar was disposed of by reference to Weiman,\textsuperscript{74} and presumably other cases and controversies now current in the state will also be settled by application of that decision.

\textbf{B. Gifts of Real Property to Non-Relatives: Chase Federal Savings and Loan Association v. Schreiber}

According to the dissenting opinion of Justice Overton, the supreme court in \textit{Chase Federal Savings and Loan Association v. Schreiber}\textsuperscript{75} created a "gigolo-mistress relief rule."\textsuperscript{76} A judicial opinion calling forth such a ringing condemnation is surely worthy of brief examination.

The \textit{Schreiber} plaintiff had, as a woman ninety years of age, transferred title to her home to a much younger man. The deed recited that "[t]his quitclaim deed is being given with the consideration being love and affection." The younger man in turn had sold the property to third parties for $50,000, after which the elderly grantor sought cancellation of both her deed of gift and the deed of sale to the third parties.\textsuperscript{77}

The issue presented was whether "a deed given to a non-relative in return only for "love and affection" is without consideration" and therefore invalid, as was held by the court below.\textsuperscript{78} The supreme court's

\begin{itemize}
\item \textsuperscript{72} Weiman, 470 So. 2d at 684.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Pioneer Fed. Sav. & Loan Ass'n., 474 So. 2d 783 ( Fla. 1985) (in \textit{Weiman} "we held that due-on-sale clauses are en
corceable in Florida").
\item \textsuperscript{75} 479 So. 2d 90 (Fla. 1985).
\item \textsuperscript{76} Id. at 104 (Overton, J., concurring in part and dissenting in part).
\item \textsuperscript{77} Id. at 94.
\item \textsuperscript{78} Id. at 95-96. In its discussion the supreme court cited and quoted from both Florida Nat'l Bank & Trust Co. v. Havris, 366 So. 2d 491, 496 (Fla. 3rd Dist. Ct. App. 1979), and Schreiber v. Chase Fed. Sav. & Loan Ass'n, 422 So. 2d 911 (Fla. 3rd Dist. Ct. App. 1982) (en banc). The latter opinion had in turn adopted an earlier dis-
examination of the issue took it back to the recondite origins of the so-called "English rule" on which the lower court had relied and to the Statute of Uses of 1535 from which it is derived. Although clearly fascinated with the arcana of both the rule and the Statute, the court could find no basis in Florida equitable principles or in the state's legislation for making consideration an absolute prerequisite to a binding deed.

On these and other grounds, the court concluded that lack of consideration does not by itself make voidable a gift of real property to a non-relative. Rather, lack of consideration in such circumstances should be merely a factor "to be considered along with others in deciding whether fraud, undue influence, violation of confidence or unconscionable advantage exists." The court cautioned that its opinion should not be construed too broadly, and did not "in any way affect the existing law of Florida" requiring consideration to support contractual undertakings. Rather, the court held only that "a deed, sufficient in form, voluntarily executed by a competent grantor, is effective to convey the owner's legal title regardless of whether he receives a contractual consideration."

Despite the court's care in thus circumscribing its holding, Justice Overton issued a dissent which surely ranks among history's most sharply worded: "In my view the majority's decision provides a means to protect title for gigolos, mistresses, and con artists, and alters four and one-half centuries of common law in the process." He saw — perhaps correctly — the decision as likely to have extremely negative effects on "the aged, infirm, and semiliterate members of our society" for whom protective principles of law would no longer be in force.

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79. _Schreiber_, 479 So. 2d at 97-99.
80. _Id._ at 100.
81. _Id._ at 99 (quoting 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 11.01 (1984)).
82. _Id._ at 101.
83. _Id._
84. _Id._ at 102 (Overton, J., concurring in part and dissenting in part).
85. _Id._ at 104.

Another case reviewed by the court presented a quite tantalizing issue under the rather dull garb of a contractual right of first refusal. The plaintiffs in Robinson v. Central Properties, Inc. alleged that strict interpretation of their right of first refusal would effectively eviscerate the right. They argued that the contractual language should be construed expansively so as to protect their opinion. The supreme court rejected the argument, stating rather pointedly that parties will be held to the "unambiguous" language of their contracts.

Under the contract at issue, plaintiff Central Properties had a "right of first refusal" with respect to the defendant-optionor's water and sewer system. The optionor's stockholders proposed to transfer the system to another party but not through the direct means of an outright sale. Rather, they were exploring transfer through an indirect means, namely sale of their capital stock. Since the company's primary asset was the water and sewer system, a sale of the stock was tantamount to a sale of the system itself.

As holder of the option, Central Properties brought a suit premised on the notion that, under the circumstances, its right of first refusal should extend to the stock transfer. The lower court accepted this reading of the contract, since otherwise the purpose of the right of first refusal "could be circumvented quite easily."

The supreme court, however, agreed with the optionor that the contract right could not be extended beyond its literal terms. Here, the contractual language was unambiguous: the right of first refusal referred to the water and sewer system, and made no reference at all to the corporate stock. The contract contained no language upon which an expansive reading could be based, nor any wording that rendered the optionee's right ambiguous. Therefore, the right of first refusal was restricted to the water and sewer system; Central Properties was helpless to prevent the transfer of the system by sale of the stock.

As to Central Properties' argument that this holding allowed the optionor's shareholders to "frustrate and circumvent" the purpose of the option contract, the court found "no merit" in the contention: "the parties were free at the time of entering into the contract to extend the

86. 468 So. 2d 986 (Fla. 1985).
87. Id. at 988.
88. Id. at 987.
89. Id.
right of first purchase to stock sales and transfers. . . .”

The case sounds a clear warning to draftsmen of Florida contracts to anticipate at the outset the various means through which a contractual purpose may be undercut. The warning may, however, be one which the human drafter of a contract is simply unable fully to heed: to foresee and make provision for the twists and turns that fate will present during the lifetime of the document.

D. Settlement Agreements: Robbie v. City of Miami

It seems fitting that a review of Florida contracts cases should end—as do the great majority of lawsuits—with a settlement agreement. The supreme court reviewed a disputed settlement agreement in Robbie v. City of Miami.

The court upheld the agreement and, in doing so, reiterated several well-established black-letter principles. For example, settlements are “highly favored” and will be enforced “whenever possible.” Their existence as enforceable agreements is, moreover, to be determined by an “objective test” which looks to “external signs” rather than to a subjective meeting of the minds.

More pertinently to the case under review, the court held that a settlement becomes enforceable when objective evidence shows that the parties have said the same thing as to the “essential elements” of the agreement, regardless of whether agreement has been reached on all “contingencies.” The court cited with approval an earlier case where it had written: "Even though all the details are not definitely fixed, an agreement may be binding if the parties agree on the essential terms and seriously understand and intend the agreement to be binding on them.”

If ever a term represented a contingency, it was the disputed provision in the Robbie agreement. The Miami Dolphins and the City of Miami had agreed to settle a contract dispute concerning the Dolphins’ use of the City’s stadium. At the last minute, the Dolphins objected to a single term of the agreement: the amount the team would owe if an

90. Id. at 988.
91. 469 So. 2d 1384 (Fla. 1985).
92. Id. at 1385 (citing Pearson v. Ecological Science Corp., 522 F.2d 171 (5th Cir. 1975), cert. denied, 425 U.S. 912 (1976), and Blackhawk Heating and Plumbing Co. v. Data Lease Fin. Corp., 302 So. 2d 404 (Fla. 1974)).
93. Blackhawk Heating, 302 So. 2d at 408.
“Act of God” prevented it from playing the last game of the season. The court’s approach to the problem was extremely practical — the settlement would be enforced; if an Act of God prevents the last game from being played, “the parties can litigate” the Dolphins’ liability.94

The Robbie opinion does not expand, but certainly affirms the principle that Florida courts will enforce settlements even when some terms are still open, so long as the “essential elements” have been agreed upon.

VI. Conclusion

The contracts cases of the Survey period are not necessarily typical of the supreme court’s rulings in any given year. Taken by themselves, however, the 1985 cases do reveal a single overwhelming trend: enforcement of consensual agreements according to their terms, against all manner of inducements to the contrary. The Florida Supreme Court showed itself careful to protect the expectations of the parties, highly respectful of the legislature, yet individualistic in its own approach. Undoubtedly the single greatest change in Florida contract law for 1985 comes out of Johnson v. Davis,95 the landmark case in which the court overruled centuries of common law to create a duty of disclosure in sale-of-home transactions.

94. Robbie, 469 So. 2d at 1386.
95. 480 So. 2d 625 (Fla. 1985). See supra notes 2-10 and accompanying text.
This article will survey decisions of the Florida Supreme Court during 1985 which dealt with substantive criminal law issues in three important areas: (1) criminal offenses, (2) lesser included and multiple offenses, and (3) defenses to crimes. Obviously, all cases addressing substantive criminal law issues are not included. Those that are included represent certain important (though sometimes quite narrow) changes in Florida’s substantive criminal law, or are representative of the Florida Supreme Court’s focus and direction with regard to the issue considered.

I. Criminal Offenses

(1) Escape. In *State v. Ramsey*, the court addressed the issue of whether Florida Statute section 944.40 is violated when an arrested but unhandcuffed suspect escapes a police officer before being placed in the police car. The Fifth District Court of Appeal had reversed Ramsey’s conviction, concluding that in order to come within the statute the escape must occur while the prisoner is being transported. In quashing the district court of appeal decision, the supreme court ap-
proved the holding of *State v. Akers*,\(^4\) from the Second District Court of Appeal, which was in conflict. *Akers* held that to come within the escape statute the state need show only (1) the right to legal custody and (2) a conscious and intentional act of the defendant in leaving the established area of such custody.\(^5\)

The court went on to address the meaning of the words "being transported to or from a place of confinement" as found in the statute. In this regard the court noted that one who meets the definition of "prisoner," as found in Florida Statute section 944.02(5),\(^6\) is at the time he becomes a prisoner "being transported to a place of confinement." As if to underscore the resoluteness of its decision, the court held that even if the words of the statute did not lend themselves to this interpretation, it would reach the same conclusion based on the purpose of the legislature in enacting the law. That intent, according to the court, was "to prevent lawfully arrested prisoners from escaping the custody of the arresting officer."\(^7\)

(2) Attempted Manslaughter. *Tillman v. State*\(^8\) was an interesting case in which the supreme court ruled that an issue on appeal had not been properly preserved during the trial, but then went ahead and considered it anyway. Tillman was convicted of second degree murder, attempted manslaughter and carrying a concealed firearm. The defense argued against the trial court's entering judgment on the attempted manslaughter conviction, since there was no such offense under Florida law. The judge disagreed and entered judgment on the three verdicts.

On appeal, Tillman raised, among others, the issue of the existence of the crime of attempted manslaughter. The district court of appeal affirmed all three convictions\(^9\) and certified to the Florida Supreme Court the question of the existence of the crime of attempted man-
slaughter as being of great public importance.\(^{10}\)

In *Taylor v. State*,\(^{11}\) an opinion written after the district court of appeal affirmed Tillman's conviction, the supreme court stated that there was a crime of attempted manslaughter in Florida, but such a conviction "must be based on proof of an act . . . with the requisite criminal intent and may not be based on mere culpable negligence."\(^{12}\) In his brief to the supreme court, Tillman recognized that *Taylor* was controlling but argued that he should get a new trial on the attempted manslaughter count because of doubts about the evidence and the jury's interpretation of it in light of the *Taylor* limitations.

Chief Justice Boyd, writing for a unanimous court approving the district court of appeal's decision, stated that since Tillman had raised no objection to the jury instructions which were given by the trial court concerning the offense of attempted manslaughter, the issue was not properly preserved for appeal. Moreover, the court went on to say that after reviewing the record, there was sufficient evidence to support the conclusion that Tillman had acted with the requisite criminal intent and not with mere culpable negligence.\(^{13}\)

*Tillman* stands for the proposition that attempted manslaughter is a prosecutable offense in Florida, but conviction must be based on a showing of criminal intent and not mere culpable negligence.

(3) Drugs and Narcotics. *Way v. State*\(^{14}\) concerned the required elements of proof for a proper conviction of trafficking in cocaine under Florida Statute section 893.135(1)(b)(1).\(^{15}\) During Way's trial, the court instructed the jury that in order to find Way guilty, they must find that the state proved beyond a reasonable doubt that Way knowingly sold, delivered or possessed a certain substance; that he knew the substance was cocaine or a mixture containing cocaine; and that the quantity of the cocaine involved was twenty-eight grams or more. Way requested that the jury be instructed that it could vote for conviction only if the state proved that Way knew that the cocaine he possessed

\(^{10}\) *Id.* "Is there a crime of attempted manslaughter under the statutes of the state of Florida?" *Id.*

\(^{11}\) 444 So. 2d 931 (Fla. 1983).

\(^{12}\) *Id.* at 934.

\(^{13}\) *Tillman*, 471 So. 2d at 35.

\(^{14}\) 475 So. 2d 239 (Fla. 1985).

\(^{15}\) FLA. STAT. § 893.135(1)(b)(1) (1983) provides: "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine . . . is guilty of a felony of the first degree, which felony shall be known as 'trafficking in cocaine.'"
weighed twenty-eight grams or more; the judge refused the instruction. Way was convicted and sentenced to three years imprisonment.

The district court of appeal affirmed,16 expressly approving the jury instructions given, and certified to the supreme court the question of the requirement of proof of the defendant’s knowledge of the weight of the cocaine.17

In a unanimous opinion, the supreme court approved the district court of appeal’s decision. Justice Overton, writing for the court, stated that the statute requires proof of knowledge of the substance possessed, but not proof of knowledge of its weight. “The word ‘knowingly’ as used in the statute,” the court stated, “modifies only the possession element of the offense and not the quantity.”18

(4) Grand Theft (of a motor vehicle). The facts in *Davis v. State*19 can be briefly stated. Davis attempted to purchase a $23,000 Mercedes-Benz automobile by means of a worthless check, and was thereafter charged with first-degree grand theft under Florida Statute section 812.014(2)(a) (theft of property with a value of $20,000 or more). Davis moved to dismiss the information, arguing that he could only be charged with second degree theft under Florida Statute section 812.014(2)(b) (theft of a motor vehicle). His argument was based on *State v. Getz*,20 in which a conviction for grand theft of the second degree by stealing a firearm was upheld notwithstanding the defendant’s contention that a firearm of a value less than $100 must be prosecuted under the petit theft statute. According to Davis, since *Getz* says a firearm is a firearm, regardless of value, then an automobile is an automobile, regardless of value — and theft of an automobile must be charged as theft of “an automobile,” and not theft of an item “of a value of $20,000 or more.” A majority of the supreme court found Davis’ reliance on *Getz* misplaced. While the legislature chose not to make value an element of proof in certain named thefts (including firearms and motor vehicles), it does not follow that the legislature has not given the state discretion to make proof of value an element in more serious thefts. Thus, the court held that the state could prosecute Davis for

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17. “It is proof that a defendant knows that the weight of the substance possessed equals 28 grams or more essential in obtaining a conviction under section 893.135(1)(b)?” Id. at 882.
18. Way, 475 So. 2d at 241.
19. 475 So. 2d 223 (Fla. 1985).
20. 435 So. 2d 789 (Fla. 1983).
grand theft in the first degree and assume the burden of proving that the value of the motor vehicle was $20,000 or more. The majority opinion would appear unassailable in logic and reason; yet, interestingly and surprisingly, three justices dissented, supporting Davis' position.\(^2\)

(5) Retail Theft. In *Emshwiller v. State*, a case of interest but of narrow scope, the supreme court answered the question of whether or not "retail theft" was a separate crime from other theft. Relying on *Tobe v. State*, Emshwiller argued that retail theft of merchandise is a separate crime from other theft and that a conviction under the retail theft statute is necessarily a second-degree misdemeanor. The supreme court disagreed. Retail theft under Florida Statute section 812.015 is a species of the theft defined in section 812.014, not a separate crime for penalty purposes. The court noted that section 812.015 does not contain a penalty provision for first offenses, but merely provides for enhanced penalties for second or subsequent convictions for theft of merchandise or farm produce.\(^25\) Language in *Tobe* to the contrary was disapproved.

Another issue addressed by the court in the case involved the determination of value. Emshwiller had requested a jury instruction that "market value" was "what a willing seller is willing to accept and a willing buyer is willing to pay when neither is compelled to sell or buy." Instead, the trial judge instructed that the value was determined by the sale price at the time the merchandise was stolen. The supreme court approved the instruction of the trial judge. According to the court, market value is the same as the retail price where the theft is from a department store and salability at the retail price is established.\(^26\)

(6) Burglary. The supreme court reviewed three cases in 1985 involving the burglary "presumption of intent" found in Florida Statute section 810.07. The resulting opinions clarified the function and use of the statute in burglary prosecutions.

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21. *Davis*, 475 So. 2d at 224.
22. *Id.* at 225.
23. 462 So. 2d 457 (Fla. 1985).
26. *Id.*
27. FLA. STAT. § 810.07 (1983) provides: "In a trial on the charge of burglary, proof of the entering of such structure or conveyance of any time stealthily and without consent of the owner or occupant thereof shall be prima facie evidence of entering with intent to commit an offense."
In the first case, *L.S. v. State*, the defendant, a juvenile, had been charged with burglary by petition for delinquency. The charging document specified that the defendant "did unlawfully enter or remain in a certain structure . . . with the intent to commit an offense therein, to wit: THEFT in violation of section 810.02, Florida Statutes."  

In obtaining a conviction, the state relied on the presumption of intent statute, which presumes intent to commit a crime upon a showing of stealthy non-consensual entry. The defendant argued that since the state had charged an intention to commit a specific offense, reliance upon the statutory presumption was improper. Rather, the defendant stated, the state must prove intent to commit the offense specified in the charging document without the benefit of section 810.07. The defendant relied on *Bennett v. State*, a case from the Second District Court of Appeal.  

Justice Adkins, writing for an unanimous court, was not persuaded by the defendant’s contentions and approved the Third District Court of Appeal’s affirmance of the conviction. In doing so, the court disapproved *Bennett* and stated that “the exact nature of the offense alleged is . . . surplusage so long as the essential element of intent to commit an offense is alleged.”

In July, the court decided *Toole v. State*. An unanimous court, again through Justice Adkins, reiterated its decision in *L.S. v. State* and in greater detail discussed the legislative history of section 810.07, the presumption of intent statute. While noting that in a charge of burglary at common law the state had the burden of proving "intent to commit a specified crime to the exclusion of all others," the court stated that such a requirement was no longer valid. In enacting section 810.07, the legislature clearly said that proof of intent to commit *any offense* would suffice.

The court went on to state that the *Bennett* case, relied on by defendants Toole and L.S., was in error in “imposing upon the state the burden of proving a specific intent and additionally disproving all other possible criminal intent.”

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28. 464 So. 2d 1195 (Fla. 1985).
29. *Id.* at 1195.
32. *L.S.*, 464 So. 2d at 1196 (emphasis added).
33. 472 So. 2d 1174 (Fla. 1985).
34. *Id.* at 1176.
35. *Id.*
Graham v. State,38 decided by the court in June, presented a different question regarding section 810.07. Graham was charged with attempted burglary. The state relied on the presumption of intent statute, since there was evidence of unlawful entry. The Fifth District Court of Appeal affirmed,37 and certified to the supreme court the question of whether reliance on section 810.07 in an attempted burglary case was proper.38 The court, again through Justice Adkins and again unanimous, answered the question in the negative, refusing to give the statute effect beyond its clear, unambiguous terms. Since the statute by its express terms pertains only to "a trial on the charge of burglary," it may not be used in a prosecution for attempted burglary, even where there is some evidence of actual illegal entry.

With the presumption of intent statute thus defined and narrowed by these cases, practitioners should be more aware of the limits on the state's reliance on the statutory presumption as well as its clear areas of applicability.

II. Lesser Included and Multiple Offenses

Many of the court's criminal law decisions during 1985 dealt with the issue of lesser included and multiple offenses arising from the same event. As confessed by Justice Shaw in his concurring opinion in State v. Enmund,39 the court has had "a long-standing problem with this issue in its various permutations: single transaction rule, double jeopardy, application of the Blockburger rule, lesser included offenses, and generally, legislative intent in adopting section 775.021(4), Florida Statutes (1977)."40 The Florida Supreme Court has not struggled with this issue alone. Addressing the double jeopardy aspect of the problem in Albernaz v. United States,41 Justice Rehnquist has called the decisional law in the area "a veritable Sargasso Sea which could not fail to
challenge the most intrepid judicial navigator.” 42 Rather than trying to navigate or fully understand the historical permutations of the problem, it is better to examine what the Florida Supreme Court has most recently said on the subject. Below is a brief survey of what appears to be the most important Florida Supreme Court decisions in the area during 1985.43

A. State v. Watts. 44 In Watts, the supreme court adopted a statutory language oriented test which makes the legislature’s choice of the articles “a” or “any” determinative.

Watts had been adjudicated guilty and sentenced separately on two counts of possession of prison-made knives. The First District Court of Appeal held this to be in error, finding but a single offense for the possession of both knives.45 In reaching this conclusion, the court applied the “chronological and special relationships” test previously embraced by the Fifth District Court of Appeal in Castleberry v. State.46 In so doing, the court recognized, but refused to adopt, the test applied by the Second District Court of Appeal in State v. Grappin.47 Grappin involved prosecution for theft of five firearms under Florida Statute section 812.014(2)(b)(3).48 The Second District Court of Appeal held that Grappin could properly be charged with five thefts since the statute proscribed theft of “a” firearm, rather than theft of “any” firearm. The reasoning was that the “a” in reference to “firearm” indicated that the legislature clearly intended to make each firearm separate for prosecution purposes.49

Unfortunately, when the First District Court of Appeal had the Watts case on appeal, it was not aware that the Florida Supreme Court

42. Id. at 343.
43. For the reader who desires a quick review of the Florida decisional law in the area from 1942 through 1983, with some rather accurate predictive conclusions as to the future course of the Florida Supreme Court, see Kaden, End of the Single Transaction Rule, FLA. B.J., December, 1983, at 693.
44. 462 So. 2d 813 (Fla. 1985).
46. 427 So. 2d 760 (Fla. 2d Dist. Ct. App. 1983).
47. Grappin v. State, 450 So. 2d 480 (Fla. 1984).
48. FLA. STAT. ] 812.014(2)(b)(3) (1983) provides: “It is grand theft of the second degree and a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084, if the property stolen is: 3. A firearm.”
49. The exact reasoning process for reaching this conclusion was not entirely clear, but apparently there was considerable reliance upon federal cases, cited in Grappin, which had reached this conclusion when faced with similar statutory language. Watts, 462 So. 2d at 814.
would eventually not only affirm *Grappin*, but also adopt the reasoning of the Second District Court of Appeal in the case. Consequently, when *Watts* reached the supreme court, the district court of appeal’s decision was approved, but not the court’s reasoning. *Watts* had been prosecuted under Florida Statute section 944.47, which essentially prohibited as contraband in a correctional institution “any” firearm or weapon. Looking at the statutory language, as was done in *Grappin*, the court contrasted the article “any” with the article “a” and concluded that the use of “any” by the legislature meant the transaction must be treated as a single offense for prosecution purposes.

**B. Wicker v. State.** In *Wicker*, the supreme court considered whether a defendant could be convicted of both first-degree felony burglary and involuntary sexual battery, which served as the basis for the burglary charge. The district court of appeal set aside the sexual battery conviction, based on its determination that the finding that the defendant committed the assault was indispensible to the conviction of the first-degree burglary. The supreme court found that the district court of appeal erroneously analyzed the allegations in the charging document to determine whether the convictions could stand, instead of analyzing the offense’s statutory elements. Relying on its 1984 decisions in *State v. Baker* and *State v. Gibson*, the supreme court found that the convictions for both offenses were proper, and quashed the district court of appeal’s decision to the contrary.

**C. Green v. State.** Green was charged with first-degree premeditated murder as a result of a shooting death. At trial, he requested a jury instruction on third-degree murder, asserting that the crime of discharging a weapon into an occupied vehicle was the underlying felony. The trial court refused, finding that third-degree murder is not a lesser included offense of premeditated first-degree murder. On appeal, the district court of appeal affirmed. Relying on the schedule of lesser included offenses published in the 1981 version of the Florida Standard Jury Instructions in Criminal Cases, the appellate court found that third-degree felony murder is not a lesser included offense of premedi-
tated first-degree murder.

In its decision, the supreme court approved the result of the district court of appeal but not the reasoning. While finding that third-degree felony murder is not a necessarily included offense of first-degree murder, the court stated that it is, under certain circumstances and evidence, a proper, permissive, lesser included offense of first-degree murder, requiring a jury instruction to that effect.

Since the court had repeatedly allowed a felony murder conviction to be sustained under an indictment for first-degree premeditated murder, and since third-degree felony murder was listed in the schedule of lesser included offenses of first-degree felony murder, the court concluded that the district court of appeal erred in its reasoning. However, the district court of appeal was correct in its approval of the trial court's refusal to give the instructions. This result was reached after an analysis of Amended Florida Rule of Criminal Procedure 3.490, which requires the giving of instructions on a lesser included offense only where supported by the evidence. Since the evidence did not support the underlying felony required for third-degree felony murder, the requested instruction on that offense was properly denied.

D. Garcia v. State. In Garcia, the Fifth District Court of Appeal certified to the supreme court the following question as being of great public importance: "Whether one can be convicted, although not sentenced, of a lesser included offense after he has been convicted of the greater crime?" This question was framed similarly to the question in State v. Enmund, except "lesser included offense" was used instead of "the underlying felony." This is significant, because as the decision points out, they are not the same. Garcia was found guilty of armed robbery and displaying, using, threatening, or attempting to use a firearm during the commission of a felony. On appeal, the district court of appeal "noted" in its position that the defendant had been convicted of both a greater and a lesser included offense, and thus framed its certified question. Referring to its Enmund decision, the supreme court wrote that it had already essentially answered the question posed by the lower court.

58. 444 So. 2d 969 (Fla. 5th Dist. Ct. App. 1983), aff'd, 476 So. 2d 170 (Fla. 1985).
59. 476 So. 2d 165 (Fla. 1985).
62. Garcia, 444 So. 2d at 970.
Actually the question had been answered in *Bell v. State*,\(^63\) where the court held that the double jeopardy clause prohibited multiple convictions and sentences for both the greater and lesser included offenses, and in *State v. Baker*,\(^64\) which limited *Bell* to necessarily lesser included offenses. Therefore, the answer to the district court's question was in the negative: One can neither be convicted of nor sentenced for a necessarily lesser included offense.\(^65\)

As noted by the court, however, this answer does not resolve the case. Because they have different statutory elements, the firearm offense is not necessarily included in the robbery offense. Both offenses may be separately charged and punished.\(^66\) While the certified question was therefore irrelevant to the case, it did result in further clarification of this often confusing issue.

**E. State v. Enmund.**\(^67\) The *Enmund* case had a long journey through the federal and Florida appellate courts before arriving at the Florida Supreme Court for the third time.\(^68\) The certified question from the Second District Court of Appeal in the instant case was succinctly stated: "When a defendant is convicted of felony murder, can he be convicted of, although not sentenced for, the underlying felony?"\(^69\)

The question was not so succinctly answered, however, as the court determined that the underlying felony (robbery) was not a necessarily lesser included offense, and proceeded to overrule its earlier decision in *State v. Hegstrom*.\(^70\) In *Hegstrom*, the court stated that the underlying felony was a necessarily included offense within the crime of felony murder, and held that the defendant could be convicted of the underlying felony of robbery, but not sentenced for both the underlying felony and the crime of felony murder.

\(^{63}\) 437 So. 2d 1057 (Fla. 1983).
\(^{64}\) 456 So. 2d 419 (Fla. 1984).
\(^{65}\) 476 So. 2d at 170.
\(^{66}\) *Id.*
\(^{67}\) 476 So. 2d 165 (Fla. 1985).
\(^{68}\) *Enmund*, a death penalty case, was initially affirmed by the Florida Supreme Court in *Enmund v. State*, 399 So. 2d 1362 (Fla. 1981). In a leading eighth amendment decision, the United States Supreme Court reversed the death sentence, holding it to be excessive for a participant in a felony murder who does not himself kill, attempt to kill, or intend that the killing occur or that lethal force be employed. *Enmund v. Florida*, 458 U.S. 782 (1982). On remand, the Florida Supreme Court vacated the death penalty and returned the case to the trial court for resentencing. *Enmund v. Florida*, 439 So. 2d 1383 (Fla. 1983). The instant case is thus the third visit of the case to the Florida Supreme Court.
\(^{69}\) 459 So. 2d 1160 (Fla. 2d Dist. Ct. App. 1984).
\(^{70}\) 401 So. 2d 1343 (Fla. 1981).
and the murder. The court based its holding in *Enmund* on its study of *Missouri v. Hunter*,\(^\text{71}\) determining that the United States Supreme Court in that case had made it clear that the *Blockburger* rule of statutory construction\(^\text{72}\) will not prevail over legislative intent. The court went on to find sufficient intent on the part of the legislature for multiple punishments when both a murder and a separate felony occur during a single criminal episode.\(^\text{73}\) Thus the court ruled in answer to the certified question, "that the underlying felony is not a necessarily lesser included offense of felony murder and that a defendant can be convicted of and sentenced for both felony murder and the underlying felony."\(^\text{74}\)

F. *State v. Snowden.*\(^\text{75}\) Snowden was tried for both first degree murder and armed robbery. Upon request of defense counsel the jury was instructed that grand theft could be considered as an underlying felony of third-degree murder. Snowden was convicted for third-degree murder and grand theft. The district court of appeal considered whether the defendant may be legally convicted of third-degree (felony) murder and at the same time be convicted of the underlying felony on which the murder conviction is based.\(^\text{76}\) Making a determined effort to analyze the maze of seemingly conflicting decisions extant at that time, the court concluded that the jury had convicted Snowden of grand theft as the underlying felony of third-degree murder and, on the

72. Blockburger v. United States, 284 U.S. 299 (1932). "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. The *Blockburger* rule has essentially been incorporated into Fla. Stat. § 775.021(4) (1983), which presently reads:

(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offense, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

74. *Enmund*, 476 So. 2d at 168.
75. 476 So. 2d 191 (Fla. 1985).
76. 449 So. 2d 332 (Fla. 5th Dist. Ct. App. 1984).
basis of *Bell v. State*, set aside both the conviction and sentence for grand theft. Unfortunately, the district court of appeal did not have the guidance of the supreme court’s decision in *State v. Baker*, which limited the *Bell* holding to “necessarily lesser included offenses,” as the *Baker* decision was still some three months away. Adhering to its current reasoning on the issue, the supreme court concluded that grand theft, as the underlying felony of third-degree murder, is not a lesser included offense, and quashed the decision of the district court. In a footnote to its decision, the supreme court called attention to Florida Statute section 775.021(4), which incorporates the Blockburger rule; the court said that henceforth, “the Florida Standard Jury Instructions in Criminal Cases (1981), which set forth what had heretofore been lesser included offenses, must be read and modified in light of this legislative decision.”

G. *State v. O'Hara*. *O'Hara* involved the question of whether one could be convicted of both extortion and theft for the taking of only one sum of money. The district court of appeal answered the question in the negative. The supreme court, relying on its decision in *State v. Baker*, held that one can be convicted of two crimes for the taking of only one sum of money, provided that neither crime is a necessarily lesser included offense of the other. Since one may commit extortion without thieving and one may commit theft without extorting, neither crime is a necessarily lesser included offense of the other. Thus the court held that the *Baker* test was satisfied, and quashed the decision of the district court of appeal.

III. Defenses to Crimes

A. Entrapment. Perhaps the most significant change in Florida criminal law during 1985 was in the area of the entrapment defense. In January, the supreme court decided *State v. Glosson*, determining that the contingent fee agreement with the informant in that case vio-

77. 437 So. 2d 1057 (Fla. 1983).
78. 456 So. 2d 419 (Fla. 1984).
80. *Id.* at 192.
81. 478 So. 2d 24 (Fla. 1985).
83. 452 So. 2d 927 (Fla. 1984).
84. *O'Hara*, 478 So. 2d at 26.
85. 462 So. 2d 1082 (Fla. 1985).
lated the defendant's due process rights under the state constitution. Within two months, in *Cruz v. State*, the court made even more significant changes in the entrapment defense by adding an objective test to the subjective test for entrapment. In April, the court decided *State v. Wheeler* and *Rotenberry v. State*, which addressed the burden of proof and jury instruction for the entrapment defense.

(1) *State v. Glosson*. Glosson and five co-defendants were charged with trafficking and conspiring to traffic in cannabis. The charges grew out of a "reverse-sting" operation run by the county sheriff's department. Motions to dismiss based on entrapment and prosecutorial misconduct were filed. The motions were based primarily upon an agreement struck between an informant and the county sheriff whereby the informant would receive a percentage of all civil forfeitures arising out of successful criminal investigations the informant instigated in the county. The agreement with the sheriff was oral, but the state attorney's office knew of the agreement and even supervised the informant's investigations. In order to collect his 10% contingent fee, the informant was required to cooperate in the criminal investigations and testify in court. The fee would be paid out of civil forfeitures resulting from the criminal investigation initiated by the informant. The trial court dismissed the charges, finding a due process violation. The district court of appeal affirmed the dismissal, holding that the constitutional due process issue was an issue of law for the trial court, and that the contingent fee arrangement with the informant violated the defendant's due process right.

In analyzing the issues, the Florida Supreme Court recognized that the due process argument concerning the entrapment defense had not fared well in the federal courts. Noting with approval decisions from two states that recognize the due process defense to overturn criminal convictions, the court rejected as too narrow the application

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86. 465 So. 2d 516 (Fla. 1985).
87. 468 So. 2d 978 (Fla. 1985).
88. 468 So. 2d 971 (Fla. 1985).
89. 441 So. 2d 1117 (Fla. 1st Dist. Ct. App. 1983).
90. The court noted that the United States Supreme Court, in dicta in United States v. Russell, 411 U.S. 423 (1973), seemed to recognize the due process entrapment defense; however, it noted that in more recent years only one due process defense has been raised successfully in only one federal circuit court. *Glosson*, 462 So. 2d at 1084.
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of the due process entrapment defense found in the federal courts. Relying on article 1, section 9 of the Florida Constitution, the court held that governmental misconduct which violates the constitutional due process right of the defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges. Finding in this case that the contingent fee agreement with the informant, who was a vital state witness, violated the defendants' due process rights under the Florida Constitution, the court approved the district court of appeal's decision affirming the dismissal of the charges.  

(2) Cruz v. State. The decision in Cruz resulted from a "drunken bum" police decoy operation undertaken in a high-crime area of Tampa. A police officer, posing as a drunk, pretended to drink wine from a bottle, while leaning against a building near an alleyway, face to the wall. Plainly visible and hanging from his pants pocket was $150 in currency, paper-clipped together. Cruz and a woman companion happened by about 10:00 P.M. Cruz initially approached the decoy, but then went on his way. Returning ten to fifteen minutes later with his companion, Cruz took the money from the decoy's pocket, whereupon he was arrested. Subsequently charged with grand theft, he moved for a dismissal, arguing that the arrest constituted entrapment as a matter of law. The trial court granted the motion, relying on State v. Casper in finding that the defendant was not predisposed to commit the crime and had been entrapped as a matter of law. The district court of appeal reversed, holding that predisposition is a question of fact and should not be decided on a motion to dismiss.

In one of its most important decisions of 1985, the supreme court quashed the district court of appeal's decision, finding that the facts surrounding the "drunken bum" police decoy operation constituted entrapment as a matter of law under its therein announced threshold test.

92. Glosson, 462 So. 2d at 1085.
93. 465 So. 2d 516 (Fla. 1985).
94. 417 So. 2d 264 (Fla. 1st Dist. Ct. App.), review denied, 418 So. 2d 1280 (Fla. 1982). Casper involved a "drunken bum" decoy scenario almost identical to that in Cruz. The Casper decision focused on "predisposition" and held that the state must prove the defendant was predisposed to steal from the decoy. "Predisposition" could be proved in one of four given ways, but under the facts the question boiled down to whether the defendant readily acquiesced to the crime, or "succumbed to temptation." According to Casper, this was a matter of law; where the trial judge finds the defendant succumbed to temptation, the matter should not go to the jury, as it is entrapment as a matter of law. Cruz, 465 So. 2d at 518-19.

95. State v. Cruz, 426 So. 2d 1308 (Fla. 2d Dist. Ct. App. 1983).
While agreeing with the lower court that the question of predisposition will always be a question of fact for the jury, the supreme court found that a second, independent, standard should be established for assessing entrapment. This second standard would examine the official conduct inducing the crime, and would be a question of law, decided by the trial judge. Thus, a two-test approach was established by the *Cruz* decision. The threshold test for the entrapment defense is an objective test, decided by the trial judge. To answer this test, the judge must determine if the police activity: (1) has as its end the interruption of a specific ongoing criminal activity, and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity. If the judge answers both questions in the affirmative, then entrapment as a matter of law has not occurred. The first prong of this threshold test asks if the police activity is seeking to prosecute crime where no such crime exists except for the police activity engendering the crime.96 The second prong of the threshold test looks toward the appropriateness of the police activity. In examining the appropriateness of the police activity, the court should consider whether a government agent 

induced or encouraged another person to engage in conduct constituting such offense by either (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.97

Once the objective test is applied and the trial judge determines that the state has established the validity of the police activity, the subjective test for "predisposition" is to be answered by the jury. This test requires that the jury determine whether the criminal design originated with the government officials and was implanted in the mind of the defendant who was an otherwise innocent person, or whether the defendant was predisposed to commit the crime. Thus a dual test, both objective and subjective, and involving determinations initially by the judge and then by the jury, was adopted by the Florida Supreme Court as the new entrapment defense. In *Cruz*, the court found that the "drunken bum" police decoy activity constituted entrapment as a matter of law under the threshold objective test.

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96. *Cruz*, 465 So. 2d at 522.
97. *Id.*
Whether the new Florida standard is consistent with or departs from the "great weight of judicial authority in the United States," was debated in the specially concurring opinion of Justice Overton and the dissenting opinion of Justice Alderman. Regardless of the answer to this question, a new standard for the entrapment defense has been established in Florida by the Cruz decision.

(3) State v. Wheeler and Rotenberry v. State. In State v. Wheeler and Rotenberry v. State, the supreme court addressed the issue of the burden of proof in the entrapment defense. The problem in Wheeler resulted from a colloquy between the defense counsel, assistant state attorney, and trial judge during the closing argument. Among other statements during the exchange, the trial judge stated in front of the jury that in his proposed instruction he was not going to include "any instruction to the effect that the State is required to prove the defendant was not entrapped." The judge's statement was based on the entrapment instruction found in Florida Standard Jury Instruction (Criminal) 3.04(c). That jury instruction does not include a clear

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98. Id. (quoting from Model Penal Code § 2.13 (1962)).
99. Id. at 523-24. The leading United States Supreme Court cases on entrapment are Hopton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); and Sorrelli v. United States, 287 U.S. 435 (1932). A substantial portion of the majority opinion in Cruz was devoted to a discussion of these cases.
100. 468 So. 2d 978 (Fla. 1985).
101. 468 So. 2d 971 (Fla. 1985).
102. The full text of instruction 3.04(c) reads:

3.04(c) Entrapment

The defense of entrapment has been raised. This means that (defendant) claims he had no prior intention to commit the offense and that he committed it only because he was persuaded or caused to commit the offense by law enforcement officers.

(Defendant) was entrapped if:
1. he had no prior intention to commit (crime charged), but
2. he was persuaded, induced or lured into committing the offense and
3. the person who persuaded, induced or lured into committing the offense was a law enforcement officer, or someone acting for the officer.

However, it is not entrapment, merely because a law enforcement officer in a good faith attempt to detect crime:

a. (provided the defendant the opportunity, means and facilities to commit the offense, which the defendant intended to commit, and would have committed otherwise.)

b. (used tricks, decoys or subterfuge to expose the defendant's criminal acts.)
statement of the burden of proof. Nevertheless, the supreme court held that in the usual case this instruction is adequate, when given in combination with the general reasonable doubt and burden of proof instruction found in Florida Standard Jury Instruction (Criminal) 2.03. A specific "burden of proof" instruction had not been included within the entrapment instructions when the instructions were rewritten in 1981, in order to avoid undue emphasis as to the state's burden of proof. In Wheeler, however, the supreme court found that the statements of the trial judge created an erroneous impression on the jury concerning the burden of proof that was not corrected by a proper instruction. For a general rule concerning the burden of proof in an entrapment defense, the supreme court stated that "[w]hen the defendant has adduced sufficient evidence to make a prima facie case of entrapment, the burden of proof regarding entrapment shifts entirely to the state. After the burden has shifted, no consideration of the defendant's initial burden is permissible."103

In Rotenberry, the court carried the Wheeler decision one step further. In Wheeler, the issue did not involve a specific request by the defendant that the court instruct the jury that the state must prove beyond a reasonable doubt that the defendant was not the victim of entrapment. In Rotenberry, the certified question from the district court of appeal dealt with such a request. 104 In answering the question, the court held, as it did in Wheeler, that instruction 3.04(c) (the standard entrapment instruction), when given in combination with the general reasonable doubt instruction, is adequate. This combination fully informs the jury of the state's burden. The court noted that a "delicate

c. (was present and pretending to aid or assist in the commission of the offense.)

If you find from the evidence that the defendant was entrapped, or if the evidence raises a reasonable doubt about the defendant's guilt, you should find him not guilty.

A margin note advised that factors a, b, and c are to be given as applicable.

103. Rotenberry, 468 So. 2d at 981.
If the state has the burden to prove beyond a reasonable doubt that a defendant was not entrapped when that defense has been raised, is the giving of the present entrapment instruction as set forth in Standard Jury Instruction 3.04(c) along with the general reasonable doubt instruction sufficient, notwithstanding the defendant having specifically requested the Court to instruct the jury that the state must prove beyond a reasonable doubt that the defendant was not the victim of entrapment by law enforcement officers?
balance has been struck between informing the jury on the law of entrapment and avoiding undue emphasis on the state's burden of proof.\textsuperscript{105} The court thus gave its approval of the trial judge's refusal to give any additional, specific instruction on the state's burden of proof in an entrapment defense, even when requested by the defense.

B. Self-defense. A self-defense issue of narrow applicability was addressed by the supreme court in \textit{State v. Holley.}\textsuperscript{106} Holley was charged with resisting arrest with violence, among other crimes, stemming from his arrest at an agricultural inspection station for carrying cannabis. At trial, Holley contended that the agricultural inspector had threatened him with a knife during the arrest and that this caused him to resist arrest. He requested a jury instruction that resistance to arrest is justified to the extent necessary for self-defense, as stated in two First District Court of Appeal opinions.\textsuperscript{107} The trial court denied the request, and instead gave the then existing standard instruction: "A person is never justified in the use of any force to resist an arrest."\textsuperscript{108} Holley was convicted on all charges and appealed, inter alia, the denial of the requested jury instruction. The First District Court of Appeal reversed his conviction for resisting arrest with violence on the basis of the denial of the requested instruction in light of \textit{Ivester} and \textit{Allen}, but certified the issue as a question of great public importance.\textsuperscript{109} The supreme court, in a 4-2 opinion authored by Justice Overton, approved the First District Court of Appeal's reversal, stating that the law permits a defendant to resist the use of excessive force in making the arrest. The court further noted that the standard jury instruction at issue in the case had been changed as of October 10, 1985, to reflect the correct statement of the law.\textsuperscript{110} The standard jury instruction now reads:

\begin{itemize}
\item \textsuperscript{105} \textit{Rotenberry}, 468 So. 2d at 975.
\item \textsuperscript{106} 480 So. 2d 94 (Fla. 1985).
\item \textsuperscript{108} \textbf{FLORIDA STANDARD JURY INSTRUCTION (CRIM.)} 3.04(d).
\item \textsuperscript{110} \textit{See} The Florida Bar Re: Standard Jury Instructions (Criminal Cases), 477 So. 2d 985 (Fla. 1985).
\end{itemize}
A person is not justified in using force to resist an arrest by a law enforcement officer who is known, or reasonably appears to be a law enforcement officer. However, if an officer uses excessive force to make an arrest, then a person is justified in the use of reasonable force to defend himself (or another), but only to the extent he reasonably believes such force is necessary. \(^{110.1}\)

The court reversed only the conviction for resisting arrest, leaving the conviction for the other crimes intact, since it found that the erroneous instruction applied only to the resisting arrest charge. \(^{111}\)

C. Voluntary Intoxication. *Linehan v. State* \(^{112}\) involved the defense of voluntary intoxication to arson and felony murder. Briefly, the facts included a confession by the defendant that he set fire to his girlfriend's apartment, which resulted in one death. Testimony at trial indicated that defendant had been intoxicated at the time he set the fire. Based on this testimony, he requested, but was denied, an instruction on voluntary intoxication as a defense. \(^{113}\) On appeal, the Second District Court of Appeal affirmed the trial judge's refusal, \(^{114}\) finding that voluntary intoxication is not a defense to arson \(^{115}\) and, further, that voluntary intoxication is not a defense to felony murder if it is not a defense to the underlying felony.

However, the district court certified these two issues to the supreme court as being of great public importance. \(^{116}\) The supreme court affirmed the district court on both issues.

The court disagreed with the defendant's argument that the words

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110.1 *Id.* at 1000.

111. Chief Justice Boyd, with whom Justice Shaw concurred, dissented only from this part of the majority opinion. The Chief Justice would have reversed all of the convictions arising from Holley's disarming his would-be captors and fleeing with their weapons. The defendant was entitled, in Justice Boyd's view, to have the jury determine the facts pertaining to all of the charges (resisting arrest, two counts of aggravated assault with a firearm, and two counts of robbery) under legally correct instructions from the court.

112. 476 So. 2d 1262 (Fla. 1985).

113. *Id.* at 1263. He also requested an instruction on second-degree (depraved mind) murder as a lesser included offense of felony murder. This was also refused. The latter refusal resulted in the district court of appeal reversing the conviction, and is briefly discussed under the section above dealing with lesser included offenses.


115. *Id.* at 253-254.

116. The two issues were framed as the following questions: "1. Whether voluntary intoxication is a defense to arson or to any other crime. 2. Whether voluntary intoxication is a defense to first degree (felony) murder." *Linehan*, 442 So. 2d at 256.
“willfully and unlawfully” as contained in the arson statute\textsuperscript{117} are words of specific intent. The court noted that the present statutory definition of arson does not materially differ from the common law definition\textsuperscript{118} with regard to the requisite intent, and that at common law arson was a general intent crime. And while voluntary intoxication has for many years been a defense to specific intent crimes, it does not apply to general intent crimes such as arson. Finding no legislative intention to change the common law intent requirement, the court held that arson under Florida Statute section 806.01 was a general intent crime and, therefore, voluntary intoxication is not a defense to arson.

With regard to whether voluntary intoxication could be a defense to felony murder, the court noted its decision in \textit{Jacobs v. State},\textsuperscript{119} where it held that when robbery was the underlying felony of a felony murder, the defendant could defend on the basis that he was too intoxicated to form the intent to commit the underlying felony. However, the court further noted, robbery at common law was a specific intent crime, whereas in the instant case, the underlying felony of arson is a general intent crime. The court concluded that when the underlying felony is based on a specific intent offense, the defense of voluntary intoxication may apply to felony murder, but when the underlying felony is a general intent crime, voluntary intoxication is not a defense\textsuperscript{120}

D. Insanity Defense. In \textit{Patten v. State},\textsuperscript{121} the supreme court had the opportunity to reaffirm its test for insanity at the time of the offense as being the modified M’Naghten test, as contained in Florida Standard Jury Instructions in Criminal Cases.\textsuperscript{122} It also addressed a rather unusual “burden of proof” issue related to the insanity defense.

Patten was charged with first-degree murder and a number of other felonies. At a court-ordered competency hearing, four experts were of the unanimous opinion that the defendant was competent to stand trial, notwithstanding the fact that three years earlier he had been found not guilty of receiving stolen property by reason of insanity. At trial, defendant’s counsel had urged the trial court to discard the

\begin{enumerate}
\item FLA. STAT. § 806.01 (1981).
\item The supreme court said that at common law, arson was defined as “the willful and malicious burning of a dwelling house, or outhouse within the curtilage of a dwelling of another,” Linehan, 476 So. 2d at 1265, citing Duke v. State, 132 Fla. 865, 870, 185 So. 422, 425 (1938).
\item 396 So. 2d 1113 (Fla.), cert. denied, 454 U.S. 933 (1981).
\item Linehan, 476 So. 2d at 1265.
\item 467 So. 2d 975 (Fla. 1985).
\item See Florida Standard Jury Instruction (Crim.) 2.11(b)-1 and 3.04(b).
\end{enumerate}
M'Naghten rule and adopt the American Law Institute Model Penal Code rule, including the "irresistible impulse" test. 123 After briefly alluding to the 1977 Wheeler decision, 124 which directed that the present modified M'Naghten test be applied in all Florida criminal trials, the court approved the trial judge's denial of the defendant's motion and went on to address the burden of proof issue.

Patten had argued that because of his prior adjudication of not guilty by reason of insanity, and subsequent civil commitment, the state had the burden of establishing his sanity as an element of the offense, despite his failure to offer any evidence of an insanity defense at trial. 125 Rejecting this argument, the supreme court noted that insanity is an affirmative defense in Florida, and the burden is upon the defendant to come forth and present some evidence of insanity at trial. It is only upon this showing that the prosecution has the burden of disproving defendant's claim beyond a reasonable doubt. The court went on to state that Patten's argument that his prior adjudication of not guilty by reason of insanity, and subsequent civil commitment, require the state to prove competency, "is correct only when the defense of insanity is asserted and evidence of the adjudication and commitment is introduced at trial." 126 At the trial no such evidence was introduced; therefore, the prosecution had nothing to rebut. 127

A somewhat similar holding was made in Alvoid v. State, 128 where the supreme court rejected Alvoid's claims "that his prior adjudication in Michigan of not guilty by reason of insanity, his resulting commitment, and the fact that there has not been a subsequent judicial restoration of sanity result in a continuing presumption of insanity." 129

Yohn v. State, 130 another case involving the insanity defense, reminds us of the rather ironic warning by the supreme court that its approval of the standard jury instructions does not insure that the use of such instructions by the trial judge will meet with the supreme

123. Patten, 467 So. 2d at 978.
125. Patten, 467 So. 2d at 978.
126. Id. at 979.
127. The court noted that the reason for the lack of evidence of insanity was clear from the record: "The appellant had no experts to testify as to his insanity. The State had four witnesses who concluded he was sane and two went further and stated that he was faking mental illness." Id. at 975.
128. 459 So. 2d 316 (Fla. 1984).
129. Id. at 318.
130. 476 So. 2d 123 (Fla. 1985).
court's approval upon review of a specific case on appeal. Yohn had been charged with the first degree murder, by shooting, of a woman who had been having an affair with Yohn's husband. The defense presented expert testimony by a psychiatrist and a psychologist that Yohn was insane at the time of the shooting; thereafter, the defense requested special jury instructions stating that the state had the burden of proving beyond a reasonable doubt that defendant was sane at the time of the incident. This special instruction was refused; however, the relevant standard jury instructions, including the instructions on insanity and the state's burden to prove guilt beyond a reasonable doubt, were given by the court. The First District Court of Appeal concluded that even though the requested instructions correctly stated the Florida law, the given instructions were adequate considering the instructions as a whole. In reversing, the Florida Supreme Court ruled that the instructions given did not adequately and correctly charge the jury as to the Florida law on the issue. The problem found by the court with the standard jury instruction on insanity was that the instruction frames the issue as one of finding the defendant legally insane, thus placing the burden on the defendant. The jury is never instructed in the standard charge that the state must prove anything with regard to sanity. The court noted that the standard jury instruction on reasonable doubt and burden of proof did not remedy the problem as this instruction was general and the insanity instructions were specific. While the general instruction referred to the state’s burden of proving every element, nowhere in the instructions was it stated that sanity was an element, which, according to the court, it clearly is. Since the defendant’s requested special instructions correctly and accurately

131. See In the Matter of the Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, modified, 431 So. 2d 599 (Fla. 1981): “[T]he court recognizes that no approval of these instructions by the court could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him.”

133. Id. at 899-900.
134. FLORIDA STANDARD JURY INSTRUCTIONS (CRIM.) 3.04(b).
135. FLORIDA STANDARD JURY INSTRUCTIONS (CRIM.) 2.03.
136. Yohn, 450 So. 2d at 900.
137. Id. at 901.
138. FLORIDA STANDARD JURY INSTRUCTIONS (CRIM.) 2.03.
140. The requested instructions are set forth in both Yohn v. State, 476 So. 2d
set forth the law, and the standard jury instructions given did not, the supreme court quashed the decision of the district court of appeal and ordered the case remanded for a new trial.

It should be noted that the supreme court split four to three in the decision. The dissenters relied on *Rotenberry v. State*, which is discussed above and which dealt with the defense of entrapment. In *Rotenberry*, the defendant had requested that the jury be instructed that the state must prove that the defendant was not entrapped beyond a reasonable doubt. The trial court refused and instead merely gave the standard jury instruction on entrapment and burden of proof. *Rotenberry* was affirmed by the district court of appeal but the issue of the sufficiency of instructions was certified to the supreme court, where it was approved as striking a delicate balance between "informing the jury on the law of entrapment and avoiding undue emphasis on the state's burden of proof."143

E. Double Jeopardy. Double jeopardy is an issue mixed inextricably with the issues of lesser included and multiple offenses, discussed in Part II, above. Consequently, many cases, such as *Houser v. State*, which follows, could be placed under the heading of "double jeopardy" or "lesser included and multiple offenses." In *Houser v. State*, the court addressed the certified question of "whether a defendant may be properly convicted of and sentenced for both DWI manslaughter and vehicular homicide for effecting a single death" without constituting double jeopardy. In answering that question in the negative, the court clarified the extent to which a defendant may be prosecuted for a death caused by his driving while intoxicated.

Houser had a blood alcohol level of 0.18% when the car he was driving struck a concrete wall, killing a passenger. He was charged with DWI manslaughter and vehicular homicide, and convicted and sentenced on both charges. The First District Court of Appeal affirmed the convictions and sentences but certified the above question as being of great public importance. The district court of appeal also

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123 (Fla. 1985), and Yohn v. State, 450 So. 2d 898 (Fla. 1st Dist. Ct. App. 1984).
141. 468 So. 2d 971 (Fla. 1985).
143. *Rotenberry*, 468 So. 2d at 975.
144. 474 So. 2d 1193 (Fla. 1985).
145. *Houser*, 474 So. 2d at 1195.
recognized that its decision was directly in conflict with the Fifth District Court of Appeal’s decision in *Vela v. State*.149

The supreme court rejected the lower court’s two-fold rationale that, first, convictions under both statutes did not violate double jeopardy since each crime was separate from the other in that each “requires proof of an element which the other does not”; and second, that DWI manslaughter is merely an enhancement of the penalty for driving while intoxicated.150 The supreme court stated that although under the *Blockburger* test151 and its statutory equivalent152 the crimes are separate, these tests “are only tools of statutory interpretation which cannot contravene the contrary interest of the legislature.”153 The “assumption underlying the *Blockburger* rule is that the legislature ordinarily does not intend to punish the same offense under two different statutes.”154 The court noted that Florida courts have determined in many cases, including cases directly on point with *Houser*,155 that the legislature did not intend to punish a single homicide under two different statutes.

In rejecting the district court of appeal’s rationale that DWI manslaughter is simply an enhanced penalty for driving while intoxicated, the court simply stated that the death of a victim “raised DWI manslaughter beyond mere enhancement and places it squarely within the scope of this state’s regulation of homicide.”156

In October, 1985, the court in *State v. Gordon*157 reiterated its decision in *Houser* by approving the Fifth District Court of Appeal’s decision vacating the DWI manslaughter conviction of the appellant, who had also been convicted of second degree murder for the same death. The supreme court simply relied on the rationale expressed in *Houser* in upholding the district court of appeal’s decision.

*Gordon* and *Houser* made clear that, absent an unambiguous specified legislative statement authorizing prosecution of a defendant for

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149. 450 So. 2d 305 (Fla. 5th Dist. Ct. App. 1984).
152. FLA. STAT. § 775.021(4) (1983).
153. *Houser*, 474 So. 2d at 1196.
156. *Houser*, 474 So. 2d at 1196.
157. 478 So. 2d 1063 (Fla. 1985).
DWI manslaughter plus another homicide for a single death, such charges are not permitted, Blockburger and Florida Statute section 775.021(4) notwithstanding.

F. Collateral Estoppel. In Green v. State, the court was faced with a certified question from the Third District Court of Appeal concerning the defense of collateral estoppel. Green, who was on probation for robbery, was charged with several crimes. Prior to trial on those charges, a probation revocation hearing was held. The trial judge at that hearing determined that the evidence against Green was insufficient to revoke his probation since the state had not proved the elements of the charged offenses beyond a reasonable doubt. At his subsequent trial on the charges, Green moved to dismiss, arguing that the state was collaterally estopped from prosecuting him because of the result of the probation revocation hearing. The motion was denied and Green was convicted; the district court of appeal upheld the conviction, but certified the collateral estoppel question to the supreme court as one of great public importance.

The supreme court, in a five to two decision, affirmed the district court of appeal, thus upholding Green's conviction. Rather than addressing the case in collateral estoppel terms, the court broadened its discussion to the issue of double jeopardy. The court reasoned that since the probation revocation hearing was only to determine if Green's probation for a prior offense had been violated, it was a deferred sentencing proceeding, citing as authority two earlier opinions by the court.

The court went on to say that Green had not been subjected to conviction or punishment for his new criminal activities during the probation revocation hearing, so there was no double jeopardy bar to his subsequent prosecution for those activities. As an analogy, the court noted that a defendant properly may be prosecuted even though there is a finding of no probable cause at a preliminary hearing.

Justice McDonald dissented in an opinion in which Justice Adkins

158. 463 So. 2d 1139 (Fla. 1985).
160. Id. at 509: "When in a probation revocation proceeding, a trial judge finds that the evidence is insufficient to prove the criminal offense asserted as the ground for revocation, is the state collaterally estopped from trying the defendant for the same criminal offense?"
161. Green, 463 So. 2d at 1140, citing State v. Payne, 404 So. 2d 1055 (Fla. 1981), and Delaney v. State, 190 So. 2d 578 (Fla. 1966).
162. Green, 463 So. 2d at 1140, citing State v. Hernandez, 217 So. 2d 109 (Fla. 1968).
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concerned. Stating that collateral estoppel and double jeopardy are "distinct legal concepts," Justice McDonald argued that the former concept could be disposed of merely by finding that jeopardy did not attach during the probation revocation hearing. He cited the United States Supreme Court's definition and rule regarding collateral estoppel: "When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future law suit." Since the issue litigated in the criminal trial was exactly the same as that litigated in the earlier probation revocation hearing, during which the trial judge sitting as trier of fact found Green not guilty, the dissent argued that collateral estoppel should have prevented the subsequent trial.

It appears that the dissent had a better grasp of the law and the distinction between double jeopardy and collateral estoppel. However, had the court adopted the position of the defense, the practical application of the rule would have created an extremely burdensome and risky situation for the state when attempting to revoke a defendant's probation prior to trying him for his latest criminal conduct.

IV. Conclusion

The Florida Supreme Court devoted much of its work during 1985 toward clarifying the law regarding lesser included and multiple offenses. It is apparent from a close reading of the court's opinions, however, that the law in this complicated area is still far from being clear and will continue to occupy much of the court's time in future years. Even while concurring, Justice Shaw, in two important decisions, has expressed serious concern regarding the underlying and fundamental reasoning of the court in this area.

Most of the decisions during 1985 regarding substantive criminal offenses and defenses were of a limited or narrow reach. However, in the important area of entrapment the court took a giant step and spoke with unusual clarity. In adding the threshold objective test, to be applied by the judge, to the "predisposition test" applied by the jury, the court departed from the federal (and majority) rule, and adopted a dis-

164. Green, 463 So. 2d at 1140 (McDonald, J., dissenting).
165. State v. Enmund, 476 So. 2d 165 (Fla. 1985), and Green v. State, 475 So. 2d 235 (Fla. 1985).
tinctive minority position. This appears to be one area where the law should be stabilized for the foreseeable future.
Criminal Procedure and the Florida Supreme Court in 1985 — Watching the Pendulum Swing

By Bruce A. Zimet*

Introduction

In 1985, the Florida Supreme Court addressed numerous important issues relating to criminal procedure. This article will review and analyze significant 1985 Florida Supreme Court decisions. The purpose of this review and analysis is not to merely catalogue cases, but to explore the rationale and direction of the supreme court.

A cursory review of the Florida Supreme Court in 1985 reveals a significant number of criminal procedure opinions relating to cases in which the death penalty was imposed. This phenomenon is no doubt attributed to the supreme court’s constitutionally mandated jurisdictional boundaries which limit direct appeal to the supreme court to final judgments of trial courts imposing the death penalty.¹ While the Florida Constitution does not prohibit the Florida Supreme Court from considering non-death penalty criminal procedure cases, as a practical matter jurisdiction limitations restrict the volume of non-death penalty cases.² The dominance of death penalty cases before the supreme court

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1. FLA. CONST. art. V, § 3(b)(1) provides that the Supreme Court: “Shall hear appeals from judgments of trial courts imposing the death penalty . . . .”

2. The Florida Constitution does not impose any other mandatory jurisdiction upon the supreme court for matters relating to criminal procedure other than direct appeals from trial courts imposing the death penalty and decisions of the district courts of appeal declaring invalid a state statute or a provision of the state constitution. FLA.
has created certain interesting characteristics. Obviously nearly all of the death penalty cases devote analysis to issues which arise during the "sentencing" phase of trial. These issues are generally limited in scope and application to the unique circumstances of the "mini-trial" of the death penalty sentencing.\(^3\) Additionally, the death penalty cases have confronted the supreme court with a significant number of claims concerning the effective assistance of counsel as well as allegations of prosecutorial misconduct. Conversely, the jurisdictional boundaries of the Florida Supreme Court, with the resultant overflow of death penalty cases and unique issues, has limited the quantity of supreme court decisions relating to certain traditional areas of criminal procedure such as search and seizure, wiretaps, grand jury or fifth amendment issues.

**Right to Jury Trial**

While the right to a jury trial is a fundamental component of Florida criminal procedure,\(^4\) the precise scope of that right has remained uncertain. In 1985, the Florida Supreme Court sought to provide more accurate definition of the right to a jury trial. The vehicle for review was the supreme court's review in *Reed v. State*.\(^5\)

In *Reed*, the supreme court considered the question of whether an accused in a criminal mischief prosecution maintains a right to a jury trial under the Florida and United States Constitutions.\(^6\) Reed was

\(^{3}\) The sentencing hearing is authorized by Rule 3.780 Fla.R.Cr.P.. This article will not seek to specifically address opinions which discuss issues raised in the sentencing phase of trial. Such a review and analysis is best suited for individual and specified analysis.

\(^{4}\) The right to a jury trial is contained in Article III, Section 2 and the sixth amendment to the United States Constitution. Additionally, the right to a jury trial is contained in Article I, Sections 16 and 22 of the Florida Constitution.

\(^{5}\) 448 So. 2d 1102 (Fla. 5th Dist. Ct. App. 1984).

\(^{6}\) *Reed* had come before the court as a certified question of great public importance from the Fifth District Court of Appeal. Reed had been denied a jury trial in county court. The circuit court, acting in its appellate capacity, determined that Reed
charged with violation of Section 806.12(2)(a) Florida Statute (1981), which carried a maximum punishment of a term of incarceration of sixty days and/or a fine of up to $500. The Reed court considered the United States Supreme Court's decision in Baldwin v. New York,\(^7\) in which that Court concluded that an offense carrying a maximum penalty in excess of six months was a "serious crime" which mandated a jury trial. Reed, however, did not construe Baldwin as requiring that an offense of less than six months as necessarily constituting a petty offense which by definition did not require a jury trial. Instead, Reed, relying upon District of Columbia v. Colts,\(^8\) provided that the classification of a crime as a serious crime (requiring a jury trial) or a petty offense (triable summarily without a jury) depended primarily upon the nature of the offense. The Florida Supreme Court in Reed further relied upon its previous holding in Whirley v. State,\(^9\) in which four classes of serious crimes (requiring jury trials) were enumerated. Those classes included crimes indictable at common law; crimes involving moral turpitude; crimes that are malum in se; and crimes carrying a penalty in excess of six months incarceration. Utilizing that analysis, the Florida Supreme Court in Reed found malicious mischief to be rooted in the common law as well as have been malum in se and requiring a jury trial under both the United States and Florida Constitutions.

**Jury Selection**

The Florida Supreme Court addressed several challenges to trial court rulings relating to the competency of potential jurors. In these cases the court was careful to follow its well-established precedent that the competency of a challenged juror was a discretionary decision of the trial court which would not be disturbed absent a showing of manifest error.\(^10\) In Ross v. State,\(^11\) the court rejected a claim of reversible error based upon the trial court's denial of a motion to strike a prospective juror for cause due to the prospective juror's belief that she had

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9. 450 So. 2d 836, 838 (Fla. 1984).
11. 474 So. 2d 1107 (Fla. 1985).
seen the prosecutor at a family reunion and the juror’s uncertainty whether the prosecutor was a distant relative of the juror’s. The Florida Supreme Court, in rejecting Ross’ claim of error, reviewed Florida’s statutory provisions relating to challenge for cause based upon blood relations between potential jurors and attorneys for parties. The court in Ross concluded that the “abstract statements” made by the prospective juror failed to satisfy the statutory requirements that jurors may be challenged for cause if the jurors are related within the third degree to the attorneys of either party.\textsuperscript{12} Unfortunately, the opinion in Ross does not discuss whether the prosecutor in question responded to the statement of the prospective juror in order to provide the court with a complete and accurate factual basis to determine the defendant’s motion to challenge for cause. Additionally, the Ross opinion does not discuss whether Ross’ counsel sought to further inquire of the juror concerning her knowledge of the prosecutor.\textsuperscript{13}

In Mills v. State,\textsuperscript{14} the Florida Supreme Court affirmed the trial court’s determination of juror competency and found no error in the trial court’s denial of a motion to excuse a potential juror for cause. The questioned Mills juror is described in the court’s opinion as having a “distant relationship”\textsuperscript{15} with the murder victim’s family and an “acquaintance with Mills and his family.”\textsuperscript{16} In applying the court for an order to excuse the juror for cause, Mills’ trial counsel had represented to the court that he had “independent information” that the questioned juror had voiced an opinion that Mills was guilty during a conversation with Mills’ brother-in-law. The questioned juror denied that he had expressed an opinion concerning Mills’ guilt during a conversation with Mills’ brother-in-law. The juror additionally stated that he could be fair and impartial. When the trial court provided Mills’ counsel with an opportunity to provide the court with evidence of the alleged statement of the juror concerning Mills’ guilt, the attorney merely “repeat[ed] his

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\item FLA. STAT. § 913.03(9) (1983).
\item Since trial attorneys are themselves provided voir dire examination, Rule 3.300(b), Fla. R.Cr.P., it would seem dubious that Ross’ counsel would not have sought to further explore the question.
\item Further, Ross should not be read as precluding trial courts from granting motions to exclude for cause in situations where the requirements of Sec. 913.03(9) are not satisfied.
\item 462 So. 2d 1075 (Fla. 1985).
\item Id. at 1079.
\item Id.
\end{enumerate}
representations that the incident did occur." The Mills court concluded that the trial court properly concluded that the absence of evidence to substantiate the claims of partiality did not negate the jurors’ insistence of impartiality. In reaching their decisions, the trial court and supreme court implemented the criteria announced in Lusk v. State, and determined that the challenged juror could “lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.”

In Stano v. State, the Florida Supreme Court considered the scope within which the ability of a juror to implement the Lusk test could be explored during voir dire. The issue in Stano was whether trial counsel could ask a potential juror “how” they could “block . . . out” pretrial publicity relating to the defendant’s case and accordingly provide the defendant a verdict based solely on the evidence presented. The trial court sustained an objection to the inquiry as to “how” the juror could block out the pretrial publicity in satisfying the Lusk test. In affirming the prohibition imposed by the trial court, the supreme court found no abuse of discretion. The court relied upon the decision in Jones v. Stater, and stated that: “While ‘counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors,’ it is the trial court’s responsibility to control unreasonably repetitious and argumentative voir dire.” Unfortunately, the Stano case reflects the difficulty experienced by trial counsel in at-

17. Id.
19. 462 So. 2d at 1081. The Mills decision does not describe any reason why the defendant’s brother-in-law was not called by the defendant to testify as to the alleged opinion of guilt expressed by the potential juror. Further, the Mills opinion is silent as to any questions asked of the potential juror concerning his knowledge of any particular facts concerning Mills and/or his background. This area is particularly significant considering the fact that Mills had four prior burglary convictions.
20. 473 So. 2d 1281 (Fla. 1985).
21. Id. at 1284.
22. Id. at 1285.
23. Unfortunately, the Stano opinion does not provide a specific description of the pretrial publicity except the following generalization “numerous numbers of the venire for the second trial had been exposed to publicity regarding Stano, the instant crime, and the first trial.” 473 So. 2d at 1285.
24. 378 So. 2d 797 (Fla. 1st Dist. Ct. App. 1979), cert. denied, 388 So. 2d 1114 (Fla. 1980).
tempting to properly explore an area critical to his client’s opportunity to receive a fair trial. While it is difficult to understand how a question such as “How can you block out pretrial publicity?” is “unreasonable repetitious and argumentative,” it is obvious that the “how” question is rather ineffective in achieving the ultimate goal of uncovering latent or concealed prejudices.

The question of whether the trial court erred in denying a motion to excuse for cause two prospective jurors who were employed as corrections officers in the state prison system was reviewed by the court in *State v. Williams.* The *Williams* court concluded that no error had occurred despite the fact that Williams had been charged with battery of a corrections officer. In reaching its decision, the supreme court quashed the decision of the First District Court of Appeal. The district court had relied upon its previous ruling in *Irby v. State.* In *Irby* the court found an “appearance and a substantial probability of inherent juror bias” when considering the ability of a corrections officer to sit as a juror in a case involving a battery of a corrections officer at the Union Correctional Institute. In *Irby,* as in *Williams,* the potential jurors claimed that they could be fair and impartial jurors despite their employment as a corrections officer. The *Williams* court concludes that the *Irby* court “ignored” the juror’s protestations of fairness in reaching its conclusion that the juror should be excused for cause. The court in *Williams* held that application of the *Lusk* test was appropriate in *Williams* and that the trial court was in the best position to determine the actual basis of a juror.

The person in the best position to determine this actual bias is the trial judge. The trial judge hears and sees the prospective juror and has the unique ability to make an assessment of the individual’s candor and the probable certainty of his answers to critical ques-

26. Id. at 1285.
27. 465 So. 2d 1229 (Fla. 1985).
28. The corrections officer who was the victim in *Williams* was employed at the Union Correctional Institute. The court’s opinion is silent as to the location of employment of the two questioned jurors (corrections officers).
31. 465 So. 2d at 1230.
32. *Williams* chose to argue in the Supreme Court that the *Lusk* test announced by the Supreme Court was not applicable to the “unique” facts of *Williams.*
The result in *Williams* reflects the supreme court's basic reluctance to disturb the findings of the trial court in deciding whether the trial court denied motions to excuse jurors for cause. Unfortunately, the court has implemented the *Lusk* test which essentially restricts the trial court from excusing a juror for cause unless the court finds that the juror lacked candor in expressing confidence in being able to implement the *Lusk* test. The *Lusk* test is particularly troublesome when the trial court considers the "candor" of law enforcement personnel who are under obvious pressure to announce themselves fair in answer to the question of whether they will sit as fair jurors in a trial. It seems unlikely that any law enforcement officer would admit to being prejudiced and even more unlikely that a trial judge will grant a motion to challenge for cause and thus (as required by *Lusk*) make a determination that the official lacked candor.

Defendant's Presence at Trial

The Florida Supreme Court was challenged by two unique questions concerning a defendant's right to be present at his trial. In *Peede v. State*, the court considered for the first time whether a defendant could knowingly and voluntarily waive his presence at a capital trial. The court considered the question from the perspective of the United States Supreme Court decisions of *Taylor v. United States*, in which a defendant's voluntary absence in a non-capital case operated as a waiver of his right to be present during all phases of a trial, as well as *Drope v. Missouri*, in which the question of whether a defendant may waive his presence at a capital trial was specifically left open. The *Peede* Court concluded that no valid distinction exists between defendants in capital and non-capital offenses and therefore concluded that a

33. 465 So. 2d at 1231.
34. It seems clear that legislative limitations on the ability of law enforcement officials to sit on juries is the only visible remedy to the *Lusk* test.
35. 474 So. 2d 808 (Fla. 1985).
37. The right of a defendant to be present at the stages of a trial where fundamental fairness might be thwarted by his absence derives from the confrontation clause of the sixth amendment and the Due Process Clause of the fourteenth amendment. *Illinois v. Allen*, 397 U.S. 337 (1972).
defendant could voluntarily waive his right to be present at a capital trial just as a defendant could knowingly waive any other constitutional right. The Peede court recognized that its opinion might be in conflict with the decision of Proffitt v. Wainwright, in which the Eleventh Circuit found a defendant's presence at a capital trial to be non-waivable. In light of Proffitt, the ultimate viability of Peede would appear questionable.

Despite its ruling in Peede, the court held in Hooper v. State, that a trial court had not erred in refusing a request of a defendant to waive his presence during the jury selection phase of a trial. The Hooper holding, which ironically was announced on the same day as Peede, concluded that Hooper's reason for absenting himself (fear that his physical size might intimidate jurors in their voir dire responses) did not outweigh what the court called "the ultimate need to be present." The Florida Supreme Court did not attempt to reconcile Peede and Hooper.

Competency

A. Defendant's Competency

The Florida Supreme Court reversed two death sentence convictions of first degree murder in 1985 due to a failure of a trial court to conduct an evidentiary hearing to determine the competency of a criminal defendant. In Gibson v. State, the supreme court found a trial court's determination of competency merely based upon review of past medical reports and the trial court's personal observations to be insufficient. The Gibson court restated its holding in Christopher v. State.

39. 474 So. 2d at 814. The Peede court looked toward the 1975 Amendment to Rule 43, Federal Rule of Criminal Procedure which abandoned any distinction between capital and noncapital offenses relating to voluntary absence from criminal trials, as well as Florida Rule of Criminal Procedure 3.180(b) which similarly lacks a capital—noncapital distinction.

40. 685 F.2d 1227 (11th Cir. 1982), cert. denied, 104 U.S. 508 (1983).

41. Peede sought to distinguish Proffitt in two respects. Initially, Peede contended that the Proffitt court had not recognized the elimination of the distinction in Rule 43 between capital and non-capital cases. Secondly, Peede noted that Proffitt had alternatively concluded that no knowing or voluntary waiver had been satisfied.

42. 476 So. 2d 1253 (Fla. 1985).

43. Id. at 1256.

44. 474 So. 2d 1183 (Fla. 1985).

45. 416 So. 2d 450, 452 (Fla. 1982).
which states the responsibility of the trial court to conduct a competency hearing "whenever it reasonably appears necessary, whether requested or not." The facts determined to require a hearing in *Gibson* included an eight year history of court-ordered examination and periodic hospitalization, as well as a prior determination of incompetency.46

In *Hill v. State*,47 the court reversed a first degree murder conviction in which the trial court refused to conduct an evidentiary hearing to determine competency in which a defendant had been previously diagnosed to suffer from grand malepileptic seizures and mental retardation. Further, during a special education program for mentally handicapped children, the defendant had been observed to often times be blamed for things he did not do, and when accused, often admitted guilt. Additionally, the defendant's I.Q. was subsequently measured to have been sixty-six which placed the defendant in the lowest one percent in the general population. The supreme court in *Hill* specifically rejected the procedure utilized by the trial court in which it determined that an evidentiary hearing was not necessary. The trial court only allowed the testimony of the defendant's attorney as well as an investigator for the defense. The trial court permitted submission of other testimony by deposition. However, the trial court stated that it was not going to review the depositions since the issue of competency was a judgment determination for the trial lawyer. The supreme court rejected this obvious misapplication of the law.

In *Trawick v. State*,48 the Florida Supreme Court held that the trial court did not err in failing to conduct a competency hearing merely on the fact that the defendant appeared despondent and ambivalent about his guilty plea to first degree murder. *Trawick* recognized the obligation placed upon the trial court in *Drope v. Missouri*,49 to conduct its own inquiry of a defendant's competency if irrational behavior or demeanor is displayed. However Trawick's contemplation of suicide and despondency when viewed in the light of the trial court's extensive colloquy prior to accepting Trawick's guilty plea were deemed not to require further hearing.

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46. *Gibson*, 474 So. 2d at 1183.
47. 473 So. 2d 1253 (Fla. 1985).
48. 473 So. 2d 1235 (Fla. 1985).
B. Physical Condition of Counsel

While appellate courts generally do not disturb trial courts' discretionary determinations of motions for continuance, the Florida Supreme Court was confronted by a trial court's denial of a motion for continuance based upon the health of defense counsel which the supreme court found compelled reversal of a first degree murder conviction.

In *Jackson v. State*, the supreme court evaluated the unrefuted record which included the defendant's attorney having suffered a head injury prior to trial and having received medication for that injury which resulted in episodes of dizziness and slurred speech. The court concluded that these circumstances mandated reversal due to the trial court's failure to grant the motion for continuance due to the inability of the trial counsel to effectively represent his client.

Search and Seizure

Relatively few significant search and seizure issues were considered by the Florida Supreme Court in 1985. In *Lara v. State*, the court concluded that an exception to the warrant requirement would be rooted in exigent circumstances when law enforcement officers conduct an immediate search of an area to determine the number and condition of the victims or survivors, to see if the killer is still on the premises and to preserve the crime scene. In *State v. Dilyerd*, the supreme court implemented the holding of the United States Supreme Court in *Michigan v. Long*, and found that reasonable suspicion that an unarrested person is dangerous supports a warrantless area search of the passenger compartment of an automobile. As in *Long*, the *Dilyerd* court reached its conclusion despite the fact that the unarrested individual had been removed from the automobile prior in time to the search.

Finally, in *Roche v. State*, the court found the statutory basis supporting random searches of vehicles in furtherance of agricultural regulations to be constitutional. The *Roche* decision was in direct con-

50. 464 So. 2d 1181 (Fla. 1985).
51. 464 So. 2d 1173 (Fla. 1985).
52. Id. at 1175.
53. 462 So. 2d 301 (Fla. 1985).
55. 462 So. 2d 1096 (Fla. 1985).
trast to the holding in *Lake Butler Apparel Co. v. Department of Agriculture and Consumer Services*.

In *Lake Butler*, the court found the identical statute to be unconstitutional.

**Statements**

In *Haliburton v. State*, the Florida Supreme Court considered the question of whether a defendant who has been advised of his *Miranda* rights and agrees to answer questions must be advised by his interrogators that an attorney retained on his behalf desires to speak to him. The supreme court answered that question in the affirmative, finding that a defendant must be advised that an attorney retained on his behalf is trying to advise him even if said notification is during the course of an interrogation. The court reiterated that the determination of the need for counsel is the defendant's prerogative, citing *State v. Craig*, and that once informed of the opportunity for advice, the defendant may reject that opportunity. The court specifically rejected any requirement for law enforcement officials to obey a telephone order of an attorney to terminate questioning a defendant.

It would appear, however, that the *Haliburton* opinion has been directly contradicted by the subsequent United States Supreme Court decision in *Moran v. Burbine*. In *Burbine*, the Supreme Court concluded that the failure to advise a defendant of the efforts of an attorney who had been retained by the defendant's sister without defendant's knowledge, to contact a defendant did not deprive the defendant of his right to counsel or defeat defendant's waiver of his *Miranda* rights.

In *State v. Inciarrano*, the Florida Supreme Court confronted a rather novel factual scenario in which a victim of a homicide had tape recorded his own murder in his own office. The issue before the court related to the admissibility of the tape recording which contained the voice of Inciarrano conversing with the victim "the sound of a gun being cocked, five shots being fired by Inciarrano, several groans by the..."
victim, the gushing of blood, and the victim falling from his chair to
the floor."\textsuperscript{62} The supreme court determined that the Florida Communic-
cations Statute which requires consent to the interception of wire or
oral communications by all parties to the communications did not apply
to the murder tape and therefore suppression of the tape was not man-
dated. While the result announced in \textit{Inciarrano} is not particularly dra-
matic, the rationale implemented to reach that result is potentially
quite significant. The court analyzed the Florida Communications Stat-
ute and determined that it applied only to communications in which an
individual "Exhibit[ed] an expectation of privacy under circumstances
reasonably justifying such an expectation."\textsuperscript{63}

In \textit{Cave v. State},\textsuperscript{64} the Florida Supreme Court affirmed the denial
of a motion to suppress a defendant's statements. In \textit{Cave}, the court
found that he had been fully advised of his \textit{Miranda} rights and ac-
knowledged his rights. The defendant proceeded to initially proclaim
his innocence. At no time did he ask for counsel or exercise his right to
remain silent. The court found that the defendant's eventual statement
was proper since the law enforcement officials had no obligation to
equate protestation of innocence with implementation of constitutional
rights that require questioning to cease.

\textbf{Prosecutorial Misconduct}

Episodes of prosecutorial misconduct were unfortunately not for-
eign to the cases considered by the 1985 Florida Supreme Court. The
court was confronted with a veritable laundry list of improper conduct
and tactics utilized in order to secure criminal convictions. These tac-
tics included use of false testimony, refreshing recollection with inad-
missible and factually inaccurate allegations of defendant's confessions,
withholding of \textit{Brady} material, attacks on defense counsel, and com-
menting on a defendant's right to remain silent. Although the 1985
supreme court cited impropriety with a high level of disdain, it never-
theless found that misconduct rarely creates grounds for reversal of
criminal convictions. Instead, the supreme court, relying upon the
harmless error rule, generally viewed disciplinary actions against par-
ticular attorneys as the most appropriate remedy for improper
behavior.

\textsuperscript{62} \textit{Id.} at 1274.
\textsuperscript{63} \textit{Id.} at 1275.
\textsuperscript{64} 476 So. 2d 180 (Fla. 1985).
Despite obvious awareness of the legendary "golden rule" parameters of closing arguments, prosecutors violated the prohibition against arguing to the jury that they may well be victims of the defendant's criminal behavior if they fail to convict him. In *State v. Wheeler*, the Florida Supreme Court found the following argument to be violative of the golden rule which mandated reversal:

Ladies and gentlemen, these officers were acting in nothing but good faith. They know there are drugs out there. It's all over the place. It's in the school yard, it's in the playground, it's in the home — it doesn't matter whether you are rich or poor, the drugs are out there. These officers know there is only one way to stop it and that is to go after the dealer. Ladies and gentlemen, Mr. Dale Wheeler is one of these people. He is one of these dealers. He is supplying the drugs that eventually get to the school yards and eventually get to the school grounds and eventually get into your own homes. He is one of the people who is supplying this. For him and people just like him — [at this point defense counsel objected, asked for a curative instruction, and moved for mistrial, all of which was denied by the judge].

Section 924.33, Florida Statutes (1983), codified and adopted the "harmless error" rule for appeals of criminal convictions. In *State v. Murray*, the supreme court applied the harmless error rule to prosecutorial misconduct in closing arguments. Consequently, the Murray court declined to apply its "supervisory power" unless the error was not harmless. Section 924.33, Florida Statutes (1983) provides that:

No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Despite the statute, Florida courts had traditionally concluded that prosecutors' comments on defendants' failure to testify created reversible error regardless of the harmless error statute. However, in *State v. Marshall*, the court applied the harmless error rule to any comment.

65. 468 So. 2d 978 (Fla. 1985).
66. Id. at 981.
67. 443 So. 2d 955 (Fla. 1984).
68. 476 So. 2d 150 (Fla. 1985).
which refers to any comment upon defendant's failure to testify. In abandoning its *per se* reversal rule, the *Marshall* court referred to four factors. Initially, the supreme court looked to court decisions which have determined comments upon silence not to be fundamental error. Secondly, the *Marshall* court looked to the United States Supreme Court decisions in *Chapman v. California*,71 and *United States v. Hastings*,72 which found the harmless error rule to be consistent with the federal constitution. Third, the harmless error rule was described as a preferred method of promoting the administration of justice. Finally, the *Marshall* court turned to the Florida legislative intent as encompassed within Section 924.33.

Consequently, as a result of *Marshall*, comments upon the failure of a defendant to testify must be evaluated according to the harmless error rule with the state having the burden of establishing the comment to have been harmless beyond a reasonable doubt.73

In *Bertolotti v. State*,74 the Florida Supreme Court criticized a prosecutor's closing comments to a jury during a death sentence hearing. In that argument, the prosecutor proceeded to comment on the defendant's right to remain silent, violated the golden rule by inviting the jury to imagine the victim's pain, terror and defenselessness, and also asked them to send a message to the community at large. The *Bertolotti* court concluded that since the penalty phase of a murder trial only results in a nonbinding recommendation, misconduct must be "egregious" and so outrageous so as to taint the validity of the recommendation of the jury.76 The court did, however, launch into a stern admonition of the prosecutor's conduct. The court restated its prescription to remedy similar misconduct by professional sanction of the individual attorney and not at the expense of the citizens by mistrial of

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69. See David v. State, 369 So. 2d 943 (Fla. 1979); Trafficante v. State, 92 So. 2d 811 (Fla. 1957); and Way v. State, 67 So. 2d 321 (Fla. 1953).
70. See Chapman v. California, 386 U.S. 18, 22 (1967); Clark v. State, 363 So. 2d 331 (Fla. 1978).
71. 386 U.S. 18 (1967).
72. 461 U.S. 499 (1983). In *Hastings* the Supreme Court set forth the issue to be decided by the reviewing court "absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victim, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty," 461 U.S. at 510-11.
73. 476 So. 2d at 153.
74. 476 So. 2d 130 (Fla. 1985).
75. 476 So. 2d at 133.
Nondisclosure of Information

On several occasions in 1985, the Florida Supreme Court considered cases in which prosecutors failed to provide required information to the defense. In Arrango v. State, the supreme court reversed a first degree murder conviction due to the state's failure to disclose the existence of evidence which had been requested by the defense pursuant to Brady v. Maryland. The Arrango court concluded that the evidence in question had been (1) requested by the defense and suppressed by the prosecution (2) favorable in character for the defendant and (3) material to the outcome of the trial.

In Brown v. State, the supreme court reviewed the trial court's exclusion of certain evidence which the state had inadvertently not disclosed to the defense in discovery. The supreme court found that the trial court properly conducted a Richardson hearing (as provided in Richardson v. State), and remedied the substantial discovery violation in a manner consistent with the seriousness of the breach.

Finally, in Francis v. Stater, the supreme court refused to grant a new trial despite the fact that the prosecutor had failed to provide the exact details of the reward to be provided a state witness for her testimony. The court found the relevant facts of the witness' "deal" with the state had been made known to the jury and thus the nondisclosed facts did not deprive Francis of due process of law or a fair trial.

Jury Instructions

Parties and courts in Florida criminal cases are guided by standard jury instructions. While the Florida Supreme Court has approved these standard jury instructions, the supreme court also requires the trial court to individualize each case with appropriate instructions.

76. State v. Murray, 443 So. 2d 955, 956 (Fla. 1984).
77. 467 So. 2d 692 (Fla. 1985).
78. 373 U.S. 83 (1963).
79. 467 So. 2d at 694.
80. 473 So. 2d 1260 (Fla. 1985).
81. 246 So. 2d 771 (Fla. 1985).
82. 473 So. 2d 672 (Fla. 1985).
Consequently, in *Yohn v. State*, the instruction relating to insanity was deemed to be insufficient by the supreme court and thus requiring reversal of a manslaughter conviction.

In *Rotenberry v. State*, the supreme court closely scrutinized the standard entrapment instruction before deeming it sufficient.

**Entrapment**

In 1985, the Florida Supreme Court considered several cases relating to the issue of "entrapment." Specifically, in *State v. Wheeler*, the supreme court defined the burden of proof to be carried by the prosecution and defense in entrapment cases. *Wheeler* defines the initial burden of adducing any evidence of entrapment as being the defendant's. The trial court is then responsible to determine the sufficiency of the evidence of entrapment. If a sufficient level of evidence relating to entrapment has been established, the prosecution then bears the burden of disproving entrapment beyond a reasonable doubt. The issue of whether the prosecution has disproved entrapment beyond a reasonable doubt is a jury question which must be preceded by a proper jury instruction. That jury instruction may not, however, include any element describing the defendant's burden to adduce evidence. *Wheeler* describes the level of evidence required to be adduced by the defendant as "[E]vidence which suggests the possibility of entrapment. . . ."87

The usual method the state uses to disprove entrapment is to prove the predisposition of the defendant beyond a reasonable doubt. Proving predisposition may be accomplished in a variety of ways. The state may show that the defendant had prior convictions or a reputation for engaging in prior similar illicit acts or by showing the defendant's "ready acquiescence" to commit the crime.89

In *Cruz v. State*, the supreme court considered whether a "subjective" and "objective" entrapment doctrine could co-exist. The subjective entrapment doctrine focuses upon the predisposition of the defendant. The determination of predisposition is normally a question for

84. 476 So. 2d 123 (Fla. 1985).
85. 468 So. 2d 971 (Fla. 1985).
86. 468 So. 2d 978 (Fla. 1985).
87. *Id.*
88. *Id.*
89. *Id.*
90. 465 So. 2d 516 (Fla. 1985).
91. *Id.*
the jury to determine.\textsuperscript{92} However, in \textit{Cruz}, the supreme court was concerned that certain police conduct inducing crime was so egregious that the predisposition of a defendant to commit a crime became irrelevant. \textit{Cruz} adopts an objective doctrine of entrapment to address such a circumstance.\textsuperscript{93} The determination of whether "objective entrapment" has occurred is one to be decided by the court. In providing guidance to courts, the \textit{Cruz} court sets forth a threshold test of an entrapment defense. The court is required to first decide whether the questioned police activity is directed at a specific ongoing criminal activity or is in reality manufacturing crime. The second element of the test is directed to determining whether law enforcement officers utilized means reasonably tailored to apprehend those involved in the ongoing criminal activity.\textsuperscript{94} \textit{Cruz} described the first prong of its test in terms of a "but for" analysis. The court must determine "but for" the police activity would there have been a crime. The second prong of \textit{Cruz} which evaluates techniques utilized to induce an individual to participate in the criminal activity. \textit{Cruz} directs courts to two particular situations in which law enforcement officers make knowing false representations designed to induce the belief that the illegal conduct is not prohibited or by employing methods of persuasion or inducement which creates the substantial risk that the offense will be committed by persons other than those ready to commit said offense.\textsuperscript{95}

In \textit{State v. Glosson},\textsuperscript{96} the supreme court held that the due process clause of the Florida Constitution (Article I, Section 9) requires dismissal of criminal charges where constitutional due process rights of a defendant are violated by governmental misconduct regardless of the defendant's predisposition. In \textit{Glosson}, the supreme court found a contingent fee agreement with an informant violated the Florida due process clause when the agreement was conditional on cooperation and testimony which was critical to a successful prosecution.

**Effective Assistance of Counsel**

The significant quantity of death penalty cases submitted to the Florida Supreme Court has predictably led to numerous issues relating
to the effectiveness of trial and appellate counsel.

In *Sireci v. State*, the supreme court reiterated its reliance upon the United States Supreme Court’s two pronged test to determine a post conviction challenge to effective assistance of counsel. That test as set forth in *Strickland v. Washington*:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose results is reliable.

In *Sireci*, the claimed error involved defense counsel’s failure to cross-examine a state witness. The Florida Supreme Court accepted the testimony of Sireci’s trial counsel that the failure to cross-examine was intended to properly preserve a state discovery violation. *Sireci* found the defense counsel’s strategy to be reasonable within prevailing professional norms.

Numerous 1985 Florida Supreme Court cases discussed the issue of effective assistance of appellate counsel. The right to effective assistance of appellate counsel was restated in *Wilson v. Wainwright*. In *Wilson* and in *Dardin v. State*, the criteria required to establish ineffective assistance of appellate counsel were stated:

Petitioner must show 1) specific errors or omissions which show that appellate counsel’s performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Utilizing this test, the supreme court concluded that appellate counsel was not ineffective in by failing to read appellate briefs of all potentially relevant cases pending before the supreme court prior to prepara-

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97. 469 So. 2d 119 (Fla. 1985).
99. 474 So. 2d 1162 (Fla. 1985).
100. 475 So. 2d 214, 215 (Fla. 1985).
101. 474 So. 2d at 1166 (quoting *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985)).
tion of his brief;\(^ {102}\) failing to file as supplementary authority supreme
court authority coming after defendant's oral argument;\(^ {103}\) failing to
raise nonfundamental issues relating to jury instructions in penalty
phase which had not been objected to in the trial court;\(^ {104}\) and failing
to argue certain prosecutorial comments.\(^ {105}\) In Jones \(v\). Wainwright,\(^ {106}\)
the supreme court found appellate counsel not to have been ineffective
for not arguing alleged improper prosecutorial argument which trial
counsel had not objected to. The Jones court concluded that
"[C]ounsel was not ineffective for not raising an issue which had no
chance of success on appeal."
\(^ {107}\)

While challenges relating to effectiveness of counsel were generally
unsuccessful, the supreme court in Wilson \(v\). Wainwright,\(^ {108}\) found ap-
pellate counsel to be ineffective. The elements of ineffectiveness cited in
Wilson included failure to brief issues relating to sufficiency of evidence
and propriety of death penalty, lack of preparation and zeal during oral
argument. Illustrative of appellate counsel's failure is the following
excerpt:

\[
\begin{align*}
\text{THE COURT:} & \quad \ldots \text{ You don't consider [the legality of the sen-
tence] with any materiality or relevance in a case where} \quad \ldots \text{the}
d\text{death penalty has been imposed, sir?} \\
\text{CONNER:} & \quad \text{Uh, those particular points about the aggravating and}
mitigating circumstance, uh, I felt the prior decision of this court
were clear that with the aggravating circumstances as found by the
court, that and with no mitigating circumstances that it was, uh, in
an area where the court had already decided, unless something has
changed in the interim.} \\
\ldots
\text{THE COURT:} & \quad \text{Well, let me ask a question. Do you feel that death}
is the appropriate punishment if he is guilty.} \\
\text{CONNER:} & \quad \text{It's, it's quite possible, yes sir. Uh, there was sufficient}
evidence in this case for the jury to find premeditation and they did
find premeditation.} \\
\text{Later in the argument, the discussion continued:} \\
\text{THE COURT:} & \quad \text{Would you agree that the evidence concerning the}
\end{align*}
\]

\(^ {102}\) 475 So. 2d at 214. \\
\(^ {103}\) Id. \\
\(^ {104}\) Id. \\
\(^ {105}\) 476 So. 2d 685 (Fla. 1985). \\
\(^ {106}\) 473 So. 2d 1244 (Fla. 1985). \\
\(^ {107}\) Id. at 1245. \\
\(^ {108}\) 474 So. 2d 1162 (Fla. 1985).
fact of his committing first degree murder in this instance was pretty overwhelming?
CONNER: I would say that it was overwhelming.

THE COURT: May I ask you this please sir. Now, on the one hand, if I'm reading it correctly, you're saying that there is no question about the guilt and then your statement of the guilt there that the death penalty is appropriate. Am I misunderstanding you?
CONNER: No, I don't — I don't think I meant to say that if that's the way it came out. 109

Conclusion

The 1985 session of the Florida Supreme Court provided several opportunities for the court to address significant issues in the subject of criminal procedure. The focus of the court was persuaded by the nature of the cases which it was required to review. Nevertheless, the Florida Supreme Court criminal procedure decisions illustrate the difficult responsibility which the court has assumed to balance the needs of society with the rights of individuals.

109. Id. at 1164.
# Survey: Evidence

*By Mark M. Dobson* and Randolph Braccialarghe**

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I. Introduction

Twenty-one years ago Chief Justice Earl Warren appointed an advisory committee to propose evidentiary rules for the federal courts, thus beginning a movement which has worked a minor revolution in substantive evidence law.\(^1\) Besides reforming federal law, the Federal Rules of Evidence have been a model for evidentiary reform in many states. Florida became one of the earliest states to adopt the federal courts' lead and consider revising its substantive evidence law.\(^2\) After several unsuccessful attempts at reform, the Florida Legislature passed the Florida Evidence Code in 1976.\(^3\) However, the Evidence Code's effective date was delayed several times while possible conflicts between the Florida Supreme Court and the Florida Legislature were resolved.\(^4\)

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4. The Evidence Code originally was to have taken effect on July 1, 1977. However, 1977 Fla. Laws 77 delayed the effective date until July 1, 1978. Subsequently 1978 Fla. Laws 379 delayed the effective date until July 1, 1979. After this legislative action, the Florida Supreme Court noted that article V, section 2(a) of the Florida Constitution gave it the sole authority to "adopt rules for the practice and procedure in all courts. . . ." Recognizing that portions of the evidence code may be procedural, rather than substantive, the Court temporarily approved and adopted the evidence code as originally enacted and amended by 1978 Fla. Laws 379. See In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979). Following the receipt of comments from the Florida Bar and Florida Academy of Trial Lawyers, the Florida Bar Board of Governors expressed its general approval with the Evidence Code to the Florida Supreme Court.
During the delay period, several amendments to the Code were passed, but the original 1976 text is the same for most provisions. The Florida Evidence Code finally became effective on July 1, 1979, applying to all crimes committed after that date and to all other proceedings pending or brought after October 1, 1981.

This article discusses the major Florida evidentiary case law developments which occurred during most of 1985. During this period, the Florida courts confronted a number of evidentiary issues. As with most surveys, the authors do not discuss each decision. Some opinions are so brief that attaching any real significance to them is impossible. Other opinions merely restate settled evidence law with which most readers would be well familiar. Those areas discussed have been so selected for three reasons: (1) because a new evidentiary development has occurred in the area, (2) because a particular case presents an excellent example of a fundamental principle involved in a particular area, or (3) because the sheer number of times that a particular area presents evidentiary issues makes it an important one for practitioners and for the courts. By way of inconclusiveness, the authors note the following evidentiary areas not dealt with in this article generated decisions during

However, the Bar noted that provisions of § 90.103 concerning the Code's applicability to civil actions could create problems and suggested changes therein. The Florida Supreme Court agreed clarification was needed but considered this a legislative responsibility. See In re Florida Evidence Code, 376 So. 2d 1161 (Fla. 1979). The legislature followed the court's suggestion and amended the Evidence Code once more to cure this problem. See 1981 Fla. Laws 93. The Florida Supreme Court approved and adopted all aspects of the 1981 legislature changes. See In re Amendment of Florida Evidence Code, 404 So. 743 (Fla. 1981).


For an article comparing the original 1976 Evidence Code before amendment with both the Federal Rules of Evidence and pre-code Florida evidence law, see Hicks and Matthews, Evidence, 31 U. Miami L. Rev. 951 (1977).

For an excellent one volume work on present Florida evidence law, see C. Ehrhardt, Florida Evidence (2d. ed. 1984).


7. This article discusses cases in 462 So. 2d through 476 So. 2d.

8. There were 154 reported cases during the survey period which dealt with evidentiary issues. Most, but not all, of these issues involved various sections of the Florida Evidence Code.
the survey period: offers to compromises; guilty pleas; character evidence; competency of witness; dead man's statute; rape shield law; academic privilege; informer's privilege; medical review com-

9. See Fla. Stat. § 90.408 (1985); H.R.J. Bar-B-Q, Inc. v. Shapiro, 463 So. 2d 403, 404 (Fla. 3d Dist. Ct. App. 1985) (offer made to plaintiff upon being fired was not a compromise since there was no "claim . . . disputed as to validity or amount at the time the offer was made"); Benoit, Inc. v. District Bd. of Trustees, 463 So. 2d 1260 (Fla. 5th Dist. Ct. App. 1984) (§ 90.408 excludes all statements made in compromise negotiations as well as the actual compromise offers themselves).

10. See Fla. Stat. § 90.410 (1985); Ellis v. State, 475 So. 2d 1021, 1022 (Fla. 2d Dist. Ct. App. 1985) (defendant's statements to a police officer made two months after guilty plea, in effort to render substantial assistance in return for a reduced sentence were not made in connection with plea negotiations or the plea itself when there was "no showing that the guilty plea was part of any bargain with the state to accept defendant's cooperation and thereupon recommend a reduction. . .").

11. See Fla. Stat. § 90.404(1)(a); Von Carter v. State, 468 So. 2d 276, 278 (Fla. 1st Dist. Ct. App. 1985), remanded on other grounds, 478 So. 2d 10 (1985), rev'd on other grounds, 482 So. 2d 533 (Fla. 1st Dist. Ct. App. 1986) (prosecutor's reference to scar on defendant's neck during defendant's cross-examination for a burglary-robbery allegedly committed with a knife was an "insinuation of bad character" violating principle that a defendant must place his character in issue before the state can attack it); Wolack v. State, 464 So. 2d 587 (Fla. 4th Dist. Ct. App. 1985), review denied, 476 So. 2d 676 (Fla. 1985) (insufficient foundation for admission of reputation evidence when knowledge of reputation was based solely on witness' official position as a police officer).

12. See Fla. Stat. § 90.601, 90.604 (1985); State v. Barber, 465 So. 2d 264 (Fla. 2d Dist. Ct. App. 1985) (trial court should not have excluded witness' testimony even though it believed he had perjured himself in two depositions concerning the criminal charges, since the jury is the sole judge of witness' credibility); Howard Bros. v. Sotuyo, 472 So. 2d 1264 (Fla. 1st Dist. Ct. App. 1985) (witness had adequate foundation based on personal knowledge despite his lack of authority to fire employees to testify about what police jobs an injured police officer-plaintiff could hold).

13. See Fla. Stat. § 90.102 (1985); Comodeca v. Comodeca, 464 So. 2d 662, 663 (Fla. 2d Dist. Ct. App. 1985) (wife of a claimant against an estate is an "interested party" under the dead man's statute since she was "closely allied with her husband . . . [and] would directly gain or lose from the resolution of the case").


14. See Fla. Stat. § 794.022 (1985); Gonzalez v. State, 471 So. 2d 214 (Fla. 4th Dist. Ct. App. 1985) (error in sexual battery case when defense was fabrication to exclude victim's forged note which showed her prior fantasizing of sexual activity); Kemp v. State, 464 So. 2d 1238 (Fla. 1st Dist. Ct. App. 1985) (defense properly excluded from asking about victim's virginity since this was irrelevant where its purpose was to impeach her testimony that she was unfamiliar about sexual relations and to impeach her by showing she lied to the examining physician when asked if she had ever
mittee privilege;\textsuperscript{17} and the attorney-client privilege.\textsuperscript{18} Likewise this arti-

had sex before the attack); Marr v. State, 463 So. 2d 391 (Fla. 1st Dist. Ct. App. 1985),\textit{ partially rev’d on other grounds}, 470 So. 2d 703 (Fla. 1st Dist. Ct. App. 1985) (en banc) \textit{review denied}, 475 So. 2d 696 (Fla. 1985) (no denial of defendant’s Sixth Amendment Right to Confrontation in precluding evidence of sexual relations between victim and her boyfriend since defendant was able to show their close relationship by other means and thus argue the victim was biased against him for having told authorities of her boyfriend’s alleged criminal activity).

However, both Marr and Kaplan v. State, 451 So. 2d 1386 (Fla. 4th Dist. Ct. App. 1984) suggest that a complete exclusion of any evidence in reliance on § 794.022 showing the victim’s bias towards the defendant may violate the Confrontation Clause. For a general discussion of potential constitutional problems with rape shield laws see Tanford and Bocchino, \textit{Rape Shield Laws and the Sixth Amendment}, 128 U. Pa. L. Rev. 544 (1980).


16. \textit{See} Aldazabal v. State, 471 So. 2d 639 (Fla. 3d Dist. Ct. App. 1985) (conviction reversed when state failed to determine and provide defense with the address of an informer who was a vital witness); State v. Carnegie, 472 So. 2d 1329, 1330 (Fla. 2d Dist. Ct. App. 1985) (mere defense assertion that informer is vital witness and should be produced is not sufficient when no defense was specified and the informer was not “the sole material witness to the events”).

17. \textit{See} former FLA. STAT. § 768.04(4) (1983), now FLA. STAT. § 768.40(5) (1985); Mercy Hosp. v. Department of Professional Regulation, 467 So. 2d 1058 (Fla. 3d Dist. Ct. App. 1985) (hospital per review committee records are not privileged from subpoena by the Department conducting disciplinary investigation of two doctors); HCA of Florida, Inc. v. Cooper, 475 So. 2d 719 (Fla. 1st Dist. Ct. App. 1985) (even though they are not explicitly protected by statutory language, a party must still show exceptional need to justify production of medical review committee records).

18. \textit{See} FLA. STAT. § 90.502 (1985). Two opinions discussed when the state can call defense counsel as witnesses in criminal cases. In Perez v. State, 474 So. 2d 398 (Fla. 3d Dist. Ct. App. 1985) \textit{review denied}, 484 So. 2d 10 (Fla. 1986), the court found error in the state’s listing of defense counsel as a witness, since the testimony desired was available from other sources. The listing compelled the attorney to withdraw and forced the defendant to accept a continuance beyond the speedy trial rule’s limits. The court reversed the defendant’s conviction and ordered his discharge. In State v. Schmidt, 474 So. 2d 899 (Fla. 5th Dist. Ct. App. 1985), defense counsel successfully appealed from an order finding him in contempt for refusing to be a witness. The attorney’s client had been granted immunity in partial return for his testimony in a first-degree murder trial. When the client was deposed, his counsel was not present. At the deposition, the client testified about communications with counsel in which the client had made a confession. Afterwards, the attorney was subpoenaed to testify about the confession but claimed the lawyer-client privilege. The Fifth District Court of Appeal found that the client had wanted counsel at the deposition but had
Evidence does not discuss any statutory amendments passed in 1985.\textsuperscript{19} been persuaded to go ahead by assurances from the attorneys present that they would protect his interests. This was obviously not done, since neither deposing counsel nor the state's attorney had warned the client he could not limit his answers to the mere fact that he had previously shown defense counsel a confession. Given these circumstances, the court refused to find a valid waiver occurred at the deposition and reversed the contempt order.

On the civil side, the Florida Supreme Court decided two major cases involving the attorney-client privilege. In City of North Miami v. Miami Herald Publishing, 468 So. 2d 218 (Fla. 1985), the court addressed the relation between the Florida Public Records Act, FLA. STAT. §§ 119.01 et seq. (1985) and section 90.502. The court found that the lawyer-client privilege “does not exempt written communications between lawyers and governmental clients from disclosure as public records.” Id. at 220. However, the court found FLA. STAT. § 119.07(3)(o) (1985) created a limited attorney work product disclosure exception for any document which may qualify as a public record “until the conclusion of the litigation or adversarial proceedings” for which the document had been prepared. Similarly, in Neu v. Miami Herald Publishing Co., 462 So. 2d 821 (Fla. 1985), the Florida Supreme Court rejected arguments that section 90.502 required an exception to Florida's Sunshine Law, FLA. STAT. § 286.011 (1985), for a meeting between a city council and its attorney to discuss pending litigation.

These last two decisions were not chosen for review since they have already been thoroughly discussed in two articles. See Comment, Florida's Open Government Laws: No Exceptions for Attorney-Client Communications, 13 FLA. ST. U.L. REV. 388 (1985); Smith, The Public Records Law and The Sunshine Law: No Attorney-Client Privilege Per Se, and Limited Attorney Work Product Exception, 14 STETSON L. REV. 493 (1985).

19. The Florida legislature passed several bills which will affect evidentiary issues in future cases. One made minor textual changes to clarify FLA. STAT. § 90.606, relating to interpreters and translators and FLA. STAT. § 90.605(2) relating to what a child must understand before being found competent to testify. See 1985 Fla. Sess. Law Serv. 85-53, §§ 2, 3 (West).

Almost all the major legislative changes concerned evidence in child abuse cases. The first recognized the privilege for confidential communications to clergy when dealing with abuse cases concerning the elderly, disabled or children. See 1985 Fla. Sess. Law Serv. 85-28, §§ 1, 2 (West). The second provided for the use of video taped testimony or testimony by closed circuit television in child abuse and child sex abuse cases. See 1985 Fla. Sess. Law Serv. 85-53, §§ 5, 6 (West). The third created a new hearsay exception, FLA. STAT. § 90.803(23) (1985), for out-of-court statements of children eleven or younger reporting sexual abuse, provided the trial court does not find the statements are untrustworthy. See 1985 Fla. Sess. Law Serv. 85-53 § 4 (West).

FLA. STAT. § 90.803(23) (1985) clearly attempts to avoid Confrontation Clause problems. When the state actually calls the child as a witness, as well as admitting his out-of-court statements under this provision, no constitutional question exists. However, when a child is not a witness, for the out-of-court statements to be admissible under the new exception, the child must be unavailable under FLA. STAT. § 90.804(1) and the trial court must find that having the child testify would cause emotional or mental
Before discussing cases dealing with specific evidence issues, a brief statistical overview is in order. Probably to no one's surprise, the majority of cases presenting evidentiary issues were criminal.\textsuperscript{20} However, a surprising number of both criminal and civil cases were reversed for evidentiary error.\textsuperscript{21} Whether this survey period included an unusually high number of reversals is impossible to say since no statistics are available for prior years. Any explanation for the number of reversals would be somewhat speculative. Florida trial courts may perhaps be too lax in their evidence-rulings. Alternatively, the appellate courts may harm. Furthermore, there must be some corroborating evidence that the abuse actually occurred. The dual requirement of unavailability under § 90.804(1) and that testifying would cause the child harm is somewhat puzzling. If the trial court finds a child unavailable under § 90.804(1) any confrontation problems should be solved. Similar state hearsay exceptions require only unavailability and corroboration, \textit{see} MINN. STAT. § 595.02(3) (1984).

While § 90.803(23) makes radical changes in Florida evidence law, child abuse hearsay exceptions have been passed in at least eleven other states. \textit{See} ARIZ. REV. STAT. ANN. § 13-1416 (1985); COLO. REV. STAT. § 18-3-411(3); ILL. ANN. STAT. CH. 37, \textit{para.} 704-6(4)(c); (Smith-Hurd 1984) IND. CODE § 35-37-4-6 (1984); IOWA CODE ANN. § 232.96(6) (1985); KAN. STAT. ANN. § 60-460(dd) (1982); MINN. STAT. § 595.02(3) (1984); S.D. CODIFIED LAWS ANN. § 19-16-38 (1984); UTAH CODE ANN. § 76-5-411 (1983); VT. R. EVID. 803(24) (1985); WASH. REV. CODE § 9A.44.120 (1982).

As can be expected, these new exceptions have received much recent attention from commentators. For discussion of various state provisions dealing with new hearsay exceptions in child abuse cases \textit{see} Pierron, \textit{The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements}, 52 J.B.A.K. 88 (1983); Skoler, \textit{New Hearsay Exceptions for a Child's Statement of Sexual Abuse}, 18 JOHN MARSHALL L. REV. I (1984). Some authors claim that the new hearsay exceptions are unconstitutional. \textit{See} e.g. Note, \textit{Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception}, 7 U. PUGET SOUND L.REV. 387 (1984) arguing that Washington's law, which is similar to Florida's except that it only requires unavailability and corroboration, is unconstitutional. State v. Ryan, 691 P.2d 197 (Wash. 1984) (en banc), found the new hearsay exception did not violate a defendant's confrontation rights.

For a recent article discussing the constitutional problems presented by both the new child abuse hearsay exceptions and the use of closed circuit television or videotape statements, \textit{see} Graham, \textit{Indicia of Reliability and Face-to-Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions}, 40 U. MIAMI L. REV. 19 (1985).

20. Of the 154 total cases, 98 or 64\% were criminal, while 56 or 36\% were civil.

21. Florida appellate courts found evidentiary error in 64 out of 154 cases or 42\%. Criminal cases produced a lower percentage of reversals, 40 out of 98 or 41\%, than civil cases, 27 out of 56 or 43\%. Since the forty reversals in the criminal cases include five where the state secured reversals of trial court evidence errors on interlocutory appeals, the percentage of cases where criminal defendants prevailed is even smaller.
possibly be stricter than those in other states. Most likely the reason partially lies in the frequent use Florida appellate courts make of *per curiam* affirmances. Appellate courts may often be writing opinions only where necessary to instruct lower courts or where a new issue of law demanding extensive consideration is presented.

In line with the statistical overview, it is important to recognize that the number of reversals could have been even higher. Florida appellate courts, like those of most states, will not review and reverse trial courts' rulings in certain situations worth noting. First, the appellate courts realize they review cases on a cold record, removed from the sometimes hectic fray of trial courts. Thus they regularly defer to trial court evidence rulings, except when clear error had been committed. 22 Second, trial counsel inaction often lead to procedural defaults when objections to admission of evidence were not made timely. 23 In most

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"A trial court has wide discretion in . . . admission of evidence, and, unless an abuse of discretion can be shown, its rulings should not be disturbed on appeal." *Id.*

23. FLA. STAT. § 90.104 (1985) provides in part that:

(1) A court may predicate error . . . on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:

(2) when the ruling is one admitting evidence, a timely objection . . . appears on the record, stating the specific ground of objection . . . .

Florida appellate courts almost always refuse to consider evidentiary arguments when trial counsel has not made a proper contemporaneous objection. This includes the failure to object at all and the failure to object until after the questioned evidence has been admitted. *See* S.C. v. State, 471 So. 2d 1326, 1328-29 (Fla. 1st Dist. Ct. App. 1983) where the court refused to hear argument on one evidence issue since no objection to admission was ever made and likewise refused to hear arguments concerning a witness' competency to testify since no objection was made about this until the close of the state's case.

In Troedel v. State, 462 So. 2d 392 (Fla. 1984), the Florida Supreme Court explained the contemporaneous objection rule's rationale while refusing to consider a defense argument that neutron activation test results should not have been admitted to help show the defendant had probably fired a gun used to kill two victims.

If appellant had objected . . . on the ground he now relies upon, the trial court could have made a determination of whether there was an adequate reason for excluding the evidence. The court could have inquired into the questions of whether the precise quality or substance of the solution used should be a matter of predicate to the admissibility of the test by reason of its effect on the test's reliability. . . . An appellate court is in a weak position to rule on the legal issue of admissibility of scientific evidence when because of the lack of an objection or motion below, there is no unfolding of the factual basis upon which the legal question turns.

*Id.* at 396.
instances, even previously made motions in limine would not suffice to preserve the record for appeal, if there were no timely objection at trial.\textsuperscript{24} Third, trial counsel also sometimes failed to preserve evidentiary issues for review by not making adequate offers of proof.\textsuperscript{25} However, if the trial court has previously granted an opponent's motion in limine excluding a party's desired proof, there is no necessity to attempt to introduce it at trial to preserve the issue for appeal.\textsuperscript{26} Finally, application of the harmless error rule prevented reversals in some cases even when evidentiary error did occur.\textsuperscript{27}

During this survey period, Florida courts also applied the contemporaneous objection rule to workmen's compensation proceedings, see Rinker Materials Corp. v. Hill, 471 So. 2d 119 (Fla. 1st Dist. Ct. App. 1985); but refused to find that counsel's failure to object to an improper calculation of points in a sentencing proceeding barred review of the sentence. See Smith v. State, 475 So. 2d 1336 (Fla. 2d Dist. Ct. App. 1985).

For other cases citing the lack of a contemporaneous objection as a ground to reject evidence arguments, see Barclay v. State, 470 So. 2d 691 (Fla. 1985); Dougan v. State, 470 So. 2d 697 (Fla. 1985), cert. denied sub nom. Dougan v. Florida, 106 S. Ct. 1499 (1986).

\textsuperscript{24} See, e.g., Phillips v. State, 476 So. 2d 194 (Fla. 1985) (even though a motion in limine to exclude prior crimes evidence had already been denied, failure to renew objection to admission at trial waived the issue for appeal).

However, one recent case seems to have created a limited exception. In Fincke v. Peoples, 476 So. 2d 1319 (Fla. 4th Dist. Ct. App. 1985), just before jury selection the trial court overruled a motion in limine to exclude certain deposition testimony. After opening statements, one deposition was read and counsel objected to it. As expected, the trial court overruled the objection. Since two other depositions had also been covered by the motion in limine, counsel asked that a continuing objection be recognized to admission of these also. Since the trial court agreed to this procedure and had only a short time before overruling what would have been the same objection by denying the motion in limine, the record was adequately preserved for review.

\textsuperscript{25} \textit{Fla. Stat.} § 90.104(1)(b) (1985), allows reversal for evidentiary error only if substantial rights are affected and if "[w]hen the ruling is one excluding evidence, . . . the evidence was made known to the court by offer of proof. . . ."

Both lack of any offer of proof at all, see Connell v. Guardianship of Connell, 476 So. 2d 1381 (Fla. 1st Dist. Ct. App. 1985) and inadequate responses to an opponent's objections come within this requirement. See Tillman v. State, 471 So. 2d 32 (Fla. 1985) (since counsel only argued the relevancy of excluded evidence to the trial court, an argument that the statements were against a declarant's penal interest could not be raised on appeal).

\textsuperscript{26} \textit{See} Bender v. State, 472 So. 2d 1370 (Fla. 3d Dist. Ct. App. 1985).

\textsuperscript{27} \textit{Fla. Stat.} § 90.104(1) (1985) embodies the harmless error rule by its requirement that error can only be found if "a substantial right of the party is adversely affected." In cases of federal constitutional error, Chapman v. California, 386 U.S. 18, 24 (1967) requires that an appellate court "be able to declare a belief that [the error] was harmless beyond a reasonable doubt."
II. Judicial Notice

The Florida Evidence Code covers judicial notice both of facts and of law.\(^{28}\) Usually cases involving the propriety of taking judicial notice are very straightforward and uncomplicated. That situation prevailed during this survey period.\(^{29}\)

In the Interest of A.D.J. and D.L.J.,\(^{30}\) is worth noting since it presents a good example of the proper limits of judicial notice and its inadequacy to cure major defects in procedure and proof. The Department of Health and Rehabilitation Services (HRS) filed dependency petitions on two minor children claiming they had been physically, mentally and sexually abused. At the initial hearing, both parents appeared and waived their right to appointed counsel. The mother admitted the children should be in HRS custody; but the father neither denied nor admitted the petitions’ allegations, nor did he give up the children’s custody. Despite this, the Duval County Circuit Court entered a written order finding both parents stipulated to dependency. Over one year later, HRS petitioned for permanent commitment of the children to it for adoption, alleging that the mother consented to this and that the father had sexually abused the children. The commitment petitions were filed as new cases rather than as part of the dependency proceedings.

At the commitment hearing, HRS asked the court to judicially notice the two dependency cases. The father’s counsel objected because the files were not adequate evidence of abuse for commitment purposes.

Besides the 64 cases reversed because of evidentiary error, there were 12 opinions where the appellate courts found evidentiary error but held it was harmless.


29. See Hill v. State, 471 So. 2d 567 (1985), aff'd, 486 So. 2d 1372 (Fla. 1st Dist. Ct. App. 1986) (motion to strike appendix to brief on grounds it contained documents not in record granted; documents possibly could have been judicially noticed by trial court but not proper for appellate court to do so); Rook v. Rook, 469 So. 2d 172 (Fla. 5th Dist. Ct. App. 1985) (local guidelines which set child support for dependents do not meet test for judicial notice and could not be considered part of the appellate record).

Neither Hill nor Rook explain why the appellate court could not have taken judicial notice of the matters involved. To that extent, they have little informational value. At least one Florida decision has found that the appellate courts are not required to take judicial notice of matters covered by § 90.202. See Hillsborough County Bd. of Comm’rs v. Public Emp. Rel. Comm’n, 424 So. 2d 132 (Fla. 1st Dist. Ct. App. 1982).

30. 466 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1985), review denied, 475 So. 2d 693 (Fla. 1985).
and because the abuse allegations had to be proved independently at the commitment hearing. The circuit court overruled the objections and noticed the files. Once this occurred, HRS argued all questions of abuse had already been proven in the dependency proceedings, so that only the issue of disposition was left. The father's counsel unsuccessfully argued that the father had been unrepresented at the dependency adjudication so that the abuse must be proved before any disposition consideration was proper. The circuit court found, in reliance on the two judicially noticed files, that the abuse element needed for termination of parental rights had been proved by the parents' supposed stipulations.

The district court of appeal first examined whether judicial notice of the prior files was proper when the father had been unrepresented in the dependency proceedings. While it recognized that a court can judicially notice its own files, such a procedure would have been unnecessary here if HRS had filed the commitment petitions as supplements to the original dependency proceedings rather than as separate actions. The filing procedure used required the circuit court to judicially notice the other cases to show continuing jurisdiction over the children. However, even a showing of continuing circuit court jurisdiction was not enough to uphold the commitment action. This only demonstrated the circuit court had authority to proceed; it did not demonstrate that the father had abused the children. Apparently in judicially noticing the prior files, the circuit court never specified what records or exhibits from those cases it was making a part of the commitment proceedings. This being so, not all the records from the dependency cases, especially the crucial one which would allegedly show the parents' stipulation to the dependency petition, were before the appellate court. Even after the record was ordered supplemented, the alleged stipulation could not be found. The district court of appeal, therefore, could not find the father had agreed in the dependency proceedings that he abused the children. Since no independent proof of abuse was offered in the commitment action, the circuit court's commitment order was reversed and the case remanded for a new evidentiary hearing in the commitment issue.

While the same result may occur after the second commitment hearing, the court of appeal's decision was certainly correct. Noticing the mere existence of another judicial proceeding is different from judi-

cially noticing documents allegedly introduced therein as proof. Had the father signed a stipulation waiving counsel and stipulating to the alleged abuse, it should be easy to produce. Even if no such statement were signed, as long as the father had stated, somewhere on the record, his agreement with the dependency petitions' allegations, that could arguably have been introduced as an admission. Of course, if both the dependency and commitment petitions had been filed under the same number, there would have been no need to judicially notice the earlier files in any respect. Failure to follow this simple procedure created a major gap in proof which judicial notice could not cure.

III. Relevancy

A. In General

The Florida Evidence Code follows the Federal Rules in its approach to relevancy. The Code expresses the general desire that all relevant evidence should be permitted "except as provided by law." Evidence will be relevant if it has a tendency "to prove or disprove a material fact." That the Evidence Code does not go beyond this brief definition is not surprising. No category of information can be considered inherently relevant to all cases. What will be material or immaterial is not a function of substantive evidence law but rather of the underlying claims and defenses in a particular trial. Likewise, whether certain information tends to prove a material fact depends upon the strength or weakness of the logical connection between the information and the matter it is being offered for. Since relevancy is a function of logical deduction and substantive law, merely changing a few facts can produce major results. As a result, cases discussing the general relevancy of certain evidence are seldom of much precedential

32. FLA. STAT. § 90.402 (1985).
33. FLA. STAT. § 90.401 (1985).
34. F.R. Evid. 401, defining Relevant Evidence, does not use the words "material fact" because of the ambiguity which the drafters felt was inherent in this term. See F.R. Evid. 401 Advisory Comment. However, the same concept is expressed by F.R. Evid. 401's language that the fact involved must be "of consequence to the determination of the action".
35. Evidence can even be admissible as to one issue but not as to another issue. FLA. STAT. § 90.107 expressly recognizes the concept of limited admissibility. During this survey period, Parsons v. Motor Homes of Am., Inc., 465 So. 2d 1285 (Fla. 1st Dist. Ct. App. 1985) presented the unusual situation of a reversal because the trial court expressly refused to admit evidence for only limited purposes.
value. Only one general relevancy case decided during the survey period is likely to be of much importance.\textsuperscript{36}

In \textit{Pitts v. State},\textsuperscript{37} an ex-deputy sheriff was charged with vehicular homicide arising from the operation of his patrol car while responding to a fellow officer's call for back-up assistance. After receiving the call, Pitts notified his central communications office that he was responding but failed to mention he was operating "code one." This was office terminology for proceeding with both lights flashing and the siren on. On his way to the call, Pitts attempted to make a car proceeding in the same direction yield. Since this was near the call's vicinity, Pitts had turned the siren off as police academy training had directed. When the car did not yield, Pitts tried to pass after checking for incoming traffic but met a second car coming in the opposite direction. Although evidence showed Pitts drove into a guardrail to avoid hitting this car, a collision still occurred and the car's driver was killed. At trial, the defense and state disputed how fast Pitts was driving when he tried to pass. State experts estimated his speed at close to eighty miles per hour, while the defense claimed it was between fifty-five and sixty. Evidence also showed that the passing may have been attempted in a no-passing zone with a fifty miles per hour speed limit.

Besides this evidence, the state called a captain in Pitts' office and through him introduced the office manual requiring an officer deciding to respond "code one" to inform the communications center of such. The state cross-examined Pitts about whether he violated department regulations by proceeding "code one" without telling anyone and argued on closing that his violation of the manual helped show Pitts drove recklessly.\textsuperscript{38} Furthermore, the trial court instructed the jury that

\textsuperscript{36} For other cases discussing the general relevancy of evidence decided during the survey period see Smith v. Telophase Nat. Cremation Soc'y, Inc., 471 So. 2d 163 (Fla. 2d Dist. Ct. App. 1985) (evidence of defendant's past practices in cremating deceased persons admissible on issue of whether conduct in the case was outrageous); Ryder Truck Rental, Inc. v. Johnson, 466 So. 2d 1240 (Fla. 1st Dist. Ct. App. 1985), (evidence that driver had not been cited for traffic violation following an accident should have been inadmissible and inquiry about such should have been mistrial); Donahue v. Albertson's, Inc., 473 So. 2d 482 (Fla. 4th Dist. Ct. App. 1985), (evidence that two months after plaintiff had been injured by a door's improper closing the doorswitch snapped because the door had been slammed into, was not so remote as to be irrelevant when a defense expert claimed any impact on the switch, from door being mistakenly slammed into, would be negligible).

\textsuperscript{37} 473 So. 2d 1370 (Fla. 1st Dist. Ct. App. 1985), \textit{review denied}, 484 So. 2d 10 (Fla. 1986).

\textsuperscript{38} FLA. STAT. § 782.071 (1981) under which the defendant was charged with
while a violation of the manual alone was not sufficient proof of recklessness, "[Y]ou may consider this circumstance together with the other circumstances in the evidence considering whether the vehicle of the defendant was operating in a reckless manner."39

The district court of appeal reversed the conviction finding the manual's admission was error for several reasons. The court found that no evidence was ever introduced to help explain to the jury the manual's purpose or the purpose of the "code one" reporting regulation. Indeed the manual itself contained a preface stating it was "for internal use only, and does not enlarge an officer's civil or criminal liability in any way."40 Without any guidance, the jury could only speculate as to what connection Pitts' reporting violation had with the charges.

Perhaps even more important to the court's decision was its finding that introducing the manual could have contributed to an erroneous decision by introducing a false standard. Florida case law recognizes that evidence describing what is the standard practice or custom for certain occupations is often introduced to help show whether someone has breached the appropriate level of conduct for his profession, thus possibly being negligent. However, in a criminal case the same evidence is irrelevant when the question is not whether the party has been negligent but has violated a higher standard of care. Here Pitts should have been found not guilty if he was merely negligent. Pitts was charged with a crime for violating a statutory standard of care, recklessness in operating a motor vehicle, not for violating a department rule. Since the state did not show a connection between the two, admission of Pitts' non-reporting violation was reversible error.41

B. Similar Happenings and Circumstances in Civil Cases

No specific rule in either the Florida Code or Federal Rules of vehicular homicide provided in part: "Vehicular homicide is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another. . . .".

39. 473 So. 2d at 1373.
40. Id.
41. The court rejected state arguments that since Pitts forgot to follow the reporting procedure this demonstrated recklessness.

Even if Pitts had been sued civilly for wrongful death, evidence of his non-reporting should not be admissible unless some showing is made that this was negligence causing the other driver's death. This author believes such a causal connection is not possible.
Evidence governs the admissibility of other occurrences similar to the event involved in the present civil litigation. The admissibility of similar happenings evidence is treated as a subspecies of relevancy. However, this type of evidence is offered so frequently in civil cases that courts are often faced with questions in this area. Two basic questions arise in dealing with similar happenings evidence in civil cases: (1) is what the proponent claims the evidence shows relevant,\(^\text{42}\) and (2) has a sufficient degree of similarity between the extraneous event and the one involved in the litigation been established.\(^\text{43}\) Unless both questions can be answered affirmatively, trial judges are justified in excluding this type of information.

Trial courts must be careful to allow proponents a fair chance to establish the predicate similarity necessary or else reversal is merited. *Saunders v. Florida Keys Electric Co-op Association*\(^\text{44}\) presents an example of how hasty discovery rulings may later cause reversals because they affect evidentiary trial rulings in this area. The plaintiff was injured when the mast of his trailered sailboat hit an overhead power line in a marina parking lot. During depositions, plaintiff learned that the defense knew of other incidents where sailboat masts had hit overhead power lines in nearby marinas. However, the trial court ruled any discovery about the details of these incidents was irrelevant. At trial, Saunders tried to prove the defendant knew the lines in his marina

\(^{42}\) Evidence of similar happenings appears to be most frequently used to prove notice. However, the possible relevancy of similar happenings is limitless and purely depends on the underlying substantive law.

An interesting use of similar happenings evidence recently occurred in *Trees by and Through Trees v. K-Mart*, 467 So. 2d 401 (Fla. 4th Dist. Ct. App.) *review denied*, 479 So. 2d 119 (Fla. 1985). The plaintiff filed a malicious prosecution/false arrest suit claiming damages stemming from her shoplifting arrest and charge which the store later dropped. To show no damages, the defense introduced evidence that the plaintiff had previously been arrested for shoplifting and taken to a police station, like in the instant case. Those charges were resolved by juvenile services counseling, and the plaintiff suffered no psychological injury from them. The trial court's ruling that the two events were sufficiently similar for the defense to claim that Trees had likewise suffered no emotional trauma from the K-Mart arrest was affirmed on appeal.

Similar happenings evidence in criminal cases is governed by Florida's *Williams Rule*, FLA. STAT. § 90.404(1). For discussion of this area see *infra* text accompanying notes 69-107.

\(^{43}\) For a recent case finding reversible error in the improper admission of evidence because the two events dealt with dissimilar matters, see *3-M Corp. v. Brown*, 475 So. 2d 994 (Fla. 1st Dist. Ct. App. 1985).

\(^{44}\) 471 So. 2d 88 (Fla. 3d Dist. Ct. App. 1985), *review denied*, 482 So. 2d 348 (Fla. 1986).
Evidence presented a danger to people towing sailboats by introducing evidence that the defendant knew about the nearby marina incidents. However, the court sustained an objection that no showing was made that these other accidents were similar to Saunders'. After a defense verdict, plaintiff appealed.

The court of appeal found reversal merited for two reasons. The early ban on discovery had been incorrect as evidence about how the other accidents occurred was clearly relevant. "Evidence of similar incidents at locations other than the place where the incident in question occurred is relevant . . . for the purpose of showing the existence of a danger or defect and notice or knowledge of."45 When the trial court subsequently rejected evidence of the other incidents, the error in its discovery ruling became even more critical. In essence, the two rulings unfairly put the plaintiff in an impossible position since he had been unable to obtain the needed predicate trial evidence due to the earlier incorrect discovery ruling.

Saunders demonstrates the use of similar happenings evidence to show actual knowledge of a dangerous condition. However, actual knowledge may not always be necessary in order for an injured party to recover. In some instances, similar circumstances evidence will be relevant to show constructive instead of actual notice. In Fazio v. Dania Jai-Alai Palace, Inc.,46 plaintiff sued when she slipped on liquid in an aisle at the defendant's premises. To prove defendant's constructive notice of the aisle's condition, Fazio tried to call witnesses who would have testified that the aisles were commonly littered with spilled drinks and food. However, the trial court limited plaintiff's proof to evidence of the aisle's condition the evening she slipped and fell. After a defense verdict, the court of appeal reversed.

Fazio presents an interesting contrast to Saunders. Both plaintiffs attempt to use events happening at other times to prove the notice element of their negligence claims. In Saunders, the question involved proving sufficient similarity between the two events. However, in Fazio, there was no serious question about the similarity. All the occurrences involved the same part of the same premises and were allegedly caused by the same factor. Thus, Fazio had to be resolved on the issue whether the other incidents at other times could ever be relevant to show constructive notice. As the court of appeal noted, this question was controlled by the underlying substantive law. In Florida, amuse-

45. Id. at 89.
46. 473 So. 2d 1345 (Fla. 4th Dist. Ct. App. 1985).

http://nsuworks.nova.edu/nlr/vol10/iss3/15
ment places, where large numbers of patrons congregate, are held to a higher standard of care than other public places and must be kept in "reasonably safe condition commensurate with the business conducted."47 Previous cases had allowed circumstantial proof to be offered on the issue of notice and had not limited this to conditions on the day of an accident, but extended it to similar conditions on the same premises at other times.48 Thus, the plaintiffs excluded similar circumstance evidence should have been admitted to show "necessary or ongoing problems, which could have resulted from operational negligence or negligent maintenance."49

C. Habit Evidence

The concept of habit has been aptly described as "one's regular response to a repeated situation."50 Assuming someone has adopted a regularized method of dealing with a particular situation, it is logical to assume that the person followed this method on an occasion in question unless there is strong proof showing otherwise. Habit evidence is admissible in most jurisdictions, assuming sufficient evidence has been introduced to prove such a habit actually existed.

Comparison of the Federal Rules of Evidence language with that of the Florida Evidence Code would logically lead a reader to believe that habit evidence is not admissible in Florida. Like Federal Rule of Evidence 406,51 section 90.406 of the Florida Statutes52 specifically provides for the admission of evidence concerning the routine practice of an organization. However, unlike the Federal Rules, there is no mention of habit evidence in section 90.406. Since the Evidence Code's drafters expressly approved admission of routine organizational practices but did not do so with habit evidence, the statutory construction

47. Wells v. Palm Beach Kennel Club, 35 So. 2d 720, 721 (Fla. 1948).
49. 473 So. 2d at 1348.
51. F.R. Evid. 406 states in part that: "Evidence of the habit of a person or of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."
52. FLA. STAT. § 90.406 states in part: "Evidence of the routine practice of an organization . . . is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice."
principle "expressio unius est exclusio alterius" would seem to have eliminated habit as an admissible mode of proof in Florida. However, despite the logic of such statutory construction, Florida courts have consistently admitted habit evidence. Decisions during this survey period show the continuation of this policy.

Fincke v. Peeples is an important habit evidence case since it discusses the foundational predicate. This was a medical malpractice suit arising from the death of a seventeen year old boy following knee

53. At least one article commenting on the new Florida Evidence Code believed the statutory omission of any reference to habit evidence meant that such proof was not admissible. See Hicks and Matthews, supra note 5, at 967.

54. The Law Revision Council note following § 90.406 specifically states that "[t]his section is not applicable to the habit of an individual." Professor Ehrhardt claims that any mention of habit was deleted because of the drafters' "feeling that it should be left to the court to determine as a matter of circumstantial evidence whether there was sufficient probative value to allow the admission of the habit evidence." C. EHRHARDT, FLORIDA EVIDENCE (2d ed. 1984). From this he concludes that "[t]his exclusion should not be interpreted as intention to prohibit the introduction of all habit evidence." Id.

Examined closely, this is not a sufficient justification to conclude that habit evidence should still be admissible. In every case, whether § 90.406 expressly mentioned habit or not, the courts would have to decide "whether there was sufficient probative value to allow the admission of the habit evidence." This language merely means that courts will have to decide on a case-by-case basis whether a sufficient predicate to prove habit has been shown. However, this should not be something surprising. Federal Rule 406 allows habit evidence but leaves it up to the courts to decide whether the evidence is logically relevant in individual cases and whether a sufficient predicate has been established in an individual case.

Professor Ehrhardt offers a second and stronger justification why habit evidence is still recognized in Florida despite § 90.406's language. Section 90.102 provides that the Evidence Code "shall replace and supersede existing statutory or common law in conflict with its provisions." Since § 90.406 arguably does not directly conflict with pre-code Florida cases allowing habit evidence, then its failure to expressly mention habit should not matter. The weakness with this argument comes from the fact that pre-code Florida law also admitted evidence of routine practice. Under Professor Ehrhardt's second argument, § 90.406 becomes completely superfluous as it merely codifies, either directly or indirectly, pre-code Florida evidence law. One questions why the drafters bothered to take what would be such a purely meaningless act.

55. Only one case during the survey period discussed evidence of a routine practice of an organization, see Hartford Accident and Indem. Co. v. Ocha, 472 So. 2d 1338 (Fla. 4th Dist. Ct. App.), petition for review dismissed, 478 So. 2d 54 (Fla. 1985) (drivers' license examiner's testimony that she always required minor applicants to secure signed parental consent form was sufficient to help prove the defendant had signed such, even though a copy could not be found).

56. 476 So. 2d 1319 (Fla. 4th Dist. Ct. App. 1985).
surgery. After surgery, Thomas Peeples was taken by the surgeon and
the anesthesiologist to the hospital’s recovery room. The factual issues
revolve around whether he was given proper care following his arrival.
Both the anesthesiologist and a recovery room nurse testified about the
proper procedures regarding the removal of an endotracheal tube which
had been used to help Peeples’ breathing during the operation. The an-
esthesiologist testified that unless a patient was fighting the tube it
should not be removed. The danger in doing so is that the patient
might still be unconscious, unable to breathe on his own. Even when
the tube is removed, there is the danger a patient might react to the
anesthesia and stop breathing. To prevent this, a recovery room nurse is
supposed to monitor the patient’s condition. At trial, the recovery room
nurse testified that the anesthesiologist removed the tube as soon as
Peeples entered the recovery room. Her testimony was partially corrob-
orated by the surgeon who momentarily left the recovery room after
arrival and returned to find Peeples had been extubated. Shortly there-
after, Peeples’ heart stopped beating. Even when the tube was rein-
serted, Peeples never regained consciousness and died almost two weeks
later.

The plaintiffs attempted to introduce deposition testimony of the
recovery room nurse regarding other times when she felt the anesthesi-
ologist had extubated patients in the recovery room prematurely. The
nurse’s deposition testimony also mentioned how she and other nurses
had talked about the anesthesiologist and how they felt patients were
being extubated too soon. Plaintiffs offered this evidence to show that
the anesthesiologist had a habit of prematurely extubating patients and
that the hospital was on notice of this. While upholding the verdict in
favor of the plaintiffs, the court of appeals rejected their position that
the nurse’s deposition testimony, giving her opinion about the doctor’s
habit, supplied a sufficient foundation to show that such a habit existed. Fincke
apparently limits proof of habit to testimony regarding a num-
ber of specific instances of conduct which the court finds have been
repeated sufficiently to arise to the level of a constant practice. Opin-
ions, whether or not a person has a particular habit without detailed
testimony based on concrete factual observances as to why the witness
has such a belief, will no longer be a sufficient foundation. Clearly, in
this case, the nurses involved in the recovery room could have seen the
doctor repeatedly extubate patients too early on many occasions, thus
rising to the level of habit evidence. However, without their testimony
relating this, their opinions alone that this occurred were insufficient.57

*Fincke* and other cases during this survey period58 show whether Florida courts are interpreting section 90.406 correctly or not. The courts have and will most likely continue to allow the introduction of habit evidence. This being so, the Florida legislature should either amend section 90.406 to expressly include habit evidence as an admissible mode of proof or amend section 90.406 to make it clear that only routine practice of an organization, and not habit evidence, should be admissible.

D. *Subsequent Remedial Measures*

Florida Statute section 90.407 follows the common law and Federal Rules of Evidence by prohibiting evidence of remedial conduct after an event to show an opponent's negligence or culpable conduct. Generally, before applying this prohibition courts must find the action taken was both (1) subsequent and remedial and (2) is being offered for a forbidden purpose. Two widely debated issues involve the admissibility of subsequent remedial measures when they are offered in a strict liability case and when they were made by a third person, rather than a party involved in the litigation. Two recent district court of appeal cases take a pro-defendant approach to both these issues.59

1. *Third-Party Action*

Subsequent remedial measures are excluded for several reasons. One is the public policy rationale that parties should be encouraged to promptly take warranted safety measures without having to fear creating damaging evidence against themselves. Another reason claims that

57. This comes close to rejecting Professor Ehrhardt's position that "[h]abit may be proved by opinion testimony from a witness with adequate knowledge." C. EHRHARDT, supra note 5, § 406.1, at 158.

58. The only other case dealing with habit evidence during the survey period was *Hall v. Spencer*, 472 So. 2d 1205 (Fla. 4th Dist. Ct. App.), *review denied*, 479 So. 2d 118 (Fla. 1985) where the court recognized a party's right to introduce habit evidence relating to past instances of a defendant's intoxication and driving.

59. Two other cases during the survey period briefly dealt with subsequent remedial measures. However, the references to § 90.407 in both are so brief that the discussions have little value. *See* Donahue v. Albertson's Inc., 472 So. 2d 482, 484 (Fla. 4th Dist. Ct. App. 1985); 3-M Corp. v. Brown, 475 So. 2d 994, 998 (Fla. 1st Dist. Ct. App. 1985).
when a party seeks safety measures after an accident, this should not necessarily be construed as an admission of fault. The party could have been completely without culpability in not acting sooner and is only acting as a good citizen should, in now trying to prevent future harms. From this second rationale, arguments have been made that when third persons make subsequent remedial measures, rather than parties to the action, the prohibitory ban against evidence of these is inapplicable. Despite this argument at least one district court of appeal appears to have taken a *per se* ban against all evidence of subsequent measures used to prove uncontraverted issues, no matter who made the repairs.

In *Thursby v. Reynolds Metal Co.*, a worker sued after his fingers were injured in an aluminum can press the defendant designed. Thursby alleged claims both in strict liability and negligence, arguing that Reynolds had defectively designed and manufactured the machine. The press used a piston to stretch aluminum pieces into a can. Occasionally, the press jammed and had to be cleared of deformed cans before continuing operations. Thursby’s job was to do this. A door guarded the area surrounding the piston. Inside was a limit switch which stopped the machine while it was being cleared. However, merely opening the guard door did not automatically do so. Proper procedure for clearing the machine required hitting two switches turning off electrical power and oil to the press before opening the door and hitting the limit switch. Thursby was injured when he forgot to turn off the electrical switch before opening the guard door and hitting the limit switch. Although the limit switch was activated, the piston still operated, injuring Thursby’s hand. At trial, he presented proof that the switch failed and that a defective design contributed to this. After a defense verdict, Thursby claimed the trial court erroneously excluded evidence that a fellow employee had examined the limit switch after the accident and replaced it with another type the employee felt was more reliable.

60. *See* C. McCormick, *supra* note 50, § 275, at 667, claiming that when a third party makes the changes, “the policy ground for exclusion is no longer present.” Some courts allow third party changes and reject the argument these are implied admissions. *See, e.g.*, Brown v. Quick Mix Co., 454 P.2d 205, 210 (Wash. 1969) (evidence that guard was installed the day after an accident admissible against manufacturer even though feasibility of design changes was not contested “since the [manufacturer] did not make the changes . . . the fact such changes were made could not conceivably raise . . . an inference [the manufacturer] had admitted it was negligent in not making the changes sooner”).

61. 446 So. 2d 245 (Fla. 1st Dist. Ct. App. 1984).
Evidence

Prior Florida law case law seemed to support Thursby's position that section 90.407 does not apply when a non-party makes the subsequent measures. In *Hartman v. Opelika Machine and Welding Co.*, the same district court of appeal had allowed in evidence that plaintiff's employer, who was not a party in the litigation, had made remedial changes after plaintiff was hurt. The First District Court of Appeal seemed to be adopting a general position in "upholding the admission of such evidence when the change is made by one not a party to the action." However, in *Thursby*, the same court limited *Hartman* to the unusual factual circumstances presented there. In *Hartman*, the defendant introduced the evidence to place blame on the third-party employer for the accident, while in *Thursby*, the plaintiff attempted to use the subsequent measures evidence to place blame on the defendant, as would be the case in most lawsuits. The First District found the evidence was being used to show Reynolds' negligence or culpability and must be excluded by section 90.407. Unfortunately, the reasoning in *Thursby* is very confusing. The court found that under *Hartman* the evidence must still be relevant, no matter who made the subsequent remedial measures. Since neither feasibility nor any other issue except lack of negligence or culpability was controverted in *Thursby*, the First District found evidence of the switch's replacement was irrelevant. Yet, feasibility of repair would always seem to be relevant in a strict liability case. Under *Thursby*’s analysis, the fact that a third party took the remedial action is immaterial. If evidence is irrelevant, it should not come in at all — no matter who did the actions involved. Unfortunately, *Thursby*’s analysis confuses the relevancy issue with the policy analysis behind excluding evidence of subsequent measures. Such measures are only admissible when controverted, but the reason for this is not a lack of relevancy but a public policy desire to promote repairs. Once a third party takes the remedial action, the public policy dissolves, but the relevancy of the evidence remains. Surely feasibility was relevant, and no good reasons seem to require this issue to be controverted when a third person not a party to the litigation takes the remedial action. Hopefully, other Florida courts will not follow *Thursby*.

62. 414 So. 2d 1105 (Fla. 1st Dist. Ct. App. 1982), review denied, 426 So. 2d 27 (Fla. 1983).
63. 414 So. 2d at 1110.
64. The First District Court of Appeal further indicated its misunderstanding of the policy behind excluding subsequent remedial actions by stating that the third-party post-accident change could not "be attributed to Reynolds as an admission of pre-acci-
2. Strict Liability Claims

*Voynar v. Butler Manufacturing Co.*,65 addressed the issue whether section 90.407's subsequent remedial measure evidence should apply to strict liability cases. A construction worker had stepped on an unsecured roof panel which buckled underneath him causing the worker to fall to his death. His widow sued the roof panel manufacturer in negligence and strict liability. After the fall, the manufacturer took two steps which arguably could have prevented the death. First, it attached warning flyers about where to walk on the panels to each bundle of panels, rather than just having these in the instructions assembly manual. Second, it changed the substance used to coat the panels for shipping so that the new protective coating would begin evaporating after exposure to air. The Fourth District Court of Appeal affirmed a defense verdict, finding the evidence of these measures was properly excluded. The court noted there is a split of authority about the admissibility of subsequent measures.66 Although it acknowledged contrary case law existed, *Voynar* held that evidence of subsequent remedial measures is not admissible in strict liability actions, as it is not in negligence claims, unless an issue like feasibility of change is contested or dent culpability . . . .” 466 So. 2d at 249. Of course it could not be an admission by conduct since Reynolds did not make the changes. However, Thursby never offered it as such — only as evidence of the feasibility of a safer design!

65. 463 So. 2d 409 (Fla. 4th Dist. Ct. App.), review denied, 475 So. 2d 696 (Fla. 1985).


One completed study examining practical problems under the Federal Rules of Evidence has concluded that the most significant issue concerning F.R. Evid. 407 is “the application of the Rule to products liability actions, particularly when claims of strict liability in tort (Restatement (second) of Torts § 402A) and breach of implied warranty are alleged.” See, *Emerging Problems Under the Federal Rules of Evidence*, 126 AMER. BAR ASSOC. SECTION OF LITIGATION (1983). The study recommended the exclusionary approach to this issue.

67. *FLA. STAT.* § 90.047 (1985), unlike Fed. R. Evid. 407, contains no second sentence which provides examples of issues, other than proving negligence or culpable
the evidence would impeach an opposing witness. The court believed defendants would be discouraged from making improvements if the opposite view was taken. Whether the case was a negligence or strict liability claim was immaterial. Strict liability in Florida does not make manufacturers absolute insurers but only requires they not put an unsafe product out. When events occur which demonstrate how an already “safe” product can be made even safer, manufacturers should not be discouraged from taking such action. The court felt that an opposite ruling would make evidence of subsequent changes admissions of fault and discourage their implementation. 

E. Other Crimes, Wrongs, or Acts

Florida Statute section 90.404(2) codifies what is often called by its pre-code name, the “Williams” Rule. This section prohibits the introduction in a criminal case of evidence concerning the defendant’s other bad acts or crimes when the sole purpose is to show propensity. However, when there is another legitimate purpose for the evidence, evidence of bad acts may be admissible. This section drew more attention in reported cases during the survey period than any of the other conduct, for which subsequent measures would be admissible providing these issues are controverted. However, the Florida courts have consistently adopted the Federal Rules approach in this area. See Voynar, 463 So. 2d at 411.

68. The court relied heavily on Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980) for its position. The Fourth Circuit’s approach was the one specifically recommended by the A.B.A.’s Federal Rules of Evidence study. See supra note 66.

Although no Florida decision expressly disagrees with Voynar, given the amount of tort litigation in Florida courts, the Florida Supreme Court should consider definitively resolving this question soon.


Surprisingly, other crimes evidence has generated little discussion among Florida evidence writers. For one of the few articles discussing this area, See Comment, Prior Crime Evidence Admissible Only When Relevant to Crime Charged, 2 FLA. ST. U.L. REV. 197 (1974).

70. In such situations, Fla. Stat. § 90.404(2)(b) requires the state to provide the defense pre-trial notice of its intention to introduce other crimes evidence and provides for mandatory limiting instructions as to the evidence’s purpose.

Like any other offered information, other crimes evidence is always subject to exclusion under the general provisions of Fla. Stat. § 90.403 that it may generate “unfair prejudice” or cause “confusion of issues.” As a practical matter, trial courts are unlikely to use this provision to exclude other crimes evidence offered for a non-propensity purpose.
relevancy rules. Not surprisingly, cases discussing other crimes evidence also generated a high percentage of reversal.\textsuperscript{71}

Unfortunately, most Williams rule cases during this survey period offer little significant discussion.\textsuperscript{72} Evidence of other crimes was found erroneous when there was insufficient evidence to connect defendants with the other crimes\textsuperscript{73} and when the other acts were not sufficiently similar to be relevant to the crimes charged.\textsuperscript{74} However, several important other crimes cases were decided during this time.

1. \textit{Williams Rule Errors Not State Caused}

\textit{Brown v. State}\textsuperscript{75} presents an unusual fact situation which all prosecutors should carefully note. The defendant, convicted of petty theft, and another woman visited the victim's hotel room twice during one day. Both times a second man was present. The second time the other woman grabbed the victim's wallet and both women ran. The trial judge granted a motion in limine preventing the victim from testifying that on her first trip to the room, Brown had her arm around his friend and it looked as if she were trying to get into the friend's pocket. On cross-examination, defense counsel's questions forced the victim to admit that the woman who grabbed his wallet was not Brown. When counsel then asked, "And, the only thing you saw that girl [Brown] do was run?"\textsuperscript{76} the victim blurted out that he also saw her trying to get his friend's wallet. Both the trial court and circuit court refused to find this caused error since they believed the cross-examination had invited such

\begin{itemize}
  \item \textsuperscript{71} Five out of seventeen decisions found reversible error in admission of other crimes evidence. A sixth found evidentiary error but also found it harmless.

  Both the number of other crimes evidence opinions and the number of reversals due to admission of other crimes evidence are apparently not unique to Florida. \textit{See Imwinkelreid, Uncharged Misconduct Evidence}, 12 Litigation 25, 67 (ABA Fall 1985).

  \item \textsuperscript{72} In the following cases, treatment of Williams Rule issues is so summary that one wonders why the courts even bothered to discuss the issue at all given the short shrift it received. \textit{See Howard v. State, 471 So. 2d 208 (Fla. 5th Dist. Ct. App. 1985); Ellis v. State, 475 So. 2d 1021 (Fla. 2d Dist. Ct. App. 1985); Lawson v. State, 470 So. 2d 109 (Fla. 4th Dist. Ct. App. 1985); Medina v. State, 466 So. 2d 1046 (Fla. 1985).}

  \item \textsuperscript{73} \textit{See, e.g., Diaz v. State, 467 So. 2d 1061 (Fla. 3d Dist. Ct. App. 1985) (evidence in a possession of more than 20 grams of marijuana case was insufficient to connect defendant with marijuana found in his brother's car when there was no connection shown between the defendant and the car).}

  \item \textsuperscript{74} \textit{See McKinney v. State, 462 So. 2d 46 (Fla. 1st Dist. Ct. App. 1984).}

  \item \textsuperscript{75} 472 So. 2d 475 (Fla. 2d Dist. Ct. App. 1985).

  \item \textsuperscript{76} \textit{Id. at 476.}
\end{itemize}
Evidence

a response. The district court of appeal agreed with the trial court's ruling that the evidence was inadmissible. However, it rejected the idea that the doctrine of invited error precluded Brown from complaining about the admission of the evidence. The court noted that when other crimes evidence is relevant only to show propensity, the Florida Supreme Court has presumed the error harmful "because of the danger that a jury will take the bad character of propensity to crime thus demonstrated as evidence of guilt of the crime charged." Here the error was clearly harmful since Brown's two previous trials for the same offense produced hung juries. Accordingly, the district court reversed the conviction and remanded for future proceedings.

Brown, confined to its unusual circumstances, does make sense even with the district court's cryptic opinion. As this was the third trial, surely the victim-witness knew he was not supposed to bring this information up. While reversing punishes the state for error it may not have caused, making it bear this burden is fairer than having the defendant do so. The state should have counseled the witness again before trial about the court's ruling. Certainly after Brown, state attorneys will have to be even more careful in preparing their witnesses so as to avoid reversible error.

Unfortunately, Brown does not explain why the doctrine of invited error did not apply. Thus, the opinion is not clear about what trial courts should do in future similar situations. When witnesses blurt out unexpected answers containing information about other crimes, which is not properly relevant, is mistrial automatic? If the trial court had immediately struck the evidence and given the jury proper instructions, would mistrial still be merited?

Finklea v. State, while not factually identical to Brown, strongly suggests that at least the First District Court of Appeal would adopt the automatic mistrial position. Finklea and a co-defendant were charged and tried jointly for robbing a Pensacola business. At trial, one of the two victims could identify the co-defendant, but neither could identify Finklea. The only testimony against Finklea came from his al-

77. Id. at 477 (citing Straight v. State, 397 So. 2d 903 (Fla. 1981)).
78. The district court of appeal's sole statement on this point was that: "The circuit court in its appellate review was clearly in error in affirming on a notion of invited error. The petitioner had every right to claim error in the unsolicited and previously prohibited testimony . . . . The petitioner's motion for mistrial should have been granted." Id.
79. 471 So. 2d 596 (Fla. 1st Dist. Ct. App. 1985)
leged admission to a third state witness. On cross-examination, the co-defendant’s attorney tried to force this witness to admit he had lied in earlier deposition testimony. However, the witness unexpectedly claimed he and counsel were “talking about two different robberies” in which the defendants had been involved. Finklea’s counsel objected to the remark and moved for mistrial. After the court denied the motion, Finklea’s attorney did not request a cautionary instruction. On appeal, the district court found the failure to request the instruction did not waive review since “the introduction of a prior unrelated criminal act is too prejudicial for the jury to disregard.” Even though the state had no part in eliciting the testimony, this did not lessen its effect; thus, reversal was required.

Like Brown, Finklea could be read as approving automatic mistrial or reversal whenever other crimes evidence is wrongfully introduced. However, the First District may have intended to still use a harmless error approach, stating that the evidence “was unfairly prejudicial. This is especially true in light of the scant evidence in this case relating to Finklea.” Unfortunately, like in Brown, the court’s cryptic opinion leaves some doubt which approach the district court meant to adopt. Hopefully, the Florida courts will adopt a harmless error approach when Finklea and Brown issues arise in the future. Since Florida courts sometimes will not reverse based on the harmless error doctrine when the state erroneously introduces the other crimes evidence, it would be illogical to take an opposite stand when a defendant or co-defendant does so.

2. Nolle Prosses and Williams Rule Evidence

When the defendant has been previously acquitted of charges involving other crimes, many courts follow the United States Supreme

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80. Id. at 597.
81. Id.
82. Id. (Emphasis added).
83. See also Howard v. State, 471 So. 2d 208 (Fla. 5th Dist. Ct. App. 1985) which can be read as meaning that the Fifth District would approve a harmless error approach when a witness blurts out inadmissible other crimes testimony.

Like Brown and Finklea, Howard is an extremely short opinion. After reading the Williams Rule cases during this survey period, this author is of the firm opinion that appellate courts should either write fully reasoned and thoroughly explained opinions in this area or not bother writing them at all.
Court's decision in *Ashe v. Swenson*\textsuperscript{84} and bar the state from using evidence about the acquitted crime in subsequent trials relating to different but similar charges.\textsuperscript{85} In *Ashe* the Court found that after a defendant was acquitted of robbing one player at a poker game, collateral estoppel prevented the state from subsequently charging him with robbing the other players. The Court's examination of the first trial's evidence showed that the jury must have found that *Ashe* was not the robber. As this "issue of ultimate fact"\textsuperscript{86} was once determined in a final judgment, collateral estoppel prevented it from being tried again. However, even those courts following *Ashe* have not excluded other crimes evidence where the prior acquittal was not based on the same issue which the state subsequently wishes to use the other crimes evidence to prove.\textsuperscript{87} In *State v. Perkins*,\textsuperscript{88} the Florida Supreme Court seemed to adopt this approach. To help convict Perkins of attempted rape on a child, the state introduced testimony from another child who claimed that Perkins had tried to use the same method, entering the bedroom late at night, to rape her. However, Perkins had been tried for and acquitted of this previous attack. The Florida Supreme Court noted *Ashe* only prohibits "the admission in a subsequent trial of evidence of an acquitted collateral crime only when the prior verdict clearly decided in the defendant's favor the issue for which an admission is sought."\textsuperscript{89} Since the issue in both charges seemed to be identity, the court found that once the defendant was acquitted of the prior charge it was "fundamentally unfair"\textsuperscript{90} to allow the state to introduce other crimes evidence concerning this charge in a subsequent proceeding. Doing so would force the defendant to defend himself a second time against the charge for which he has once been acquitted. However, the court left open the question whether evidence of collateral crimes for which acquittals had not been obtained could be used.

\footnotesize{\cite{84} 397 U.S. 436 (1970). \\
\cite{86} 397 U.S. at 443. \\
\cite{87} For cases in which a prior acquittal did not prevent use of other crimes evidence see Oliphant v. Koehler, 594 F.2d 547 (6th Cir. 1979) (rape charge, previous rape acquittals on consent defense stemming from same factual claims admissible to show pattern or plan); *State v. Darling*, 197 Kan. 471, 419 P.2d 386 (1966) (charge of intent to procure abortion, previous acquittal on similar charge did not prevent admissions since evidence admissible to show intent). \\
\cite{88} 349 So. 2d 161 (Fla. 1977). \\
\cite{89} Id. at 163. \\
\cite{90} Id.}
In *Holland v. State*, the Florida Supreme Court decided whether evidence of a defendant’s participation in a collateral offense which has been nolle prossed could ever be admissible in a subsequent proceeding on another charge. Holland was charged with the December 5, 1979, armed robbery of a bank. His first conviction resulted in an acquittal but was overturned because of error in the jury instructions. At Holland’s first trial the state introduced other crimes evidence through the testimony of a bank employee who identified Holland as the person who robbed her bank twelve days after the December 5th robbery. Following Holland’s conviction, the state nolle prossed any charges relating to the December 17th robbery. After Holland’s conviction was reversed, defense counsel moved to preclude state use of the crime’s evidence, because it had previously nolle prossed the charges relating to the December 17th robbery. The trial court denied this motion and also denied Holland’s request to inform the jury that the collateral crime charged had been nolle prossed. After his second conviction on the December 5th bank robbery charge, Holland appealed to the First District Court of Appeal, which affirmed. However, the First District certified the issue relating to the *Williams* Rule use of prior crimes for which any charges have been nolle prossed as a question of great public importance to the Florida Supreme Court.

The Florida Supreme Court refused to extend *Perkins* to the situation “where the defendant has been charged with the collateral offense and subsequently had the charges dropped.” Unlike a *Perkins* and *Ashe* situation, the court felt that there was a major difference in using other crimes evidence after a state nolle prosse as opposed to an acquittal of prior charges. Since a nolle prosse does not necessarily mean that the evidence of the other crime is weak or nonexisting, there is no fundamental unfairness when it is subsequently introduced against the defendant in another trial. The Florida Supreme Court also felt that a contrary ruling, given the procedural facts of *Holland*, would result in an indefensible windfall to the defendant. During his first trial the December 17th charges were still pending. It was only after his first conviction that the state made the decision to drop these. Since his conviction was overturned for reasons unrelated to the *Williams* Rule, a decision now preventing the state from introducing evidence of the De-

91. 466 So. 2d 207 (Fla. 1985).
94. 466 So. 2d at 207.
The December 17th robbery would "unfairly prejudice the state's case." 95

*Holland* is clearly a correctly decided case even apart from its unusual procedural circumstances. Other crimes evidence is commonly introduced in criminal cases against the defendant even though the defendant has not even been charged. Why the state should decide to nolle pros a case often depends on matters unrelated to the strength of the evidence. *Holland* provides a perfect example of this. After first securing a conviction on the December 5th robbery, the state could reasonably presume that Holland's sentence would not be extended by a subsequent conviction on the December 17th robbery. Therefore, considering an expeditious use of prosecutorial and judicial resources, it is difficult to fault the decision to drop the second prosecution. If *Holland* had been decided differently, fear of reversals on appeal would mandate that the state sometimes needlessly prosecute defendants for multiple charges even though it would not be in the overall public interest to do so.

Certain language in the Florida Supreme Court's decision is troubling however. The court notes that there is no indication that the state dropped the charges because of matters involving how strong the evidence was. Hopefully, the lower courts will not read this language to mean that in subsequent cases involving the proposed admission of Williams Rule evidence relating to a nolle prossed charge, the defendant has a right to inquire into the state's motive behind dropping the charges. There are two good reasons for not doing so. First, this would only introduce another issue and allow the defendant to perhaps divert the jury's and the court's attention from the central issue of guilt or innocence on the crime charged, rather than on a previous one. Secondly, assuming that the state did indeed drop the other crimes evidence because proof of it was weak, then in most situations it would not have been able to lay the correct factual predicate for the introduction of other crimes evidence either.

The Florida Supreme Court never ruled expressly on Holland's second point that assuming the other crime's evidence is admissible despite the nolle prosse, then Holland should be allowed to testify that at the time of his second trial he was not charged with the collateral offense. Chief Justice Boyd, although concurring in the court's decision that *Perkins* should not be extended to cover the situation involving nolle prossed crimes, would have allowed the defendant to so testify.

95. *Id.* at 209.
Justice Boyd felt that such a ruling was necessary because "the defendant has a right to inform the jury of all the circumstances pertaining to the evidence adduced against him." Fortunately, he was not able to convince other members of the court on this point. If the court had adopted Justice Boyd's reasoning, then the state may feel compelled to offer explanations as to why defendants such as Holland were not under charge for the other offenses. Once the state offered such reasons, the defense would perhaps feel compelled to counter these reasons or to cross examine the state about them. The jury might end up examining whether the decision to drop the other crimes charges was based on a lack of evidence and whether that same lack of evidence could be inferred over to the present case. Such a scenario would only introduce collateral issues diverting the jury's attention from the central goal at hand, the resolution of the criminal charges pending before it.

3. Miscellaneous Williams Rule Cases

The remainder of the cases discussing section 90.404(2) presented rather standard issues. In all of them, the state used Williams Rule evidence to prove such issues as intent and/or identity. Some of these cases are not interesting enough to merit much discussion. The others are briefly discussed below.

a. Identity

When other crimes evidence is used to prove identity, a multi-step inferential process is used. First, there must be sufficient evidence to connect the defendant with the other act or crime. Second, the other crimes evidence must be unique. Third, the crime charged must also be of the same unique character. From this, the inference drawn is that the defendant is the one responsible for both unique acts or crimes.

When several crimes or attempted crimes are committed with an unusual modus operandi, it is logical to infer the same individual is

96. Id. at 210.
involved each time. *Smith v. State* demonstrated the successful use of other crimes evidence having an unusual *modus operandi* to prove identity. Smith was charged for a first degree murder occurring by arsenic poisoning in 1975. At trial, the court admitted evidence of an attempted arsenic poisoning murder which occurred in November, 1981. After conviction, the First District Court of Appeal affirmed. The court noted that mere similarity between a collateral crime and one charged is not enough to make the other crimes evidence admissible. Rather, "there must be something so unique or particularly unusual about the perpetrator or his *modus operandi* that it would tend to independently establish that he committed the crime charged." *Smith* found arsenic poisoning to possess this unique quality. Unfortunately, the court's opinion does not relate the circumstances connecting Smith to both acts and what the evidence was, as to how the arsenic had been given both times.

An event like attempted arsenic poisoning almost has its own stamp of uniqueness, perhaps explaining why the *Smith* court assumed this without discussion. However, two quasi-ordinary events may be shown to be so similar by the sheer number of common features they share that inferring the same person was involved in both is perfectly logical. In *Larkin v. State*, the defendant was charged with the gunpoint robbery of a Plantation pharmacy on August 12, 1983. The pharmacist testified the robber came into the store, asked for something for a sore throat and then drew a gun. The robber ordered that a "closed for inventory" sign be put on the front door, after which he demanded certain drugs be put in a garbage bag. He then took the watches and wallets of the pharmacist and the pharmacist's father, took some Timex watches from a display case, grabbed some Salem cigarettes and


100. *Id.* at 1341.

101. Besides identity, the court found the other crimes evidence was also "relevant to rebut appellant's defense that the victim committed suicide, and was introduced to establish a pattern of criminality on the part of appellant." *Id.* How the evidence rebutted a suicide defense is not explained. As to the notion that it established Smith's "pattern of criminality", this may be another way of saying the evidence was admissible to prove identity through *modus operandi*. Arguably *Smith* may even be read as not involving the use of other crimes evidence to prove identity but instead to prove a common scheme or plan. Unfortunately, this case appears to be yet another example where a court has so cryptically explained the reasons behind its decision and stated so little facts that a clear understanding of the opinion is difficult.

102. 474 So. 2d 1281 (Fla. 4th Dist. Ct. App. 1985).
left. At trial, the state introduced evidence about the robbery of a Deerfield Beach pharmacy after the Plantation robbery. The similarities between the two robberies were numerous and striking. The Deerfield Beach robber also ordered a "closed for inventory" sign be posted on the door, demanded many of the same drugs, used a garbage bag to carry the robbery proceeds, took the pharmacist's wallet and watches, grabbed some Salem cigarettes and took additional Timex watches from a display case. The pharmacist in the second robbery identified Larkin as the perpetrator.

The Fourth District Court of Appeal correctly affirmed admission of the Williams Rule evidence. Larkin had been linked to the other crime; the other crime was of the same nature and close in time and distance with the one charged. The method used by the robber in each case, once the robbery actually began, was strikingly similar. Larkin thus represents a classic use of other crimes evidence to show identity. Indeed, a contrary decision would cast doubt on when other crimes evidence could ever be so used. 103

b. Intent

Other crimes evidence was used to prove intent more than any other issue. Like all use of other crimes evidence, this requires traveling through a series of inferential steps. First, the defendant must be sufficiently connected to the collateral crime evidence. Second, the two events must be sufficiently similar so that the intent on both occasions is logically the same. Third, the intent during the collateral crime must be clearly demonstrated.

Bricker v. State 104 illustrates that where the intent during the collateral act is not clear, Williams Rule evidence should not be admitted to prove intent on another occasion. Otherwise, the jury would be faced with evidence of two similar events where the intent both times is equally ambiguous and, thus, not helpful. Bricker was a beauty salon inspector, charged with bribery and receiving unauthorized compensation for official behavior. In fall 1982, Bricker told his supervisor he

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103. Besides showing how other crimes may be used to prove identity, Larkin and Smith are reminders that admissible other crimes evidence can occur either before or after the act on trial. What is important is how strong a logical connection there is between the collateral crime or act, the charge on trial and the proposition the other crime evidence is being offered to prove at trial - not the time of the other act or crime's commission.

104. 462 So. 2d 556 (Fla. 3d Dist. Ct. App. 1985).
believed a salon owner had tried to bribe him. The supervisor advised Bricker that unless he was actually given something nothing could be done. A week later, Bricker went to a second salon where a discussion of possible violation fines led the owner to believe Bricker was soliciting a bribe and Bricker to believe the owner was attempting to offer him one. At a second meeting between the two the owner actually gave Bricker money. Unknown to the defendant, the owner had contacted the state attorney’s office after the first meeting and was wearing a body wire the second time. Bricker was arrested with the money outside the second salon. He told his supervisor he was trying to trap the salon owner but was still fired and charged. At trial, the court admitted testimony from the first salon owner claiming Bricker tried to solicit a bribe from him. After Bricker’s conviction, the Third District Court of Appeal reversed finding that while the crimes were similar there was nothing “so unique or particularly unusual about the perpetrator or his modus operandi that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged.”

In this author’s view, the court correctly reversed but for the wrong reasons. The Williams Rule evidence was not being offered to prove identity, which is what the court’s modus operandi discussion really related to, but to prove intent. Certainly, the intent was at worst ambiguous on both occasions. Indeed, a fair-minded person could even say that with respect to the first salon, intent clearly was missing since Bricker himself reported what he believed to be an attempted bribe. After his supervisor’s comments, his actions at the second salon could be viewed as perfectly reasonable.

Randolph v. State is the only other decision where the use of other crimes evidence to prove intent received more than cursory attention. Randolph was charged with the first degree murder of a robbery victim. At trial the state elicited testimony from Glinton, Randolph’s girlfriend, that she worked for Randolph as a prostitute and gave her earnings to him. She testified that on the night of the homicide as she was leaving a customer, Randolph ran up and pushed her away. As she left, Glinton heard Randolph warn her customer not to do anything. Two gunshots followed. After the shooting, Randolph asked Glinton about the victim and returned to the shooting scene after she told him the victim had money. To prove intent, the state introduced evidence of

105. Id. at 559.
106. 463 So. 2d 186 (Fla.), cert. denied, 105 S. Ct. 3533 (1985).
another robbery two nights earlier. Randolph had robbed two victims after Glinton had finished with them. On this earlier occasion he also used a gun and was heard saying "he could have killed one of them because he [the victim] didn't have any money."\textsuperscript{107}

While arguably his actions during the early crime do not reflect his intent during the later homicide, since Randolph actually did not shoot either victim, the Florida Supreme Court was probably correct in admitting the other crimes evidence. Certainly, both incidents were similar and Randolph participated in both. True, he did not shoot the one earlier victim, but this may have been because the other victim on that occasion did have money. During the later crime, Randolph apparently had no idea the homicide victim had any money when he shot him, or else why did Randolph find it necessary to ask Glinton about this and return to the scene following her affirmative reply. Finally, the mere fact that Randolph bothered to make the earlier statement during the partially successful earlier robbery reflects his state of mind at that time and that he had at least contemplated inflicting such "punishment" should another potential victim be so unfortunate as to not have any money.

IV. Privileges

A. Marital Communications Privilege

Florida, like many other states, recognizes a limited testimonial privilege for the marital relationship.\textsuperscript{108} Under Florida Statute section

\textsuperscript{107} \textit{Id.} at 189.

\textsuperscript{108} Two marital privileges have been recognized in the United States. One is the privilege for confidential marital communications, also called the husband-wife communications privilege, which Florida evidence law recognizes. This privilege only precludes one spouse from testifying about confidential communications between the couple while they were married. The second is the spousal immunity or anti-marital facts privilege. This "privilege" is actually a rule of competency since when applicable it prevents one spouse from giving \textit{any testimony} against the other spouse in a criminal case, while the two are validly married. The holder of the spousal immunity privilege varies from jurisdiction to jurisdiction. \textit{See, e.g.}, \textit{Trammel v. United States}, 445 U.S. 40 (1980), declaring that the witness-spouse rather than the defendant-spouse is the appropriate holder of this privilege in federal criminal actions. For a critical review of \textit{Trammel}, \textit{see} Lempert, \textit{The Right to Every Woman's Evidence}, 66 \textit{Iowa L. Rev.} 725 (1981).

For a general discussion of Florida's Marital Privilege before passage of the Florida Evidence Code, \textit{see} Hipler, \textit{Confidential Communications: Developments in Flor-
90.504 either spouse in a marriage has a privilege to refuse to disclose and to prevent the other spouse from disclosing confidential communications between the two during their marriage. The privilege’s purpose is to foster communication between the spouses and, to a certain extent, to protect the marriage relationship itself. Thus, the marital privilege, like other privileges, deprives the trier of fact of information which is often probative and trustworthy in order to foster relationships which the law deems worthy of protection. Certainly there is a constant tension between the notion that a jury or judge should be allowed to hear all relevant evidence before making a decision and the notion of excluding information because it is privileged. Recognizing this tension, Florida law recognizes that matters which may be otherwise considered confidential can be waived. Florida Statute section 90.507 provides that a privilege will be considered waived in three separate situations: (1) when the holder “voluntarily discloses” the communications; (2) when the holder “consents to disclosure of any significant part of the matter;” or (3) when the holder makes the communication in a situ-


109. FLA. STAT. § 90.504 (1985) states in part that: “(1) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses . . . (2) the privilege may be claimed by either spouse. . . .”

110. Since privileges work a disposition of evidence, Wigmore felt that four conditions must be fulfilled before any valid privilege could be recognized:

(1) The communications must originate in a confidence that they would not be disclosed;
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and
(4) The injury that would insure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

8 WIGMORE, HANDBOOK ON EVIDENCE § 2885 (3d ed.) (Emphasis in the original).

111. FLA. STAT. § 90.507 states in part that: “A person who has a privilege against the disclosure of a confidential matter . . . waives the privilege if he, . . . voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication.”

112. Id. See infra text accompanying notes 116-117 for discussion of this language.

113. Id.
atation where "he does not have a reasonable expectation of privacy." 114

Koon v. State 115 was the only husband-wife privilege case decided in this survey period. Koon was charged and convicted of first-degree murder for killing a government informant who implicated him in a counterfeiting scheme. Koon and his nephew allegedly lured the informant Dino to a private place where they beat him and then took him to a secluded rock pit in the Everglades. At the pit, Koon allegedly ordered Dino to walk away with him from the car. He then killed Dino with a shotgun. At trial, Koon's wife was forced to testify against her husband despite an assertion of the husband-wife privilege. Mrs. Koon testified that on the night of the alleged murder, Koon had telephoned her and admitted the crime. The state successfully convinced the trial court that since Koon had also told his mother-in-law and his son about killing Dino, this constituted a waiver under section 90.507. However, on appeal the Florida Supreme Court reversed the conviction finding that both spouses intended the telephone call to be privileged and "made the communications when they had a reasonable expectation of privacy." 116

Like so many other opinions during this survey period, Koon's discussion of the evidentiary issues is extremely brief. However, careful reflection shows that the Florida Supreme Court was clearly correct. Although Koon's admissions to his mother-in-law and son may at first blush seem to constitute waivers under section 90.507, they were not. Privileges protect the content of the confidential communications — not the underlying information communicated itself! While section 90.507 uses the words "voluntarily discloses" with respect to a privilege's holder, the words apply to "the disclosure of a confidential matter or communication" and not to any information about the underlying event itself. Since Koon did not tell his mother-in-law and his son about the contents of the confidential phone call conversation with his wife, the marital communication was never voluntarily disclosed. What was voluntarily disclosed was the fact of the killing, not the fact Dino had told his wife about the killing. Forcing the wife to relate the phone

114. Id. For an article discussing pre-code Florida law concerning this issue see Comment, Husband-Wife Privileges - Testimony of Third Party Eavesdropper Concerning Privileged Communication Admissible Where Privileged Party Knows or Has Reason To Know of Eavesdropper's Presence, 4 FLA. ST. U.L. REV. 553 (1976).
115. 463 So. 2d 201 (Fla.), cert. denied, 105 S. Ct. 3511 (1985).
116. Id. at 204. Evidently the nephew was not present when Koon made the telephone call to his wife since the court also found that "[n]o other party was present at the time of the incriminating conversation between appellant and his wife" Id.
conversation was error, although having the mother-in-law and son testify about what Koon told them would not be.

B. Psychotherapist-Patient Privilege

Florida Statute section 90.503 follows pre-code law by recognizing a psychotherapist-patient privilege. The privilege prevents unwilling disclosure of confidential communications between a patient, seeking treatment or diagnosis, and a psychotherapist. Unlike other confidential communication privileges, this one extends beyond communications between the parties and also covers records a psychotherapist would make in the course of treatment and diagnosis. During this survey period, section 90.503 generated more opinions than any other privilege. While some were merely restatements of settled law, two important cases were decided.

1. Child-Custody Cases and the Privilege

Section 90.503(4)(c) expressly provides that the privilege will not be recognized "[f]or communications relevant to an issue of the mental or emotional conditions of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense. . . ."

117. One pre-code case provides an example of what should still be considered voluntary disclosure of a confidential matter. In Tibado v. Brees, 212 So. 2d 61 (Fla. 2d Dist. Ct. App. 1968), one spouse testified in a deposition about a confidential communication with his wife. Since there was no objection at the deposition to this testimony, the court considered it waived. Brees is certainly a correct decision. Communication privileges exist not merely to prevent admission of certain confidential communications but to prevent their disclosure. Failure to take prompt steps to prevent disclosure should be considered a waiver.


119. Fla. Stat. § 90.503 protects not only treatment for what may be considered standard mental or emotional problems but also for “alcoholism and other drug addiction.”

120. See Hall v. Spencer, 472 So. 2d 1205 (Fla. 4th Dist. Ct. App.), review denied, 479 So. 2d 118 (Fla. 1985) (§ 90.503 prevents disclosure of hospital records concerning defendant-driver’s alcohol treatment when driver does not plan to use his mental or emotional condition as a defense in automobile collision lawsuit), Connell v. Guardianship of Connell, 476 So. 2d 1381 (Fla. 1st Dist. Ct. App. 1985) (trial court erred in excluding deposition testimony of doctor in competency restoration proceeding, since § 90.503(4)(c) provides exception to exclusion when there is “an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim. . . .”).
This language is virtually identical to that in pre-code statutes governing the privilege. Questions concerning this exclusionary language seem to arise frequently in child custody proceedings. Since custody awards are based on what is in the best interests of the child, an inquiry into the mental condition of one or both spouses may often appear needed. Depending upon the extent of such an inquiry, this could lead to divulgence of medical records and communications with a psychotherapist.

Pre-code Florida law rejected the position that merely asserting a claim for child custody constitutes a waiver of the psychotherapist-patient privilege. In *Roper v. Roper*, both parties sought custody in a dissolution of marriage proceeding. The husband sought to depose the wife's psychiatrist over her wife's objection. The Fourth District Court of Appeal agreed that a patient's mental health "is a factor that the Court can and should consider in determining the best interests of the child." However, *Roper* refused to adopt the position that a spouse, merely by seeking custody, waived any privilege claims to communications with a psychiatrist. The Fourth District admitted that "[t]he wife's mental condition may become an issue in the case" but never established any clear guidelines when this would result in the privilege's waiver. The only concrete guidance *Roper* gave was that a spouse's own introduction of communications with the psychiatrist to prove mental condition would be construed a waiver. Since the wife had not done so here, the husband had no right to depose her psychiatrist.

*Miraglia v. Miraglia* apparently exemplifies one of those rare instances where a spouse's mental condition is not initially such an issue that requesting custody automatically constitutes a waiver, but

121. *See* former Fla. Stat. §§ 90.424(3)(b) and 490.32(2)(b).
122. 336 So. 2d 654 (Fla. 4th Dist. Ct. App. 1962).
123. *Id.* at 656.
124. *Id.*
125. *Roper* did suggest that the trial court under Fla. R.C.P. 3.160 could always order an examination by a court-appointed psychiatrist to explore a spouse's mental status.
126. 462 So. 2d 507 (Fla. 4th Dist. Ct. App. 1984).
127. During this survey period, the Fourth District Court of Appeal summarily re-affirmed its position that merely requesting custody does not waive the psychotherapist-patient privilege. *See* Khairzdah v. Khairzdah, 464 So. 2d 1311 (Fla. 4th Dist. Ct. App. 1985) (quashing trial order denying protective order motion filed when husband subpoenaed hospital record of wife's treatment during period prior to dissolution
where subsequent circumstances during the dissolution proceeding make a waiver necessary. There the trial court awarded custody to the wife and refused to admit testimony from her psychiatrist concerning her mental condition. After the final judgment, the wife attempted suicide and custody was transferred to the father. However, one week later, the trial court returned the children to the wife and denied the father’s petition for rehearing. One reason for awarding the wife custody was to “help her resolve admitted emotional problems.” The Fourth District Court of Appeal found this an impermissible basis since it would effectively put the mother’s best interests over that of the children. The Fourth District agreed that the court’s initial decision excluding the wife’s psychiatrist’s testimony was correct. However, when the wife subsequently attempted suicide, this made her mental health a vital issue as to who should be awarded permanent custody. Thus, on remand, the husband would be able to introduce the psychiatrist’s testimony over an assertion of privilege.

Miraglia is certainly a correct decision. If the wife’s subsequent suicide attempt did not put her mental condition in issue, it would be difficult to see what would. However, why an event reflective of a spouse’s mental status which occurs subsequent to a custody request is any more reflective than one which occurs before is puzzling. The Roper-Miraglia line of cases demonstrate the need for an explicit exception to the psychotherapist-patient privilege in custody cases. Even Roper admitted mental status was important to inquire into in determining custody. Then why should such extremely relevant evidence be excluded? Florida law refuses to recognize other confidential communications privileges where children may be concerned. One argument against such an exception may be that the parties would try to introduce any and all evidence of mental or emotional treatment no matter how far removed. However, trial courts consider remoteness in ruling on the relevancy of all evidence, and there appears to be no reason why such a consideration would not keep out the truly irrelevant psychiatric data in custody proceedings any less than it would in other cases. If Florida truly wants to make custody determinations in the best interests of the children, legislative action creating such an exception is merited.

128. 462 So. 2d at 507.
2. Communications Made Under Court Order Exception

Miraglia construed one exception to the psychotherapist-patient privilege. The privilege also does not apply to "communications made in the course of a court-ordered examination of the mental or emotional condition of the patient." Such communications probably most often occur when a defendant claims insanity and the court orders an examination.

In Carson v. Jackson, parents brought a negligence and child abuse action against a babysitter and her husband. The babysitter had previously pled nolo contendere to a battery charge in a criminal case unconnected with the parents' suit. She had been placed on probation under the condition she would not babysit again until she was "examined and found fit by a psychologist." To comply with this, both spouses saw a psychologist. As part of discovery, the plaintiffs sought to either depose the psychologist or have his records produced. After the trial court denied the defendants' motion for a protective order, they appealed.

The Fourth District Court of Appeal agreed with the babysitter's privilege claim stating that it did "not believe that the petitioners' visit to a psychologist under a plea agreement relating only to the continuation of doing business constitutes a 'court-ordered examination'" under the psychotherapist-patient privilege's exception. Unfortunately, the court never stated why it adopted this belief. Possibly the court meant to distinguish between court-ordered examinations which are directly necessary to secure information in a pending proceeding and court-ordered examinations which are merely incidental in nature to a court proceeding. Whatever its reasoning, the court should have explained its ruling in this part of Carson so that trial courts could be given some guidance on this point.

However, even with the Fourth District's ruling on the psychotherapist-patient issue, the babysitter-defendants still were a denied a protective order. Carson noted that Florida Statute section 415.512 expressly abrogates all statutory privileges except for attorney-client communications in "any situation involving known or suspected child abuse or neglect" and provides that a privilege claim is not a ground

131. 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985).
132. Id. at 1190.
133. Id.
for "failure to give evidence in any judicial proceeding relating to child abuse or neglect." The defendants urged that section 415.512 should be construed to apply only to proceedings brought by the State Department of Health and Rehabilitative Services. They claimed that one purpose of the psychotherapist-patient privilege is to encourage individuals in need of treatment to seek such and that applying section 415.512 to abrogate the privilege beyond a HRS proceeding would discourage people from seeking voluntary treatment.

The Fourth District recognized the defendants' argument that section 90.503's purpose was valid. However, the court assumed the legislature had weighed the need to encourage individuals to voluntarily seek treatment, versus the need to deter child abuse by permitting the broad introduction of evidence in abuse related cases in civil lawsuits for damages. Thus, the Fourth District found section 415.512 required rejection of defendant's privilege claim.

In the author's view, the court was correct in its construction of section 415.512. Besides this, factually the babysitters should not have been given the benefit of a claim that an opposite construction was needed to voluntarily encourage people to seek mental care. Here the wife sought psychological help under a court order as a part of her probation, so her visit for treatment was clearly not voluntary.

C. Privilege Against Self-Incrimination

Both the United States and Florida Constitutions recognize that all individuals have a privilege against self-incrimination. Most discussions of these privileges occur in the context of addressing the admissibility of confessions or incriminating statements in criminal cases, an area beyond this article's scope. However, the courts have recog-

134. Fla. Stat. § 415.512 (1985) states in part: 
Abrogation of privileged communications in cases involving child abuse or neglect. — The privileged quality of communication between husband and wife and between any professional person and his patient or client, and any other privileged communication except that between attorney and client shall . . . not apply to any situation involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report, . . . or failure to give evidence in any judicial proceeding relating to child abuse or neglect.

135. See U.S. Const. amend. V, and Fla. Const. § 9, Declaration of Rights (both providing in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself.").
nized that the privilege also extends to civil and administrative proceedings.

*Boedy v. Department of Public Regulation*\(^{136}\) recently afforded the Florida Supreme Court an opportunity to revisit the privilege against self-incrimination’s applicability to professional regulatory proceedings. The Department filed an administrative complaint against Boedy pursuant to the Medical Practice Act.\(^{137}\) The complaint alleged Boedy suffered from a mental or emotional condition making him “unable to practice medicine with reasonable skill and safety”\(^ {138} \) under Florida law. Pursuant to its complaint the Department ordered Boedy to submit to a series of psychiatric examinations, the results of which would be used to determine his fitness to continue practicing medicine. When a Department hearing officer denied his claim that the examinations would violate his privilege against self-incrimination, Boedy appealed to the First District Court of Appeal\(^ {139} \) and then to the Florida Supreme Court, both of which also rejected his privilege argument. Since the supreme court relied heavily on the district court’s opinion, a review of both is necessary.

The First District Court of Appeal carefully phrased the issue as whether the “privilege against compelled self-incrimination is applicable in the circumstances of this case.”\(^ {140} \) The answer depended on whether the practical effect of the proceedings could be considered penal in nature. The court acknowledged that the Florida courts had found the privilege applicable to Florida Real Estate Commission proceedings investigating allegations of misconduct\(^ {141} \) and to State Board of Medical Examiners investigation of unprofessional conduct claims.\(^ {142} \) In both cases, sanctions were sought for the unprofessional

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136. 463 So. 2d 215 (Fla. 1985).
140. *Id.* at 505 (Emphasis added).
141. *See State ex rel. Vining v. Florida Real Estate Comm’n*, 281 So. 2d 487 (Fla. 1973). The misconduct allegations included the following: failure to maintain trust funds in an escrow account; breach of trust and dishonesty in a business dealing; failure to obtain a new registration certificate or otherwise tell the Commission about an office address change; sharing offices with an attorney in violation of a Commission Rule; and a general charge that Vining’s past conduct showed he was so incompetent and dishonest a client’s money or property could not be trusted to him.
142. *See Lester v. Department of Prof. and Occ. Regulations*, 348 So. 2d 923 (Fla. 1st Dist. Ct. App. 1977) (involving allegation of receiving kickbacks from a hospital where the physician’s patient had received services).
conduct alleged. The First District contrasted these situations with that in Boedy. The Department of Professional Regulation admittedly sought to at least temporarily curtail the doctor's ability to practice medicine, but this happened because his ability was impaired not because Boedy had engaged in professional misconduct meriting disciplinary action. The court noted that the United States Supreme Court has held that the privilege against self-incrimination is not implicated when a proceeding is for the purpose of assessing a civil penalty rather than a criminal one.\textsuperscript{143} Examining the factors the United States Supreme Court used in \textit{Kennedy v. Mendora-Martinez}\textsuperscript{144} to determine whether a penalty was criminal or civil in nature, the First District summarily concluded that the Department's proceeding against Boedy did not seek to impose a criminal penalty; thus, he had no privilege to refuse the examinations. However, the court certified the question to the Florida Supreme Court as one of great public importance.\textsuperscript{145}

In a brief opinion, the Florida Supreme Court affirmed. Like the First District, the supreme court found the specific section of the Medical Practice Act involved in Boedy "does not deal with an issue of guilt or innocence."\textsuperscript{146} No misconduct charges or the possibility of any pen-

\textsuperscript{143} See United States v. Ward, 448 U.S. 242 (1980).
\textsuperscript{144} 372 U.S. 144 (1963). The Court listed the factors as:
Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment, . . . whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ." \textit{Id.} at 168-169.

\textsuperscript{145} The exact question certified was: "Whether the fifth amendment privilege against compelled self-incrimination applies to disciplinary proceedings initiated under section 458.331(1)(s), Florida Statutes, to determine whether a physician is unable to practice medicine with reasonable skill and safety to patients as a result of a mental or physical condition." \textit{Boedy}, 444 So. 2d at 504.

\textsuperscript{146} 463 So. 2d at 217. The court relied on Parkin v. State, 238 So. 2d 817 (Fla. 1970), \textit{cert. denied}, 401 U.S. 974 (1970) where a defendant claiming insanity as a defense refused to answer questions at a court ordered psychiatric evaluation. The Florida Supreme Court held that the privilege against self-incrimination would not be violated by requiring a defendant to answer questions in a psychiatric interview since any statements of the accused could only be properly used as evidence of mental status and not for the factual truth of the statements themselves. Indeed, \textit{Parkin} specified that the state should only elicit the experts' opinion "as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during
alty for misconduct were involved in a section 458.331(1)(s) proceeding. Rather the sole issue is a doctor's fitness to practice medicine "with reasonable skill and safety." The state clearly had a great interest in certifying and making sure that persons engaging in a professional discipline are physically and mentally able to do so. Since there is no absolute right to practice medicine free from any reasonable regulation, Boedy could not refuse the ordered psychiatric evaluations and continuing practicing. As long as the state did not seek to use anything Boedy might say during the evaluations against him in later criminal proceedings, there was no valid privilege claim. Since section 458.331(1)(s) prohibited such, this was not a bona fide issue. The Florida Supreme Court thus found it "constitutionally permissible to deny authority to practice medicine to a physician who asserts the privilege against self-incrimination if his claim has prevented full assessment of his fitness and competence to practice." 148

V. Compulsory Process

In a criminal case, the United States and Florida constitutions guarantee the accused the right to subpoena witnesses to testify for the defendant.149 The Compulsory Process Clause has been construed as affording an accused the right to present a defense free from arbitrary

his interview. . . . " Id. at 820.

The Florida Supreme Court found that the examination in Boedy like that in Parkin, was not related to "guilt-in-fact", 463 So. 2d at 217, but to the presence or absence of a mental condition. This author believes the analogy drawn to Parkin is both strained and unnecessary. To claim that the Parkin examination was not related to "guilt-in- fact" is sophistry. If Parkin was insane at the time she committed the alleged criminal acts, she was not "guilty-in-fact" because she did not possess the requisite mental status! At any rate, once the Florida Supreme Court found that Boedy's proceeding did not seek to impose a criminal penalty, there should have been no need to even draw such an analogy.

147. FLA. STAT. § 458.331(1)(s) specifically stated that: "[I]n any proceeding under this paragraph, neither the record of proceedings nor the orders entered by the board shall be used against a physician in any other proceeding."

148. 463 So. 2d at 218.

149. U.S. CONST. amend. VI states in part that: "[i]n all criminal prosecutions, the accused shall have the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." FLA. CONST. art. I, § 16, Declaration of Rights, states that "[i]n all criminal prosecutions the accused . . . shall have the right to compulsory process for witnesses. . . ."
and unreasonable state evidentiary rules.\textsuperscript{150} In \textit{State v. Montgomery},\textsuperscript{151} the Third District Court of Appeal resolved a conflict between an accused's right to present a defense and a proposed defense witness' legitimate claim of the privilege against self-incrimination. More specifically, the court decided whether a trial court can override the state's objection to giving a witness use immunity.

Montgomery was charged with various offenses, including resisting arrest, grand theft, and battery of a law enforcement officer. He claimed that a person named Downey had been present, had seen the incident giving rise to the charges and could give exculpatory information. Downey refused to testify unless immunized. When the state did not offer immunity, Montgomery asked the trial court to immunize Downey anyway, which the court did over state objection.

The district court noted that \textit{Montgomery} was a case of first impression in Florida. The court found there were two kinds of defense witness immunity — statutory and judicial. Statutory immunity is “granted by the legislature to the executive branch through statute which gives a prosecutor authority to confer immunity on a witness in return for the witness' self-incriminating testimony.”\textsuperscript{162} Traditionally, the decision to confer this lies with the state. However, the district court found that when prosecutorial misconduct interferes with a defendant's constitutional rights to present a defense, statutory immunity can be used as a remedy to avoid a court ordered acquittal. Thus, when the prosecution so threatens a defense witness with possible criminal charges that the witness invokes the privilege against self-incrimination instead of testifying\textsuperscript{163} or when the prosecution intentionally refuses to grant immunity as a matter of trial strategy to keep exculpatory evidence out,\textsuperscript{164} statutory immunity has been recognized as possible appropriate action. However, even so, the recognition of statutory immunity does not make its use mandatory. Since the executive has the authority

\textsuperscript{150.} See, e.g., Washington v. Texas, 388 U.S. 14, 23 (1967) holding that a state statute prohibiting persons charged as accomplices from being witnesses for each other violated a defendant's compulsory process rights since it "arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." \textit{Id.}

\textsuperscript{151.} 467 So. 2d 387 (Fla. 3d Dist. Ct. App. 1985).

\textsuperscript{152.} \textit{Id.} at 390.

\textsuperscript{153.} See United States v. Morrison, 535 F.2d 223, 225 (3d Cir. 1976).

\textsuperscript{154.} See Government of Virgin Islands v. Smith, 615 F.2d 964, 969 (3d Cir. 1980).
to decide whether statutory immunity is appropriate, even in instances of prosecutorial misconduct, the state still maintains that residual power. If the state wishes to continue prosecution when its misconduct has interfered with the defendant's constitutional right to call a witness, the state must grant the immunity or suffer dismissal. But the state must decide which choice is appropriate, not the trial court.

Since a dismissal is such a drastic remedy, Montgomery found that the defense has the burden of showing the state intentionally attempted to deprive the defendant of a fair trial by interfering with the right to call a witness.155 Unfortunately for Montgomery, the record did not reflect this. The district court refused to accept the position that when the state declines to immunize a defense witness, the lack of any present intention to prosecute the witness is *per se* evidence of misconduct. Thus while the court recognized statutory immunity as a viable remedy, this was not an appropriate occasion for it.

As an alternative to statutory immunity, Montgomery also argued the theory that judicial immunity should exist whenever "the defendant is prevented from presenting exculpatory evidence which is crucial to his defense"156 despite the lack of prosecutorial misconduct. Under this theory, judicial immunity is part of a court's inherent power to see that a defendant's rights are fulfilled. Unlike statutory immunity which has been favorably recognized by many courts and some commentators,157 the district court found only the United States Court of Appeals for the Third Circuit favorably recognized judicial immunity.158 Since granting immunity is a traditional executive decision, respect for the separation of powers doctrine has driven many courts away from recognizing judicial immunity. Furthermore, the time and information needed for a

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155. "The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact finding process." 467 So. 2d at 391 (quoting United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), cert. denied, 441 U.S. 913 (1979).

156. 467 So. 2d at 392-393.

157. *See* Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 Harv. L. Rev. 1266, 1280 (1978) concluding that the "right to compulsory process guaranteed by the sixth amendment requires the State to grant use immunity to defense witnesses when doing so would not create significant burdens for the state;" Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 170 (1980) arguing that "[o]nce the state makes immunity available to the prosecution it should not be permitted arbitrarily to withhold it from the defense."

court to intelligently assess when judicial immunity is appropriate would lead to both “significant expenditures of judicial energy to the detriment of the judicial process overall, and would risk jeopardizing the impartiality of the judge at trial.”

Against these two reasons for declining to recognize judicial immunity, Montgomery again sought to utilize a compulsory process clause argument. However, the district court declined to recognize such. The clause gives defendants the right to subpoena witnesses and have their testimony heard free from prosecutorial conduct which would merit granting statutory immunity. However, “it does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination.” Thus, Montgomery had no valid compulsory process clause claim to judicial immunity for his witness.

Ultimately, the district court found that only when there is sufficient prosecutorial misconduct can a court become involved in an immunity decision. Even then the ultimate choice between dismissal or immunity still remains with the state.

VI. Cross-Examination and Impeachment

Of the fourteen cases decided in late 1984 and 1985 that this survey will discuss that deal with cross-examination and impeachment, all but one of them are criminal cases. The first four cases involve reversals as a result of trial courts’ improperly restricting the cross-examination by defendants of the main witnesses for the state.

A. Prior Conviction

Belton v. State involved a reversal of a defendant’s conviction because “the trial court improperly limited cross-examination of the
State's principal witness . . . by precluding cross-examination with respect to an out-of-state conviction. The out-of-state conviction in Belton was the crime of joy-riding which, while punishable by ninety days imprisonment, was a crime considered in both Michigan and Florida to involve a dishonest act, and therefore a crime with which a witness could be impeached under section 90.610(1), Florida Statutes.

B. Bias

In Yolman v. State, the Second District Court of Appeal reversed a trial court's ruling that had prohibited the defendant on cross-examination from impeaching a state witness as to that witness' bias. The appellate court held that "[i]t is not necessary for matters tending to show bias or prejudice to have been within the scope of the direct examination to be proper cross-examination." The appellate court also found that the trial court's error in not permitting the defendant to cross-examine the key state witness concerning that witness' bias or prejudice "was not made harmless by related testimony of appellant's husband, who was also co-defendant, and who had little credibility with the jury." Furthermore, had the defendant taken advantage of the trial court's offer to permit the defendant to call the state's key witness as defendant's witness, defendant "would have been wrongfully deprived of her concluding closing argument. . . . This deprivation alone may have been reversible error."

The Third District Court of Appeal held that it was error in Wooten v. State not to permit a defendant to cross-examine a victim about the victim's having hired an attorney in contemplation of filing a civil suit against the defendant's employer.

A rare instance of an Anders brief leading to a reversal of a guilty verdict is Jackson v. Florida. Jackson involved an appeal of a theft conviction that resulted from the defendant's refusal to turn over
Evidence

a customer's payments, for work done on the customer's car, to the victim car repair shop. The defendant maintained that he was an independent contractor paying rent to the car repair shop plus 50% of the profits, while the owner of the car repair shop claimed that the defendant was an employee who received a commission and did some independent contracting. The trial court had refused to permit the defendant to cross-examine the victim (the owner of the car repair shop and the state's main witness) about the victim's having made romantic advances to the defendant's girlfriend. The defendant had also proffered the testimony of another employee who would have testified that the victim had made romantic advances to her as well and that the victim had promised to "get even" with the defendant. Saying that this was improper impeachment of the victim's character, the trial court had not permitted the proffered testimony. However, the trial court was reversed as the proffered questions dealt with the victim's bias and "a trial judge should allow the defendant to inquire of the witness via cross-examination of the witness's bias."  

C. Permitted Restrictions on Cross-Examination

The next three cases deal with permissible limitations on defendants' cross-examination of state witnesses.

1. Prior Consensual Sex Acts

_Marr v. State_ involved an appeal from a trial court's limiting defendant's cross-examination of a rape victim's prior consensual sexual acts. The victim in _Marr_ claimed that the defendant had forced her to undress and perform oral sex, but that after she bit the defendant's penis and escaped, she did not notify anyone until, after receiving several threatening phone calls and being assaulted outside of her home, she contacted the police. The defendant sought to cross-examine the victim about her prior consensual sexual acts with her boyfriend, but was only permitted by the trial judge to elicit from both the victim and the victim's boyfriend that their relationship was close and loving with-

173. _Id._ at 348.
174. _Id._ at 349. An interesting side note is that _Jackson_ was a non-jury trial, so the trial court heard all the excluded evidence as a proffer. The appellate court assumed that: "[T]he trial court honored its own evidentiary ruling, and thus refused to consider the proffered testimony. . . ." _Id._
175. 470 So. 2d 703 (Fla. 1st Dist. Ct. App. 1985).
out reference to any specific sexual acts. The appellate court found no error in the trial court's ruling but reversed the conviction on other grounds.

2. Pending Charges

In *Francis v. State*, the Florida Supreme Court affirmed a trial court's having restricted the defendant's cross-examination of two state witnesses against him. *Francis* involved the third first-degree murder conviction and death sentence (the previous two had been reversed) of the defendant for a 1975 murder. The trial court had prohibited the defendant from cross-examining one witness regarding pending murder charges against that witness. The Florida Supreme Court upheld the trial court's ruling that the witness' pending murder charge was irrelevant. The defendant had proffered neither what the witness' answers would be to his proposed questions nor how those answers would be relevant, other than to show that the witness had a bad character or a propensity towards violence, neither of which is permissible. Furthermore, the state alleged that no deals had been made with that witness and that witness had indeed later been convicted of the second degree murder of her husband.

3. Witness' Job Performance

In affirming another first-degree murder conviction and death sentence, the Florida Supreme Court in *Rose v. State* found no error in the trial court's restricting defendant's cross-examination of a police detective. The defendant "wanted to bring out the level of professionalism of Detective Luchan for the purpose of determining his credibility." However, since section 90.608 of the Florida Statutes does not permit an attack on one's professionalism as a way of attacking credibility, the Florida Supreme Court found no abuse of the trial court's discretion in restricting the defendant's cross-examination.

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176. *Id.* at 705.
177. 473 So. 2d 672 (Fla. 1985).
178. *Id.* at 674. One wonders if the result would have been the same had the defendant proffered that the questioning would have shown that the witness' motive for testifying might have been leniency in her own case.
179. 472 So. 2d 1155 (Fla. 1985).
180. *Id.* at 1157.
181. *Id.* at 1158.
D. "Impeachment" of One's Own Witness

In two cases, appellate courts held that it was not impeachment and therefore not improper for the state to bring out the weaknesses of its own witnesses on direct examination, thereby weakening defendant's subsequent cross-examination. *Sloan v. State* involved an appeal from a conviction of burglary and grand theft. During direct examination of its own witness, a co-perpetrator, the state elicited that its witness had given a prior inconsistent statement. The Second District Court of Appeal held that this was not an attempt by the state to impeach its own witness, "but rather to bolster his credibility by revealing his earlier inconsistent statements."  

Adopting a reasoning that is sounder than the dicta of a previously decided Fourth District Court of Appeal case, the Second District Court of Appeal in *Bell v. State* ruled consistently with *Sloan*, that it was permissible for the state on direct examination of its own witness to bring out that the witness had previously lied under oath. The appellate court found no merit to the defendant's contention that the state was attempting to impeach its own witness.

In contrast to the well-reasoned Second District Court of Appeal opinions in *Sloan* and *Bell*, a bad evidentiary ruling from Florida's Fifth District Court of Appeal is *Price v. State*. *Price* involved a retrial of a defendant accused of a narcotics offense; the first trial had ended in mistrial. During the retrial, a state witness testified that the defendant had given her quaaludes, testimony that was inconsistent with that witness' testimony at the first trial, during which the witness testified that she had not received drugs from the defendant. Over defendant's objection, the trial court permitted the prosecutor on direct examination to let his witness explain the prior inconsistent testimony and the reason for it — that the witness had been threatened by the defendant. Reasoning that the prosecutor was trying to rehabilitate his witness before that witness had been impeached and that this is tantamount to attacking the credibility of one's own witness which is prohibited by section 90.608, Florida Statutes, the appellate court in *Price* reversed the defendant's conviction. An explanation for the Fifth Dis-

183. *Id.* at 490.
187. 469 So. 2d 210 (Fla. 5th Dist. Ct. App. 1985).
trict Court of Appeal’s error here may be that the appellate court did not understand that the prosecutor was not impeaching his own witness, but rather was attempting to bolster the credibility of that witness.\textsuperscript{188}

However, it is error for the prosecution to elicit on direct examination that the state’s witness has never been convicted of a crime: the witness must first be impeached by the defense. Such was the ruling of \textit{Mohorn v. State}.\textsuperscript{189} However in that case, the error was not reversible, in light of “[t]he totality of the evidence against the defendant, including her admission of guilt. . . .”\textsuperscript{190}

\section*{E. Opening the Door on Direct}

In two cases, the state’s otherwise impermissible questioning was permitted because the defendant had opened the door on his direct examination. \textit{Jefferson v. State}\textsuperscript{191} involved an appeal from a manslaughter conviction. The appellate court affirmed a trial court’s ruling that permitted the state to cross-examine the defendant on defendant’s failure “to subpoena two competent and available witnesses where the defendant’s own presentation of testimony had indicated that these witnesses could exonerate him.”\textsuperscript{192}

In affirming a conviction for sexual battery and burglary, the Second District Court of Appeal in \textit{Ashcraft v. State}\textsuperscript{193} held that the trial court properly allowed cross-examination of the defendant by the state into the details of the defendant’s prior crimes. During his direct examination, the defendant referred to his prior crimes and stated “that he had never hurt anyone during those prior crimes.”\textsuperscript{194} Consequently, the trial court permitted the state to cross-examine the defendant about a prior rape conviction.

\begin{footnotesize}
\item[188.] While it may be merely coincidental, one notes in passing that the Fifth District Court of Appeal is the only one of Florida’s appellate districts which does not have a law school in its district. On the other hand, Stetson Law School is located within the boundary of the Second District Court of Appeal, whose evidentiary rulings in \textit{Sloan} and \textit{Bell} were correctly decided.
\item[189.] 462 So. 2d 81 (Fla. 4th Dist. Ct. App. 1985).
\item[190.] \textit{Id.} at 82.
\item[191.] 471 So. 2d 181 (Fla. 3d Dist. Ct. App. 1985).
\item[192.] \textit{Id.} at 182.
\item[193.] 465 So. 2d 1374 (Fla. 2d Dist. Ct. App. 1985).
\item[194.] \textit{Id.} at 1375.
\end{footnotesize}
F. Illegally Obtained Confessions

Where a confession has been ruled coerced and involuntary, that confession may not be used to impeach a defendant who takes the stand and tells a different story. *Hawthorne v. State*[^198] involved an appeal from a manslaughter conviction, the defendant’s third trial, in which the trial court had permitted the state to impeach the defendant on cross-examination by using the defendant’s prior statement that had been illegally obtained. The fact that the state did not refer to the previously suppressed statement did not save the impeachment attempt since the state used information from the previously suppressed statement to impeach the defendant.

1. The Civil Case

The one civil case involved two issues of improper impeachment which the trial court permitted and one instance of permissible impeachment as to bias.

G. Sequestration Rule Violation

*Del Monte Banana Co. v. Chacon*[^197] was a suit by an employee against shipowners for injuries which the employee said occurred in an accident on one of defendant’s ships. The defendant’s main witness, the captain of the ship, was required to wait outside of the courtroom during testimony of the other witnesses. A woman friend of the captain would watch some of the testimony in court and then come out and sit by and talk to the captain. The appellate court ruled that the trial court improperly permitted plaintiff’s attorney to impeach the captain (defendant’s witness) regarding this supposed violation of the Sequestration Rule without a prior determination by the judge that the Rule had been violated. The appellate court held that before cross-examination of a witness regarding a violation of the Sequestration Rule would be permitted, the court must first make a determination that the Rule had been violated.[^198]

The appellate court in *Del Monte* also held that it was improper to

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[^196]: The first trial had resulted in a conviction for murder in the first degree and the second trial had ended in a conviction for murder in the second degree.
[^197]: 466 So. 2d 1167 (Fla. 3d Dist. Ct. App. 1985).
[^198]: *Id.* at 1171.
permit cross-examination of the captain insinuating that the captain had been fired because of plaintiff's injury, since there had been no proof that the captain was fired, merely that the captain had left the job with defendant for another job. "It is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury." 199

On the other hand, the appellate court approved the trial court's having permitted the plaintiff to cross-examine the captain as to bias and party alignment, specifically by inquiring into the fact that before the trial, the captain had been rehired by defendant company as a mate and promised a position as a captain as soon as that position opened up.

VII. Impeachment By Prior Inconsistent Statements

The nine cases which deal with impeachment by prior inconsistent statements are all criminal cases. In a pair of cases, discussed above, Sloan v. State and Bell v. State, the Second District Court of Appeal permitted the state on direct to bring out and have the state witnesses explain prior inconsistent statements, thereby stealing the thunder of defendant's cross-examination of those witnesses. In Price v. State, criticized above, the Fifth District Court of Appeal refused to permit the state witness to explain during direct examination a prior inconsistent statement.

Technically, neither Sloan nor Bell nor Price — the Fifth District Court of Appeal notwithstanding — concern impeachment by prior inconsistent statements.

In a case involving the question of what use can be made of a witness who recants his testimony before trial, the First District Court of Appeal in Austin v. State, 200 severely restricted the prosecution's use of a witness' unsworn prior statement that incriminated the defendant. After reversing a robbery conviction on other grounds, the court in Austin also addressed improper use of a witness' unsworn prior statements. During the defense side of the case, the defense called a witness who claimed to have been with the defendant and a state witness at a time when the state witness claimed the defendant had made admis-
sions. The defense witness maintained that he did not hear the defend-
ant make any admissions.\textsuperscript{201} The defense to the robbery charge was that the defendant had been in Georgia for about one week before the robbery was committed in Jacksonville. On rebuttal, the prosecution asked the court to call as a court witness the defense witness previously mentioned. Since the defense witness claimed to have no memory of just when he was with defendant on Jacksonville Beach, the court permitted the prosecution to elicit from the defense witness that the defense witness had previously told an assistant state attorney and an investigator that the defense witness and the defendant had been together on Jacksonville Beach one day before the robbery. The appellate court made the distinction between the witness who was hostile, which this defense witness certainly was, and one who was adverse, distinguishing between the witness whose testimony is not beneficial and the witness who gives testimony that is prejudicial to the cause of the party calling him.\textsuperscript{202} In the instant case, the defense witness’ testimony was not adverse, even though the defense witness himself may have been hostile to the state. Consequently, the appellate court ruled that the trial court had erroneously permitted the prosecutor to get around section 90.608 of the Florida Statutes, which requires a showing of adversity before a prior inconsistent statement can be used to impeach a witness. Moreover, the appellate court ruled that even had the prosecutor been permitted to impeach the defense witness, the prior inconsistent statement would only have come in for impeachment and not as substantive evi-
dence since the prior statement had not been under oath.\textsuperscript{203}

A conviction for trafficking in cannabis was reversed in \textit{Williams v. State}\textsuperscript{204} because the trial court refused to permit defendant to im-
peach the state’s main witness by a prior inconsistent statement. The trial court had erroneously ruled that since the prior inconsistent statement had been an oral statement, impeachment would not be permit-
ted. In reversing, the appellate court stated:

\begin{quote}
The prior inconsistent statement may be oral and unsworn and may be drawn out on cross-examination of the witness himself and, if on cross-examination the witness denies, or fails to remember, making such a statement, the fact that the statement was made may be
\end{quote}

\textsuperscript{201} Id. at 1382.
\textsuperscript{202} Id. at 1383.
\textsuperscript{203} Id.
\textsuperscript{204} 472 So. 2d 1350 (Fla. 2d Dist. Ct. App. 1985).
proved by another witness. The appellate court would have permitted the introduction of extrinsic evidence in the instant case even though the oral statement had been made to defendant's attorney and defendant's attorney would have had to become a witness in the case.

After reading the quoted passage from Williams above, it comes as no surprise that the Second District Court of Appeal's sister court in Courtney v. State reversed a conviction because of the trial court's failure to permit extrinsic evidence of a prior inconsistent statement of a state's eyewitness. Courtney was an appeal of a murder conviction and during the cross-examination by defendant of the state's only eyewitness, the state's witness denied having told another person that the state's witness had not seen the crime. The defense attorney sought to lay the predicate for impeaching the state's witness but the prosecutor's objection was sustained by the trial court. The defense attorney then made a proffer of the testimony of three impeachment witnesses. The proffer of the testimony of one of them, Adams, was that the state's eyewitness had told Adams that the state's witness had seen nothing. In reversing the conviction, the appellate court affirmed the trial court's decision to exclude extrinsic evidence by another impeachment witness since the state's eyewitness had admitted having made that statement.

In Toranco v. State the court permitted the state to use a prior inconsistent statement that had not been given to the defense during discovery because that statement had been in a police report that was furnished to the defendant. Delgado-Santos v. State reversed a first-degree murder and armed robbery conviction because a prior inconsistent statement, of an alleged accomplice, of the defendant made during police interrogation was admitted as substantive evidence. The court held that a police interrogation was not a "proceeding" under section 90.801(a) of the Florida Statutes, even though defendant had been under oath and had been given his Miranda rights at the time he made the statement. In reaching its decision, the appellate court looked to

205. Id. at 1352 (citing United States v. Sisto, 534 F.2d 616 (5th Cir. 1976) and FLA. STAT. § 90.614(23) (1983)).
206. Id. at 1352-53.
207. 476 So. 2d 301 (Fla. 1st Dist. Ct. App. 1985).
208. Id. at 302.
209. 471 So. 2d 1355 (Fla. 3d Dist. Ct. App. 1985).
211. Id. at 75-77.
interpretations of Federal Rule of Evidence 801(d)(1)(A), including the Congressional history reprinted in the U.S.C.A. found in the comments after each section of the Evidence Code.\textsuperscript{212}

Lastly, in affirming a conviction for first-degree murder and vacating a stay of execution, the Florida Supreme Court in \textit{Demps v. State}\textsuperscript{213} reaffirmed the general rule that evidence of prior consistent statements, to bolster a witness' testimony, is inadmissible unless there has been an attempt to attack that witness' credibility.\textsuperscript{214} \textit{Demps} involved a post-conviction hearing on the defendant's claim that the state had interfered with a defense witness. Since the prosecutor declined to cross-examine one of the defense witnesses at that hearing, the trial court correctly prohibited the defense from calling other witnesses to bolster his testimony.

\section*{VIII. Confrontation}

The Confrontation Clause was invoked in 1985 as the grounds for appeal in six Florida cases and one federal case which this survey will discuss. In the federal case, \textit{Harris v. Wainwright},\textsuperscript{215} the Court of Appeal for the Eleventh Circuit affirmed the granting of habeas relief by a district court to a defendant who had been convicted on hearsay evidence. Harris had been convicted of attempted first-degree murder and attempted robbery. The state contended that after demanding money from and shooting the victim, Harris fled the scene of the crime in a yellow Cadillac. The victim's son chased and rammed the Cadillac, from which three men fled.\textsuperscript{216} A photograph of Harris was identified by the victim as that of the robber. At trial, rather than prove ownership of the yellow Cadillac, the prosecutor asked the police officer if he received any information concerning the ownership of the Cadillac and what did the police officer do after receiving the information, to which the officer replied that he made a photographic lineup.\textsuperscript{217} Since the sole purpose of the officer's testimony was to tie the defendant to the rob-

\begin{itemize}
  \item \textsuperscript{212} In reaching its decision, the Third District Court of Appeal in \textit{Delgado} eschewed the Fifth District Court of Appeal's case by case analysis of Robinson v. State, 455 So. 2d 481 (Fla. 5th Dist. Ct. App. 1984) for a "bright line" test. It is difficult to read \textit{Delgado} without being persuaded by its reasoning.
  \item \textsuperscript{213} 462 So. 2d 1074 (Fla. 1984).
  \item \textsuperscript{214} \textit{Id.} at 1075.
  \item \textsuperscript{215} 760 F.2d 1148 (11th Cir. 1985).
  \item \textsuperscript{216} \textit{Id.} at 1149.
  \item \textsuperscript{217} \textit{Id.} at 1150.
\end{itemize}
bery and attempted murder by means of defendant’s connection with the yellow Cadillac, the court of appeal affirmed the district court’s finding that the error was not harmless.218

Another attempted first-degree murder conviction was reversed in Carrasco v. State.219 Carrasco and Edward Morales were accused of shooting a man and stealing his car. Carrasco was tried separately from Morales, but during Carrasco’s trial, the police officer who had taken Morales’s confession, told the jury that the confession implicated Carrasco.220 Finding a violation of Carrasco’s sixth amendment right to confront Morales, the district court of appeal reversed the conviction.221

Restricting a defendant’s right to cross-examination resulted in reversals in two cases, Rivera v. State222 and Alvarez v. State.223 Rivera involved an appeal from an aggravated assault conviction. The victims alleged that while they were driving in a car, someone in Rivera’s car shouted obscenities and pointed a gun.224 While the victims had been able to note the car’s license number, neither one was very sure about identifying Rivera from a photo lineup until the investigating police officer pointed out Rivera’s picture and said that he was the registered owner of the car whose license plate they had recorded.225 During the trial, the prosecutor asked neither the victim nor the police officer about the photo lineup and the prosecutor successfully objected to the defendant’s attempt to cross-examine both witnesses about the photo lineup. This forced the defense to call both witnesses as defense witnesses, thereby prohibiting the defense from impeaching these witnesses by calling another witness to testify that the pointing out of the defendant’s photograph was not standard police procedure.226

Alvarez involved an appeal from a first-degree murder conviction by a defendant whose conviction rested entirely on the testimony of two witnesses, an accomplice and an accessory after the fact. The district court of appeal reversed Alvarez’s conviction because the trial court

218. Id. at 1153. Florida’s Court of Appeal for the Third District had found in Harris v. State, 414 So. 2d 242 (Fla. 3d Dist. Ct. App. 1982) that the error was harmless.
220. Id. at 860-61.
221. Id. at 861.
222. 462 So. 2d 540 (Fla. 1st Dist. Ct. App. 1985).
223. 467 So. 2d 455 (Fla. 3d Dist. Ct. App. 1985).
224. 462 So. 2d at 541.
225. Id. at 541-42.
226. Id. at 542.
had refused to permit Alvarez on cross-examination of the accomplice to bring out that the accomplice "had served less than eight months of a thirty-two month sentence by virtue of an agreement with the state to recommend an-‘early parole’ in return for ‘telling the truth.’" The district court of appeal also ruled that the defendant should have been able to cross-examine the accomplice, and accessory after the fact, about their past convictions, even though those convictions had occurred in Cuba and the defense attorney had no record of the conviction and hence lacked the evidence necessary for impeachment. The district court of appeal so ruled, even though the defense attorney had no knowledge of the witnesses' prior convictions.

On the other hand, a defendant's right to cross-examination was held not to have been violated when his cross-examination of the main state witness was limited in Mills v. State. Mills involved an appeal from a first-degree murder conviction that arose out of a burglary of a residence. Mills and an accomplice, Ashley, had entered the victim's house at night and Mills had shot the victim with a shotgun. Mills' attorney, the public defender, had previously represented Ashley at the beginning of the case and in other unrelated charges. The public defender withdrew from representation of Ashley once he became aware that Ashley was involved in the burglary and murder. The trial court restricted Mills' cross-examination of Ashley by not permitting Mills to ask about statements Ashley had made to a public defender investigator and not permitting the use of those statements to impeach Ashley. In finding that the attorney/client privilege claimed by Ashley was correctly used to bar the attempted impeachment, Florida's Supreme Court noted that Mills had been permitted to impeach Ashley with several prior inconsistent statements and with Ashley's bargaining for immunity in return for his testimony. Consequently, the supreme court found no abridgement of Mills' right to confront his accuser.

A defendant's right to confront his accusers requires a reversal where in an attempt to perpetuate a witness's testimony by taking a pretrial deposition, the prosecution fails to notify the defendant and produce the defendant at the deposition. In Brown v. State the Flor-
ida Supreme Court reversed the defendant’s conviction for first-degree felony murder because the state, while notifying the defense counsel of its intention to take a deposition and perpetuate testimony of a witness, failed to notify the defendant and also failed to produce the defendant, who was in custody at the time, at the deposition. Brown’s conviction was reversed even though his lawyer failed to object at the trial to the introduction of the deposition and only raised the lack of notice to the defendant and defendant’s absence from the deposition for the first time on appeal.\(^{233}\)

Important as the right to confront one's witnesses is, that right can be waived, as was found by the defendant in \textit{Lara v. State}.\(^{234}\) \textit{Lara} involved an appeal from a conviction of attempted robbery and second-degree murder. The trial had been a non-jury trial and the defendant agreed to stipulate that the testimony at the trial would be based on the discovery taken by both parties prior to trial, thereby obviating the necessity of calling witnesses. In affirming the conviction, the district court of appeal held that there was no necessity for an affirmative showing that the defendant voluntarily and intelligently waived his right to confront the witnesses against him.\(^{235}\)

IX. Testimony of Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.\(^{236}\)

A. Factual Basis Need Not Be Given

In eliciting an opinion from an expert, a party on direct examination need not establish the factual basis for that opinion.\(^{237}\) In \textit{City of

\begin{footnotes}
\footnotetext{233} {\textit{Id.} at 7.}
\footnotetext{234} {475 So. 2d 1340 (Fla. 3d Dist. Ct. App. 1985).}
\footnotetext{235} {\textit{Id.} at 1341.}
\footnotetext{236} {\textsc{Fla. Stat.} \S 90.702 (1985).}
\footnotetext{237} {\textsc{Fla. Stat.} \S 90.705 (1985).}
\end{footnotes}
Evidence

The appellate court affirmed a trial court's permitting a physician to give his opinion that had paramedics examined the plaintiff's decedent, they would have found that the decedent was having a heart attack and the decedent would not have died from a heart attack the next day. The defendant city objected to the opinion being given and failed to cross-examine the doctor as to the basis for the opinion. In affirming, the appellate court cited to section 90.705 of the Florida Statutes and held:

[T]he statute eliminates the requirement formerly placed on the party calling an expert witness to present underlying data and factual support for expert testimony. Under current law, the burden of challenging the sufficiency of the basis for the opinion rests with the party against whom it is offered. 239

B. May Be Based on Inadmissible Evidence

Also, an expert's opinion may be based on inadmissible hearsay, and that otherwise inadmissible hearsay may be made known to the jury. 240 The appellate court in Bendor v. State overturned a defendant's attempted murder conviction because the trial court refused to permit defendant's expert witness, a psychiatrist, from testifying about the results of a computerized brain scan upon which the expert relied in reaching his diagnosis that the defendant suffered from organic brain syndrome. This testimony went to the defendant's defense that he was incapable of forming the necessary intent to commit the crime charged. 241 The appellate court relied on section 90.704 of the Florida Statutes in reaching its result.

C. Reasonable Certainty Not Necessary

It may not even be necessary for a medical expert to give his opinion within the bounds of reasonable certainty either for that opinion to be admitted or for a jury verdict to be based on that opinion. Brate v. State 242 was an appeal of a manslaughter conviction. The victim in

238. 466 So. 2d 1127 (Fla. 3d Dist. Ct. App. 1985).
239. Id. at 1129.
241. Id. at 1371.
Brate had died from abdominal bleeding. While there had been testimony that the defendant had stomped the victim once in the chest or abdomen, there was also testimony that before he was stomped, the victim might have hit his chest against the dash board of a speeding car that he was riding in. The medical examiner testified that the blow to the victim's chest "would have been consistent with either a stomp with a cowboy boot or a passenger's thrusting impact with the dashboard of a vehicle . . . [and] that stomping a passenger who had sustained an abdominal injury in a broadside collision probably would materially contribute to the cause of death." The doctor "conceded that he could not state with reasonable medical certainty that a boot stomp killed the decedent or materially contributed to his death." The appellate court affirmed the admission of the opinion testimony by the trial court and the conviction even though the doctor "was unwilling to testify within the bounds of reasonable certainty that such a stomp actually caused or materially contributed to decedent's death." Reasoning that expert testimony "generally is deemed advisory in nature and ordinarily not conclusive on the judgment of the jury," the appellate court cited to Baker v. State, for the proposition that medical testimony advancing a reasonable theory of causation would be sufficient to uphold the conviction where that testimony is supplemented by other evidence. The supplemental other evidence in Brate was eye witness testimony that the victim had been stomped once by the defendant.

In 1985, Florida appellate courts affirmed trial court rulings permitting experts to testify to the identity of a victim through old dental records, the results of a neutron activation analysis to show a probability that the defendant fired a gun, even though that test does

243. Id. at 792-93.
244. Id. at 793.
245. Id.
246. Id.
247. 30 Fla. 41, 11 So. 492 (1892).
248. 469 So. 2d at 794.
249. While the Brate court appears to be correct in not finding a difficulty with the doctor's inability to give an opinion within a reasonable degree of medical certainty as to cause of death, and in permitting the doctor's testimony that the victim's injuries were consistent with the boot stomp, on redirect examination, the doctor said his conclusion was "within the bounds of reasonable medical certainty." Id. at 793.
not conclusively establish whether a gun has been recently fired, and the number of assailants as well as their relative strength vis-a-vis the victim based on strangulation marks. On the other hand, experts were not permitted to testify about false confessions, the defects of a model of a device other than the device implanted in plaintiff, testimony resulting from hypnosis, polygraph answers, thermogram results, the cause of brain damage, and testimony about the battered woman syndrome.

3-M Corp. v. Brown involved a suit against the manufacturer of a mammary implant by a plaintiff who was injured as a result of the implant’s rupture. The appellate court found that the trial court erred in permitting an expert to testify about the design defects of one model of breast implant without any testimony that that model was similar to a different model, the one actually implanted in plaintiff’s breast. The appellate court also held that the plaintiff’s medical expert “was erroneously allowed to testify as to the “possibility” of future medical treatment and complications.” This speculative type of testimony is “not probative of . . . future damages.”

D. Hypnosis

In affirming Theodore Bundy’s conviction in Bundy v. State, the Florida Supreme Court held “that hypnotically refreshed testimony is per se inadmissible in a criminal trial in this state, but hypnosis does not render a witness incompetent to testify to those facts demonstra-
tively recalled prior to hypnosis." 265 However, Bundy's conviction was affirmed because the Florida Supreme Court found that totally apart from the hypnotically refreshed testimony, the witness was able to testify to other facts that he recalled prior to the hypnosis. 268

The appellate court in *Carter v. State* 267 affirmed a trial court's denial of the defendant's motion to compel production of a victim's answers to a polygraph which the polygraph examiner felt were untrue. 268 The defendant had been given a copy of the victim's statement to the polygraph examiner, the questions asked and her answers. The appellate court found that to compel production of specific answers which the polygraph examiner found untrue would not have aided the defense as that information could not have been used in evidence.

Refusal to admit thermograms was upheld in *Crawford v. Shivashankar*. 269 Crawford claimed to have sustained injury to her neck as a result of an automobile accident. Although their objective findings were slight, four doctors testified that Crawford had suffered some degree of permanent injury. 270 The trial court refused to permit Crawford to introduce thermogram photographs or to have a neurologist give his opinion that thermographic examination showed soft tissue injury. Not only had Crawford not listed the thermograms as proposed evidence in her pre-trial statement, but she "had failed to show that thermography was a well-established and reliable technique for detecting soft tissue injury." 271 While the appellate court found that it was error for the trial court to exclude the neurologist's opinion, the appellate court found the error to be harmless as four other doctors had testified that there was injury and that it was permanent, hence making the neurologist's testimony cumulative. After examining the evidence that Crawford elicited as to the reliability and acceptability of thermography, the appellate court refused to find an abuse of discretion in the trial court's exclusion of the thermography evidence based on the facts of that case. 272

It is not necessary for a clinical psychologist to be a medical doctor in order to testify to the existence of organic brain damage. This

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265. *Id.* at 18.
266. *Id.* at 19.
267. 474 So. 2d 397 (Fla. 3d Dist. Ct. App. 1985).
268. *Id.* at 398.
270. *Id.* at 874.
271. *Id.*
272. *Id.* at 875.
was the holding of *Executive Car and Truck Leasing, Inc. v. DeSerio.* Executive Car and Truck involved an appeal from a judgment arising out of an automobile collision. DeSerio's neurosurgeon testified that he could not detect any permanent organic brain damage and so he referred DeSerio to a clinical psychologist for psychological testing, something which he commonly does. The clinical psychologist testified that he then gave DeSerio psychological tests commonly used by psychologists to identify organic brain damage, and based on those tests, it was his opinion that DeSerio had suffered organic brain damage. Because neurosurgeons rely on psychological testing to detect organic brain damage, the appellate court affirmed the trial court's "allowing a clinical psychologist who is not a medical doctor to testify to the existence of organic brain damage." Noting that the Florida Supreme Court had previously held that medical testimony is not always necessary to show causation between an occurrence and damages, the appellate court found that allowing the clinical psychologist to testify that the automobile accident caused the organic brain damage was harmless error. Consistent with *Executive Car* is *G.I.W. Southern Valve Co. v. Smith,* which cited *Executive Car* in support of its ruling that a clinical psychologist who is not a medical doctor could not testify "that because of the accident, plaintiff's brain would deteriorate much more rapidly in the future." 

E. Battered Woman Syndrome

Psychiatric testimony about the battered woman syndrome was addressed in *Terry v. State,* *Hawthorne v. State* and *Ward v. State.* Terry reversed the trial court's exclusion of expert testimony as to the battered woman syndrome. The appellate court found that specialized knowledge of an expert would aid the jury in understanding the defense of self defense. The court noted that admission of the bat-

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273. 468 So. 2d 1027 (Fla. 4th Dist. Ct. App. 1985).
274. *Id.* at 1028.
275. *Id.* at 1029.
276. *Id.* at 1030 (citing Clark v. Choctawhatchee Elec. Coop., 107 So. 2d 609 (Fla. 1958)).
278. *Id.* at 82.
279. 467 So. 2d 761 (Fla. 4th Dist. Ct. App. 1985).
281. 470 So. 2d 100 (Fla. 1st Dist. Ct. App. 1985).
tered woman syndrome testimony is based on a trial court determin-
ation that the "expert is qualified and the field is sufficiently developed
to support an expert opinion." \(^{282}\) \textit{Hawthorne v. State} involved an ap-
peal from a manslaughter conviction. \(^{283}\) The appellate court held that
the trial court did not abuse its discretion in refusing to permit defend-
ant's proffered expert, Dr. Lorraine Walker, from testifying that the
defendant was a battered woman. The trial court held three days of
hearings and decided it "is not convinced that she has knowledge neces-
sary to give such testimony . . . [and that the] depth of study in this
field had not yet reached the point where an expert witness can give
testimony with any degree of assurance that the state of the art will
support an expert opinion. . . ." \(^{284}\) \textit{Hawthorne} was reversed for other
reasons and the majority invited the defendant to again attempt to
qualify an expert in the battered woman syndrome. In a lengthy dissent
as to that part of the case, Judge Ervin argued for overturning the trial
court's refusal to permit Dr. Walker to testify as an expert. In af-
firming a second degree murder conviction, the appellate court in \textit{Ward v. State}\(^{285}\) found that the defendant had not made a sufficient record
for appeal to permit the appellate court to review the question of ad-
missibility of the battered wife syndrome. \(^{286}\) After the first of two pro-
posed defense witnesses had been excluded, the defendant then decided
without any court ruling to not call the second witness who would have
testified to the battered wife syndrome. By failing to give the trial court
an opportunity to evaluate the qualifications of the second witness and
the syndrome, the defendant had precluded any possible action by the
appellate court. \(^{287}\)

Finding that an expert opinion must be relevant to be admissible,
it must prove or tend to prove a fact in issue, the Florida Supreme
Court in \textit{Stano v. Florida}\(^{288}\) affirmed a trial court's refusal to permit a
psychiatrist to testify that certain people confessed to crimes which
they did not commit, finding the proffered testimony to be irrelevant.
The Florida Supreme Court ruled this way even though the defendant
was also prepared to put on testimony of a police officer to whom the

\(^{282}\) 467 So. 2d at 765.
\(^{283}\) The defendant's previous conviction of first-degree murder had been re-
versed, as was her subsequent second-degree murder conviction.
\(^{284}\) \textit{Id.} at 773.
\(^{285}\) 470 So. 2d 100 (Fla. 1st Dist. Ct. App. 1985).
\(^{286}\) \textit{Id.} at 101.
\(^{287}\) \textit{Id.}
\(^{288}\) 473 So. 2d 1282 (Fla. 1985).
defendant had confessed a murder which the defendant had not committed and even though the defendant's theory of defense was that the defendant had killed someone other than the victim.\textsuperscript{289} What the supreme court found lacking was a proffer that the defendant's confession in the instant case "was infirm or tainted."\textsuperscript{290}

X. Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.\textsuperscript{291}

Out of court statements can be introduced for their truth under one of the many exceptions to the general proscription of hearsay.

A. Admissions

Admissions, statements of one party offered against that party, are one of the easiest exceptions to meet. In two of the six cases that fall under direct admissions, \textit{S. C. v. State}\textsuperscript{292} and \textit{Adams v. School Board of Brevard County},\textsuperscript{293} the admissions addressed were those of the parties themselves. The case of \textit{S. C.} involved an appeal from a circuit court order adjudicating a child as dependent and placing the child in foster care. Two other children had previously been taken away from the parents of \textit{S. C.} and the evidence issues involved the admissibility of (1) the hearsay testimony of a woman to what \textit{S. C.'s} father had told her as the reason the two other children had been removed (a six-year old girl suffering from venereal disease and a five-year old boy from neglect) and (2) the father's testimony as the state's adverse witness as to the reason that the other two children had been taken away from their parents. The district court of appeal found that the woman's testimony, while hearsay, was an exception as an admission by the father, whom the appellate court declared to be a party.\textsuperscript{294} The father's statements as an adverse witness were found not to be hearsay (why he

\textsuperscript{289} Id. at 1285-86.
\textsuperscript{290} Id. at 1286.
\textsuperscript{291} FLA. STAT. § 90.801(1)(c) (1985).
\textsuperscript{292} 471 So. 2d 1326 (Fla. 1st Dist. Ct. App. 1985).
\textsuperscript{293} 470 So. 2d 760 (Fla. 5th Dist. Ct. App. 1985).
\textsuperscript{294} 471 So. 2d at 1328.
was told the other children had been taken away) but rather information based on his own personal knowledge. 295

Adams involved the appeal by several students of their expulsion from high school for using, possessing or selling controlled substances or substances that are held out to be controlled substances. While hearsay is admissible at administrative hearings, there must also be other competent evidence. 296 Consequently, those students who made statements to administrative deans had their expulsions affirmed, as those statements were deemed to be admissions. 297

One can remain silent and by his silence be deemed to have adopted the out-of-court statement of another, which out-of-court statement is then admissible as an adoptive admission. Drake v. State 298 was an appeal from a conviction of attempted second-degree murder, aggravated battery and armed robbery with a deadly weapon. Drake was accused of stealing money from a church where his wife worked and of hitting his wife on the head with a hammer. Even though his wife had no memory of the incident, a police officer was permitted to testify that while she was in the wife's hospital room, she heard the wife say to the defendant, "You don't care for me at all." 299 The defendant said that he did care, to which his wife responded, "Well, you certainly don't act like it." When the husband asked why the wife said that, she replied "How would you like me to hit you on your habit?" 300 The police officer then testified that the defendant said nothing and then left the hospital room. The police officer followed the defendant into the hall and he looked back at her twice. 301 The appel-
late court affirmed the admission of the wife’s comment to her husband and his silent response as an admission by silence. In the event that the victim’s words were not an accusation but were meaningless, the appellate court conceded that the police officer’s testimony would be irrelevant and claimed that in that circumstance would also be harmless.

Another example of a statement that would be admitted against a party as an admission is a statement made by a servant or an employee about a matter within the scope of the employment. Poitier v. School Board of Broward County involved an appeal by a plaintiff who failed to recover for injuries to her daughter when her daughter slipped and fell on a wet floor in a school cafeteria. The appellate court reversed the case based on the trial court’s erroneous exclusion of the mother’s conversation with a school employee, a janitor, after the accident. The mother proffered that the janitor said that the janitors knew they were supposed to put up ropes and signs when they cleaned an area, but that they generally did not do so. The appellate court found that the janitor’s statement to the mother was an admission and should have been introduced as an exception to hearsay since the janitor was an employee of the school board and the janitor’s statement was about a matter within the scope of his duties.

Statements of a co-conspirator can also be introduced against one as one’s own statements, and hence exceptions to hearsay. An example is found in State v. Wilson, a petition for a writ of certiorari by the state of a judge’s denial of a pretrial motion to permit the state to use statements of co-conspirators against the defendants. However, to preserve for appeal a trial court’s erroneous exclusion of testimony that would fit under an admissions exception to the hearsay rule, one must

302. Id. at 215.
303. Id.
305. 475 So. 2d 1274 (Fla. 4th Dist. Ct. App. 1985).
306. Id. at 1275.
307. Id. While the appellate court reached the correct evidentiary result, its language was rather sloppy, specifically in referring to the janitor’s statement as “an admission against the interests of his employer.” Id. The court seems to confuse “admissions” (§ 90.803(18)) with “declarations against interest” (Fla. Stat. § 90.804). The reason for this becomes apparent when one notes that the appellate court cited not to the Florida Evidence Code but to case law. The Sponsors’ Note to § 90.803(18) mentions that some courts tend to make this confusion.
308. 466 So. 2d 1152 (Fla. 2d Dist. Ct. App. 1985).
assert the ground for admissibility at trial.\textsuperscript{309}

B. \textit{Spontaneous Statements and Excited Utterances}

Statements made describing or explaining an event or condition while the declarant was perceiving the event or condition, or immediately thereafter, as well as statements relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition may be admitted in court as the exceptions to the hearsay rule known as spontaneous statements and excited utterances.\textsuperscript{310}

The circumstantial guarantee of [a spontaneous statement] is that when a spontaneous statement of narration is made simultaneously with perception, the substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misinterpretation. The theory of [an excited utterance] is simply that when an excited utterance is made, the circumstances produce a condition of excitement which temporarily stills the capacity of reflection and produces utterance free of conscious fabrication. The key element in both is spontaneity.\textsuperscript{311}

An example of each is found in \textit{Preston v. State}.\textsuperscript{312} \textit{Preston} was an appeal from a conviction of sexual battery. After having dinner and drinks with her boyfriend, the victim went to a bar close to where her boyfriend worked to wait for him. While waiting for her boyfriend, the victim met and drank with the defendant. When her boyfriend didn’t come back for her, the victim left with the defendant who had offered to take her to her home, stopping at the Elks Club where they had more drinks. After the club closed, the defendant and the victim left and the victim claimed that the defendant forced her to perform oral sex on him in his van. When the van stopped at a traffic signal, the victim ran to the nearest house and reported the incident.\textsuperscript{313} At trial, a fourteen-year old boy testified to what the victim told him about the incident without objection from the defense. The appellate court stated

\textsuperscript{310} \textsc{Fla. Stat.} §§ 90.803(1) and (2), respectively.
\textsuperscript{311} Sponsors' Note to \textsc{Fla. Stat.} §§ 90.803(1) and (2).
\textsuperscript{312} 470 So. 2d 836 (Fla. 2d Dist. Ct. App. 1985).
\textsuperscript{313} \textit{Id.} at 836-37.
that the victim's statements to the boy were admissible either as a spontaneous statement or an excited utterance. However the defense unsuccessfully objected to testimony by the victim's boyfriend and a police officer as to what the victim told them about the incident. Because between one and two hours had elapsed since the incident and the telling of the story, because the victim had left the bar with the defendant "for several hours of drinking and 'partying', as described by several witnesses, she had a possible reason to contrive a story or misrepresent to her boyfriend," and because the victim appeared to be nervous and upset, the appellate court reversed the conviction finding that the statements were inadmissible hearsay as there had been time for reflection and a motive to fabricate by the victim. The appellate court was clear to point out that the statements were excluded because of all of the factors of the case, taken together, rather than any single factor.

C. Then Existing Mental, Emotional, or Physical Conditions

An out-of-court statement may be an exception to the hearsay rule if the statement regards the declarant's existing state of mind, emotion or physical sensation, including a statement of intent, plan, motive, design, mental feeling which is offered to prove the declarant's state of mind. An example is found in Peede v. State, an appeal from a murder conviction. Before going to meet the defendant, the victim told her daughter that she was going to the airport to pick up the defendant, and "that she was nervous and scared that she might be in danger, that her daughter should call the police if she was not back by midnight, that she was afraid of being with the other people he had

314. Id. at 837.
315. Id.
316. The appellate court also found that the statements were not admissible as prior consistent statements under § 90.801(2)(b), as they were made after the existence of a motive to fabricate.

In another case, Cox v. State, 473 So. 2d 778 (Fla. 2d Dist. Ct. App. 1985), statements made by a defendant's wife on learning that her husband had been in an accident were admissible as excited utterances. The statements were made immediately upon being notified of her husband's accident, "an occurrence startling enough to produce nervous excitement and render the utterances spontaneous and unreflecting." 473 So. 2d at 782 (cite omitted). As the statements were not given, nothing further can be gleaned from Cox.

318. 474 So. 2d 808 (Fla. 1985).
threatened to kill, and that he would kill them all on Easter.”319 The Florida Supreme Court affirmed the trial court’s having permitted the daughter to testify to what the victim had told the daughter. In Peede, the Florida Supreme Court found that the victim’s mental state was at issue regarding elements of the kidnapping which formed the basis of the state’s felony-murder theory, i.e. it was necessary for the state to prove forcible abduction of the victim against her will. It is not apparent why the Peede court felt it had to address the issue since it points out that the testimony came in at trial without any hearsay objection.320

D. Business Records

Records that are kept in the ordinary course of a business may be admitted as exceptions to the hearsay rule.321 However, the supplier of the information in the business record must have a business duty to supply the information, i.e. he must work for the business whose records are sought to be introduced.322 Computer printouts can be business records, but before someone can testify to what was on a computer printout, the foundation must be laid to admit the computer printout as a business record.323

Where the business record is prepared solely in anticipation of litigation, it lacks trustworthiness and may not be admitted as a business record.324 Stambor v. One Hundred Seventy-Second Collins Corp. involved an appeal from a suit against a restaurant by a customer who slipped and fell. The manager of the restaurant immediately filled out

319. Id. at 816.
320. Id.
323. Cofield v. State, 474 So. 2d 849, 851 (Fla. 1st Dist. Ct. App. 1985). Cofield involved an appeal from a grand theft conviction. The appellate court held that the state failed to adequately prove the value of the stolen equipment. The state witness had no personal knowledge as to the value but used a computer printout prepared by someone else that listed the cost of each item stolen.

It is difficult to tell from the decision, but it doesn’t appear that the state tried to offer the computer print-out as evidence. Since the computer print-out was not offered as a business record, it remained hearsay and the state witness could not use that record to testify to the value of the goods stolen. Id.

an accident report stating that nothing was on the floor and forwarded that report to the restaurant’s insurance carrier in anticipation of litigation. The appellate court found the accident report to be inadmissible as business record because of its lack of trustworthiness: the report was made solely to help defend against an anticipated claim; the manager had a business motive to fabricate and no business motive to be truthful; accident reports have generally been considered “work product” and therefore not discoverable because they are prepared solely for litigation and have no business purpose.

E. Absence of Public Record or Entry

Another exception to the hearsay rule is the certification that a diligent search failed to disclose a public record, when offered to prove absence of the record that would have been made and preserved by a public office or agency. An example of an absence of a public record is found in Terranova v. State. Terranova was convicted of engaging in the business of a contractor without being duly registered or certified. The appellate court affirmed the trial court’s having admitted into evidence a certificate of nonlicensure by the Construction Industry Licensing Board.

F. Unavailable Declarant

There are some circumstances where the unavailability of a declarant will permit his declaration to be admitted as an exception to the hearsay rule. The test is two-pronged: the declarant must be unavailable — able to assert a privilege, refuses to testify, has suffered lack of memory, illness or death prevents his attendance or the proponent cannot procure his appearance — and the statement must be one of the several recognized exceptions — former testimony subject to cross-examination, dying declaration, statement against interest or a statement of personal or family history. Stano v. State involved an appeal from a conviction of first-degree murder. The defendant’s first trial had

325. Id. at 1297.
326. Id. at 1298.
328. 474 So. 2d 1206 (Fla. 2d Dist. Ct. App. 1985).
329. Id. at 1208-9.
331. 473 So. 2d 1282 (Fla. 1985).
ended in a mistrial and the victim's parents refused to testify during the second trial and were therefore unavailable under section 90.804(1)(b) of the Florida Statutes. Consequently, the court permitted the state to read in the victim's parents' former testimony under section 90.804(2)(a), Florida Statutes. Since the parents had said sanctions would not induce them to testify and the defendant had the opportunity for a full cross-examination of the parents in the prior trial, the Florida Supreme Court affirmed the conviction. The Florida Supreme Court affirmed another first-degree murder conviction in Brown v. State. Brown and two accomplices burglarized the home of an eighty-one year old woman who was also raped and killed. One of Brown's co-defendants testified against him and also stated that the third man, Rickey, was the defendant's stepson. This testimony was found to be an exception to hearsay as the stepson was unavailable at the time of the trial (the police were still looking for him) and the statement of the relationship was permitted by the second prong, a statement of personal or family history, under section 90.804(2)(d) of the Florida Statutes. Johns-Manville Sales Corp. v. Janssens involved an asbestos products liability action in which the plaintiff sought to introduce depositions of two witnesses taken in other actions. Since the defendant or its predecessor in interest had an opportunity to cross-examine the witnesses during their depositions in the prior actions and since the witnesses had both since died, the appellate court affirmed the trial court's permitting the plaintiff to read into evidence the depositions from the other lawsuits.

G. Dependency, Probation and Forfeiture Proceedings

Lawyers must be attentive to hearsay problems in dependency proceedings, probation revocation hearings and forfeiture proceedings as well as at trials. In reversing an order declaring children to be dependent and placing the children in the custody of the Department of Health and Rehabilitative Services, the appellate court in In re S.J.T. and T.N.T. held that admission of numerous exhibits including case summaries and observations of field workers and doctors who had vis-

332. 473 So. 2d 1260 (Fla. 1985).
333. Id. at 1264.
335. Id. at 259-62.
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ited the family and observed the treatment of the children, the trial court had erroneously admitted hearsay evidence. The appellate court noted that in conducting adjudicatory hearings in dependency actions, a judge is required to apply "the rules of evidence in use in civil cases. . . ."337

While hearsay evidence is admissible in a probation revocation proceeding,338 a probation revocation may not be premised solely on the basis of hearsay evidence.339 Bass v. State340 involved an appeal from a trial court’s order revoking probation for failure to work diligently, make restitution and pay a fine.341 Because Bass had admitted the violations, the appellate court found that the probation had not been revoked solely on hearsay evidence, but also on non-hearsay admissions.342 Davis v. State343 also involved an appeal from a revocation of probation. The appellate court ordered excised from the written order of revocation the probationer’s failure to pay the cost of supervision, as the only evidence of that had been hearsay.344 In reversing a trial court’s order forfeiting an automobile used in the commission of a

337. Id. at 953 (citing Fla. Stat. § 39.408(2)(b)). The appellate court notes that some of the evidence could have been introduced as a business records exception if the proper foundation had been laid.

Another dependency case, In re A.D.J. and D.L.J., 466 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1985), found no reversible error in admitting hearsay statements and reports as: "The record reflects that the trial judge was aware of appellant’s several hearsay objections and gave no probative effect to the inadmissible hearsay." Id. at 1162.

In Re A.D.J. and D.L.J. is a frustrating opinion to read because of its lack of detail about the statements themselves and how the appellate court knew the trial judge did not consider the statements. It was reversed for other reasons.

338. Cuciak v. State, 410 So. 2d 916, 918 (Fla. 1982).


341. Id. at 1368.

342. Id. at 1369 (The order revoking Bass’s probation was reversed, however, because the trial court failed to make a factual determination that Bass had an ability to make restitution and pay the fine).

343. 474 So. 2d 1246 (Fla. 4th Dist. Ct. App. 1985).

344. Id. at 1246. The appellate court affirmed the violation as to the probationer’s failure to file written reports but remanded to permit the trial court to reconsider whether the probation should be revoked solely for failure to file written reports. Both the opinion of the appellate court and the concurring opinion specifically mentioned that the trial court was free to reach the same conclusion as before and revoke the probation solely for the failure to file the required reports. Id. at 1247.
crime, the appellate court in *Doersam v. Brescher*\(^{346}\) held that "hearsay evidence should not be admitted in a final hearing in forfeiture proceedings and, of course, such evidence may not form the basis for a factfinder's decision that the property was utilized in the commission of a crime."\(^{346}\) In arriving at its decision, the *Doersam* court noted that even in administrative hearings, hearsay evidence was not sufficient but could only be used to supplement or explain other evidence.\(^{347}\)

**H. Prior Inconsistent & Consistent Statements**

Out-of-court statements may be introduced for reasons other than their truth, in which case they are not subject to the prohibition against hearsay. One example is a trial witness' prior consistent statement which is offered to rebut a charge of improper influence, motive, or recent fabrication.\(^{348}\) *Parker v. State*\(^{349}\) was an appeal from a conviction of first-degree murder. Parker and two co-defendants had been charged with robbing a convenience store and killing the convenience store's clerk. The girlfriend of one of the co-defendants had spoken to Parker when Parker was in jail and in answer to the girlfriend's question of who had shot the convenience store clerk, Parker stated that he had shot the clerk. The co-defendant's girlfriend then told her mother and sister what Parker had told her. At the trial, not only was the prosecutor permitted to introduce the testimony of the co-defendant's girlfriend, but was also permitted to call the girlfriend's mother and sister to show that the girlfriend's story was not a recent fabrication. The Florida Supreme Court agreed with Parker that permitting the girlfriend's sister and mother to testify was error because the girlfriend's motive to testify (to keep her boyfriend out of the electric chair) existed at the time the co-defendant's girlfriend had made the statements to her mother and sister.\(^{350}\) However, the Florida Supreme Court found that the error was harmless and affirmed the conviction.

Another example of an out-of-court statement, that is not coming in for its truth, is a prior inconsistent statement.\(^{350.1}\) *Busch v. State*\(^{351}\)

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345. 468 So. 2d 427 (Fla. 4th Dist. Ct. App. 1985).
346. *Id.* at 428.
347. *Id.* (citing FLA. STAT. § 120.58(1)(a) (1985)).
349. 476 So. 2d 134 (Fla. 1985).
350. *Id.* at 137.
350.1 FLA. STAT. § 90.614.
351. 466 So. 2d 1075 (Fla. 3d Dist. Ct. App. 1985).
was an appeal from a conviction of attempted first-degree murder and shooting into an occupied building. Busch admitted the shooting but claimed that the weapon had accidentally discharged while he was in his truck outside the building. A key state witness was Busch's female companion of the evening who at trial testified that the firing of the weapon had been intentional. When originally questioned about the incident, Busch's female companion has stated that the weapon discharged accidentally. At the trial the prosecutor brought out both the prior inconsistent statement and the motivation for that statement, that the witness was afraid of Busch. While the appellate court does not appear to be sure whether the complained-of testimony was hearsay or whether it was error to permit the testimony, the appellate court decided that if the testimony were error, it was harmless.

Under certain circumstances, prior inconsistent statements are not merely admissible, but may actually be accepted as substantive evidence. However, as the case of Moore v. State indicates, even as substantive evidence, the prior inconsistent statement may not be sufficient to sustain a conviction in the absence of competent corroborating evidence. Moore involved an appeal from a conviction of second-degree murder. Moore had been indicted by a Grand Jury for first-degree murder based on the testimony of two witnesses who had identified Moore as the murderer. Both witnesses later recanted their statements.

352. *Id.* at 1077, 1079.
353. "While the testimony introduced was allegedly hearsay. . . ." *Id.* at 1079.
354. "While it may have been error to permit the allegedly hearsay testimony. . . ." *Id.*
355. *Id.* From the opinion, it is not clear if the panel was bothered by what they perceived as an attack on the defendant's character or by the witness' reason or basis for her fear. The opinion does not contain the testimony to which the defendant objected. Even assuming that the witness had said she was afraid of the defendant because she had been told he was dangerous, that testimony would not be objectionable as hearsay because it would not be coming in for its truth, but rather to show the witness' basis for her fear. The distinction may be a fine one, but it is the job of appellate courts, no less than trial courts and evidence teachers, to make these distinctions until Florida chooses to permit hearsay evidence in its courts.

356. § 90.801(2)(a) states that:
A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
(a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

in depositions and Moore had successfully moved to dismiss the indictments. An appellate court reinstated the indictment,358 a decision the Florida Supreme Court approved359 holding that:

[U]nder section 90.801(2)(a), Florida Statutes (1981), the prior inconsistent statement of a witness at a criminal trial, if given under oath before a Grand Jury, is excluded from the definition of hearsay and may be admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact.360

Before Moore was tried, both witnesses who had accused him before the Grand Jury pled guilty to perjury. At trial, the witnesses testified that their Grand Jury testimony had been false and that their deposition testimony had been true. Nevertheless, the jury convicted Moore of second-degree murder. The appellate court reversed the conviction, holding that: "[P]rior inconsistent statements standing alone do not constitute sufficient evidence to sustain a conviction."361

In reversing the conviction, the appellate court distinguished Webb v. State362 because "in Webb the State had introduced other corroborating evidence in addition to the witness’s recanted testimony."363

XI. Photographs and Demonstrative Evidence

Seven of the eight cases dealing with photos or demonstrative evidence that this survey will examine are criminal cases. The state’s introduction of photographs was either proper or, if erroneous, harmless in six of those cases and the trial court’s refusal to let the defendant introduce photos and demonstrative evidence in the seventh case was affirmed.

If a defendant is going to contend that the improper admission of photographs contributed to his conviction, he must do so on direct appeal and not in a motion for post-conviction relief.364 The “admission of photographic evidence is within the trial court’s discretion and . . . a

360. Id. at 562.
361. 473 So. 2d at 688.
362. 426 So. 2d 1033 (Fla. 5th Dist. Ct. App. 1983).
363. 473 So. 2d at 687.
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court's ruling will not be disturbed on appeal unless there is a showing of clear abuse.”

Even gruesome or inflammatory photographs maybe admitted if they are relevant. Mills v. State involves an appeal from a conviction of first degree murder. The state's main witness was a co-defendant who claimed that Mills hit the victim on the back of the head with a tire iron and then shot the victim with a shot gun. Mills contended that it was error for the trial court to admit a photograph of the victim's skull because the photograph was irrelevant to any disputed issue, cumulative and prejudiced the jury. In affirming the conviction, the Florida Supreme Court disagreed with the defendant's contentions, and found the photograph relevant because it “helped establish how long the victim had been dead . . . [and] explain the lack of medical evidence that the victim had received a blow to the skull by Mills, as [the co-defendant] had testified.”

Similarly, the Florida Supreme Court affirmed three first degree murder convictions and the trial court's admission of photographs that the defendant contended were gruesome in Henderson v. State. Henderson had been accused of binding, gagging, and killing three hitchhikers. The Florida Supreme Court seemed peaked that the defendant would challenge the introduction of the photographs, and stated that the photographs of the victims' partially decomposed bodies "were relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when their bodies were found, and the manner in which they were clothed, bound and gagged."

Even where irrelevant and unfairly prejudicial photographs are erroneously admitted, if the error is harmless, a conviction will be affirmed. Little v. State involved an appeal by two defendants of their

367. 462 So. 2d 1075 (Fla. 1985).
368. Id. at 1078.
369. Id. at 1080.
370. 463 So. 2d 196 (Fla. 1985).
371. "Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.” Id. at 200.
372. Id.
373. 474 So. 2d 331 (Fla. 1st Dist. Ct. App. 1985).
convictions for armed robbery. Based on a tip from a confidential inform- 
formant, the police went to an apartment expecting to find Little. 
While in the apartment, they arrested Little’s co-defendant and while 
searching the apartment for Little they found photographs of Little and 
his co-defendant posing with their guns pointed at the photographer, as 
well as a photograph of a bag with a gun protruding from it.374 The 
appellate court affirmed the convictions, finding admission of the photo-
graphs harmless error even though none of the guns seen in the photo-
graphs were positively identified as those used in the robbery and, be-
cause the poses would suggest to the jury that the defendants were of 
poor character, the photographs were thus unfairly prejudicial.375 In 
the words of the appellate court:

The trial judge erroneously admitted into evidence the photographs 
seized during the search over the objections of the defendants. As 
to their relevancy, there is no evidence as to where or when the 
photographs were taken. They do not depict a prior similar act of 
robbery. The record does not reveal that the association of appel-
lants was at issue and the photos were therefore not properly ad-
mitted as probative of that issue. Nor were any of the four guns 
seen in the photographs positively identified as those used in the 
robbery. Moreover, the prosecution had placed two guns into evi-
dence which it alleged were those used in the robbery. We also find 
that the photographs were likely to be unfairly prejudicial to the 
appellants because the poses would suggest to the jury that appel-
lants were of poor character. We conclude that the photos were 
irrelevant, not material to any issue in controversy, and had a ten-
dency to be inflammatory and potentially confusing to the jury. 
Notwithstanding the error committed in the admission of the 
photographs, the convictions are affirmed, as we find that the error 
was harmless.376

It is not an abuse of discretion for a trial court to prohibit counsel 
from showing demonstrative exhibits to the jury during closing argu-
ments if those exhibits were not introduced into evidence during the 
trial.377 Walker v. State involved an appeal of a conviction of at-
tempered second degree murder and two counts of aggravated assault. 
During his cross examination of state witnesses, defense counsel had

374. Id. at 331.
375. Id. at 332.
376. Id.
used a drawing, but he had not put that drawing in evidence in order to "sandwich" the prosecution's closing argument. During the defense closing, the prosecutor successfully objected to the defense counsel's use of the drawing in argument to the jury. The appellate court affirmed the trial court, finding no abuse of discretion in prohibiting defense counsel from showing exhibits to the jury since those exhibits had not been introduced into evidence.378

Relevant evidence may be inadmissible if its probative value is substantially out-weighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.379 In State v. Wright,380 the appellate court affirmed a trial court's excluding defense evidence, including photographs and demonstrative evidence, which "was of dubious probative value . . . [and whose] potential for confusion of issues and misleading the jury was substantial."381 Wright involved a defendant convicted of raping a fourteen-year-old girl. The defense was that the defendant's penis was so large as to make the rape unlikely if not impossible. The victim had testified that she had been raped twice, each time over a twenty minute period and that "the rapist moved rapidly up and down. . . ."382 On cross examination of the examining physician, the defendant brought out that violent thrusting by a nine inch penis would be likely to cause vaginal lacerations, which were not found in the victim. However, the physician would not equate violent thrusting with rapid thrusting. The defendant's girlfriend and wife both testified that intercourse with the defendant was very painful and had been accompanied by bleeding. Two other individuals were permitted to testify that the defendant's penis was eight and one half inches long. However, the trial court refused to permit one of the witnesses to testify that the circumference of the defendant's penis was five and one half inches and refused to permit the defendant to introduce photographs, a wooden model and to display his penis to the jury.383 The appellate court affirmed the conviction finding that "[t]he potential for confusion of issues and misleading

378. Id. The appellate court also affirmed the trial court's having permitted the prosecutor to introduce photos of the defendant. The photos had been taped so that numbers and dates were not visible, thereby permitting no inference that the defendant had been arrested before. Id. at 698.
381. Id. at 270.
382. Id. at 269.
383. Id.
the jury was substantial."\(^{384}\)

**XII. Best Evidence**

Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph.\(^{385}\)

While the Florida Evidence Code has a Best Evidence Rule, one requiring introduction of an original document under certain circumstances, the Florida Evidence Code liberally permits the admissibility of duplicates\(^{386}\), which includes photocopies as well as carbon copies.\(^{387}\)

Two cases involving reversals of trial courts for failure to admit duplicates were *Gastroenterology Associates v. Matuson*\(^{388}\) and *Tillman v. Smith*.\(^{389}\) *Gastroenterology Associates* involved an appeal from an unsuccessful suit by doctors against a patient who had not paid them. The trial court refused to permit one of the doctors to prove the services rendered either by oral testimony or by business records, reasoning that the Best Evidence Rule required that original hospital records were the only evidence that would be permitted.\(^{380}\) In reversing the trial court, the circuit court, sitting in its appellate capacity, ruled that since the doctors' records contained photocopies of the originals, the records should have been received as duplicates under section 90.953 of the Florida Evidence Code.\(^{381}\) Moreover, the appellate court pointed out that the doctor's records were his business records and would have been admissible on that score alone, and the doctor's oral testimony should

384. *Id.* at 270. The opinion does not state whether the defense also included identity. If it did, then the trial court's ruling excluding the evidence and the appellate court's affirmance would appear to be erroneous.

If, on the other hand, the defense was not misidentification, but only that no penetration or intercourse occurred, then the ruling is correct as the examining physician found sperm in the victim's vagina, as well as engorged blood vessels — hence the proffered evidence would be of questionable probative value and would likely lead to confusion of the issues.

389. 472 So. 2d 1353 (Fla. 5th Dist. Ct. App. 1985).
390. 9 Fla. Supp. 2d at 95.
391. *Id.* at 95-96.
also have been be admissible.\textsuperscript{392} In \textit{Tillman}, the trial court had refused to accept into evidence a duplicate copy of an antenuptial agreement under the theory that the antenuptial agreement was a document involving the payment of money, and hence inadmissible under section 90.953 (1) of the Florida Statutes. In rejecting the trial court’s ruling excluding the antenuptial agreement, the appellate court’s language seems to hold that the only duplicates which are excluded under section 90.953 (1) of the Florida Statutes are negotiable instruments.\textsuperscript{393}

XIII. Conclusion

Florida courts discussed so many different evidentiary issues during this time that drawing any conclusions is difficult. In the criminal procedure area, the Florida Supreme Court decided important cases dealing with the \textit{Williams} Rule, privilege against self-incrimination, restrictions on cross-examination of a witness about pending charges and hypnotically related testimony. Also in criminal cases, the district courts of appeal split over whether the state can “impeach” its own witnesses on direct examination by exposing their weaknesses before defense counsel has an opportunity to do so. Ideally the Florida Supreme Court will soon resolve this issue, if it has not done so before this article’s publication.\textsuperscript{394}

On the civil side, Florida District Courts of Appeal took a defense-oriented, conservative approach to admission of subsequent remedial measures evidence. Likewise, the Florida courts continue to take a restrictive position toward admission of psychotherapist-patient communications in child custody cases. Finally the admission of expert testimony concerning thermograms was denied.

Judging various opinions to try to discern a general overall trend is almost like comparing apples with oranges. However, both authors believe that Florida courts need to write better opinions when dealing

\textsuperscript{392} Id. at 96.
\textsuperscript{393} 472 So. 2d at 1354. Another opinion dealing with duplicates is E.F.K. Collins Corp. v. S.M.M.G., Inc., 464 So. 2d 214 (Fla. 3d Dist. Ct. App. 1985). The Collins court does not report enough facts to permit a determination as to why a trial court’s admission of a copy of a sublease was erroneous.
\textsuperscript{394} On July 10, 1986, the Florida Supreme Court resolved the conflict in favor of permitting a direct examiner to bring out his own witness’ weakness. The Florida Supreme Court correctly ruled that such questioning was not impeachment. \textit{See} Bell v. State, 491 So. 2d 537 (Fla. 1986); Sloan v. State, 491 So. 2d 276 (Fla. 1986); State v. Price, 491 So. 2d 536 (Fla. 1986).
with evidentiary issues. Too often, courts stated the general principle of law involved and jumped straight to a conclusion with little or no explicit factual analysis. Evidentiary questions are almost always "fact-bound." Thus, for appellate opinions to have any real effect in this area, they must present complete analysis of both the facts and the law. At times this happened during the survey period, such as in the Third District Court of Appeal's well-reasoned Compulsory Process Clause decision. Our hope is that all future evidentiary opinions will be as thorough.
Florida's New Rules of Professional Conduct

Howard Messing*

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I. Introduction and Scope

This article considers the ethical directives contained in Florida's New Rules of Professional Conduct adopted by the Florida Bar late in 1984. These Model Rules were recommended to the Florida Supreme Court by the Florida Bar in November 1984 and after lengthy consideration were promulgated by the court on July 17, 1986 to take effect on January 1, 1987.¹

This article considers all proposed rules contained in the final ver-

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¹ This article was written in March, 1986, and updated in August, 1986.
sion of Florida's Rules of Professional Conduct as adopted by the Florida Supreme Court. Also discussed is the format of the new rules, which represents a significant departure from Florida's former Code of Professional Responsibility. Reference will be made to former Code sections and a comparison between the Code and Rules will be offered where helpful.

Among the most controversial rules discussed in detail in this article are those relating to: confidentiality of information (one of the most highly debated of the ABA Model and Florida rules); conflict of interest; advertising and solicitation; and trial practice (especially candor to the tribunal). The author will also discuss the various roles filled by attorneys in the practice of law. To a lesser extent this article will consider rules addressing pro bono service, client disability, case control and the expediting of litigation.

II. Model Rules: A Brief History

In this century, the ethical conduct of lawyers has been regulated by three sets of rules adopted by the American Bar Association and the several states. The first set of rules, the Canons of Professional Ethics, were adopted in 1908 and remained in effect until 1970. In 1970, the American Bar Association adopted the Model Code of Professional Responsibility. These regulations remained in effect until 1983. On August 2, 1983, the American Bar Association adopted the most recent set of regulations, the Model Rules of Professional Conduct.

In 1977, the American Bar Association began a review and evaluation of the then-existent Model Code of Professional Responsibility. The ABA's evaluating committee was chaired during most of its existence by Robert J. Kutak of Omaha, Nebraska, and is often referred to as the Kutak Commission.

4. Florida New Rules Rules 4-1.7, 4-1.8, 4-1.9 and 4-1.10 (1986).
5. Florida New Rules Rules 4-7.1, 4-7.2, 4-7.3, 4-7.4 and 4-7.5 (1986).
7. Canons of Professional Ethics (1908) [hereinafter cited as Canons].
as the Kutak Committee. The Kutak Committee proposed new guidelines for professional conduct. Many of the proposals were highly controversial. For example, proposed were rules which mandated substantial disclosure by an attorney if such disclosure were necessary to prevent criminal conduct by a client. Disclosure was also proposed to prevent the continuing consequences of past criminal conduct. A Kutak Committee draft also required attorneys to perform mandatory pro bono service.

This ABA committee determined that a new format for these professional rules was necessary. The old Code, with its Ethical Consideration (EC), Disciplinary Rule (DR) and Canon format, was relatively inaccessible and often confusing to the practitioner. These controversial proposals went through many redrafts before final consideration by the American Bar Association. A draft of the rules even returned to the old Code format in May 1981. However, the Restatement format was ultimately adopted.

Passage of the Model Rules of Professional Conduct was not easy. It required over a year and a half of vigorous debate at annual and mid-year ABA meetings in San Francisco, New Orleans and Atlanta before the final Model Rules of Professional Conduct were adopted in 1984. The San Francisco debate considered only Rule 1.5 (Fees) in the time originally allotted for consideration of all rules. The next mid-year meeting in New Orleans went into “overtime” each evening, debating the remaining sections of the Proposed Model Rules. Almost no section of the Rules was too minor for debate. There was wide-ranging input from state and local bar associations and lawyers groups, and many alternative wordings were considered. In the end, a “traditional” coalition was successful in deleting from the Proposed Model Rules all rules considered too progressive or controversial. Finally, in August 1984, a consensus developed between the opposing factions and the interpretive comment sections were adopted almost without debate at the annual meeting in Atlanta. Among the state delegations voting against the Model Rules were Florida, California and New York. Florida’s delegation, led by Bar President Gerald Richman, specifically rejected the rule limiting disclosure of a client’s proposed illegal activities.

A Florida Bar special committee had been tracking the development of the Model Rules since mid-1980. This committee was therefore ready to offer its own proposal to the Board of Governors of the Florida Bar less than a year after the adoption of the ABA’s Model Rules. This special study committee, chaired by attorney Steven Busey...
of Jacksonville, decided early in its deliberations to follow the ABA Model Rules format and content whenever possible. The committee felt that editing for its own sake would be detrimental to the potential for uniformity of these Rules among the many states. The Board of Governors of the Florida Bar reviewed the Rules presented to them, approving the Model Rules with only a few changes and relatively little debate. The Board then petitioned the Supreme Court of Florida for expeditious adoption of the Rules. The Florida Bar’s formal petition was presented to the Supreme Court for adoption on September 14, 1984. Oral argument took place on November 5, 1984. After lengthy consideration the Florida Supreme Court adopted the proposed rules package with several changes on July 17, 1986 with an effective date of January 1, 1987.

In addition to adoption of the ABA Model Rules by the federal courts and in Florida, versions of the Rules have also been adopted in Arizona, Arkansas, Connecticut, Delaware, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Washington and Virginia. Additionally, most other states have study commissions or proposals for adoption before their respective supreme courts at this time.

III. Format of the Model Rules

The Model Rules of Professional Conduct have abandoned the traditional Code format of Canons, Ethical Considerations (aspirational) and Disciplinary Rules (mandatory) in favor of a Restatement format. This format provides a black letter rule mandating or prohibiting attorney conduct. The black letter rule is followed by a non-binding comment section intended to assist in interpretation of the rule. Following each comment section is a Code comparison section in which citations to former Code sections are given. All rules with the exception of pro bono service are mandatory. The Model Rules also contain an exceptionally accessible table of contents and a readily available comprehensive index.

10. The court altered the following rules originally proposed by the Florida Bar: 4-1.15(a); 4-3.6; and a major change to Rule 4-7.3 (solicitation).

11. The New York State Bar Association is the first state group to categorically reject the new Rules.

12. Rule 4-6.1 states, “A lawyer should render public interest legal service” (emphasis added).
The ABA Model Rules of Professional Conduct are numbered 1.1 through 8.5, while the Florida Rules are numbered identically with the addition of the prefix "4-" before each of the rules. Florida's draft of the New Rules distinguished between differing American Bar Association Model Rules and Florida Proposed Rules sections by "legislative" underlining and strike through. Furthermore, the Florida rules include an extensive table of contents and an available cross-reference table to Code sections addressed by the Model Rules.

The Model Rules view the role of lawyer in a wider and more varied manner than the "traditional" litigator model of the previous Code and Canons of Professional Conduct. The lawyer is viewed as an adviser, mediator, negotiator, evaluator, and an advocate. As an advisor the attorney helps explain "the client's legal rights and obligations and explains their practical implications." The more traditional advocate model is discussed, as are other views of the attorney as negotiator and the companion role of intermediary. Finally, a lawyer is shown as acting as an evaluator "examining a client's legal affairs" and discussing them (in a variety of ways) with the client and third parties.

Almost all rules use the terms "shall or shall not" to define proper conduct for attorneys. Only one rule, the pro bono rule, is permissive. Although the comments following each rule may use directive terms of art (such as "shall" or "must"), they do not create black-letter law. These terms of art are merely used to place special emphasis on particular commentary sections.

Finally, the Model Rules are only one source of guidance for the practitioner. Consideration must be given to case law and other rules such as the Florida Rules of Evidence on lawyer-client privilege.

IV. Preamble and Scope of the New Rules of Professional Conduct

The Preamble and Scope provide a framework for understanding the underlying philosophical policy of the proposed rules. In a sense,
the Preamble is a statement to the public and the bar of the requirements and aspirations of the legal profession. The Preamble speaks to the role of attorney as the client's representative in the legal system and as a special "public citizen" responsible for the quality of justice. The Preamble then defines the various roles played by lawyers. The requirement for maintaining a diligent and competent practice is also discussed. The Preamble stresses that "[z]ealous advocacy is not inconsistent with justice."  

The Scope section of the Rules is directed more to the needs of lawyers than laypersons. It attempts to provide protection for the practitioner by stating that although attorneys are bound to follow the rules which direct them to act or refrain from acting, failure to follow these rules should "not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." The Scope section also directs the reader to other rules and principles of substantive law which must be considered in determining "a framework for the ethical practice of law."  

The Scope section is followed by a terminology section which defines those terms used most often in the Model Rules. This terminology section defines eleven words and their derivatives. For example, the list includes the definitions of: lawyer, fraud or fraudulent, and reasonable belief.

V. Article One: Lawyer-Client Relationship

Article One includes general rules considering the lawyer-client relationship. These include basic guidance in practice areas such as: diligence; communication with a client; competence; and the reasonableness of fees charged. The controversial rule regarding confidentiality of information is in this article, as are the several conflict of interest rules. The remaining Article One rules consider a variety of specific situations including the special problems of representing an organiza-
tion, and declining or terminating client representation.

A. The Lawyer-Client Relationship (Rules 4-1.1, 4-1.2, 4-1.3)

A lawyer is required to be sufficiently competent in the area of law in which his potential client requests representation. Diligence is required during this representation and the client must be informed of case progress. Ignoring these straightforward requirements gives rise to a significant number of client complaints. It is unfortunately quite easy to place a less interesting or less lucrative case on the back burner while directing attention to more compelling issues. However, every client is owed the attorney's zealous commitment to his or her case.

Clients should be informed and involved in all stages of their case. It is the client whose property or liberty is in jeopardy and the client who must make the ultimate policy decisions including case objectives. For example, offers of a plea bargain or settlement should be communicated quickly to a client. Many attorneys have found it beneficial to send copies of all pleadings filed and other relevant material to their clients to keep them informed of the progress of their case. However, these mailings are not a substitute for the in-person contact which clients desire and demand.

The objectives of the representation are ultimately the client's decision. However, a lawyer is obligated to provide advice and assistance to the client in reaching that decision. It is not unusual for a client to lack an understanding of the legal system. Clients often seek an attorney's advice and direction on how best to handle the matter in question. Despite this fact, ultimate decisions remain the province of the client. The attorney may only properly determine the means used to implement those objectives.

In a very real sense, the ideal representation is a partnership between attorney and client with a mutual sharing of information and goals by both parties. The attorney may, however, place limits on representation if agreed to in advance. A lawyer may (although less so in

31. Florida New Rules Rules 4-1.3 and 4-1.4(a) (1986).
32. From July 1, 1984 to June 30, 1985 approximately 45% of all complaints to the Florida Bar (2457 of 5514 total complaints) involved attorney neglect, relations with clients, or personal behavior.
criminal than civil matters) limit the objectives or means to accomplish those objectives if the lawyer regards certain actions as repugnant or imprudent. This may include a too vigorous investigation of certain witnesses or a determination of whether the client should testify. Typically, these are defendant's decisions. It is possible, however, for a fully-informed defendant to waive these prerogatives when contracting for representation.

The Rules further prohibit attorneys from assisting a client in criminal or fraudulent conduct or in behavior not permitted by the Rules of Professional Conduct.\(^34\) For example, a lawyer may not assist a defendant in creating illegal tax shelters or in hiding a murder weapon.

Finally, a practitioner is required to be competent in the area in which he or she is providing representation.\(^35\) This competence is difficult to define. A new lawyer may with study reach a satisfactory level of competence while an experienced practitioner (due to inattention to new legal developments) may be insufficiently qualified. A reasonable-lawyer standard is used, requiring thoroughness in preparation and willingness to spend the time necessary to be fully informed of the law, procedure and facts relevant to the particular case.

**B. Communication with the Client (Rule 4-1.4)**

Perhaps no action by an attorney leads to greater complaints about the quality of representation than a failure in communication with a client. Florida's *Code of Professional Responsibility* has no section which is the direct counterpart of Rule 4-1.4,\(^36\) which requires that a lawyer keep clients "reasonably informed" about their case.\(^37\) This rule recognizes that a client needs to be able to intelligently participate in his or her representation. This responsibility includes the duty to expeditiously inform a client of a plea offer or settlement offer made in his or her case. A lawyer is permitted to withhold information from the client only if it is in the client's best interest; not included is withholding information to serve the lawyer's interest or convenience.\(^38\) The rule

\(^34\) Florida New Rules Rule 4-1.2(d)(e) (1986).
\(^35\) Florida New Rules Rule 4-1.1 (1986).
\(^36\) Note however that Florida's Code addresses this issue to some extent. See Florida's Code DR 9-1.2(b), EC 7-8, EC 9-02 (1970).
\(^37\) Florida New Rules Rule 4-1.4(a) (1986).
\(^38\) Id. at Rule 4-1.4 Comment.
suggests that it might be appropriate for a lawyer to “withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates the disclosure would harm the client.”

C. Fees (Rule 4-1.5)

The ABA’s longest debate concerned this section of the Rules. Rule 4-1.5 is divided into three sections. The first considers the reasonableness of a fee; the second contingent fees; and the third referral fees.

Florida’s New Rules require that lawyers “not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.” This is a departure from the ABA approach which requires that “a lawyer’s fee shall be reasonable.” “Clearly excessive” was felt to be a more understandable and absolute standard. The excessiveness of a fee is determined by a reasonable-lawyer standard, that is, a lawyer of ordinary prudence. This rule lists a variety of factors to assist in determining the reasonableness of a fee. Among these factors are: the amount of work involved; the novelty of the issue; the skill required of the lawyer to perform this service; and the fees customarily charged for work of this nature in the area. Also considered are: the amount in question in the lawsuit; the results of the lawsuit; time limitations placed on the attorney; and whether this case will prevent the lawyer from taking other cases. Finally, this Model Rule considers how long the professional relationship has existed (the longer the relationship the more flexibility); the experience, reputation and capability of the attorney performing the service; and whether the agreement is for a fixed fee or a contingent amount. The Model Rules encourage, but do not require, that the fee agreement be memorialized in writing.

Contingent fee agreements are permitted in all matters except

39. Id.
40. The ABA General Assembly meeting in San Francisco spent the time allotted for review of all rules debating only Rule 1.5.
41. Referral fees were previously prohibited by FLORIDA’S CODE.
42. FLORIDA NEW RULES Rule 4-1.5 (1986) (emphasis added). See also Florida Bar re Amendment to the Code of Professional Responsibility (contingent fees), 11 FLA. L. WEEKLY 294 (Fla. June 30, 1986), limiting contingency fees, now adopted as part of the “rules” package.
43. ABA MODEL RULES Rule 1.5(a) (1983).
44. FLORIDA NEW RULES Rule 4-1.5(b)(6) (1986).
45. Id. at Rule 4-1.5(c).
criminal law and domestic relations cases. These prohibitions exist for public policy reasons. There was substantial support during consideration of the Florida Model Rules for allowing contingent fees in criminal cases. However, the Florida Bar's Criminal Law Section strenuously opposed the use of contingency agreements in these cases and this provision was deleted at the last minute from the final draft. The Florida Rules, unlike their ABA counterpart, require that contingent fee agreements must be in writing, as must the closing statements which distribute those fees. The drafting committee felt that due to the somewhat controversial nature of contingent fee agreements, and the relative lack of sophistication of many clients entering into them, a relationship in writing was necessary to clarify the attorney-client fee relationship.

The New Rules accept what was often the standard, if unethical, practice of giving referral fees. It has always been possible to divide a fee between two or more lawyers not in the same firm. However, this "fee-splitting" required that each attorney be paid according to his or her amount of the work done on the case. Rule 4-1.5 now additionally allows a division of the fee between lawyers (not in the same firm) if the client consents in writing and the lawyers assume joint responsibility for the representation. While the amount of work done by each is no longer a factor, the total fee must still be reasonable. However, surprisingly, the lawyers need not disclose to the client the share that each lawyer will receive.

Florida's New Rules continue to allow the acceptance of credit cards but prohibit any additional fee for their use. Finally, the comment section of 4-1.5 expresses the Florida Bar's long-standing policy of encouraging the use of arbitration or mediation procedures if a fee dispute should arise between attorney and client.

46. Id. at Rule 4-1.5(d)(3).
47. Id. at Rule 4-1.5(d)(1)(4) (1986).
48. FLORIDA NEW RULES Rule 4-1.5(e) (1986).
D. Confidentiality (Rule 4-1.6)

Confidentiality was an area of major controversy during the American Bar Association debates as well as during Florida's Busey Committee meetings on this Model Rule. Early ABA drafts required disclosure of a client's planned criminal conduct or of criminal conduct which had continuing consequences. However, the final draft adopted by the American Bar Association strictly limited the disclosure of client information. This requirement of confidentiality, one of the strongest themes of the American Bar Association Model Rules, is based upon the belief of the American Bar Association’s General Assembly that confidentiality and resultant client trust is the cornerstone of the American legal system.

Florida, joined by several other states, rejected this argument. In fact, Florida's negative ABA General Assembly vote on the Model Rules was based upon its rejection of this philosophy. Most of the states which have adopted versions of the Model Rules (or which are far along in the adoption process) have also rejected the ABA's position with regard to the absolute supremacy of confidentiality. 49

Florida's Code of Professional Responsibility requires disclosure of a client's intent to commit any crime. 50 The Model Rule for the Florida Bar continues and expands this disclosure requirement. The American Bar Association Rules only permit disclosure of criminal conduct likely to result in death or substantial bodily harm or when necessary to collect an attorney's fee. 51 Florida's version of the Rules opted for mandatory disclosure to prevent the client from committing any crime 52 or to prevent other acts which while no longer criminal might result in death or substantial bodily harm to another. 53 This second required disclosure supplements Florida's long-standing disclosure rule, adding mandatory disclosure of any act with continuing consequences which might result in death or substantial bodily harm. 54

49. Of 17 states adopting a version of the Model Rules to date, a majority have required or permitted more disclosure of the criminal plans of their clients.
51. ABA Model Rules Rule 1.6(b)(1)(2).
52. Florida New Rules Rule 4-1.6(1) (1986).
53. Id. at Rule 4-1.6(b)(2).
54. The classic example of a past act with continuing consequences would be the "girl in the box": the kidnapped heiress buried underground awaiting release upon payment of ransom. Another example of a past act with continuing consequences is a corporation's past pollution of an aquifer which has the current consequence of polluting a
"Permissive" disclosure is now allowed in several categories by Florida's New Rules. A lawyer may reveal a client's confidences when necessary to serve the client's interest,\textsuperscript{55} to assist the lawyer in responding to charges or claims arising from representation of the client,\textsuperscript{56} or to assist one to comply with the \textit{Rules of Professional Conduct}.\textsuperscript{57} When required to disclose the confidences of a client by a tribunal, a lawyer may but is not required to exhaust all appellate remedies before disclosure.\textsuperscript{58}

It is important to note that the confidences covered by rule 4-1.6 expand the net of protected material beyond the lawyer-client privilege of \textit{Florida Evidence Code} section 90.502.\textsuperscript{59} The Rules define confidentiality as applying to all matters \textit{relating} to the representation of a client, whatever its source,\textsuperscript{60} and not just the confidences and secrets protected by Florida Statutes section 90.502.

E. \textit{Conflict of Interest (Rules 4-1.7, 4-1.8, 4-1.9)}

In accepting a new client, a lawyer should always be aware of the potential for conflict with a prior or existing client, or with the attorney's own interests. Courts exhibit a strong prejudice against even potentially conflicting representation. The policy reason for this prejudice is quite simple. Courts are most concerned about divided loyalty on the part of an advocate or even the appearance of a divided loyalty. Practitioners are well-advised to refuse a case (no matter how attractive) if a conflict appears at the start of a case and to withdraw if a conflict occurs during the case.\textsuperscript{61}

The "general" conflict rule is 4-1.7. This rule instructs an attorney to avoid representation against the interest of one client on behalf of another client even if the matter in question is unrelated.\textsuperscript{62} Furthermore, an attorney may not represent a client if the attorney's interests or responsibilities to another party will restrict the attorney's represen-
tation of that client. It should be noted that these are two distinctly different situations. The first prohibition is more absolute. An attorney is prohibited from taking sides against a client. The second involves an attorney's professional judgment which may be limited by his interest or responsibilities to another. In both instances, this rule permits a client to consent to this potentially conflicting representation after consultation. However, an attorney may not request the client to consent if the attorney reasonably believes the potential conflict will adversely affect his representation of the client. Case law in this area also directs the practitioner to proceed with caution.

Somewhat more subtle areas regarding the representation of a client and the potential for conflict follow.

1. **Third Party Interests (Rule 4-1.8(f))**

An attorney may occasionally find his or her fee paid by a third party to guarantee representation of a client. There is nothing inherently unethical about such payment but it may be subject to scrutiny by the courts if there is a suggestion of a divided loyalty. It is clear, however, that the client’s interest must guide the attorney, and not the interest of the party who is paying for the client’s representation. Third-party payment is always subject to the following three provisos. The client must always consent to the third-party payment; the attorney’s loyalty to the client may not be compromised by this payment; and the lawyer-client confidential relationship must always be protected.

63. Id. at Rule 4-1.7(b).

64. Id. at Rule 4-1.7(b)(2).

65. Id. at Rule 4-1.7(a)(1).

66. See, e.g., Cinema 5 Ltd. v. Cinerama, Inc. 528 F.2d 1384 (2d Cir. 1976), a civil case, or Holloway v. Arkansas 435 U.S. 475 (1978), a criminal case.

67. Prosecutors in a criminal case may also be interested in the name of the party paying for the client's representation. This is especially true in illegal drug cases. This topic, however, is beyond the scope of a chapter on legal ethics.

68. FLORIDA NEW RULES Rule 4-1.8(f)(1) (1986).

69. Id. at Rule 4-1.8(f)(2).

70. Id. at Rule 4-1.8(f)(3).
2. **Guilty Pleas and Settlement Offers when Representing Two Clients (Rule 4-1.8(g))**

In the extraordinary event of permissible dual representation, the case resolution will often be a plea bargain or settlement arrived at between the defense attorney and the prosecutor, or the plaintiff’s attorney and defense counsel. The Rules attempt to guarantee loyalty to each individual client.71

An attorney is required to insure that each client’s interests are treated separately in plea or settlement agreements. Aggregate settlement or plea agreements are not permitted, and neither is bargaining one client’s interest against the other. This bargaining would present a clear conflict and the attorney should immediately attempt to withdraw and seek new representation for each client. If, however, the agreement is fair to both clients, it is possible to represent two (or more) clients if each consents after full and complete consultation.

3. **Attorney Family Relationships (Rule 4-1.7(d))**

An area of growing concern is the potential for conflict when lawyers on opposing sides are related to one another (for example, husband/wife, parent/child). While a client may consent to this representation, it is probably the wisest course to transfer the case to another member of the same law firm. This may be done despite imputed disqualification,72 as this “in-firm” transfer is specifically permitted by the rules.73 To clearly understand the policy reasons for this rule one need only view the classic film *Adam’s Rib*, in which Katherine Hepburn portrays a defense attorney and Spencer Tracy portrays a prosecutor who is her husband. A recent California case suggested that the same exclusion might apply when opposing counsel were dating each other over an extended period of time and they failed to disclose this fact to the defendant.74

4. **Media Rights (Rule 4-1.8(d))**

In a high profile practice of law, particularly criminal law, the op-

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71. *Id.* at Rule 4-1.8(g).
72. *Id.* at Rule 4-1.10.
73. *Id.* at Rule 4-1.7(d).
portunity for the sale of media rights (books, TV, etc.) may arise. This was true for the attorney who represented the "Son of Sam" killer in New York as well as for the attorneys who have represented other notorious criminal defendants. At first, it may not appear obvious why the sale of a "good story" is prohibited by the rules which regulate conflict of interest. However, a conflict between an attorney and a client may arise from a media rights agreement. The attorney will now have an interest in the outcome of the case (e.g., a plea agreement might detract from the value of the book sales) and the attorney may no longer have an undivided loyalty in representing his or her client. This rule is absolute (the client may not waive its operation) and continues until the conclusion of the representation of the client. Nothing in the rule, however, seems to prohibit "subsequent" negotiation with the client or sale of the lawyer's own story regarding the case "after" representation has ended.

5. Conflict of Interest: Former Client (Rule 4-1.9)

This rule, which has no direct counterpart in the Code, prohibits a lawyer from appearing against a former client in a "substantially related matter," or when a new client's interest will be "materially adverse" to a previous client's interest. However, a previous client is permitted to consent to an attorney's appearance for a new client via a full and informed disclosure of the possible conflicts. An attorney is not prohibited from representing another party in a "wholly distinct problem."

The essence of the "conflict of interest" rule is noted in the comment section, which declares that "subsequent representation can be justly regarded as a changing of sides." Lastly, the rule prohibits an attorney from using information gained by representing a former client to the detriment of that client in a later action. This information may

75. See, e.g., Conflict of Interests When Attorneys Acquire Rights to the Client's Life Story, 6 J. LEGAL PROFESSION 299 (1981).
76. But see FLORIDA'S CODE DR 5-105c and EC 4-6 (1970).
77. FLORIDA NEW RULES Rule 4-1.9(a) (1986).
78. Id.
79. Id.
80. Id. at Rule 4-1.9 Comment.
81. Id.
82. FLORIDA NEW RULES Rule 4-1.9(b) (1986).
be used, however, when it has "become generally known." 83

6. **Imputed Disqualification (Rule 4-1.10)**

When a lawyer is prohibited from taking a case or continuing to represent an individual by any disqualification under Rules 4-1.7, 4-1.8, or 4-1.9, any other member of the lawyer's firm shall also be prohibited from representing this individual. This is subject to the previously mentioned exception for familial relationships 84 and to some qualification regarding the permissive client waiver of the disqualifying rules. 85 Imputed disqualification operates quite strictly. An attorney is well-advised to consider the possibility of conflict as soon as possible when establishing a new relationship or in continued representation of a client. Failure to do so may result in significant damage to the rights of the client as well as a frustrating loss of time and effort to the practitioner.

7. **Successive Government and Private Employment and the Activities of Former Judge or Arbitrator (Rules 4-1.11 and 4-1.12)**

These rules apply the general conflict principles mentioned in the preceding sections to successive government and private employment and the subsequent employment of a former judge or arbitrator. The first rule (4-1.11) attempts to balance the right of former government lawyers to seek meaningful employment after leaving government service, with the right of the public to be protected from undue influence on government lawyers with future plans for private employment. This rule rather closely tracks the other conflict rules and is also quite similar to DR 9-101(b) of the Code. However, 4-1.11 contains a new provision which allows a government agency to waive a conflict where appropriate and in the best interest of the government agency. While this provision was subject to considerable debate, it was the belief of the drafting committee that a government lawyer should be placed at no greater disadvantage than lawyers in private practice experiencing a conflict.

Rule 4-1.12 regarding the activities of a former judge or arbitrator

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83. *Id.*
84. *Id.* at Rule 4-1.7(d).
85. *Id.* at Rule 4-1.7(a)(2) and 4-1.7(b)(2).
is quite similar to Rule 4-1.11 and includes judges, judges pro-tempore, referees, special masters, hearing officers and other quasi-judicial or part-time judges. The rule prohibits a judge or adjudicative officer from appearing in a matter in which they "participated personally and substantially as a judge." However, the rule permits representation where all parties consent. A judge or adjudicative officer is also prohibited from attempting to gain employment from those appearing before the judge. This rule is quite similar to Code section DR 9-101(a). However, it is considerably more comprehensive and allows representation if all clients consent. The Code does not allow the clients to consent to an attorney's representation of them where the attorney handled their matters as a judge.

F. The Organization as a Client (Rule 4-1.13)

This rule considers the relationship between an attorney and an organization; for example, a corporation or government agency. The rule defines the attorney's client as the organization; that is, the "entity" itself is the client of the attorney rather than a specific individual. The attorney works through the constituents of the corporation in proceeding with the entity's representation. Interestingly, the rule currently allows the attorney to represent the corporation and its individual constituents where there is no conflict between their interests.

The body of this rule offers direction for an attorney on how best to proceed when the organizational components are acting contrary to law or contrary to the best interests of the organization itself. An attorney is directed to proceed in a manner which will "minimize disruption of the organization and the risk of revealing information." This rule offers a series of increasingly active alternatives which culminate in permissive resignation if the organization refuses to correct its action.

Nothing in this rule will limit or increase a lawyer's responsibili-

86. Id. at Rule 4-1.12 Comment.
87. Id. at Rule 4-1.12(a).
88. Id. at Rule 4-1.12(b).
89. Id. at Rule 4-1.13(a).
91. FLORIDA NEW RULES Rule 4-1.13(e) (1986).
92. Id. at Rule 4-1.13(b).
93. Id.
94. Id. at Rule 4-1.13(c).
ties under rules such as 4-1.6, on Confidentiality, and 4-1.2(d), regarding the use of a lawyer's services in a crime. This rule has no real counterpart in the Code of Professional Responsibility, and for the first time specifically addresses the special problems in the representation of an organization.

G. **Clients with Disabilities (Rule 4-1.14)**

An attorney should be especially sensitive to the problems of a client suffering a "disability" such as mental illness or minority. The rules suggest maintaining as normal a relationship as possible with the client subject to the special needs of their disability.\(^{95}\) When necessary, a lawyer is directed to seek professional evaluation and advice to adequately assist in representing the client's rights.

The attorney involved in representing a juvenile, for example, must be cognizant of the fact that while young people are often quite sophisticated (even at a very tender age) and deserve thoughtful consideration of their opinion, they may be unable to make all decisions regarding their legal representation without assistance. The same is also true of clients suffering from mental disease or retardation.

For this special client (in addition to the normal demands of representation), the lawyer may become a de facto guardian. As much as possible, the lawyer should follow the client's wishes, paying special attention to the maintenance of full and detailed communication with his client. Although the rules specifically suggest that an attorney seek guidance from an appropriate diagnostician when the client's condition requires,\(^{96}\) this raises the problem of disclosure of the client's condition during the course of the representation. For example, in a criminal case, a court so informed may commit a client who would otherwise go free.

There are no absolute answers in this area. However, the criminal practitioner is advised to be alert to the possibility that their client may be suffering a disability which requires special attention and care.

H. **Safekeeping of Property (Rule 4-1.15)**

This rule, which is substantially similar to Florida's Code of Pro-

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95. *Id.* at Rule 4-1.14.
96. *Id.* at Rule 4-1.14(b).
Professional Responsibility and was redrafted by Florida’s Supreme Court, discusses the lawyer’s responsibility to keep in trust (in a separate bank account or otherwise) clients’ or third persons’ funds and property in the lawyer’s possession. The rules also require an attorney to comply with the Bar’s proposed rules regarding trust accounting procedure and requires strict adherence to the lawyer’s fiduciary responsibilities. While this rule appears obvious, violation of this rule and the Bar’s requirements for trust accounting is a common cause for attorney discipline.

I. Withdrawal from the Case (Rule 4-1.16)

Declining or terminating representation of a client includes withdrawal immediately before or during trial. A client has the right to fire his or her lawyer at any time although the client remains responsible for paying for the lawyer’s fair services to that point. Likewise, a lawyer may withdraw at any time during representation if the client demands that the lawyer engage in conduct that is illegal or which violates the Rules of Professional Conduct or law. Of course, once a notice of the appearance has been filed, withdrawal is contingent upon the permission of the court. Said permission is unlikely to be granted during a trial except for a very compelling reason. Compelling reasons include an attorney’s physical or mental inability to proceed. Even at trial, however, a lawyer may withdraw from representing a client with the court’s permission if this can be accomplished without serious damage to the client’s position. Among the factors permitting this withdrawal would be: the client has used the lawyer’s services to perpetrate a crime or fraud; the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; the client fails to fulfill an obligation to the lawyer; the representation results in an unrea-

98. Florida New Rules Rule 4-1.15(a) (1986). This rule suggests that funds be kept in a separate bank account unless the client “specifically instructs, in writing” that these funds be held “other than in a bank account.”
99. Id. at Rule 4-1.15(d).
100. Id. at Rule 4-1.16(a).
101. Id. at Rule 4-1.16(a)(2).
102. Id. at Rule 4-1.16(b).
103. Id. at Rule 4-1.16(b)(2).
104. Id. at Rule 4-1.16(b)(3).
105. Id. at Rule 4-1.16(b)(4).
sonable financial burden on the lawyer;\textsuperscript{106} or other good cause.\textsuperscript{107} Even with good cause shown, when ordered to do so by a tribunal, a lawyer is required to continue representation.\textsuperscript{108}

An attorney is under no obligation to accept a paying client.\textsuperscript{109} Monetary considerations may affect this decision, but the creation of a lawyer-client relationship should be a matter of choice for both parties. Court-appointed attorneys are not always free to make such choices.\textsuperscript{110} Before agreeing to represent a client, an attorney should carefully consider his or her decision. Attorneys may find themselves tied to the client and unable to withdraw even if the client fails to show up for trial or fails to meet the fee. Also, the Rules mandate a lawyer not represent a client if that representation will require a violation of the \textit{Rules of Professional Conduct} or law, or if the lawyer is physically or mentally unable to adequately represent the client.\textsuperscript{111}

An attorney who is allowed to withdraw from representation is directed to assist the client in minimizing any negative consequences resulting from the withdrawal.\textsuperscript{112} Finally, Florida’s Proposed Rules direct an attorney to return any unused portion of an advanced fee upon withdrawal, less any earned or “reasonable, non-refundable fee” which was originally agreed to by the parties.\textsuperscript{113}

\section*{VI. The Attorney as Counselor — Article Two}

Article Two of the proposed Rules discusses the role of attorney as counselor. The attorney-counselor may serve as advisor,\textsuperscript{114} intermediary,\textsuperscript{115} or evaluator for third persons.\textsuperscript{116}

\begin{itemize}
  \item 106. \textit{Id.} at Rule 4-1.16(b)(5).
  \item 107. \textit{Id.} at Rule 4-1.16(b)(6).
  \item 108. \textit{Id.} at Rule 4-1.16(c).
  \item 109. Neither the Code nor the Rules suggest accepting a paying client unless both parties agree to the representation.
  \item 110. \textit{Florida New Rules} Rule 4-6.2 (1986).
  \item 111. \textit{Id.} at Rule 4-1.16.
  \item 112. \textit{Id.} at Rule 4-1.16(d).
  \item 113. \textit{Id.} at Rule 4-1.16 Comment.
  \item 114. \textit{Id.} at Rule 4-2.1.
  \item 115. \textit{Id.} at Rule 4-2.2.
  \item 116. \textit{Id.} at Rule 4-2.3.
\end{itemize}
A. The Attorney as Advisor (Rule 4-2.1)

This rule recognizes that an attorney during the representation of a client may offer advice which exceeds the scope of strictly legal representation. "An attorney may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The comment section to this rule points out that advice which is limited to the law may be of little value to a client when other factors may play a much greater role in a client's decision-making. Moral and ethical advice may be very important to a full and complete representation of a client. When the advice which is required exceeds the attorney's experience, the comment to 4-2.1 directs the attorney to suggest other professional help for their client. This rule has no counterpart in the Code of Professional Responsibility, but mirrors the reality of practice by recognizing that there are many roles of the modern attorney beyond that of litigator.

B. The Attorney as Intermediary (Rule 4-2.2)

In many situations an attorney is called upon to represent "the situation" and thereby represent two or more individuals with potentially conflicting interests. This rule specifically excludes the attorney acting as arbitrator or mediator and suggests the difficulty of representing parties of conflicting interests. However, there will be situations where the attorney as intermediary will best solve the needs of the several clients. For example, an attorney may be called upon to form a business or arrange for the distribution of property in the settling of an estate. In any event, an attorney must fully explain his or her role to each client and receive their knowing consent. When forced to withdraw, the intermediary must withdraw from representation of all clients. This is necessary even if only one client has brought an action for the attorney's withdrawal. It is clear that an attorney must seek to avoid the confidentiality and privilege conflicts which could arise should he or she fail to withdraw.

This rule also has no counterpart in the earlier Code, and, once again, recognizes the new and varied roles filled by attorneys today.
C. Evaluations for the Use of Third Parties (Rule 4-2.3)

This rule considers lawyer's activities such as opinion letters. Opinion letters, while conducted for the attorney's client, will often be used by a third party. If the attorney is limited in her ability to obtain information for this evaluation, she is required to report any limitations for the benefit of the third parties.\(^\text{120}\) Perhaps the most interesting question posed by this rule remains unanswered by it; that is, what is the professional relationship between the attorney and the third-party client who relies upon the attorney's opinion? The comment section to the rule simply says "that legal question is beyond the scope of this rule."\(^\text{121}\) This rule is new, and was not considered by the *Code of Professional Responsibility*.

VII. Trial Practice — Article Three

"A lawyer's responsibility as a representative of clients, and also to the legal system and as a public citizen are usually harmonious. Vigorous advocacy is not inconsistent with justice."\(^\text{122}\) Many of the proposed rules arguably affect trial practice situations.\(^\text{123}\) However, Article Three speaks directly to the lawyer as an advocate, and includes sections on: trial publicity;\(^\text{124}\) lawyers as witnesses;\(^\text{125}\) advocacy in nonadjudicative proceedings;\(^\text{126}\) fairness to opposing counsel and parties;\(^\text{127}\) meritorious claims or contentions;\(^\text{128}\) expediting litigation;\(^\text{129}\) and the central rule, 4-3.3, candor toward the tribunal. During the ABA debate and the Florida adoption process, Rule 4-3.3 remained the bottom-line limit on a lawyer's protection of the confidentiality of his client and the minimum standard of his responsibility as an officer of the court.

\(^{\text{120}}\) Id. at Rule 4-2.3(b).

\(^{\text{121}}\) Id. at Rule 4-2.3 Comment.


\(^{\text{123}}\) See, e.g., *Florida New Rules* Rules 4-1.2 and 4-1.3.

\(^{\text{124}}\) *Florida New Rules* Rule 4-3.6 (1986).

\(^{\text{125}}\) Id. at Rule 4-3.7.

\(^{\text{126}}\) Id. at Rule 4-3.9.

\(^{\text{127}}\) Id. at Rule 4-3.4.

\(^{\text{128}}\) Id. at Rule 4-3.1.

\(^{\text{129}}\) Id. at Rule 4-3.2.
A. Meritorious Claims and Contentions (Rule 4-3.1)

Rule 4-3.1 suggests that while a client has a right to the full benefit of representation, an attorney is prohibited from abusing the legal process. The benefit of any ambiguity and potential for change in the law should always be given to one's client. However, action taken primarily to harass, injure or embarrass the other party is prohibited by the rule. 130

Rule 4-3.1 is similar to the Florida Code's DR 7-102 with some difference in emphasis only. Rule 4-3.1 requires that the litigation not be "frivolous," while the Code prohibited conduct designed "merely to harass and maliciously injure another." 131

B. Expediting Litigation (Rule 4-3.2)

Rule 4-3.2 establishes the Rules' general policy "to expedite litigation." 132 However, this policy is limited by the requirement that an attorney's efforts must be consistent with the interest of the client. A lawyer's convenience, or an attempt to frustrate the opposing parties' rights, are not sufficient grounds for delay. Also, the fact that this delay is typical in the jurisdiction, or that the client may realize financial benefit from the delay, are not sufficient grounds for delaying litigation. This is similar to the Code's DR section 7-102(a)(1), although the phrase "legitimate interest of the client" 133 is added to the Model Rule.

This rule requires an attorney to "make reasonable efforts to expedite litigation consistent with the interests of the client." 134 A litigator does not appear to be significantly affected by this rule. If delay is a valid technique (which would serve the interests of the client), this rule permits such delay. However, rules of procedure, constitutional rights and court practices may require an attempt at an expeditious resolution of a case. Nothing in the Rules makes it a violation of professional conduct for criminal attorneys, acting in the best interests of their clients, to delay a case.

130. Id. at Rule 4-3.1 Comment.
132. FLORIDA NEW RULES Rule 4-3.2 (1986).
133. Id. at Rule 4-3.2 Comment.
134. Id. at Rule 4-3.2.
C. Candor Toward the Tribunal (Rule 4-3.3)

This rule requires an attorney to disclose important information or relevant law to a court, or to correct a false statement of the same despite the requirement of confidentiality. Although the past conduct of a client is still protected, Florida's rule on attorney-client confidentiality requires significantly more disclosure than the ABA Model Rule. Both ABA and Florida confidentiality rules, however, are subject to the mandate of 4-3.3 (ABA Rule 3.3) requiring disclosure to the tribunal.

1. Legal Argument

A lawyer must always be scrupulously honest in presenting the law to a court. This rule requires an advocate to disclose legal authority in the controlling jurisdiction which is directly adverse to the position of the client if it has not been disclosed by the opposing party. This is an area of considerable concern to the courts today.

2. False Evidence

Under no circumstance should a lawyer offer evidence which the lawyer knows to be false even if the client insists. If false evidence has been offered and is material, the lawyer must withdraw and/or correct this false evidence. When the evidence has been offered by the attorney's client, the client should be persuaded to withdraw that evidence. If the client refuses, the attorney must take "reasonable remedial measures." The rules recognize that this disclosure will severely damage the lawyer-client relationship. However, the comment says the "alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process." The rule also points

135. Id. at Rule 4-3.3.
136. ABA Model Rules Rule 3.3(b) (1983) and Florida New Rules Rule 4-3.3(b) (1986).
138. Id. at Rule 4-3.3(a)(3).
139. Id. at Rule 4-3.3 Comment.
140. Id. at Rule 4-3.3(a)(3).
141. Id. at Rule 4-3.3 Comment.
142. Id.
143. Id.
out that if an attorney in a civil matter could not disclose false evidence in every case, the lawyer could be made an unwilling party to fraud on the court. It is interesting to note that the Rules recognize that the obligation may be different for a criminal defendant but are unequivocal in requiring disclosure in civil matters.\textsuperscript{144} In \textit{Nix v. Whiteside},\textsuperscript{145} the United States Supreme Court recently held that threatened disclosure of a client's lies does not violate a criminal client's sixth amendment rights.

In any event, if a civil client has offered false evidence to the court and the client cannot be convinced to rectify the same, the Rules allow an advocate to withdraw "if that would remedy the situation."\textsuperscript{146} If the withdrawal will not satisfactorily remedy the problem or cannot be accomplished, disclosure must be made.\textsuperscript{147}

Rule 4-3.3(c) allows a lawyer to refuse to offer any testimony or other proof which the lawyer believes is untrustworthy. This is true despite the general policy of the Rules which require client control of matters relating to representation.\textsuperscript{148}

Finally, Rule 4-3.3(d) considers the advocate's special responsibilities in an \textit{ex parte} proceeding. A lawyer is held to have a duty to disclose all material facts known to the lawyer necessary for an informed decision by the court.\textsuperscript{149} Disclosure is required even if the facts are contrary to the position held by the lawyer's client. The protection of the "unrepresented" other side from what may be a significant and unfair decision is the policy basis for this rule.

Rule 4-3.3 is substantially similar to Disciplinary Rule 7-102. However, the rule clarifies the attorney's duty to rectify the use of perjured testimony or false evidence, and extends the professional judgment of the lawyer in refusing to offer evidence reasonably believed to be false.\textsuperscript{150}

### D. Fairness to Opposing Party and Counsel (Rule 4-3.4)

This rule considers an attorney's obligation to the opposing party

\begin{itemize}
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Nix v. Whiteside}, 106 S. Ct. 988 (1986).
\item \textsuperscript{146} \textit{FLORIDA NEW RULES Rule 4-3.3 Comment} (1986).
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textit{Id.} at Rule 4-3.3(d).
\item \textsuperscript{150} The \textit{ex parte} section is a new addition to the rule discussing candor to the tribunal.
\end{itemize}
and their lawyer in trial or immediately pre-trial and is directed to “fair competition” with a goal of guaranteeing the effective functioning of the adversary system.\textsuperscript{151} Prohibited are: the destruction of evidence; hiding of witnesses; fabrication of evidence; failure to comply with discovery; and attempts to use irrelevant or inadmissible evidence in trial. Most of this rule calls for the judicious application of common sense. For example, the rule states that a legally made discovery request must be complied with\textsuperscript{152} and that the fabrication of testimony is prohibited.\textsuperscript{153} Although often ignored in practice, perhaps the most interesting sections of this rule prohibit an attorney’s use of evidence known to be inadmissible.

An attorney is prohibited at trial from “allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”\textsuperscript{154} Thus, an attorney may not properly use the traditional tactic of asking questions that are inadmissible or irrelevant hoping the opposing party will not object. This rule also prohibits an attorney from asking inadmissible questions simply for the “effect” of the question.

An attorney is also prohibited from stating a “knowledge of facts in issue” except when the attorney has been called as a witness. For example, in closing argument an attorney is prohibited from guaranteeing the truthfulness of evidence which he or she has presented. An attorney is also prohibited from stating an opinion “as to the justness of a cause” or commenting on the credibility of the witness or the culpability of a civil litigant.\textsuperscript{155}

\textbf{E. Impartiality and Decorum of the Tribunal (Rule 4-3.5)}

This rule restates the obvious: for the court system to function properly, neither judge, jury, nor prospective juror should be improperly influenced by an advocate. Of course, influence through the presentation of evidence and the persuasive ability of an attorney is not prohibited. \textit{Ex parte} communications are prohibited during an official proceeding. Contact with a juror after the case has ended is also pro-

\textsuperscript{151} FLORIDA NEW RULES Rule 4-3.4 (1986).
\textsuperscript{152} Id. at Rule 4-3.4(a).
\textsuperscript{153} Id. at Rule 4-3.4(b).
\textsuperscript{154} Id. at Rule 4-3.4(e).
\textsuperscript{155} Id. Rule 4-3.4 is essentially the same as DR 7-106(c)(1) — (c)(4).
hibited unless such contact is initiated by the juror.  

This rule is substantially the same as Code Disciplinary Rules 7-106, 7-108, and 7-110. The Busey Committee determined that DR 7-110(b) was more practical than the ABA Model Rule 3.5(b). Therefore, they included the complete text of DR 7-110(b) in Florida's Rule 4-3.5(b).

F. Trial Publicity (Rule 4-3.6)

The "trial publicity" rule, as redrafted by the Florida Supreme Court, details permitted and prohibited conduct by an attorney, when he or she is offering information to the media before and during trial. This is a troubling area because the interests of free speech and a fair trial conflict. This "trial publicity" rule deserves particular attention because even a cursory review of much of the popular media suggests that the dictates of this rule are rarely honored.

Rule 4-3.6 generally prohibits any out-of-court statement which is likely to be reported by the media and might "materially prejudice" a trial. Lawyers are also prohibited by the Florida rule from aiding another in making such a statement. Examples of such statements are those which: relate to the character, credibility or reputation of a party; discuss results of any test or the nature of physical evidence which might be presented at trial; or divulge information which would be inadmissible at trial or prejudice an impartial trial.

The "trial publicity" rule does allow certain statements to be made "without elaboration." Statements which give general information about the claim or defense; divulge publicly-recorded information; announce that an investigation is underway; or request assistance in ob-

156. Florida New Rules Rule 4-3.5(c) (1986).
157. An almost daily review of local television or newspapers reveals attorney comments on pending and in-trial cases contrary to the dictates of this rule.
158. Florida New Rules Rule 4-3.6(a) (1986).
159. Id. The Florida Supreme Court specifically added the following proviso to 4-3.6(a): "[P]rosecutors and defense counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a criminal case from making extrajudicial statements that are prohibited under this rule." Very similar wording had been considered but dropped by the drafting committee from Rule 4-3.8, Special Responsibilities of a Prosecutor.
160. Id. at Rule 4-3.6(b)(1).
161. Id. at Rule 4-3.6(b)(3).
162. Id. at Rule 4-3.6(b)(5).
163. Id. at Rule 4-3.6(c).
taining evidence and information, are allowed under this rule.\textsuperscript{164}

G. \textit{The Lawyer as Witness (Rule 4-3.7)}

The bar and courts have been long concerned about the confusion which results from an attorney serving as advocate and witness in the same trial. Therefore, this rule was adopted to prohibit an attorney from acting as an advocate in a trial where he or she is likely to be called as a witness. This rule is subject to four exceptions in Florida's New Rules.

Since disqualification of a lawyer is often brought by an opposing party to obtain a tactical advantage, withdrawal will not be required where it will "work a substantial hardship on the client."\textsuperscript{165} However, the court will consider the foreseeability of the lawyer's need to serve as a witness in reaching its decision on disqualification.

To determine whether or not a potential for conflict exists, lawyers should determine if their testimony relates to any of the three other areas which do not require disqualification. These include: testimony on an uncontested issue; testimony relating to the nature and value of the legal services rendered in the case; and testimony having to do with a matter of formality where it is unlikely that substantial evidence will be offered in opposition.\textsuperscript{166}

This rule generally tracks Florida's current Disciplinary Rules, sections 5-101(b) and 5-102. The proposed rule, however, adds a section which allows a lawyer who is required to act as a witness "to assist in trial preparation."\textsuperscript{167} The Rules also do not require a firm to withdraw from representation when one member of the firm will be called as a witness.\textsuperscript{168} The Florida approach suggests that this is a tactical rather than an ethical decision, and should not require withdrawal of the whole firm.

H. \textit{Special Responsibilities of a Prosecutor (Rule 4-3.8)}

This rule recognizes the special role of a prosecutor as spokesperson for justice, and discusses the special obligations imposed by this

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{164} \textit{Id.} at Rule 4-3.6(c)(1) — (c)(7). Rule 4-3.6 is similar to Code DR 7-107.
  \item \textsuperscript{165} \textit{Id.} at Rule 4-3.7 Comment.
  \item \textsuperscript{166} \textit{Id.} at Rule 4-3.6(c)(1) — (c)(7). Rule 4-3.6 is similar to Code DR 7-107.
  \item \textsuperscript{167} \textit{Id.} at Rule 4-3.7 Comment.
  \item \textsuperscript{168} \textit{Id.} at Rule 4-3.7(b).
\end{itemize}
\end{footnotesize}
role. A prosecutor is directed to only bring criminal charges which are supported by sufficient probable cause. A prosecutor is also directed to be especially sensitive to the very important constitutionally protected pre-trial rights of an unrepresented criminal defendant. Finally, a prosecutor is directed to provide the defense with evidence and information which might “negate the guilt of the accused or mitigate the offense” and at sentencing to disclose all mitigating information which is not privileged. This special role of the prosecutor in the criminal justice system is in accord with prior code section DR 7-103.

I. Advocate in Nonadjudicative Proceedings (Rule 4-3.9)

Although not strictly addressing a “trial situation,” this rule applies the previously mentioned rules requiring honest and ethical conduct to representation before a legislative or administrative tribunal. In administrative law practice, a lawyer may be subject to regulations and procedures of an administrative tribunal. However, the Model Rules may subject the attorney to a standard of conduct higher than that of other non-lawyer advocates before the same tribunal. The comment section to this rule suggests that “legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with the courts.”

VIII. Transactions with Persons Other than Clients — Article Four

This article provides guidance for an attorney’s dealing with persons other than his or her client. These rules consider truthfulness in statements to others; in communications with persons represented by

169. Rule 4-3.8 comment section cites to the ABA STANDARDS OF CRIMINAL JUSTICE relating to the Prosecution Function which have been adopted in Florida and provide more guidance on the specific role of the prosecutor. Prosecutors are also directed to Rule 4-3.3(d) regarding ex parte proceedings, Rule 4-8.4 regarding systematic abuse of prosecutorial discretion, and Rule 4-3.6(a) on extrajudicial statements.

170. FLORIDA NEW RULES Rule 4-3.8(a) (1986).
171. Id. at 4-3.8(b).
172. Id. at 4-3.8(c).
173. Id.
174. Id. at Rule 4-3.9 Comment.
175. Id. at Rule 4-4.1.
attorneys;\textsuperscript{176} when dealing with those not represented by attorneys,\textsuperscript{177} and with respect for the rights of third persons.\textsuperscript{178} One should also consider Rule 4-2.3 (Evaluation for Use by Third Persons) and Rule 4-3.4 (Fairness to Opposing Party and Counsel) as relevant to material covered by this article.

A. \textit{Duty to the Opposing Party and to Third Persons (Rules 4-3.4, 4-4.1, 4-4.2, 4-4.3, and 4-4.4)}

Rule 4-3.4, previously considered as part of the “trial” rules, contains substantial material which applies to pre-trial practice as well. The adversary system requires “fair competition” between the parties to work properly. Substantive law, procedural law and the \textit{New Rules} require that a lawyer not hide, destroy or fabricate evidence. This applies even where no formal case yet exists.

For example, assume a crazed killer appears at a lawyer’s office and drops a blood-stained knife on the lawyer’s desk. No formal charges exist (the murder has not been discovered); however, the destruction of the murder weapon is a violation of ethics and law. If a potential action is reasonably foreseeable, lawyers are prohibited by the \textit{New Rules} from hiding, destroying or fabricating evidence.\textsuperscript{179} The Rules prohibit assisting others in doing that which an attorney is prohibited from doing.\textsuperscript{180} Therefore, advising a client to “get rid of the knife” would also violate this rule.\textsuperscript{181}

Rule 4-3.4(b), (c) and (f) prohibits assisting perjury or discouraging a witness from giving information to an adversary. A client and the client’s relatives, employees or other agents are excluded from the operation of the rule if they will not be hurt by withholding information.

The Rules also require respect for the rights of third persons.\textsuperscript{182} These rights should be honored whenever consistent with the role of the advocate. Naturally clients’ rights must supercede the rights of the third person. However, an attorney should refrain from using tactics which “have no substantial purpose other than to embarrass, delay or

\textsuperscript{176} Id. at Rule 4-4.2.
\textsuperscript{177} Id. at Rule 4-4.3.
\textsuperscript{178} Id. at Rule 4-4.4.
\textsuperscript{179} Id. at Rule 4-3.4(a).
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at Rule 4-3.4.
burden a third person.” 183 Furthermore, methods of obtaining evidence which “violate the legal rights” of the third parties are also prohibited. 184

The rights of third parties also include the requirement for truthfulness to the third party and may include some limited disclosure. 185 Attorneys are prohibited from making false statements of material law or fact to third parties and are required to disclose material facts if it will help a third party avoid becoming victimized by their client’s actions. However, this disclosure requirement is subject to Rule 4-1.6. 186 This may be applicable to the situation where a lawyer’s client proposes a criminal activity and refuses the attorney’s advice to refrain from such action. 187

B. Communication with a Person Who is Represented by Counsel (Rule 4-4.2)

This rule is substantially the same as Florida’s prior Code section. 188 A lawyer is prohibited from communicating with a person about the subject matter of an attorney representation. Communication not regarding the subject matter of the representation is permitted. Parties are allowed to communicate directly with each other, despite the fact they are represented by counsel. Lastly, an attorney representing a client may consent to another attorney’s communication with that person.

C. Dealing with Unrepresented Persons (Rule 4-4.3)

Rule 4-4.3 cautions attorneys to refrain from dealing with unrepresented persons. 189 Attorneys are best advised to avoid contact with unrepresented persons outside a formal, structured setting or a courtroom. However, if contact is initiated by an unrepresented person, the Rules permit an attorney to speak with this person. The attorney is best advised to hold this conversation in the presence of an independent wit-

183. Id.
184. Id.
185. Id. at Rule 4-4.1(b).
186. Id.
187. See Florida New Rules Rules 4-1.6 and 4-4.1 (1986). Each requires disclosure to an intended victim.
ness to protect all parties. The attorney should clearly explain that he or she is not there to help the unrepresented person, and should also explain all options available to that person.

IX. Law Firms and Associations — Article Five

This section of the Model Rules details the responsibilities of law firms and subordinate attorneys. It clearly discusses the responsibility of supervising lawyers, subordinate lawyers, and non-lawyer assistants. This article also considers unauthorized practice of law, a lawyer's independence, and limitations on restriction of the right to practice.

A. Law Firm and Government Office Responsibility for Professional Conduct (Rule 4-5.1)

This rule clarifies an individual attorney's responsibility for himself as well as those he supervises to comply with the Rules of Professional Conduct. Every lawyer's responsibility extends to those supervised by the lawyer including secretaries, paralegals and clerks. Ultimately the lawyer is responsible for the action of these "non-lawyer assistants" if he or she has directed them to act or permits them to act in violation of the Rules. The law firm partner or government office supervisor is also responsible for ensuring that his or her office takes reasonable steps to guarantee that all office staff observe the Rules of Professional Conduct. Measures to ensure compliance can range from informal support and guidance to structured seminars. Junior firm members should be encouraged to raise ethical issues. Formal mechanisms should be established within the workplace to promote this compliance. Lawyers who are required to act in a supervisory capacity have a greater obligation to ensure that the conduct of their subordinates meets the standards of the Rules of Professional Conduct. Junior associates are not, however, relieved of their individual re-

190. Id. at Rule 4-5.1.
191. Id. at Rule 4-5.2.
192. Id. at Rule 4-5.3.
193. Id. at Rule 4-5.5.
194. Id. at Rule 4-5.4.
195. Id. at Rule 4-5.6.
196. Id. at Rule 4-5.1.
197. Id.
responsibility to follow the *Rules of Professional Conduct*. It is not an excuse that a supervisor has directed the action of the junior lawyer, unless the ethical issue in question is subject to a disagreement between reasonable attorneys.  

X. Public Service — Article Six

Article Six was one of the most controversial during the ABA and Florida debate and adoption process. It discusses pro bono service, law reform, and legal service activities.

A. Pro bono Service (Rules 4-6.1 and 4-6.2)

This is the only rule that is purely aspirational in nature, but does apply this pro bono "obligation" to civil and criminal matters. Lawyers are encouraged to provide free legal services to those in need who are unable to afford required legal assistance. Although the Florida public defender system has dealt with most indigent criminal representation, the criminal practitioner is still required to observe this rule by providing service to those in need of civil representation. The Florida Rules provide three ways to meet this suggested pro bono responsibility: 1) free or reduced fee representation to those of limited means; 2) service without compensation in public interest activities that improve the law, the legal system, and the legal profession; or 3) provision of financial support to Legal Aid or similar organizations.

Several times in the past few years, proposals for mandatory pro bono service have been considered and rejected by the Florida Supreme Court and the Florida Bar. While such mandatory plans have been rejected, at least one voluntary bar association (Orange County) has instituted a mandatory pro bono plan. This plan requires pro bono service or a financial assessment to support the local legal services office, and seems to operate most satisfactorily.

It is likely that the debate on mandatory pro bono service will continue in Florida. The Florida Bar's Special Commission on Access to the Legal System recently proposed a change in Rule 4-6.1, suggesting

198. Id. at Rule 4-5.2.
199. Id. at Rule 4-6.1.
200. Id. at Rule 4-6.4.
201. Id. at Rule 4-6.3.
202. Id. at Rule 4-6.1.
that the Bar make pro bono service mandatory. This change was rejected by the Board of Governors of the Florida Bar but will no doubt resurface. Since attorneys have a monopoly on access to the legal system, lively debate in this area is guaranteed for years to come.

In other states, courts have appointed attorneys (without fee or with minimal compensation) to represent indigent clients in criminal and civil matters. Such “involuntary servitude” has been gaining acceptance in many states.\textsuperscript{203} Given the substantial cost counties incur when appointing special public defenders, this approach may also be a matter for future consideration in criminal cases in Florida.

The Rules encourage the acceptance of these court appointments and strongly discourage refusal or withdrawal except for “good cause.”\textsuperscript{204} “Good cause” means that the representation would require a violation of the rules of professional conduct; an unreasonable financial burden will be placed upon the lawyer; or “the client or the cause is so repugnant”\textsuperscript{205} that the lawyer cannot adequately enter into this relationship.

**B. Membership in Legal Services Organizations (Rule 4-6.3)**

This rule, which has no counterpart in the Code, encourages attorneys to participate in legal service organizations. However, an attorney is warned that potential conflicts can arise from such activities. Therefore, the attorney is directed to consider his or her obligations under Rule 4-1.7.\textsuperscript{206}

**C. Law Reform Activity (Rule 4-6.4)**

The “law reform activity” rule encourages attorneys to support and participate in law reform activities. An attorney is encouraged to do so even if the activities are contrary to the interests of the attorney’s client. A lawyer represents the client but is not married to the client’s cause. Denying lawyers participation in law reform activities would deny society the input of those best trained in this area.\textsuperscript{207} If a lawyer participates in law reform activities and his client will be materially

\textsuperscript{203} California, for example, has accepted the constitutionality of this “involuntary servitude.”

\textsuperscript{204} \textit{FLORIDA NEW RULES} Rule 4-6.2 (1986).

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} \textit{Id.} at Rule 4-6.3(a).

\textsuperscript{207} \textit{Id.} at Rule 4-6.4 Comment.
affected by these activities, the client’s relationship must be disclosed. The client need not be identified, however.

XI. Information about Legal Services — Article Seven

Article Seven deals with the activities of a lawyer in communicating the availability of his or her services.208 Among the areas discussed are attorney advertising,209 solicitation,210 specialization,211 and law firm names.212

A. Advertising (Rules 4-7.1, 4-7.2, 4-7.3)

State bars have reluctantly allowed advertising in response to the mandates of the United States Supreme Court and state supreme courts. Rules 4-7.1, 4-7.2, and 4-7.3 are an attempt to accommodate the hesitancy of the bar to the directives of case law.

The New Florida Rules allow advertising in a wide variety of media, with “truthfulness” the only limitation on a lawyer’s right to advertise. Advertising is permitted by Rule 4-7.2 in all public media including telephone directories, legal directories, newspapers or other periodicals, outdoor signs, radio, television or written communication.213 Florida’s drafting committee was concerned about lawyers abusing the right to advertise, but concluded that the right to commercial speech was a superior interest. Considering the traditional reticence of the profession to be involved in the “business world,” the drafting committee agreed that advertising helps serve the public’s need for information regarding the availability and cost of legal services.

False or misleading advertising is defined in the rules as advertising which contains “a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not misleading.”214 Advertising is also false or misleading if a lawyer’s ad creates an “unjustified expectation about results the lawyer can

208. Id. at Rule 4-4.1.
209. Id. at Rule 4-7.1.
210. Id. at Rule 4-7.3.
211. Id. at Rule 4-7.4.
212. Id. at Rule 4-7.5.
213. Id. at Rule 4-7.2(a).
214. Id. at Rule 4-7.1(a).
achieve." An attorney's advertisement should not compare "the lawyer's services with other lawyers' services unless the comparison can be factually substantiated." Prohibited communications include advertisements which discuss the results obtained on behalf of a particular client, the lawyer's win/loss record, or client endorsements. Beyond that, little regulation and little guidance is offered to an attorney regarding the content or format of an advertisement. Since "taste is a highly subjective matter" advertisements should "comport with the dignity of the profession."

The comment to Rule 4-7.2 discourages the use of slogans; gimmicks or other garish techniques; large electrical or neon signs; or other extravagant media. Despite the specific addition of this commentary section to Florida's rules (it does not exist in the Model Rules), it is questionable if such guidance is more than aspirational at best.

For example, an Ohio Bar rule which prohibited most advertising illustrations and cautioned against an attorney giving advice regarding specific legal problems in their advertisements was recently overturned by the United States Supreme Court in *Zauderer v. Office of Disciplinary Counsel.* Zauderer, an Ohio attorney, used an illustration of a Dalkon Shield in a newspaper advertisement which asked, "Did you use this IUD? [This device is] . . . alleged to have caused [many injuries]. Do not assume it is too late to take legal action against the shield's manufacturer."

The Supreme Court held that this advertisement was protected commercial speech, and the Ohio Bar could only prohibit false and misleading advertisements. Absent a showing on the part of the state that the regulation prohibiting this advertisement served a substantial governmental interest, the Court indicated it was inclined to allow all advertisements meeting the standards of New Florida Rule 4-7.1.

Recently, the United States Supreme Court rejected an Iowa Supreme Court ruling which had prohibited television advertisements by

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215. *Id.* at Rule 4-7.1(b).
216. *Id.* at Rule 4-7.1(c).
217. *Id.* at Rule 4-7.1 Comment.
218. *Id.* at Rule 4-7.2 Comment.
219. *Id.*
220. *Id.*
221. 105 S. Ct. 2265 (1985).
222. *Id.* at 2271.
223. *Id.*
lawyers, thereby reaffirming the almost unlimited access to the public by truthful attorneys.

Only a few additional restrictions are mandated by Rule 4-7.2(b) and 4-7.2(d). A copy of an advertisement or written communication must be kept for at least three years after it was last used, along with a record of to whom it was sent and where. This "communication" by an attorney also must include the name of at least one lawyer responsible for its content. Florida's Rules Drafting Committee debated but abandoned the "laundry list format" of the Code's DR 2-101 in favor of a more defensible general standard of truthfulness. The Committee correctly felt that In re R.M.J. and Bates v. State Bar of Arizona prohibited most specific limitations on advertising without a showing of a commensurately compelling state interest.

The Florida Rules also permit lawyers to communicate their fields of practice subject to restrictions contained in Rule 4-7.4. While lawyers may not state they are specialists in a given field, they may state those areas in which they choose to practice. Exceptions to this rule are attorneys in patent and admiralty practice, and those lawyers who are certified under Florida certification or designation plans.

Law firms in Florida continue to have the option of using trade names or other professional titles. Trade names, however, must not be misleading nor may lawyers state or imply that they practice in a partnership or other organization when that is not the fact.

B. Solicitation (Rule 4-7.3)

Solicitation, the direct contact with prospective clients, is an area more closely regulated by the courts than advertising. There is a long history of prohibition of this conduct by the Florida and United States Supreme Courts. However, the United States Supreme Court's decision In re R.M.J., and the Florida Supreme Court's decision in Florida Bar v. Schreiber, have begun to reshape this area of regulation. Schreiber, a Dade County Commissioner and attorney, sent letters to international trade companies explaining the availability of his firm for legal

224. See Humphrey v. Commission of Professional Conduct, 105 S. Ct. 2693 (1985). At time of publication the Iowa Supreme Court on rehearing has still strictly limited such advertising.
227. FLORIDA NEW RULES Rule 4-7.5 (1986).
228. 407 So. 2d 595 (Fla. 1981), vacated on reh'g, 420 So. 2d 599 (Fla. 1982).
services in immigration matters. In light of the Supreme Court’s *In re R.M.J.* ruling, the Florida court reluctantly allowed this relatively non-intrusive solicitation subject to certain guidelines contained in direct-mail rules issued by the court in January 1984.229

Florida’s Rules continue the generalized prohibition against solicitation of new clients when a lawyer’s profit motive is the primary reason for this solicitation. Solicitation of this type is prohibited whether it is made in person, by telephone or in writing.230 However, solicitation for social causes or the public welfare (that is, without the primary motive of financial reward) is still permitted by Rule 4-7.3 and by *In re Primus.*231

Now targeted direct-mail advertisements, which are often characterized as solicitation, are permitted. However, direct-mail advertisement must be marked “advertisement” on the envelope and at the top of each page. Furthermore, the word “advertisement” must be in type one size larger than the largest type232 in the communication.

Even this permitted “solicitation” is subject to the requirement of truthfulness and must avoid “coercion, duress, fraud, over-reaching, harassment, intimidation or undue influence.”233 Further, those known to be represented in a specific matter may not be contacted nor may those who do not wish to receive communications from the lawyer.234

The most unsupportable section of the committee draft solicitation rule prohibited mail contact with those known to be in need of legal services in a specific matter (e.g., direct-mail contact with the families of airplane accident victims). A growing body of case law seems to permit such conduct. For example, New York State’s highest court recently overruled a Bar rule (similar to Florida’s) which prohibited targeted direct mail.235 Responding to this the Florida Supreme Court

229. *Id.* Arguably, this alters the limitations required by Fla. Stat. § 877.02 (1985).


232. The Florida Supreme Court redrafted 4-7.3(b)(1) to include larger type and 4-7.3(b)(2) to include the mailing of a copy of all written solicitations to staff counsel at bar headquarters.


234. *Id.* at Rule 4-7.3(B)(2)(a) and Rule 4-7.3(B)(2)(b).

wisely concluded that this targeted mailing could not be prohibited. In its rewriting of this Rule the court proposed five rules\textsuperscript{236} regulating such communication and said it would revisit this area if a pattern of abuse is established.

The danger of "ambulance chasing," exemplified by \textit{Ohralik v. Ohio State Bar Association},\textsuperscript{237} is the basis for the rules prohibiting solicitation. Ohralik, an Ohio attorney, solicited the parents of one of the drivers injured in an automobile accident. The parents suggested that whether an attorney would be hired would be the injured daughter's decision. Ohralik approached the daughter at the hospital and offered to represent her. She would not sign an agreement until conferring with her parents.

The Ohio attorney then went back to the parents' home with a tape recorder concealed under his raincoat. He examined the parents' insurance policy and discovered that the daughter's passenger also could benefit from the policy. Ohralik eventually got the daughter to sign a contract with him, and an oral agreement with the daughter's passenger to allow him to represent her as well.

Eventually, each of these parties discharged Ohralik and filed a formal complaint against him with the Ohio Bar's Grievance Board. The Board rejected the attorney's defense that his conduct was protected under the first and fourteenth amendments. The Supreme Court of Ohio, as well as the United States Supreme Court, adopted the findings of the Board.

This type of conduct by an attorney still invokes the Rules' strongest limits on a lawyer's right to communicate the availability of his or her services. In this situation the possibility of undue influence, intimidation and overreaching\textsuperscript{238} is without limit, while public scrutiny or regulation is almost impossible.

C. \textit{Communication of Fields of Practice (Rule 4-7.4)}

This rule allows attorneys to communicate to the public the areas of law in which they do and do not practice. However, it prohibits attorneys from stating that they are specialists except for a few limited

\begin{itemize}
  \item \textsuperscript{17} See \textit{Florida New Rules} Rule 4-7.3(b)(2)a-e (1986).
  \item \textsuperscript{236} Id. at 477 (1978).
  \item \textsuperscript{237} Id. at 464.
\end{itemize}
areas such as patent practice;\textsuperscript{239} admiralty;\textsuperscript{240} certification,\textsuperscript{241} as set forth in Article 21 of the integration rule and Article 14 of the by-laws of the Florida Bar; and designation.\textsuperscript{242} The rule specifically rejects the Code prohibition of communication regarding limitation of practice\textsuperscript{243} but is essentially similar in other respects.

D. Firm Names and Letterheads (Rule 4-7.5)

This rule allows the use of trade names which are not misleading,\textsuperscript{244} and requires truthful and complete communication in the use of trade names and in the printing of a letterhead for a firm.

XII. Integrity of the Profession — Article Eight

Article Eight rules mandate respect for and obligation to the legal profession and the courts. For example, Rule 4-8.2, Judicial and Legal Officials, directs a lawyer not to make a statement which he or she knows to be false or "with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge."\textsuperscript{245} Lawyers are encouraged by the commentary to this rule to defend judges in courts when they have been unjustly criticized, but are allowed to express honest and candid opinions on such matters to contribute to improving the administration of justice.\textsuperscript{246}

Lawyers are directed by Rule 4-8.3 to report a violation of the Rules of Professional Conduct on the part of a court, and to report the professional misconduct of opposing counsel that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer."\textsuperscript{247}

Rule 4-8.4 is a catch-all, requiring conduct similar to earlier "officer and a gentleman" standards. This includes the prohibition of conduct that is "prejudicial to the administration of justice."\textsuperscript{248}

\textsuperscript{239} FLORIDA NEW RULES Rule 4-7.4(a) (1986).
\textsuperscript{240} Id. at Rule 4-7.4(b).
\textsuperscript{241} Id. at Rule 4-7.4(c).
\textsuperscript{242} Id. at Rule 4-7.4(d).
\textsuperscript{243} See FLORIDA'S CODE DR 2-105 (1970).
\textsuperscript{244} FLORIDA NEW RULES Rule 4-7.5(a) (1986).
\textsuperscript{245} Id. at Rule 4-8.2(c).
\textsuperscript{246} Id. at Rule 4-8.2 Comment.
\textsuperscript{247} Id. at Rule 4-8.3(a).
\textsuperscript{248} Id. at Rule 4-8.3.
A. **Bar Admission and Disciplinary Matters (Rule 4-8.1)**

This rule requires applicants to the Bar and admitted attorneys to be completely candid in their relationship with the Florida Board of Bar Examiners. The rule further requires that an attorney or applicant respond to any request for information from the Board of Bar Examiners or the Florida Bar and to correct any misunderstanding which may have occurred in the matter.\footnote{249. Id. at Rule 4-8.1(b).}

B. **Judicial and Legal Officials (Rule 4-8.2)**

This is a judicial protection rule requiring lawyers to be moderate in their public evaluation of judges and encouraging them to defend "judges and courts which have unjustly been criticized."\footnote{250. Id. at Rule 4-8.2 Comment.}

C. **Professional Misconduct (Rules 4-8.3, 4-8.4)**

The Florida Rules (4-8.3, 4-8.4) regarding misconduct are so general and so obvious as to require only a brief listing. Rule 4-8.4 prohibits a lawyer from attempting to violate or from violating any other rule, or helping or encouraging another to do so; from committing a crime of moral turpitude; from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, or conduct prejudicial to the administration of justice; from stating or implying an ability to improperly influence a government agency or official; or from assisting a judge in violating the code of judicial conduct.

Of greater interest and sophistication, however, are the Rule 4-8.3 requirements for reporting the misconduct of others. Lawyers are obligated to maintain the high standards (theirs and others) of the profession. There is a strong bias in America in favor of loyalty to one's fellows. The rule requiring reporting professional misconduct for this reason does not require reporting every violation of the rules. Only violations that "raise a substantial question as to . . . [a] lawyer's honesty, trustworthiness or fitness as a lawyer"\footnote{251. Id. at Rule 4-8.3(a).} must be reported. The same is true of reporting judicial misconduct. Failure to report "substantial" misconduct is a clear violation of the rules.\footnote{252. Id. at Rule 4-8.3(b).}

It is important to note that Rule 4-8.3(c) does not permit disclos-
ure of information protected by confidentiality.\textsuperscript{253} A lawyer representing another attorney accused of professional misconduct, therefore, is under no obligation to report the nature of their discussions. More typically, a lawyer obtains information regarding another lawyer's misconduct from a client. Under these circumstances, a client should be encouraged to allow disclosure of this misconduct unless it would significantly injure the client's interest.\textsuperscript{254}

D. \textit{The Jurisdiction of the New Rules (Rule 4-8.5)}

This rule applies the new rules to attorneys admitted in Florida but practicing elsewhere. Rule 4-8.5, which has no counterpart in the Code, suggests that where the rules of the attorneys in two jurisdictions are in disagreement the "principles of conflict of laws may apply."\textsuperscript{255}

XIII. Summary

It is somewhat exceptional for a law review's annual law survey to include a full section on \textit{Rules of Professional Conduct}. In the post-Watergate years, ethical conduct has taken on a new importance for the Bar. There is an increased awareness in law schools and in practice of the need for attention to ethical concerns.

The \textit{Florida Code of Professional Responsibility} is a rather inaccessible reference source. However, the \textit{New Rules of Professional Conduct} are accessible to all practitioners and contain a comprehensive table of contents and an even more extensive index. These Rules may be consulted for easy guidance in all major ethical areas. For more complex questions, there exist published formal opinions of the Florida Bar. These formal opinions are available from the Bar, law schools and most county law libraries. The opinions provide guidance on a wide range of topics relating to professional conduct.

The practitioner (especially the new attorney) is encouraged to discuss matters of ethical concern with partners or other senior attorneys. This discussion leads to an improved awareness on the part of all members of the Bar of the importance of ethical issues. Further guidance may be obtained by calling one of Florida's law schools and speaking with faculty members responsible for the Professional Ethics

\textsuperscript{253} \textit{Id.} at Rule 4-8.3(c).
\textsuperscript{254} \textit{Id.} at Rule 4-8.3 Comment.
\textsuperscript{255} \textit{Id.} at Rule 4-8.5.
programs at that institution.

For more formal guidance, the nearest Florida Bar office may be consulted. These offices are most helpful in providing informal, over-the-telephone opinions on ethical concerns. Opinions are also available from the Florida Bar Ethics Counsel in Tallahassee at 1-800-235-8619. The Tallahassee office will upon request provide a written ethical opinion. Especially controversial areas may be referred to the Florida Bar Professional Ethics Committee, which drafts and approves the previously mentioned formal opinions.

Case law is evolving rapidly in this area. This is especially so in the areas of advertising, solicitation and client truthfulness. The practitioner may wish to consult the *ABA/BNA Lawyers Manual on Professional Conduct*, which is available at most law libraries.

The Rules of Professional Conduct are minimum guideposts for the practitioner. An awareness of ethical concerns and open discussion of ethical issues will help guarantee the continued high standard of professional conduct in Florida.
Of Alligators and Hotel Beds: A Review of Florida Supreme Court Decisions on Taxation for 1985

Richard Gershon*

I. Introduction

While most states impose taxes on the personal income of their residents as a means of generating revenue,1 individuals residing in Florida enjoy a life without the burdens of state income taxation.2 However, the Florida Constitution and legislature do provide the state, county and local governments with useful revenue generating devices in the form of such taxes as ad valorem taxes,3 convention development taxes,4 and sales taxes.5 The Supreme Court of Florida must often determine whether or not the taxes authorized by the Florida legislature are valid both facially6 and as applied to a given taxpayer.7

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2. The Constitution of the State of Florida prohibits the state from levying a tax upon the income of natural persons. FLA. CONST. art. VII, § 3(b).
5. FLA. STAT. § 212.05 (1983). The sales tax is a tax on the exercise of the privilege of engaging in the business of selling tangible property at retail in Florida.
6. E.g., DeLand v. Florida Pub. Service Co., 119 Fla. 804, 161 So. 735 (1935), in which a tax of ten cents for every sale of electricity in a city, which could not be passed on to the consumer, was declared to be an unconstitutional confiscation of property.
7. E.g., Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311 (Fla. 1984), in which the court upheld a tax imposed on aviation fuel but not on fuel used by railroads. Eastern claimed that such a tax was discriminatory, and was therefore invalid. The court disagreed stating that “a statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy.” Id. at 315. See also, Delta Air Lines, Inc. v. Department of Revenue, 455 So. 2d 317 (Fla. 1984) citing the principle that no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. In that case, Delta challenged Florida Statute § 220.189 (1983), which granted a corporate tax credit against the Florida fuel tax; the credit was only available to Florida-based carriers, which gave such carriers a direct commercial advantage.
In 1985, the Supreme Court of Florida heard five key cases dealing with taxation. This article will discuss those cases and their impact on Florida taxpayers.

**Sales Tax: *Campus Communications, Inc. v. Department of Revenue*\(^8\)**

While the University of Florida's football program languished under the watchful eye of the National Collegiate Athletic Association, the Florida Department of Revenue (D.O.R.) subjected the University's student run newspaper, known as *The Alligator*,\(^10\) to equally painful scrutiny.

In general, the Florida statutes provide that newspapers are exempt from sale taxes.\(^11\) However, the D.O.R. is delegated the authority to make, prescribe and publish reasonable rules and regulations concerning what types of publications qualify as newspapers for the purposes of the sales tax exemption.\(^12\) Pursuant to that delegated authority, the D.O.R. adopted Florida Administrative Code Rule 12A-1.08, the relevant portions of which are:


(1) Receipts from the sale of newspapers are exempt...

(3) In order to constitute a newspaper, the publication must contain at least the following elements:

(a) It must be published at stated short intervals (usually daily or weekly).

(b) It must not, when successive issues are published, constitute a book.

(c) It must be intended for circulation among the general public.

(d) It must have entered or qualified to be admitted and entered as second class mail matter at a post office in the county where published.

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\(^8\) 473 So. 2d 1290 (Fla. 1985).

\(^9\) In 1985, the Florida Gators were placed on probation, which precluded them from participating in post-season bowl games, and denied them a share of the Southeastern Conference championship.

\(^10\) The paper's official name is *The Independent Florida Alligator*. *The Alligator* is not under the control of the University of Florida; instead, it has been independently operated since the 1970's.


\(^12\) Fla. Stat. § 212.17(6) (1971).
(e) It must contain matters of general interest and reports of current events.

(4) To qualify for exemption as a newspaper, a publication must be sold and not given to the reader free of charge. So-called newspapers which are given away for advertising and public relations purposes are taxable.

Because *The Alligator* has no second class mailing permit, and is given to readers free of charge, it fails to meet the definition of a "newspaper" as set forth in Rule 12A-1.08 3(d) & (4). Thus, the D.O.R. assessed sales taxes against the publisher of *The Alligator*, Campus Communications, Inc. The D.O.R. reasoned that a taxable sale occurred when Campus Communications purchased the newspaper with the intent to give the paper away rather than sell it. Campus Communications sought review of the D.O.R.'s decision within the D.O.R. itself, but to no avail. However, the trial judge in the Circuit Court granted Campus Communications' motion for summary judgment. The D.O.R. in turn appealed the trial court's decision to the First District Court of Appeal.

The district court had previously held Rule 12A-1.08 to be valid, and thus rejected *The Alligator*'s argument that the rule was an invalid exercise of delegated legislative authority. However, the court was not certain that the Rule could be validly applied to tax a school newspaper like *The Alligator*, especially if such a publication was clearly a newspaper despite its failure to meet the criteria of the rule. Because of the district court's uncertainty on this issue, it certified the following question to the Supreme Court of Florida:

Is Rule 12A-1.08, Fla. Admin. Code, which requires taxation of all publications which are not sold but are given away, unconstitu-

13. Because a second-class mailing permit is available only to newspapers with a paid circulation, the primary "flaw" with *The Alligator* was the fact that it was a publication with free circulation. The postal regulations concerning second-class mailing were invalidated by a federal district in *The Enterprise, Inc. v. Bolger*, 582 F. Supp. 228 (E.D. Tenn. 1984). In that case, the court held that discrimination between paid and free-distribution newspapers was arbitrary and capricious, in violation of the first amendment protection of free speech and the fifth amendment equal protection clause.


tional as applied to The Alligator and similarly situated school publications?\(^{16}\)

The supreme court's answer to the question was yes.\(^{17}\) It held that The Alligator was indeed a newspaper within the meaning of the statute,\(^ {18}\) and should, thus, be exempt from sales tax. The court's decision discussed the need to differentiate between shoppers and newspapers, in that the main purpose of a shopper is the widespread distribution of advertising and not news.\(^ {19}\) The court stated that Rule 12A-1.08 could be a valid tool in distinguishing between shoppers and newspapers but, that as it is now written, the rule creates an irrebuttable presumption that a free publication cannot be a newspaper, as a matter of law, even if such publication is factually a newspaper within the plain meaning of the Florida statutes.\(^ {20}\) It is this irrebuttable presumption which renders the rule void as an invalid exercise of delegated legislative authority.\(^ {21}\)

Therefore, the sales tax imposed upon The Alligator was improper, as the publication factually qualified as a newspaper for the purpose of the tax exemption. The supreme court's ruling forced the D.O.R. to amend 12A-1.08 to include some way for publications distributed free-of-charge to rebut the presumption that they are advertising circulars rather than newspapers. The court's decision is perfectly

\(^{16}\) 454 So. 2d at 31.

\(^{17}\) 473 So. 2d at 1295.

\(^{18}\) The court relied on the common sense of definition of newspaper, stating that the statutes "had reference to the natural, plain and ordinary significance of the word newspaper — the understanding of the word newspaper in general and common usage." Gasson v. Gay, 49 So. 2d 525, 526 (Fla. 1950). The court also looked to other jurisdictions for support in its finding. For example, the Massachusetts Supreme Court decision of Greenfield Town Crier, Inc. v. Commissioner of Revenue, 385 Mass. 692, 433 N.E.2d 898 (1982). The Massachusetts court in Town Crier held that "[T]he fact that a newspaper is not a 'publication' until it is published does not support the conclusion that a paper, which is a 'newspaper' upon publication is anything less than a 'newspaper' before publication." 385 Mass. at 695-696, 433 N.E.2d at 900.

\(^{19}\) See supra note 18.

\(^{20}\) A rule which enlarges, modifies or contravenes statutory provisions constitutes an invalid exercise of delegated legislative authority. State Dep't of Business Regulation v. Salvation Limited, Inc., 452 So. 2d 65 (Fla. 1st Dist. Ct. App. 1984). Thus, when the administrative body, the D.O.R., created a rule which taxed a newspaper, The Alligator, it unconstitutionally used its delegated rule-making authority.
reasonable. It would defy logic to hold that a publication sold for a
penny could be a newspaper, while one given away free could not, as a
matter of law. The question of whether a publication is indeed a news-
paper is essentially a question of fact, not of law.

Hotel Bed Tax: *Golden Nugget Group v. Metropolitan Dade
County.* \(^{22}\)

Section 212.057 of the Florida Statutes (1983), known as the
"Convention Development Tax" Act authorizes certain counties to levy
a three percent (3%) bed tax on payments made to rent, lease or use
any living quarters or accommodations for a period of thirty (30) days or
less. The Act only applies to counties which have adopted home rule
under the Florida Constitution of 1885, \(^{23}\) as preserved by the Constitu-
tion of 1968. \(^{24}\) While Dade, Hillsborough and Monroe Counties qualify
for home rule, only Dade county has adopted a home-rule charter.
Thus, only Dade County could utilize the "Convention Development
Tax".

The purpose of the Act is to provide counties with funds to im-
prove the largest existing publicly owned convention center in the
county's most populous municipality. Dade County, eagerly seeking to
take advantage of a revenue making opportunity, enacted ordinance 83-
91, which "implemented the tax and provided for the collection, distrib-
ution and application of the revenues." \(^{25}\)

Naturally, hotel and motel operators in Dade County were not
pleased with the prospects of an additional tax on their customers.
Therefore, they filed suit seeking a determination that the Act, and the
Dade County Ordinance enacted pursuant to the Act, were invalid and
unconstitutional. The trial court agreed that the Act was invalid, be-
cause it included no mechanism for tax collection and by implication
provided that the revenues would be segregated and paid to municipalities in
contravention of Florida Statutes. \(^{26}\) The court also held that the
ordinance was invalid because it authorized the collection of tax by the
Dade County Tax Collector which caused a conflict with section

\(^{22}\) 464 So. 2d 535 (Fla. 1985).
\(^{23}\) FLA. CONST. art. VIII, §§ 10, 11 and 24 (1885).
\(^{24}\) FLA. CONST. art. VIII, § 6(e) (1968); see FLA. STAT. § 125.011(1) (1985).
\(^{25}\) FLA. STAT. § 212.057 (1983).
\(^{26}\) FLA. STAT. § 212.230 (1983).
212.18, Florida Statutes (1983).  

Dade County appealed the trial court's decision to the Third District Court of Appeal.  The district court did not agree with the trial court's conclusion concerning the validity of the Act "because the statute was expressly made a part of chapter 212, which includes a comprehensive scheme for the collection, administration, and enforcement of all taxes imposed by the chapter."  However, the district court refused to allow Dade County to assess the "bed tax" stating that the tax must, instead, be collected by the State Department of Revenue, and paid to the state treasurer.  The state treasurer would then return the revenues to Dade County when the county was ready to make appropriations for improvements on the largest publicly owned convention center in Miami.  

While the district court held Dade County's ordinance to be invalid, its decision was, in effect, a victory for the county over the hotel owners. The district court held that the Act itself was constitutional and was an appropriate means to enhance the tourist trade in three tourist oriented counties. The defect found by the court of appeal concerned only the technical means for collecting the tax. Thus, the hotel and motel owners sought review by the Florida Supreme Court, in the hope that the supreme court might find the bed tax itself to be unconstitutional.  

Unfortunately (?) for the hotel owners, the supreme court was in total agreement with the Third District Court of Appeal.  Furthermore, in the interim, the legislature had amended section 212.057 to

27.  Section 212.18 of the Florida Statutes (1983) requires that the state be the collector of the convention development tax. More specifically, § 212.18(2) states that "the department shall administer and enforce the assessment and collection of the taxes, interest and penalties imposed by this chapter." The convention development tax, which falls under § 212.057, is clearly within chapter 213 of the Florida Statutes. There is, therefore, no authority which provides for collection of the tax by the Dade County Appraiser.  

29.  Id. at 518.  
30.  Id. at 519.  
31.  Miami is the largest city in Dade County. The Act requires that the funds be used to develop the convention center in the largest city of the home-rule county in question.  FLA. STAT. § 213.057 (1985).  
32.  448 So. 2d at 520.  
33.  464 So. 2d at 535, 537.
require the D.O.R. to collect the bed tax.\textsuperscript{34} Thus, anyone renting, leasing or using accommodations for less than thirty days in Dade County can expect to pay a three percent bed tax. Interestingly enough, if the revenues generated by the bed tax are used properly, Dade County’s attraction as a convention center will be enhanced, which will in turn enhance the business of the hotel owners in Dade County. It is possible that, at least in terms of long-range potential, the best thing that could have happened to Dade County hotel operators was that they lost this case.

\textbf{Ad Valorem Tax on Household Goods of Nonresidents: \\
\textit{Golding v. Herzog}.\textsuperscript{35}}

Tangible personal property\textsuperscript{36} is subject to an ad valorem tax in Florida. However, this ad valorem tax is not applied to personal effects used for the creature comforts of the owner, rather than for commercial purposes.\textsuperscript{37} Thus, personal clothing and household furnishings are all exempt from ad valorem taxation.\textsuperscript{38} The Department of Revenue has not actually contested that exemption as applied to Florida residents.\textsuperscript{39}

On the other hand, the D.O.R. has promulgated an administrative rule\textsuperscript{40} which states in part that household goods and personal effects which belong to nonresidents are subject to ad valorem taxation.\textsuperscript{41} The D.O.R., an ever vigilant watchdog of constitutional rights, reasoned that the legislature could not constitutionally exempt household goods

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\textsuperscript{34} See 1984 FLA. LAWS 84-67; FLA. STAT. § 212.057 (1985).
\textsuperscript{35} 467 So. 2d 980 (Fla. 1985).
\textsuperscript{36} FLA. STAT. § 192.001(11) (1985) establishes the definition of “personal property.” The statute distinguishes between household goods and tangible personal property. Household goods are defined as “wearing apparel, furniture, appliances, and other items ordinarily found in the home and used for the comfort of the owner and his family.” The statute provides further that household goods are not held for commercial use or resale. § 192.001(11)(a).
\textsuperscript{37} FLA. STAT. § 192.001(11)(a), (d) (1985).
\textsuperscript{38} Department of Revenue v. Markham, 381 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1979).
\textsuperscript{39} 467 So. 2d at 981.
\textsuperscript{40} FLA. ADMIN. CODE rule 12D-7.02.
\textsuperscript{41} Id.
\end{flushright}
and personal property from ad valorem taxation, since the Florida Constitution provides for a means of taxing "all property." Such enlightened thinking gave rise to an administrative rule which provides that household goods and personal effects belonging to persons not making their permanent home in Florida are not exempt from ad valorem taxation, even though no such tax is imposed upon Florida residents. Presumably, Florida residents were allowed the exemption, not because of any constitutional provision, but because the D.O.R. decided that the administration of an ad valorem tax on household goods of Florida residents would be a revenue loser due to the excessive administrative costs from such an effort.

Interestingly enough, the First District Court of Appeal in the case of Department of Revenue v. Markham, had already determined that household goods should be exempt from ad valorem taxation irrespective of the nonresident status of their owner. Unfortunately, the Florida Supreme Court quashed the Markham decision on the ground that "the lawsuit was improperly commenced by one who lacked legal standing." The supreme court's refusal to accept Markham left open the possibility that ad valorem taxes would be applied against nonresidents, which is exactly what happened in Collier County.

The Collier County tax appraiser assessed an ad valorem tax against the household property of Peter W. Herzog, a Missouri resident, even though the assets taxed were not used for commercial purposes. Herzog contested the tax at trial, but the trial court approved the tax, granting summary judgment to the appraiser. The taxpayer appealed the trial court's decision to the Second District Court of Appeal.

The district court determined that, even though Markham had been quashed because of a defect in standing, the reasoning used by the First District in its Markham decision was perfectly sound. In Markham, FLA. CONST. art. VII, § 4 (1968) provides: "By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation."

The D.O.R. cited Article VII, section 3(b) of the Florida Constitution for the proposition that the "household goods" exclusion only applied to heads of families residing in Florida. The exclusion can be limited by the state, but in no even can the exclusion be less than one thousand dollars.

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44. 467 So. 2d at 983.

45. 381 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1979).

46. Department of Revenue v. Markham, 396 So. 2d 1120, 1121 (Fla. 1981).

47. 437 So. 2d at 227.
ham, the First District Court of Appeal extensively discussed the history of taxation of household goods in Florida noting that "when section 200.01, Florida Statutes (1965), was amended by the legislature in 1967 to exclude household goods and personal effects used for the comfort of the owner and for non-commercial purposes from the definition of 'tangible personal property,' such goods and effects were effectively eliminated from the operation of the taxing statutes, regardless of residency of the owner." Following the reasoning set forth in Markham, the Second District Court of Appeal held that Herzog's personal effects in Florida are not subject to ad valorem taxation.

After rendering its decision in favor of Herzog, the district court certified the question of whether or not household goods and personal effects are subject to ad valorem taxation. The supreme court accepted jurisdiction over the matter, believing the issue to be of great public importance.

The supreme court's decision on the certified question was not surprising. The court agreed with the district court's conclusion that all personal effect property is exempt from ad valorem taxation. The supreme court's willingness to adopt the rationale of the First District in Markham, even though Markham was quashed, indicates that the court was hoping that a case like Herzog, in which the taxpayer had proper standing, would arise, and the issue of ad valorem taxes on household goods would be resolved. Clearly, after Herzog, all non-commercial household property is exempt from ad valorem taxation.

Taxpayer Standing: North Broward Hospital District v. Fornes

To some extent, every taxpayer has a stake in every governmental action. After all, taxpayers ultimately pay the bills. However, the fact that a person is a taxpayer, in and of itself, is generally not enough to give that taxpayer standing to challenge the government's action in a

48. Id.
49. Id.
50. Id. at 226.
51. 467 So. 2d at 981. The supreme court accepted jurisdiction under article V, section 3(b)(4) of the Florida Constitution.
52. 467 So. 2d at 982.
53. Id.
54. 476 So. 2d 154 (Fla. 1985).
court of law. In fact, most courts have held that a taxpayer must show some special injury, distinct from other taxpayers, in order to have standing. The only exception to the special injury requirement is where the taxpayer raises a constitutional challenge to the exercise of governmental taxing and spending powers.

Therefore, when Sharon Fornes, a taxpayer, sued the North Broward Hospital District, a special taxing district, and alleged that the District acted illegally in awarding construction contracts not to the lowest bidder, but instead to favored companies, the question of taxpayer standing was raised. Ms. Fornes contended that she did not need to show any special damages in order to bring her suit, and that the fact that her taxes would be higher because of the district's actions should be sufficient to give her standing. The trial court disagreed with Fornes, and dismissed her suit because she lacked standing.

However, the Fourth District Court of Appeal reversed the trial court's decision, and held that Fornes did, indeed, have standing to sue to prevent the illegal expenditure of public funds. Yet, the district court decided that the issue was of great public importance and therefore merited certification to the Supreme Court of Florida.

The supreme court quashed the district court's decision, holding that a mere increase in taxes does not confer standing upon a taxpayer to challenge a governmental expenditure. The court emphasized that "in the event an official threatens an unlawful act, the public by its representatives must institute proceedings to prevent it, unless a private person can show a damage peculiar to his individual interests in which case equity will grant him succor."

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55. E.g., Henry L. Doherty & Co. v. Joachim, 146 Fla. 50, 200 So. 238 (1941), holding that a mere increase in taxes does not confer standing upon a taxpayer to challenge a governmental expenditure.

56. E.g., Richman v. Whitehurst, 73 Fla. 152, 74 So. 205 (1916), holding that a private person must show some special damages in order to sue a public official who threatens an unlawful act. See also, McFarland v. Atkins, 594 P.2d 758 (Okla. 1978), and Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979).


58. Fornes pointed to the fact that the district was granting contracts for bids higher than necessary. She contended that the additional cost of the contracts would cause increased taxes to cover the costs of the contracts.


60. Id. at 586.

61. 476 So. 2d at 154.

62. Id. at 155.
Fornes had not raised a constitutional issue upon which to base her claim of standing.\textsuperscript{63}

While the court justified its decision by pointing to the importance of allowing state and county governments to exercise lawfully their taxing and spending authority without undue hinderance,\textsuperscript{64} it is important to note Justice Ehrlich's dissent in this case.\textsuperscript{65} The justice discussed several prior Florida decisions which allowed taxpayers to have standing upon a showing that a governmental agency had improvidently used public funds.\textsuperscript{66} Such allegations constitute special injury to all taxpayers.\textsuperscript{67} Otherwise, the justice argued, governmental agencies which ignored or violated the law would be insulated from accountability to the citizens whose trust they violate.\textsuperscript{68}

Justice Ehrlich's argument should be noted by the court in future questions concerning taxpayer standing, as it is, in this writer's opinion, the better position for two basic reasons. First, the supreme court stated that its aim was to protect the "lawful application"\textsuperscript{69} of the taxing and spending powers of state and county governments from being unduly hampered. In the \textit{Fornes} case, on the other hand, a taxpayer was contesting an arguably unlawful application of the Hospital District's spending powers. Secondly, the supreme court majority opinion stated that public officers should bring suit against other public officials who act improvidently. Public servants often do not act against other public servants, which would leave taxpayers as a whole without any

\begin{itemize}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id. at 156.}
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{See, e.g., Peck v. Spencer, 26 Fla. 23, 7 So. 642 (1890); Chamberlain v. City of Tampa, 40 Fla. 74, 23 So. 572 (1898); Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1912).}
\item \textsuperscript{67} While the cases cited by Justice Ehrlich in note 66, \textit{supra}, are all of older vintage, it should be noted that several states have allowed taxpayer standing without a showing of damages peculiar to a particular taxpayer. For example, the Minnesota Supreme Court has held that the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied; a taxpayer, suing only as a taxpayer, has standing to challenge administrative action which is unlawful. McKee v. Likins, 261 N.W.2d 566 (Minn. 1977). The Georgia and Nebraska Supreme Courts have also allowed taxpayers standing solely on the basis that they were taxpayers. Brock v. Hall County, 239 Ga. 160, 236 S.E.2d 90 (1977); Cunningham v. Exxon, 202 Neb. 563, 276 N.W.2d 213 (1979).
\item \textsuperscript{68} 476 So. 2d at 156.
\item \textsuperscript{69} \textit{Id. citing Paul v. Blake, 376 So. 2d 256, 259-260 (Fla. 3d Dist. Ct. App. 1979).}
\end{itemize}
recourse. Thus, the supreme court’s opinion in *Fornes*, in holding that a taxpayer must show special injury other than an illegal act by a governmental unit, in order to have standing, is much too broad. There have to be circumstances in which a private citizen can force a public agency into accountability, and *Fornes* should have been such a case. 70

**Enforcement and Review: Redford v. Department of Revenue** 71

Another question resolved by the Florida Supreme Court in 1985 was whether or not the Department of Revenue has the authority to overrule or challenge decisions of a County Property Appraiser or Property Appraisal Adjustment Board. 72 Generally, the County Property Appraiser (appraiser) is allowed to appeal decisions of the Property Adjustment Board (board). 73 However, in *Redford* the appraiser refused to appeal the board’s decision, so the Department of Revenue (D.O.R.) chose to bring an action itself.

Basically, the facts of *Redford* are quite simple. When the D.O.R. reviewed the appraiser’s assessment roles for 1979, 74 it decided that some twenty-five leaseholds in Miami International Airport should not be exempt from real property taxes. In order for such leaseholds to be exempt, they must be used for some governmental, municipal or public purpose. 75 The D.O.R. determined that the leaseholds, while on Dade County property, 76 were used for commercial, rather than government-

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70. One of the major problems with the *Fornes* decision is that it is hard to imagine a taxpayer who would be able to show the special injury required by the court. After all, Ms. Fornes lived in the North Broward Hospital District. Clearly, her tax burden was more specifically affected than a taxpayer living in other parts of Broward County, or other parts of Florida. It is unfortunate that Florida views taxpayer standing on a plane equal to that of the United States federal government, which has consistently dismissed taxpayer suits for lack of showing special injury. *See*, e.g., Public Citizen, Inc. v. Simon, 539 F.2d 1347 (D.C. Cir. 1976). Florida does not need to protect itself from taxpayer suits to the same extent that the federal government does. While some protection is needed, the Court in *Fornes* seems to have completely overlooked the need to protect private citizens from the impropriety of public officials.

71. 478 So. 2d 808 (Fla. 1985).

72. *Id.*, at 810.


74. This review was conducted in accordance with *Fla. Stat.* § 193.144 (198:)


76. Certain leaseholds on property owned by a county are exempt under *Fla. Stat.* §§ 125.019 and 159.15 (1985). Dade County owns the Miami International Airport.
tal purposes. The appraiser agreed with the D.O.R.'s determination, and forwarded assessment rolls to the board. The board, however, refused to accept the D.O.R.'s position, and continued to treat the leaseholds as tax-exempt. The D.O.R. asked the appraiser to appeal the board's decision, but the appraiser did not make an appeal. Thus, the D.O.R. was forced to file its own suit in the circuit court.

The circuit court granted the D.O.R.'s motion for summary judgment, and held that the leaseholds were not tax-exempt. On appeal, the District Court of Appeal for the Third District agreed that the leaseholds should be placed on the tax rolls, but vacated the trial court's conclusion that the leaseholds were not tax exempt, since the actual taxpayers were not present to litigate their claims. 77 The district court, instead, granted the affected taxpayers sixty days to challenge the D.O.R.'s assessment.

At the supreme court, the board argued that only taxpayers or the appraiser should be allowed to challenge a decision by the board. 78 The court rejected this argument on three grounds. First, the appraiser had statutory authority 79 to appeal the D.O.R.'s initial decision that the property was taxable, but he chose, instead, to agree with the D.O.R., and therefore should have appealed the board's decision when the D.O.R. requested such an appeal. Secondly, the board acted without authority when it chose to defy both the D.O.R. and the appraiser. 80 Finally, the D.O.R. has statutory authority 81 to "bring actions at law or equity to enforce any lawful order, rule, regulation or decision . . . lawfully made under the authority of the tax laws." 82

As to the merits of the D.O.R.'s assessment, the supreme court, like the district court, refused to make a determination about the actual status of the leaseholds until the taxpayers were actually before the court. 83 The court was mildly upset with the D.O.R. for failing to include the appropriate taxpayers in its suit; suing the taxpayers would have been much more efficient as all parties would have been before the court at one time, allowing for a resolution of the merits of the case as

78. 478 So. 2d at 811.
80. 478 So. 2d 808, 811.
82. 478 So. 2d at 811.
83. Id.
well as its procedural propriety.\textsuperscript{84}

All in all, the supreme court rendered the correct decision in a case which was rather poorly handled by all parties involved. It should be noted that, for all practical purposes, the \textit{Redford} scenario can only arise in a situation in which the appraiser changes his position mid-stream and refuses to appeal a board decision which is pro-taxpayer.\textsuperscript{85}

\textbf{Conclusion}

In conclusion the Florida Supreme Court's 1985 decisions on taxation can be generally be characterized as logical and well-reasoned. However, the court should revisit its determination in \textit{Fornes}\textsuperscript{86} that no taxpayer can ever have standing absent a showing of special injury, or some constitutional claim. The court must adopt a policy which allows taxpayers to have standing in situations where a denial of taxpayer standing would totally insulate governmental units from having to account for their allegedly illegal activities.

\begin{itemize}
\item \textsuperscript{84} The court stated "'[p]arenthetically, we add that it would have been preferable from the standpoint of judicial economy for the department to have included the affected taxpayers in its suit. This would have permitted the circuit court to reach a judgment on the merits which would have bound all interested parties.' \textit{Id.}
\item \textsuperscript{85} After all, taxpayers themselves will appeal a decision disfavorable to them. The Department of Revenue, on the other hand, would never appeal a decision in its favor. The \textit{Redford} case can only arise when the property appraiser refuses to appeal a decision in favor of a taxpayer, after he has previously adopted the D.O.R.'s position.
\item \textsuperscript{86} The court should look to the progressive standards of taxpayer standing which have been established by various other states. \textit{See supra} note 67.
\end{itemize}
Torts
Paul R Joseph*

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I. Introduction

Throughout the law there are powerful forces which are resistant
to change. The need for continuity and stability, the need to be able to
plan one's actions with some assurance as to the outcome of proposed
courses of conduct, argue for the status quo. These forces are at work

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ghram, Jr., for his assistance in the preparation of this article.
in the area of torts (partly because of the need to insure against loss), but these stabilizing forces are weaker than in some other areas of law. In general, people do not plan accidents (which makes up a large part of modern tort law) and the judicial response to them has tended to be somewhat fluid. Change seems to come more easily in the tort field than in others as society wrestles with human interactions gone wrong, which demand resolution.

At times it may still be debated whether there is tort law (suggesting a coherent body of law with some unifying principle) or whether there is merely the law of torts (a disparate group of actions lumped together for convenience as much as for any other reason). While this debate is not a wholly useful one, it does suggest a perception that torts seems to change, often very quickly, and at times in seemingly contradictory directions. To some degree, this perception is correct. Courts are confronted daily with new situations and questions in a context where they are less constrained by precedent and history than they might be when dealing with a question arising in some other area of law. We see in any study of torts, the attempt to react to a changing world, and the attempt to balance competing interests following situations of unplanned and unexpected tragedy resulting in often horrible injury to the lives and limbs of people.

In one year no court is able to examine all or even most aspects of an area as broad and diverse as torts. Yet, many different issues are addressed each year. The Florida Supreme Court, for example, examined issues as varied as the duty not to cause emotional distress and the meaning of a statute concerning injuries caused by dogs. Thus, a survey such as this, taking, as it were, a cross section of current issues, may prove valuable not only for the practitioner who wishes to be aware of the latest developments, but also for those attempting to chart the future course of the law of torts in Florida.

II. Intentional Infliction Of Emotional Distress

The "new" tort\(^2\) of intentional infliction of emotional distress was

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2. "It is time to recognize that the courts have created a new tort. It appears, in one disguise or another, in more than a hundred decisions, the greater number of them within the last two decades." Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874 (1939). Leading "early" cases such as Wilkinson v. Downton, 2 Q.B. 57, 66 L.J.Q.B. 493 (1897), in which defendant falsely told plaintiff...
well-established in Florida before this year. Every district court of ap-
peal, except the Second District, had recognized it.³ Yet, although giv-

that her husband had been in a terrible accident and was lying injured in the road, pointed the way. But, as late as 1934, the RESTATEMENT continued to reject any protec-
tion for intentionally - caused emotional distress, with the exception of that caused by assault, false imprisonment or that caused by a common carrier to its passengers, in recognition of the special responsibility of such carriers toward their passengers. RE-
STATEMENT (SECOND) OF TORTS § 46 (1948 Supp.).

3. See Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. 1st Dist. Ct. App. 1979), in which an employee of a credit company, in an effort to locate the plain-
tiff, called plaintiff's mother, represented herself as an employee of a hospital and stated that plaintiff's children had been involved in a serious accident. The mother supplied plaintiff's address and communicated the content of the call to plaintiff. This resulted in a frantic seven-hour attempt by phone to hospitals and police to locate his supposedly injured children until he finally confirmed that the information was false. The jury awarded both compensatory and punitive damages and the district court of appeals affirmed, holding, "[W]e conclude that there is in Florida no bar to an inde-
pendent action for intentional infliction of severe mental distress when the conduct al-
ledged is beyond all bounds of decency . . . [A]s stated, Ford Motor Credit's conduct falls within that description." Id. at 960. The court certified the issue to the Florida Supreme Court, but certiorari was dismissed.

In Dominguez v. Equitable Life Assurance Soc'y of the United States, 438 So. 2d 58 (Fla. 3d Dist. Ct. App. 1983), an employee of defendant insurance company falsely represented to plaintiff that plaintiff's eye doctor had stated in a letter that plaintiff’s eyes were in good condition and that plaintiff was not any longer disabled. Building upon this lie, the employee told plaintiff that he was no longer covered under the insur-
ance policy and attempted to have plaintiff sign a paper to that effect. The court of appeals held that an action could be maintained on those facts. Id. at 61. It then re-
versed the order of the trial court dismissing the complaint for failure to state a cause of action. Id. at 64.

In Scheur v. Wille, 385 So. 2d 1076 (Fla. 4th Dist. Ct. App. 1980), where a funeral home, knowing that the deceased was Jewish, nevertheless embalmed the body, the court of appeals acknowledged the existence of the action, and reversed a summary judgment which had been entered by the trial court in favor of the funeral home, re-
manding the case. Id. at 1078.

In Food Fair, Inc. v. Anderson, 328 So. 2d 150 (Fla. 5th Dist. Ct. App. 1980), in which plaintiff was terminated from her employment after being required to take poly-
graph tests in regard to thefts which had taken place, the court acknowledged the exist-
ence of the action while concluding that the particular facts did not demonstrate out-
rageous conduct as required. Id. at 153.

By contrast, in Gmeur v. Garner, 426 So. 2d 972 (Fla. 2d Dist. Ct. App. 1982) (per curiam) (rehearing partly granted and partly denied 1983), in which plaintiff, an employee of Hillsborough Community College, complained of alleged sexually offensive remarks and propositions from the college president, the court held that the tort was not recognized in Florida. Id. at 973. On motion for rehearing, the court granted the motion to the extent of certifying the question to the Florida Supreme Court a a matter
ing hints that it would recognize the tort,\textsuperscript{4} the issue was not finally decided by the Florida Supreme Court until this year,\textsuperscript{5} when \textit{Metropolitan Life Insurance Co. v. McCarson}\textsuperscript{6} was decided.\textsuperscript{7}

In \textit{McCarson}, a group insurance policy had been issued by the defendant which covered the employees of the plaintiff's paint and body shop and the plaintiff's wife. Sometime later it was discovered that the wife had Alzheimer's disease. The defendant first claimed the disease was a preexisting condition for which no payment was due. After a lawsuit by McCarson, however, the defendant was found to be in breach of contract and was ordered to continue payments under the policy. Eventually, the plaintiff's wife needed full-time nursing care.

of great public importance, but otherwise denied it. \textit{Id.} at 975.

4. See, e.g., \textit{Slocum v., Food Fair Stores of Fla., 100 So. 2d 396 (Fla. 1958)}. The court noted a "strong current of opinion in support of such recognition [of the tort]," \textit{Id.} at 397, and carefully distinguished a supposed precedent against recovery, \textit{Mann v. Roosevelt Shops, Inc., 41 So. 2d 894 (Fla. 1949)}, as a case dealing only with "an action in defamation for injury to reputation as opposed to peace of mind." \textit{Id.} The court then declined to address this particular question, because the facts as presented would not have met the requirements that the conduct be likely to cause severe emotional distress. \textit{Id.}

In \textit{Slocum}, a shopper in a food store asked the price of an item and was told by an employee in essence that he would not help her because she smelled. The conduct, although insulting and rude was, essentially, no more than "vulgarities obviously intended as meaningless abusive expressions." \textit{Id.} at 398. The court noted that this action would hold only if the conduct or words are "calculated to cause 'severe emotional distress' to a person of ordinary sensibilities, in the absence of special knowledge or notice." \textit{Id.} Thus, it did not have to decide whether the tort would be recognized upon properly pleaded facts.

5. "We have skirted that issue [recognition of the tort] in previous cases, finding it not to be directly before the Court." Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277, 278 (Fla. 1985). Besides \textit{Slocum, see supra} note 4, the court cited two other cases in which the issue had been "skirted". They are: \textit{Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950)} (en banc), in which the Florida Supreme Court recognized an action for emotional distress based upon the "tortious interference with rights involving dead human bodies," and \textit{La Porte v. Associated Indeps., Inc., 163 So. 2d 267 (Fla. 1964)}, in which mental suffering was held to be a proper element of damages caused by the malicious killing of the plaintiff's dog in his presence. Both of these cases stand for no more than that a malicious act which interferes with some other legally-protected interest of the plaintiff permits recovery for the proximately caused mental suffering of the plaintiff as well. Neither can be read to decide whether recovery is allowed when the only interest of the plaintiff involved is the interest in freedom from intentionally-caused mental distress.

6. 467 So. 2d 277 (Fla. 1985).

7. Jurisdiction existed due to conflict among the circuits. \textit{Fla. Const.} art. V. § 3(b)(3).
The defendant was liable for such care until the wife became entitled to Medicare. The defendant requested proof that the wife was not eligible for Medicare but received no answer. The defendant thereupon stopped its payments. The full-time nursing care had to be discontinued.\(^8\) Plaintiff\(^9\) sued once again, but during the pendency of the litigation, his wife had to be taken from her home and placed in a nursing home. Her condition deteriorated and she died of a heart attack a few months later.

The plaintiff won at trial.\(^10\) The trial court upheld all but the award for the wife’s emotional distress while living.\(^11\) The Fourth District Court of Appeals upheld the award based upon intentional infliction of emotional distress and did not reach the issues raised concerning breach of contract and bad faith.\(^12\)

The Florida Supreme Court held that the tort of intentional infliction of emotional distress was recognized in Florida,\(^13\) and expressly disapproved *Gmeur v. Garner*,\(^14\) which had held the opposite. The court gave neither reason nor analysis for its decision.\(^15\) The supreme court may have been relying on the reasoning of the Fourth District Court of Appeals, which basically argued, first, that the very cases cited later by the supreme court as having “skirted the issue”\(^16\) had actually “implic-
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itly approved an action for intentional infliction of emotional distress upon sufficient facts." 17 Finally, the Fourth District Court of Appeal noted that "there is a need for the recognition of such an action to control intentionally harmful conduct which would otherwise go unpunished, and which, in cause and effect, can hardly be distinguished from other intentional torts such as assault." 18

It may well be that the supreme court felt no extensive discussion of the reasons for its decision was necessary due to the wide acceptance of the emotional distress doctrine throughout Florida and the nation. 19 It also seems probable that earlier cases such as Slocum 20 had strongly suggested an implicit recognition of the action. Interestingly, the supreme court could have chosen to duck the issue of recognition of the tort just as it did in Slocum because, as in Slocum, the facts in McCarson were held not to meet the requirements for the emotional distress action. 21 The supreme court even noted the requirement that the act of a defendant must be "extreme and outrageous." 22 In McCarson, how-

17. 429 So. 2d 1287, 1290 (1983). The Fourth District also relied on dicta from a previous supreme court case, Gilliam v. Stewart, 231 So. 2d 593 (1974). Although the case actually dealt with negligently caused emotional distress, and the certified question was whether the impact rule should be abolished, the supreme court focused its major attention on the fact that the Fourth District Court of Appeals had openly "overruled" decisions of the Florida Supreme Court. In Gilliam, the impact rule was upheld and the opinion is a restrained reprimand of the Fourth District Court. Perhaps for this reason, Gilliam is not cited in the supreme court's opinion in McCarson.

18. Id. at 1291.

19. Restatement (Second) of Torts § 46 (1964) states:

Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress,

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any such person who is present at the time, if such distress results in bodily harm.

20. Supra note 4.

21. 467 So. 2d 277, 279 (Fla. 1985). A later case, in which a cause of action was stated, and which was affirmed by the supreme court on the authority of Metropolitan Life, was Crawford and Co. v. Dominguez, 467 So. 2d 281 (Fla. 1985).

22. See generally Restatement (Second) of Torts § 46 (1965).
ever, the defendant company had a right under the policy to demand proof that Mrs. McCarson was not eligible for Medicare. Defendant did no more than it had a legal right to do and the means used were reasonable. Thus, the court felt the acts were "privileged under the circumstances."  

What is clear from this case is that the action for intentional infliction of emotional distress as outlined in the Restatement has been formally adopted in Florida. Although this result is not startling, when read in conjunction with other cases decided this year which expanded recovery for negligently inflicted emotional distress, it can be seen that the push to gain recognition for the right to be free from tortiously-caused emotional distress has moved forward significantly in Florida during 1985.

III. Negligent Infliction Of Emotional Distress

The question "duty" asks, in essence, is whether the defendant was under any legal obligation to take care for the safety of the plaintiff. When affirmative acts by a defendant are involved, it is often safe to say that a duty will be owed by a defendant to a plaintiff when the defendant "as a reasonable person, [would] foresee that his conduct will involve an unreasonable risk of harm to . . . [the plaintiff]. . . . [The defendant] is then under a duty to [the plaintiff] to exercise the care of a reasonable person as to what he does or does not do."  

Theoretically, it should not matter whether a defendant creates foreseeable risks of physical or mental harm to the plaintiff. If any type of harm is foreseeable, a duty of due care would arise. However, although any foreseeable harm could create this duty, physical and

23. *McCarson*, 467 So. 2d at 279. The supreme court went on to discuss the breach of contract and bad faith issues, but they are beyond the scope of this article.

24. See *supra* note 19.

25. See *infra* notes 27-56 and accompanying text.


27. Id. at 358. The notion of duty arising because of foreseeability of harm (which can also be understood as a duty arising out of the relationship between plaintiff and defendant) probably got its start in *Heaven v. Pender*, 11 Q.B.D. 503 (1883), and can also be recognized in cases such as *Donoghue v. Stevenson*, App. Cas. 562 (H.L. 1932), and the well known *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928), in which no injury to the plaintiff was foreseeable from the act of defendant in shoving another passenger at the other end of the platform, and therefore no duty was owed to the plaintiff as to that act.
mental harms have always been treated differently. For a variety of reasons, courts have been unwilling to handle mental harms as they do physical harms, and have, instead, limited the duty owed in relation to foreseeable mental harms with special rules and restrictions. The rule in Florida had been that there could be no recovery for emotional distress injuries (mental harms) unless the plaintiff suffered some physical impact from defendant’s conduct. Thus, if defendant’s negligently-driven automobile careened toward plaintiff, stopping one foot from him, causing plaintiff to have a heart attack from fright, there could be no recovery, since there was no physical impact. Many jurisdictions allowed recovery in these circumstances under the more liberal zone-of-danger rule in which a plaintiff within the zone of physical risk from defendant’s negligent conduct could recover when that conduct caused emotional distress and resulting physical injuries, even absent any physical impact upon the plaintiff. Under a zone-of-danger theory, it also becomes possible to recover damages for emotional distress and resulting physical injuries from observing physical injuries to another as long as the plaintiff was in the zone of danger. It should be noted, however, that the distance from the accident becomes crucial. Unless the plaintiff is close enough to be within the zone of danger, recovery will still be denied.

28. Absent an assault, there was no recovery until recently even for intentionally-caused emotional distress. Florida did not finally adopt the tort until last year. See supra notes 2 to 26 and accompanying text. Early influential cases also refused recovery for negligently-caused emotional distress. For example, Spade v. Lynn and B.R. Co., 168 Mass. 285, 47 N.E. 88 (1897) refused compensation for emotional harm and the physical injuries which that harm caused when defendant forced another passenger off its tram. The court seemed to feel that such distress would only be suffered by overly sensitive plaintiffs and did not warrant compensation. Spade was not finally overruled until 1978 in the case of Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978).

29. In Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974), the supreme court reaffirmed the rule that no recovery could be had for negligently-caused emotional distress, even when the distress produced physical injuries as well, absent physical impact. A thorough dissent by Justice Adkins analyzed the history of the impact rule and the trend away from it.


31. The classic situation would be the mother watching her child at play. The defendant’s negligently-driven car crashes into the child. The mother suffers a heart attack caused by emotional distress. Under the impact rule, the mother would be denied recovery. Under the zone-of-danger rule, the plaintiff might recover or might not depending on whether the plaintiff was standing close enough to the accident to be within the zone of physical danger. A matter of a few feet could make the difference.
In another context, this author has examined the various reasons which have been proposed to explain why recovery for emotional distress should be limited.\(^3^2\) When the various reasons are analyzed, what emerges is a fear that the scope of liability will be so sweeping that the doctrine will get out of control. It is a concern about the inability to set realistic limits to emotional distress recovery that initially led courts to refuse any recovery at all.

As time went by, various limiting rules were devised. The impact rule and the zone-of-danger rule were two of these. There is a similar rule in effect in many, but not all, jurisdictions that no recovery will be permitted for emotional distress unless that distress produced physical injuries or symptoms. Essentially, any such line or limit is arbitrary. By that is meant that it is hard to defend any rule falling short of normal foreseeability as sensible in and of itself. What must be recognized, however, is that these lines are drawn as alternatives to complete denial of the claim by courts which are worried about keeping some reasonable control over the possible spread in the scope of litigation. Historically, the lines have been drawn, little by little, in the direction of allowing more meritorious plaintiffs to recover. The line has been drawn ever nearer to that which would be allowed if normal foreseeability principles were permitted to operate.

Thus, even though each rule is arbitrary in a sense, each must be viewed not as the end, but rather as only an intermediate stop along the way. As a court gains experience with a particular rule and finds that runaway liability is not the result, it relaxes the rule still further. It is possible that emotional or mental injury eventually will be treated no differently than physical injury. If this is the case, it will happen, in most jurisdictions, incrementally.

The impact rule is about dead and the zone-of-danger rule is under attack. While England seems ready to take the leap of faith to pure foreseeability,\(^3^3\) no American jurisdiction has gone quite that far.

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32. Joseph, Dillon's Other Leg: The Extension of the Doctrine Which Permits Bystander Recovery for Emotional Trauma and Physical Injuries to Actions Based on Strict Liability in Tort, 18 Duq. L. Rev. 1 (1979). Many reasons have been used by courts to explain the “no recovery” result, including lack of precedent for the extension (a weak reason which is no longer applied as more and more jurisdictions abandon the older rule), floodgates of litigation (that the courts will be swamped with claims), problems of proof (that mental upset is hard to recognize or measure), fraud (that courts will not be able to tell real from feigned claims), and that duty is lacking (an argument that such injuries are not actually foreseeable).

33. In McLoughlin v. O'Brien, 2 All E.R. 298 (1982), the English House of
Rather, the next wave toward foreseeability in the United States was begun by the California Supreme Court in *Dillon v. Legg.* In *Dillon*, the California Supreme Court considered injuries caused by defendant's negligent driving. Defendant hit Erin Lee Dillon who died. Actions were also brought by Erin's sister and her mother who claimed they were near the scene of the accident, witnessed it, and suffered emotional distress, shock, and related injuries. The trial court granted a judgment for the defendant on the pleadings of the mother's action because she was not within the zone of danger and so could have had no fear for her own safety. The sister's action was allowed to continue because her location was close enough to raise an issue of fact as to whether she was within the zone of danger. Rejecting such incongruous results, and overruling its own prior decision in *Amaya v. Home Ice, Fuel and Supply Co.*, the California Supreme Court abolished the zone-of-danger limitation.

While purporting to adopt a foreseeability approach, the rule of *Dillon* falls short of that, because it created and applied specific requirements for testing foreseeability instead of permitting a case-by-case determination of that issue. While speaking of the three requirements of *Dillon* as mere "factors," it has been pointed out that they have generally been applied as absolute requirements or elements, and that the absence of any one of them has generally resulted in a "no duty" rule being applied. The three factors articulated by the California Supreme Court were:

1. Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
2. Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
3. Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Lords, while considering various factors which might limit recovery in particular cases, adopted a foreseeability approach as the test in emotional distress cases.

34. 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
35. *Id.* at 912, 69 Cal. Rptr. at 75.
38. 441 P.2d at 920, 69 Cal. Rptr. at 80.
Interestingly, as time passed, just what was discussed above came to pass. The California Court modified *Dillon* to permit recovery in some cases even when no physical injuries resulted from the emotional distress.39 Further, later courts adopting the *Dillon* approach fashioned control devices broader than the three factors in *Dillon*. For example, in *Dziokonski v. Babineau*,40 the Supreme Judicial Court of Massachusetts essentially adopted the *Dillon* rule in bystander emotional distress cases, but phrased their rule more broadly to include the situation of a plaintiff who did not actually witness the accident but arrived on the scene while the injured person was still present.41

Within this context of change, this year the Florida Supreme Court considered the impact rule in two cases: *Champion v. Gray*42 and *Brown v. Cadillac Motor Car Division*.43 *Champion* involved an allegation that

Karen Champion, the child of Joyce and Walton Champion, was walking near a roadway when a car driven by a drunk driver left the road, struck the child and killed her. Immediately after the accident, Karen's mother, Joyce, came to the scene and discovered the body of her child. Overcome with shock and grief at the sight of and death of her daughter, Joyce collapsed and died.44

Because there was no impact on the mother, the trial court had no choice but to dismiss the action and the court of appeals had no choice but to affirm. The appellate court took the opportunity to thoroughly review the issue and urged that the impact rule be abolished.45 Although noting that the issue of bystander recovery went beyond mere abolition of the impact rule, since the mother was not in the zone of

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41.
42. 478 So. 2d 17 (Fla. 1985).
43. 468 So. 2d 903 (Fla. 1985).
45. *Id.* at 350.
danger and clearly suffered her injury only because she was affected by seeing her dead child, the court analyzed the justice of the claim as well as of the trend started by the California Supreme Court in Dillon. The appellate court urged the adoption of the Dillon rule. The question was certified to the Florida Supreme Court.

Rethinking its earlier decisions, such as Gilliam, the Florida Supreme Court, while not ignoring the concern about fraud and limitless claims, nevertheless stated:

We now conclude, however, that the price of death or significant discernible physical injury, when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact before a cause of action exists.

The court stressed the narrowness of the decision, specifically noting that a total foreseeability approach (such as that adopted in McLoughlin v. O'Brien) was too broad and not what the court had in mind. The court quoted at length from Dillon, including its three factors, and, in particular, stressed that emotional harm alone could not be compensated without "a causally connected clearly discernible physical impairment [which] must accompany or occur within a short time of the psychic injury."

Interestingly, while purporting to be very narrow, the case is actually broader than Dillon was on its facts and continues to demonstrate how courts become familiar with emotional distress recoveries, feel more comfortable with them, and then expand them ever closer to the full extent of recovery granted to physical injuries alone. For example, the Florida Supreme Court jumped right from the impact rule to Dillon without feeling the need to stop for a few years at the zone-of-danger halfway house. Clearly, the experience of other states with the zone-of-danger rule and with the Dillon rule left the court secure

46. Id. at 354.
47. The certified question was: "Should Florida abrogate the 'impact rule' and allow recovery for the physical consequences resulting from mental or emotional stress caused by the defendant's negligence in the absence of physical impact upon the plaintiff?" Id.
48. Champion, 478 So. 2d at 18-19.
49. Champion, 478 So. 2d at 18-19.
enough that the power of *Dillon* could contain the doctrine and that no more restrictive rule was necessary. Additionally, the court stated that the rule would be applied where the plaintiff either saw, heard, or "arrives on the scene while the injured party is still there." While this makes good sense, it is really the *Dziokonski* extension of *Dillon* and cannot be characterized as a narrow rule. Finally, the court intimated that it might be prepared to go even further, stating:

The English case of *McLoughlin v. O'Brian*, 2 All E.R. 298 (1982), adopting a pure foreseeability rule, allowed recovery when a parent suffered psychic injury upon seeing her child *in the hospital* shortly following an accident. We do not say whether or not we would or would not recognize a claim under such circumstances, but, if so, we would think that this scenario reaches the outer limits of the required involvement in the event.

The court held that "a claim exist[ed] for damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing the injury, is foreseeably injured." Contrast with the facts of *Champion*, are those of *Brown v. Cadillac Motor Car Division*, in which plaintiff Brown struck and killed his mother who had just exited from the car Brown was driving. Defendant, Cadillac, was found to be at fault because of a defective design of the accelerator pedal. Brown did not allege any physical injuries or trauma. Rather, he suffered only psychological upset alone. The court made it clear that no such recovery could be had:

We hold that such psychological trauma must cause a demonstra-

50. *Id.* at 20.

51. *Id.* [Emphasis added]. Importantly, the court explicitly acknowledged that the adopted rule was, essentially, just a control device for the doctrine. "We recognize that any limitation is somewhat arbitrary, but in our view it is necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims." *Id.* Once this is acknowledged, the potential for future modifications and expansions should be obvious.

52. *Id.* The court also emphasized in a footnote: "We reiterate that a claim for psychic trauma unaccompanied by discernible bodily injury, when caused by injuries to another and not otherwise specifically provided for by statute, remain nonexistent." *Id.* at 20 n.4.

53. 468 So. 2d at 903.
ble physical injury such as death, paralysis, muscular impairment, or similar objectively discernible physical impairment before a cause of action may exist. We hold that there is no cause of action for psychological trauma alone when resulting from simple negligence.54

It seems that the supreme court is firm, for the moment at least, in holding the line of recovery at physical consequences of negligently-caused emotional distress (a line at first held firmly and later abandoned in California). The importance of the decisions, however, is not that they do not go the whole way, but rather, how very far they do go. In one step, the Florida Supreme Court has moved into the growing group of courts charting the future for emotional distress recovery in this country.55 The eventual limit of the growth of this doctrine remains to be seen.56

54. Id. at 904. [Footnote omitted].

55. Recently, a number of jurisdictions have adopted some variant of the Dillon rule including Nebraska: James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985); Wisconsin: Garrett v. City of New Berlin, 122 Wis. 2d 223, 362 N.W.2d 137 (1985); Ohio: Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 753 (1983); Montana: Versland v. Caron Transp., 671 P.2d 583 (Mont. 1983); Maine: Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Iowa: Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); and New Jersey: Portee v. Jafee, 84 N.J. 88, 417 A.2d 521 (1980). This does not include cases decided before 1980 adopting the same approach in jurisdictions such as New Hampshire, Massachusetts, Texas, Rhode Island, Arizona, Pennsylvania (plurality), Michigan, Hawaii, and, of course, California which started it all. For a somewhat less enthusiastic view of the doctrine and of Champion v. Gray, see Richmond, Life After Champion: Defending Against Claims of Emotional Distress Stemming From Injuries to Third Parties, 4 TRIAL ADVOC. Q. 43 (1985). Professor Richmond states, “The truly heartening thing about Champion is the willingness of the Court to keep a tight rein on an amorphous and highly questionable cause of action.” Id. at 46.

56. The Florida Supreme Court granted a rehearing limited to the question of whether the cause of action was a derivative one or, by contrast, a separate cause of action. The court stated that the action “is a direct and distinct claim,” Champion v. Gray, 478 So. 2d 17, 22 (Fla. 1985), but also stated, “We do not discuss the possible effects of the minor’s comparative negligence or of contribution because there is no issue of those factors in this case.” Id.

If the action is derivative, then it would seem that any defense which could be raised against the primary plaintiff can also be raised against the bystander suffering emotional distress. This seems to be the correct solution to this question. If the Florida Supreme Court sticks strictly to the view that the action is a separate one and not derivative, then, analytically, this result is not compelled. The fact that the primary plaintiff may, himself, have been negligent would not affect the fact that the defendant’s act was negligent to the plaintiff-bystander suffering foreseeable emotional dis-
IV. Premises Liability

A child's fall from monkey bars in a municipal park reached the Florida Supreme Court in *City of Miami v. Ameller.* The issue was whether an allegation that the monkey bars were placed over hard-packed earth stated a cause of action when no allegation was made that the monkey bars themselves were defective in any way. The Third District Court of Appeals ruled in a brief per curiam opinion that a cause of action was stated, while acknowledging a conflict with an earlier case from the First District, *Alegre v. Shurkey.*

There were earlier cases denying recovery. In *Hillman v. Greater Miami Hebrew Academy,* the supreme court held that no cause of action was stated because the complaint did not allege that the monkey bars contained a latent defect nor was the danger one that a young child would not notice. In addition, there was nothing to indicate that the presence of adult supervision would have prevented the accident. The court in *Hillman* expressed concern that the complaint amounted to an attempt to make the defendant an insurer of the child's safety.

Later, in *Alegre,* the First District panel split on the issue. The allegation in *Alegre* was, as it was in *Ameller,* that the hard nature of the packed surface under the monkey bars and the failure to provide a softer surface constituted negligence. The majority in *Alegre* felt bound by *Hillman,* and quoted extensively from that case. Judge Ervin, concurring in part and dissenting in part argued that if *Hillman* meant that a complaint was deficient for failing to allege that the defect would not be noticed by the plaintiff because of the child's youth,
then an opportunity could be provided to permit the complaint in Allegre to be amended to include such an allegation.\footnote{68} If, on the other hand, \textit{Hillman} intended to require an allegation that the monkey bars contained a latent defect, the case should not be considered controlling. The basic point was that the latent defect rule was, essentially, a duty limitation in the nature of the assumption-of-risk defense, and that the defense and any parallel duty limitation ought to be treated as an issue of the negligence of the child under Florida's comparative negligence rule which had not been adopted when \textit{Hillman} was decided.\footnote{69} The Third District Court of Appeal in \textit{Ameller} specifically adopted the reasoning of Judge Ervin in his \textit{Hillman} dissent, thus setting the stage for review.\footnote{70}

The supreme court managed to uphold both the result reached by the Third District and the reasoning of the majority opinion in Allegre.\footnote{71} The general reasoning in the Allegre majority opinion was reaffirmed as to private defendants, however, the supreme court stated "[w]e see no reason, however, why \textit{Hillman} and Allegre should protect a municipality or other public agency from liability for the negligent operation of playground equipment."\footnote{72} The court noted that the complaint alleged the defendant violated both its own standards for such equipment as well as those of the playground industry.\footnote{73} This was sufficient to state a cause of action.

V. The Duty of Parents to Control the Acts of Their Children

It is hornbook law that parents are not liable for the torts of their children merely by virtue of the parent-child relationship.\footnote{74} By the

\footnote{68. \textit{Id.} at 249. It was noted by Judge Ervin that "a child of tender years may be incapable of comprehending a patent risk and that a greater degree of care may be owed to the invitee-child by the business owner than to an adult of normal intelligence." \textit{Id.}}
\footnote{69. \textit{Id.} at 249-50.}
\footnote{70. \textit{Ameller}, 447 So. 2d at 1014.}
\footnote{71. \textit{City of Miami v. Ameller}, 472 So. 2d at 728.}
\footnote{72. \textit{Id.}}
\footnote{73. \textit{Id.} "Public safety and welfare demand that a public agency be responsible for making its own standards at the very least." \textit{Id.} at 729. The court stressed that its decision did not have the effect of making the city an insurer because the duty owed was only that the city "maintain its parks in a condition reasonably safe for public use." \textit{Id.}}
\footnote{74. \textit{W. Prosser and W. Keeton, Prosser and Keeton on Torts} § 123 (5th ed. 1964).}
same token, parents may become liable for unreasonable failure to supervise their children.\textsuperscript{75}

In Florida, the leading case interpreting this doctrine was \textit{Gissen v. Goodwill},\textsuperscript{76} which essentially required parental knowledge that the child had a habit of doing the particular type of conduct before liability could attach.\textsuperscript{77} Allegations in the second amended complaint that the parents knew that their minor child "[had] dangerous tendencies and propensities of a mischievous and wanton disposition,"\textsuperscript{78} and even that the parents had knowledge of other anti-social acts directed at third parties and property,\textsuperscript{79} were not sufficient to state a cause of action when there was no prior history of acts such as the one which injured the plaintiff.\textsuperscript{80}

In \textit{Snow v. Nelson},\textsuperscript{81} the Florida Supreme Court reviewed and retained the \textit{Gissen} decision,\textsuperscript{82} and upheld the district court which had affirmed the order of the trial court directing a verdict for the defend-

\textsuperscript{75} One of four exceptions to the "no liability" rule is "[w]here he [the parent] fails to exercise parental control over his minor child, although he knows or in the exercise of care should have known that injury to another is a profitable consequences." \textit{Gissen v. Goodwill}, 80 So. 2d 701, 703 (Fla. 1955). \textit{See also} \textit{RESTATEMENT (SECOND) OF TORTS} § 316 (1965).

\textsuperscript{76} 80 So. 2d 701 (Fla. 1955).

\textsuperscript{77} \textit{Id.} at 705.

\textsuperscript{78} \textit{Id.} at 702.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} It is nowhere claimed that the child here involved had a propensity to swing or slam doors at the hazard of persons using such doors. The deed of a child, the enactment of which results in harm to another and which is unrelated to any previous act or acts of the child, cannot be laid at the door of the parents simply because the child happened to be born theirs. However, a wrongful act by an infant which climaxes a course of conduct involving similar acts may lead to the parents' accountability.

\textit{Id.} at 705.

\textsuperscript{81} 475 So. 2d 225 (Fla. 1985) (per curiam).

\textsuperscript{82} In \textit{Gissen} we read the exception narrowly, holding that the cause of action must allege that the child had a habit of engaging in a particular act or course of conduct which led to the plaintiff's injury. Consequently, because there was no allegation that the child in \textit{Gissen} had a habit of swinging or slamming the doors to the hazard of persons using such doors, we affirmed the dismissal of the complaint.

\textit{Id.} at 226.
ant. The court rejected the contention that injustice was caused by adhering to such a narrow rule.

VI. Loss of Parental Consortium

Actions for loss of consortium are based on the notion that due to the relationship between two persons, tortious injury to one results in the loss of various "services" owed by the injured party to the other. It is the action to recover for the loss of these services that is labeled an action for loss of consortium. It was held early on that such an action would lie on behalf of the husband when the wife was injured, but it was not until 1950 that it began to be recognized that services were mutually owed between spouses and that an action by the wife for lack of consortium would lie when it was the husband who was injured.

Although historically a parent had a right to the services of his or her children, there has been less than full support for a consortium action on the part of a parent for loss of a child's intangible services. This may be because many felt that a monetary award for the loss of the society, companionship, and affection of the child would do little to remedy the loss. Similarly, the notion of a child's suit for loss of parental consortium was not well-received generally until 1980, when a few courts began to recognize it. In Florida, a limited right for a child's action of loss of consortium had been recognized in Florida's wrongful

83. Id.
84. Id. Justice Ehrlich concurred specially. While agreeing that the facts in Snow did not warrant recovery because the injury occurred to one child by another when both were playing together, a situation in which such injuries are likely to happen, Justice Ehrlich argued that the rule in Gissen was too narrow. He stated:

I would hope that, were Gissen before us today, we would construe that exception to the general rule of parental non-liability to encompass Gissen's facts. Where parents have actual or constructive notice of their offspring's propensity to commit a general class of malicious acts, the child's creativity in developing new ways to bring about injury should not absolve parents from the duty to attend to and discipline the child.

Id. at 227 (Ehrlich, J., concurring).
86. Id. The drive to recognize a wife's action for loss of consortium was begun with Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), cert. denied, 340 U.S. 852 (1950).
87. See supra note 85.
88. Id.
death act.\textsuperscript{89} In \textit{Zorzos v. Rosen},\textsuperscript{90} the Florida Supreme Court considered whether to extend the action by judicial decision to situations in which the parent was injured but not killed by the acts of the defendant.

The positions pro and con for such an action have been well argued in Florida. In \textit{Clark v. Suncoast Hospital, Inc.},\textsuperscript{91} the Second District rejected children’s claims for loss of consortium after the permanent injury to their father from a cardiac arrest during surgery, allegedly caused by defendant’s negligence.\textsuperscript{92} The reasons suggested by the court to justify its denial of the action were several: The court suggested no precedent existed for this action and that it generally was rejected by other courts considering the question. It also pointed out that there was a danger of overlapping claims and double recovery. It was noted that many administrative difficulties existed, including problems of apportionment, the possibility of fraudulent claims, and the uncertainty of how to value the damage. It was also noted that insurance rates could be affected by a recognition of the action.\textsuperscript{93}

Many of the reasons above do not attack the basic fairness of such an action. In fact, the court itself in \textit{Clark} noted, “If the claims asserted by plaintiffs were properly circumscribed, there could be merit to their position from a policy standpoint.”\textsuperscript{94} However, the court concluded that the legislature was the appropriate body to address the

\textsuperscript{89} “(3) Minor children of the decedent may also recover for loss of the decedent’s companionship, instruction and guidance and for mental pain and suffering from the date of injury.” \textit{FLA. STAT. \S} 768.21 (1983).

\textsuperscript{90} \textit{467 So. 2d} 305 (Fla. 1985).

\textsuperscript{91} \textit{338 So. 2d} 1117 (Fla. 2d Dist. Ct. App. 1976).

\textsuperscript{92} \textit{Id.} at 1118.

\textsuperscript{93} \textit{Id.} at 1118-19. It was also suggested that there was no claim which could be enforced by the child for the services of the parent. It should be remembered that the child \textit{does} generally have a right to financial support from the parents and that child neglect is generally criminalized. These factors might be sufficient to suggest a conceptual basis for a parental consortium action by the child.

\textsuperscript{94} \textit{Id.} at 1119.

Plaintiffs make a forceful argument that as children of a disabled father, they will not only suffer a loss of the funds that their father ordinarily would have provided for their food, shelter, and health; but likewise, the loss of love, moral training, example and guidance they would otherwise receive. And while plaintiffs concede that their father is the appropriate claimant to recover for loss of income which would be used to pay for their basic requirements of life, they argue that to deny them the right to recover their own intangible losses is a manifest injustice.

\textit{Id.} at 1118.
Problem. The Fifth District Court of Appeal in *Rosen v. Zorzos* rejected the concept that the legislature was the proper body to make the decision, stating, "The cause of action for loss of consortium is a creation of the common law and its continued development is properly within judicial authority and responsibility." Additionally, this court noted that some limited authority recognizing the action now exists. The court found it anomalous that a child would have a consortium action if the parent died, but not if the parent were seriously injured. It discussed a pattern where courts allowed consortium actions, in most cases, with only this latter situation left unredressed. It was noted that "[t]he majority of legal commentators support the recognition of an independent cause of action for parental consortium." Finally, it was suggested that recognition of the action would help effectuate the policy of the Florida Constitution that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

The Florida Supreme Court quashed the decision of the court of appeals and specifically approved the opinion in *Suncoast Hospital* instead. The supreme court agreed that the legislature was the proper body to consider the doctrine and to engage in the delicate process of constructing limits for the doctrine if it were to be adopted. Finally, the court raised the possibility that lack of legislative action to extend the doctrine may have represented the legislature’s will on the issue.

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95. Id. at 1119.
96. 449 So. 2d 359 (Fla. 5th Dist. Ct. App. 1984).
97. Id. at 361. [Footnote omitted]. The court also noted several controversial policy expansions of the law which had been made in Florida by judicial decision, including the recognition of a wife’s right to sue for loss of the husband’s consortium, and the adoption of comparative negligence. Id.
98. Id.
99. Id. at 362-63. The court continued, "To suggest that the disparate treatment between the parent and the child with respect to their right to each other’s companionship is historically based, and, consequently, should be perpetuated, is unpersuasive in light of the growing recognition of children’s rights.” Id. at 363. [Footnote omitted].
100. Id. at 363 n.8.
102. 467 So. 2d at 307.
103. Id.

In addition, we are influenced by the fact that the legislature has recognized a child’s loss of parental consortium in a wrongful death action.
Justice Ehrlich, in dissent, refused to be moved by legislative inaction, noting that the change of the wrongful death statute was a focused one and limited to that area. No attempt had been made to engage in a general or complete revision of the entire tort system. Rather, Justice Ehrlich argued that, in passing the Wrongful Death Act with a parental consortium provision, the legislature had, in effect, established the public policy of Florida to be in favor of such recovery, thus opening the door for further judicial action. Concluding, Justice Ehrlich argued, "There is no longer any reason to subscribe to the fiction that a minor child has not sustained any recoverable monetary damage resulting from the personal injury of a parent . . . It is a principle whose time has long since arrived."

VII. Punitive Damages

The Florida Supreme Court had several opportunities to consider issues relating to punitive damages during the past year. In *Como Oil Co. v. O'Loughlin*, the issue was whether gross negligence was sufficient to support an award of punitive damages. The court addressed the issue only the year before in *White Construction Co. v. Dupont*, where it held that gross negligence was not sufficient and that the proper standard was wanton and willful misconduct equivalent to that necessary for criminal manslaughter. In the face of this, however, but has not created a companion action for such loss when the parent is injured but not killed. Although this omission may be only an oversight, it strongly suggests that the legislature has deliberately chosen not to create such a cause of action.

*Id.*

104. *Id.* at 307-08 (Ehrlich, J., dissenting).

I therefore can draw no inference from the fact that the legislature addressed a narrow segment of tort law by enacting the new death statute, and did not attempt an overall revision of this area of the law. This was nothing more and nothing less than the legislative process in action.

*Id.*

105. *Id.*

106. *Id.* at 308. (Justice Adkins also concurred in the dissent).

107. 466 So. 2d 1061 (Fla. 1985) (per curiam).

108. 455 So. 2d 1026 (Fla. 1984).

109. *Id.* at 1028.

The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presump-
the Fourth District Court of Appeal reversed the trial court's entry of a directed verdict for defendant on the issue of punitive damages because the district court of appeal found that there was gross negligence.\textsuperscript{110} The supreme court quashed the decision of the district court of appeal because of its use of the incorrect standard.\textsuperscript{111}

In \textit{Winn-Dixie Stores, Inc. v. Robinson,}\textsuperscript{112} plaintiff bought merchandise at a Winn-Dixie store. When he returned to the store and purchased additional merchandise, an employee of the store erroneously concluded that the original items were stolen. Plaintiff was arrested and the items taken from his car and put back on the shelf. He was charged with petit theft, charges which were eventually dropped. Plaintiff filed suit for false imprisonment, malicious prosecution and conversion. The jury found for the plaintiff and awarded $200,000 in compensatory damages and $750,000 in punitive damages. The trial court granted a motion for a directed verdict in favor of Winn-Dixie on the punitive damage issue and, alternatively, granted remittitur or a new trial.\textsuperscript{113} The district court of appeal reversed the directed verdict as well as the order for remittitur or a new trial.\textsuperscript{114}

The Florida Supreme Court agreed that granting the directed verdict had been improper.\textsuperscript{115} The trial court granted it based upon an

\begin{quotation}
tion of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

455 So. 2d at 1029 (1984) (quoting \textit{Carraway v. Revell}, 116 So. 2d 16, 20 n.12 (Fla. 1959) (citations omitted)).

110.

We find that there was an adequate basis for the jury to determine that Como's driver was guilty of gross negligence and that such was attributable to Como Oil because of Como's failure to oversee and maintain its equipment and failure to train and equip its driver, particularly when handling a hazardous substance.


111. 466 So. 2d at 1062. The court also reviewed the evidence and decided that it could not be viewed as amounting to the required wanton and willful conduct. Justice Shaw, joined by Justice Ehrlich concurred in part and dissented in part, arguing that the evidence presented sufficient indications of wanton and willful conduct on the part of the defendant, itself, to preclude a directed verdict on the punitive damages issue. \textit{Id.} at 1063.

112. 472 So. 2d 722 (Fla. 1985).

113. \textit{Id.} at 723.

114. \textit{Id.} at 724.

115. \textit{Id.}
earlier case, *Mercury Motors Express, Inc. v. Smith,*{116} which held that an employer was not vicariously liable for punitive damages based upon the acts of the employee unless the employer was also at fault in some way.{117} But the supreme court held that the holding in *Mercury Motors Express* did not apply when "the suit was tried on the theory of the direct liability of Winn-Dixie, and the jury, by special verdict, decided that Winn-Dixie should be held directly liable for punitive damages."{118} The court disagreed, however, with the action of the district court of appeal in reversing the trial court's order granting remittitur or, in the alternative, a new trial. The supreme court noted "that it is proper for the trial court to issue an order for new trial or remittitur when the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct."{119} The correct standard for the review of the trial court's decision is "a clear showing of abuse of discretion."{120} The district court of appeal made no such finding, but merely stated that "it was not convinced that the punitive

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116. 393 So. 2d 545 (Fla. 1981).
117. Before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part. . . . Although the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee's conduct, also be willful and wanton. It is sufficient that the plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages. *Id.* at 549.
118. 472 So. 2d at 724. Previously the court had held in Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530 (Fla. 1985), that *Mercury Motors* also did not apply "where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation." *Id.*
119. 472 So. 2d at 725.
120. *Id.*
damages assessed by the jury were unreasonable."\textsuperscript{121} This suggests that reasonable minds could differ about the reasonableness of the award which is not a sufficient ground for overturning the trial court’s decision.\textsuperscript{122}

In \textit{Tamiami Trail Tours, Inc. v. Cotton},\textsuperscript{123} the supreme court held that when the theory upon which defendant was held liable for punitive damages was not mentioned in the pleadings and was not raised until the charge conference and after all of the evidence had been heard, and where no motion was made to conform the pleadings to what had been proved, the theory, although correct, could not be the basis of liability.\textsuperscript{124}

In \textit{Bankers Multiple Line Insurance Co. v. Farish},\textsuperscript{125} the supreme court noted that the trial court is generally in the best position to evaluate the impact of a particular jury instruction and agreed with the trial court that “the charges given the jury did not adequately apprise it that awarding punitive damages is discretionary.”\textsuperscript{126}

\textsuperscript{121.} \textit{Id.}
\textsuperscript{122.} \textit{Id.}
\textsuperscript{123.} 463 So. 2d 1126 (Fla. 1985).
\textsuperscript{124.} The theory was that defendant was “a possessor of property who fails to control the actions of its servant on the property, [and so is liable] even though the servant is acting outside the course and scope of his employment.” \textit{Id.} at 1128.

The defense attorney repeatedly objected to both the charge and the special interrogatory on the verdict which allowed finding Tamiami liable for Crosby’s actions outside the scope of his employment. No motion was ever made to conform the pleadings to the evidence, nor were the pleadings ever amended to include this theory. In short, Tamiami was sandbagged. It proceeded to trial on notice that it had to defend against charges of tortious interference with a business relationship for actions attributable to it on theories of conspiracy or agency. It won verdicts absolving it of liability on both theories. It was found liable on a theory it never had an opportunity to rebut at trial. While the theory itself is the law of the state, the procedural requirements of due process will not allow it to be raised in this manner.

\textit{Id.}

\textsuperscript{125.} 464 So. 2d 530 (Fla. 1985).
\textsuperscript{126.} \textit{Id.} at 532. The instruction given was not the standard one. The charge was, “the greater the defendant’s wealth, the greater it [sic] must be, the punitive damages assessed, in order to get his attention regardless of the amount of compensatory damages awarded to the plaintiff.” \textit{Id.} at 533. Although punitive and compensatory damages do not have to bear any particular relation to each other, neither is the wealth of the defendant alone the mark by which punitive damages are judged.

In Lassiter \textit{v. International Union of Operating Engineers}, 349 So. 2d 622 (Fla. 1976), we did not intend to abandon the required relation-
VIII. Interspousal Tort Immunity

Immunities protect status. In essence, the raising of an immunity says, "I can’t be sued, even though I acted wrongfully and even though my fault caused your injury, because of who or what I am." When understood in this light, immunities ought to be generally disfavored and permitted only when society will clearly benefit from their use. In recent times, immunities have been narrowed or discarded. The traditional immunity of the sovereign, for example, has been partly waived through legislation or court decisions in many jurisdictions. Similarly, charitable immunity has waned. It is probably safe to say that interspousal tort immunity, which prevents one spouse from suing the other, is in a state of declining health. Yet, this year, the Florida Supreme Court gave it a shot in the arm by upholding it. The case was Snowten v. United States Fidelity and Guaranty Co.

Snowten involved the negligent use of an automobile by the wife. The husband was struck by the auto and seriously injured. The husband sued his wife and the insurance company. The company moved for summary judgment, which was granted. The judgment was affirmed on appeal, but the First District Court of Appeals certified the issue to the Florida Supreme Court as one of great public importance.

The immunity of husband and wife is a common law creation,
and although it was adopted in Florida's "reception statute," such a statute would not necessarily be understood as denying to the courts of the state the power to develop the common law through subsequent decisions. The Florida Supreme Court seemed to acknowledge that it had the power to abolish or limit the immunity if it had chosen to do so. The court stressed, however, that the common law enacted by the reception statute would not be abrogated by judicial action without a compelling need to do so, and then only when "the reason for the law no longer exist[ed]."

The court cited three main reasons which have traditionally been advanced for the doctrine: 1) The legal unity of husband and wife; 2) Avoidance of marital disharmony; and 3) Avoidance of fraudulent and collusive claims. In the modern world, one would expect the first of these reasons to be rejected out of hand. The legal unity of husband and wife grew at a time when the persona of the wife was almost totally submerged into that of her husband. She could neither sue nor be sued in her own name and she could not enter into contracts. Thus, the conceptual notion of a suit by one spouse against the other would appear impossible because it would be as if a plaintiff were suing himself. Surely, this doctrine of "unity" and the conceptual framework

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132. Florida Statutes section 2.01 states:
The common and statute laws of England which are of a general and not a local nature, with the exceptions hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the Legislature of this state.

FLA. STAT. § 2.01 (1985).


134. "[P]etitioner asserts that this court should use its power to abrogate the doctrine." 475 So. 2d at 1212. The court then considered the policy basis for the immunity.

135. Id. at 1213.

136. Id. at 1212.

137. Historically, the merger of husband and wife and the need for "family harmony" and order resulted in some legal recognition of a right of "family discipline" vested in the husband. "He might administer to his wife 'moderate correction,' and 'restrain' her by 'domestic chastisement'. . . . The altered position and independent legal status of married women in modern society has done away with any such discipline." W. PROSSER AND W. KEETON, PROSSER AND KEETON ON TORTS § 27 (5th ed. 1984).

138. See generally W. PROSSER AND W. KEETON, PROSSER AND KEETON ON
upon which it was based has been discredited. Similarly, any legal rule which flows from so tainted a source ought also to be suspect. Surprisingly, the Florida Supreme Court stated that the unity argument still makes sense. To support that view, the court quoted from respondent's argument to the effect that marriage relationships are different from other relationships and create some "special circumstances" which must be taken into account.\footnote{Torts § 122 (5th ed. 1984); Barber v. Barber, 62 U.S. (21 How.) 582 (1858).}

It is, of course, true, that marriage is a very special relationship of love, trust, and mutual financial interest. This alone, however, does not suggest that those who enter into it should give up rights to bodily security and compensation for injuries suffered that any unmarried person has. In fact, it might well be seen as a sort of "marriage penalty," in which the natural grief and remorse which one spouse would feel upon injuring another is compounded by the realization that there will be no compensation whatsoever for the injuries in most cases.

It is likely that the first reason to justify this doctrine, the legal unity of husband and wife, is not really the reason upon which the case was decided, or, at least, that it is meant only as an introduction to the other two; i.e., that because of the special relationship of marriage, it should be saved from the strains which a lawsuit would entail, or that it might be the breeding ground for fraudulent claims. As the supreme court saw it, those who would abolish interspousal tort immunity are caught on the horns of a dilemma; either the suit will disrupt family harmony (and so should not be allowed) or the suit will not disrupt family harmony because the claim is fraudulent.\footnote{475 So. 2d at 1212 (quoting Brief for Respondent at 7).} No third alternative seemed to suggest itself to the court. This avoidance of marital disharmony is the court's second reason for advancing the doctrine.

One is led to wonder whether a legitimate suit is necessarily going to lead to marital disharmony, especially in a day and age when most

\footnote{139. The notion that a woman's legal existence is suspended during marriage, or at least is merged with that of her husband's to the extent that she cannot control her own property or contractual relationships certainly has no place in today's world. That does not mean that married persons are no different than other individuals. The intimacy of the relationship, its mutual financial interests, and societal significance create special circumstances which are not, cannot, and should not be ignored by our legal system.}

\footnote{140. Id. (quoting Raisen v. Raisen, 379 So. 2d 352, 355 (1979)).}
people are insured.\textsuperscript{141} Even if the suit is technically "spouse v. spouse" as the court suggested,\textsuperscript{142} it is not hard to imagine that the spouses will understand that the real issue is whether the family unit will recover from the insurance company for its loss.\textsuperscript{148} In fact, in light of insurance, one might well argue that family harmony will be greater in a situation where the family is compensated for the losses it has suffered. A severely-injured spouse, perhaps out of work due to the injury, incurring massive doctor bills, will affect the ability of the family to take care of itself. The strains which this will inevitably cause might be lessened if proper compensation was to be forthcoming.

Finally, then, there is the issue of fraud. Will fraud inevitably occur and go undiscovered in so great a degree that the immunity is necessary to prevent it? Although fear of fraud has often kept courts from permitting certain actions (actions for emotional distress are a good example), as courts became convinced that the action itself was valid, they have rejected fear of fraud as a sufficient reason, standing alone, to deny claims which are valid.\textsuperscript{144}

Although fraud is always possible, and is more probable when those involved in an alleged accident have a close and confidential relationship, there are many types of such relationships and courts, in general, do not seem unable to tell true from false claims. Florida itself, for example, seems to feel that such problems can be overcome when a child sues a parent.\textsuperscript{145} In recent years, in fact, a number of courts have

\textsuperscript{141} It should be noted that a possible intermediate position, also rejected by the court in this case but accepted in 1982 when the issue was the continuing viability of the parental immunity, is that the immunity is waived when there is insurance and then only up to the limits of the insurance policy.

\textsuperscript{142} 475 So. 2d at 1212.

\textsuperscript{143} It must be conceded that this realization will exist. Without it, the argument that collusive suits are likely would make no sense.

\textsuperscript{144} In Dillon v. Legg, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), the California Supreme Court stated:

\[\text{[T]he interest of meritorious plaintiffs should prevail over alleged administrative difficulties. "[T]he fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficiency of the judicial processes to ferret out the meritorious from the fraudulent in particular cases."}\]

\textit{Id.} (citing Emery v. Emery, 45 Cal. 2d 421, 431, 289 P.2d 218, 224 (1955)).

\textsuperscript{145} In Ard v. Ard, 414 So. 2d 1066 (Fla. 1982), the Florida Supreme Court abrogated the parent-child immunity to the level of insurance coverage if any. "We recognize that the possibility of fraud exists in every lawsuit but reject the contention
abolished or modified the interspousal tort immunity doctrine even in the face of a concern about fraud. 146 It is truly tragic to deny admittedly real claims because of worry about other hypothetical ones which may be feigned. It is, in any case, to be presumed that the insurance companies will be diligent in ferreting out any attempted fraud in this as well as in other areas.

It seems that the policy reasons for the doctrine are weak at best. Indeed, it might be said that the reasons for the doctrine no longer exist. Although it can be argued that there is no compelling need to change the doctrine, it could be argued that there is a compelling need to prevent a situation in which legitimate plaintiffs who have suffered real and serious injuries continue to go uncompensated, with all of the problems which this may cause to the individuals and to society, because of the continued application of a doctrine which has ceased to have any reason for being.

The real basis for the decision, then, seems to be that the court felt a principle settled at the time of the reception statute should usually be changed by legislation or not at all. This was the position taken in Raisen v. Raisen, 147 and it is consistent with Ard, since the court in that case noted that parent-child immunity "did not have its origin in the common law of England as did interspousal immunity." 148 This is a valid position although it has not always convinced other courts. 149

The legislature appears to have begun a process which the court was unwilling to undertake. Recently a partial abrogation of the immunity has been passed. 150 Yet, it is to be hoped that the process will continue and that a complete elimination of that immunity will be forthcoming. Even if the court feels unable to take the step itself, it would help if the Court would acknowledge that the reasons for the

that such possibility still forms a valid justification for denying a child compensation for injuries negligently inflicted by the parent when the immunity is waived by the presence of insurance.” Id. at 1069.

146. See, e.g., Klein v. Klein, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962).
147. 379 So. 2d 352 (Fla. 1979).
150. FLA. STAT. § 741.235 (1985) provides: “The common law doctrine of interspousal tort immunity is hereby abrogated with regard to the intentional tort of battery, and the ability of a person to sue another person for the intentional tort of battery shall not be affected by any marital relationship between the persons.”
immunity have now ceased. As long as the court continues to hold to the view that the interspousal tort immunity makes logical sense, this can only serve to slow the drive for reform in the legislature.

IX. Sovereign Immunity

Historically, a sovereign could not be sued without his consent. The doctrine grew first from the personal immunity of the king and was taken over as an incident of national sovereignty to protect the governmental entity from suit without its consent. In a federal system where individual states retain much of their sovereign character, the immunity of the sovereign applies to them as well.

The Florida Constitution provides that the immunity may be waived by the legislature. The legislature has from time to time provided for broad waivers of sovereign immunity by statute. The Florida Supreme Court was called upon to decide a number of cases involving sovereign immunity during 1985.

The attempt of a young girl and her parents to obtain compensation for injuries received by the child in a 1980 bus accident eventually required the supreme court to review a complex relationship between several statutes and constitutional provisions in Hess v. Metropolitan Dade County.

Recovery for the injuries was governed by the state statute providing for, and regulating, the waiver of sovereign immunity. In relevant part, the statute provided for "caps" on liability, but also provided that a judgment for more than the statutory "caps" could be obtained and could be paid if legislation was passed so directing.

152. Id.
153. "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Fla. Const. art. x, § 13 (1968).
154. 467 So. 2d 297 (Fla. 1985).
155. Fla. Stat. § 768.28 (1981). Fla. Stat. § 768.30 (1981) stated: "Section 768.28 shall take effect on July 1, 1974 for the executive departments of the state and on January 1, 1975 for all other agencies and subdivisions of the state, and shall apply only to incidents occurring on or after those dates."
156. Fla. Stat. § 768.28(5) (1981) provides in part: Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or
In a suit against Dade County, judgments significantly over the statutory caps were obtained and payments up to the caps were made. The Florida Legislature then passed a bill directing Dade County to pay the excess of the judgments. Payment was demanded, but was refused by Dade County, after which the action to require payment was commenced. The county argued that the act of the legislature was unconstitutional because it violated the home rule charter for Dade County in that the legislation was not general but was “a local act relating only to Dade County and constitutes the precise evil sought to be avoided by Dade County’s Home Rule Amendment.”

The Florida Supreme Court upheld the constitutionality of the legislature’s action. It did this primarily by analyzing the relationship between the Dade Home Rule Charter and the waiver of sovereign immunity contained in section 768.28 of the Florida Statutes. The particular act requiring payment of the particular claim was seen as “merely an implementation of the general law authorizing waiver of sovereign im-

subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974.

157. 467 So. 2d at 298. See also 1983 Fla. Laws 393. The bill was styled: “An act relating to Dade County; authorizing and directing the county to compensate Michele Hess, a minor, and Don Hess and Connie Tippett, her parents, for damages suffered as a result of the negligence of the county; providing an effective date.” The act recounted the facts of the case in a preamble, enacted a statement that the preamble was true, and then directed payment in specific amounts.

158. In a brief per curiam opinion, the appellate court ruled that it did not have the power to issue a writ of mandamus as requested as “there are other adequate remedies available to the petitioner.” Hess v. Metropolitan Dade County, 447 So. 2d 267 (Fla. 3d Dist. Ct. App. 1983). Therefore, the court did not reach the merits of the case. The supreme court held that mandamus was an appropriate remedy and that “the district court was not precluded from exercising its discretion to address the merits . . . .” 467 So. 2d at 298.

159. 467 So. 2d at 299. FLA. CONST. art. VIII, § 11 (1885), the Dade County Home Rule Charter, remained in effect by virtue of article VIII, § 6(e), of the Constitution of 1968.
Thus, the court seemed to conclude that as long as the sovereign immunity waiver provision was constitutional and did not conflict with the Dade Home Rule Charter, any specific implementing act passed under the waiver would also be constitutional. No separate analysis of the relationship between the particular claims act authorizing payment in the *Hess* case and the Dade Home Rule Charter was thought to be necessary.

The waiver of sovereign immunity contained in section 768.28 of the Florida Statutes, after providing for the waiver and for the statutory caps, states that "that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature." Several sections of the Dade County Home Rule Charter state that "[n]othing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties of the state of Florida." There is no doubt that section 768.28 is a general law and applies to all counties equally. It would not, therefore, violate the provisions of the Dade Home Rule Charter. The legislature is empowered to pass acts requiring the payment of the excess of judgments over the statutory cap. Yet, the form such an act may or must take is not spelled out. One can imagine several different approaches which could be taken which would not implicate the Dade Home Rule Charter at all. For example, one could imagine the legislature could establish a statewide fund and pay excess claims out of it rather than to direct specific local entities to pay specific claims. Further, in light of being made aware of the hardships caused by certain classes of injuries, say bus accidents, the legislature could respond by exempting all bus accidents from the cap and ordering that all such claims, from whatever county, be paid. Section 768.28 could, therefore, be implemented through general legislation which would pose no conflict with the Home Rule Charter. Thus, there is no necessary conflict between the section and the Home Rule provision.

When, by contrast, the legislature exercises its power to regulate sovereign immunity by passing an act relating only to Dade County, the act is, arguably, not a general law. The unconstitutional act, if any, 

160. 467 So. 2d at 300.
161. FLA. STAT. § 768.28(5) (1968).
162. FLA. CONST. art. VIII, § 11 of the Constitution of 1885 is continued in effect due to article VIII, § 6(e) of the Constitution of 1968.
would be the passage of the specific claims bill or section 768.28 as applied, and, thus, the issue would not be the constitutionality of the section on its face. The question might be seen, in essence, to be whether the legislature has the power by general law to grant itself the power to pass local laws when such power has been withdrawn by the State Constitution in a home rule bill? This suggests a need to analyze the claim bill’s relation to the Home Rule Charter, not merely the relation of section 768.28 to that charter.¹⁶³

Other questions concerning the administration of the sovereign immunity waiver were tested in Gerard v. Department of Transporta-

¹⁶³. Chief Justice Boyd dissented, arguing that the claims bill in the Hess case, 1983 Fla. Laws 393, was unconstitutional because it violated the Dade Home Rule Charter. He relied, in his brief opinion, on Dickinson v. Board of Pub. Instruction of Dade County, 217 So. 2d 553 (Fla. 1968), in which it was stated, inter alia, that a similar claims bill “was a local law. . . .” Id. at 554. The majority discounted Dickinson because it was decided before § 768.28, the waiver of sovereign immunity, was passed. However, if used for the limited purpose of characterizing the nature of a legislative act which affects only one county as local rather than general, this does not seem to matter. Surely an act which is local does not become general merely because the legislature purports to grant to itself the right to pass such acts. This would appear to take deference to the legislature too far.

In Dickinson, the supreme court stated that the claims act “was a local law because it affected only Dade County and made an appropriation out of specific funds due to the schools of that county only.” Id. By this definition, the claims bill in the Hess case was also local and not general and so violated the Dade Home Rule Charter. The majority noted that the claims act was “an integral part of the scheme established by the legislature for waiver of sovereign immunity which we have said should apply equally, and not in a disparate manner, to all constitutionally authorized entities.” 467 So. 2d at 300. The court’s citation following the quote, to Cauley v. City of Jacksonville, 403 So. 2d 379 (1981), also reminds us of the following quote from that case that “section 768.28 also furthers the philosophy of Florida’s present constitution that all local governmental entities be treated equally.” Id. at 385. Upholding specific claims bills which affect only one county tends to lead to counties being treated unequally. But even if this quote suggests that all should be treated equally in that they are subject to such claims bills, it could be argued that the general policy of the Constitution conflicts with the specific policy of the Dade Home Rule provision. In Dickinson the policy was said to be this:

[T]hat in matters which affect only Dade County, and which are not the subject of specific constitutional provisions or valid general acts pertaining to Dade County and at least one other county, the electors of Dade County may “govern themselves autonomously and differently than the people of other counties of the state.”

Dickinson v. Board of Pub. Instruction of Dade County, 217 So. 2d 553 (Fla. 1968) (quoting in part, S and J Transp., Inc. v. Gordon, 176 So. 2d 69 (Fla. 1965). (Emphasis added)).
The case involved litigation which grew out of injuries and death caused by the fall of a tree limb. A negligence action was brought against the municipality and the Department of Transportation, which then had the action against it transferred to another county. The municipality settled the case and its insurer paid over one-half million dollars.

The Department of Transportation then sought and obtained a summary judgment on the ground that the statutory caps on the waiver of sovereign immunity had been exhausted, that, therefore, if a judgment were obtained, the department would pay nothing anyway, and that the sole purpose for the suit was to establish a basis for a request to the legislature that it authorize additional payment through a claims bill.

The district court of appeals held, and the Florida Supreme Court agreed, that the "per incident" cap upon the waiver of sovereign immunity applied "regardless of whether the source of payment is a single governmental entity or multiple governmental entities," and that funds received from insurance companies applied toward the "cap" amount. The appeals court went on to conclude, however, that the action against the Department of Transportation could not be brought at all since no money would be paid under it and it would be, in essence, nothing more than a device to prepare the way for a request to the legislature for an act authorizing payment.

The supreme court disagreed. While noting that obtaining a judgment against the Department of Transportation was not required before legislative relief could be requested, by the same token, the courts retained jurisdiction over such actions whether or not the statutory cap amounts had been previously paid by others. Thus, the cases could be filed in the courts.

164. 472 So. 2d 1170 (Fla. 1985).
165. Id. at 1171.
166. Id.
167. Id. at 1172.
168. Id.
169. "We therefore conclude that an excess judgment is statutorily permitted only when accompanying a claim which is otherwise authorized by section 768.28." Gerard v. Department of Transp., 455 So. 2d 500, 502 (Fla. 1st Dist. Ct. App. 1984). The appellate court certified, as a question of great public importance, the question of "[w]ether satisfaction of a claim by payment of the statutory amount specified in section 768.28(5), Florida Statutes, precludes a further claim, in excess of the specified statutory amount?" Id.
We therefore hold that Gerard is entitled to proceed in the trial court against the Department of Transportation. We note, however, that he assumes certain risks if he elects to proceed. A costly trial may result in a judgment of no liability against the Department and the assessment of court costs. It is also possible that a trial may result in a judgment for less than the settlement amount. In that event, Gerard would not be able to seek a claims bill. Even if he is able to obtain a judgment against the Department of Transportation on excess of the settlement amount and goes to the legislature to seek a claims bill with the judgment in hand, this does not mean that the liability of the Department has been conclusively established. The legislature will still conduct its own independent hearing to determine whether public funds should be expended, much like a non-jury trial. After all this, the legislature, in its discretion may still decline to grant him relief.\textsuperscript{170}

The bulk of the cases dealing with sovereign immunity which came before the supreme court raised the issue of whether certain conduct was or was not actionable. That is, whether the conduct fell within the statutory waiver of sovereign immunity. The court had become committed to a case-by-case determination of the issue when it decided \textit{Commercial Carrier Corp. v. Indian River County}\.\textsuperscript{171}

In \textit{Commercial Carrier}, the supreme court analyzed the scope of the statutory waiver of sovereign immunity and determined that despite the lack of any specific provision in the statute, it would still be read as continuing immunity for "discretionary governmental functions."\textsuperscript{172} The court distinguished between those activities requiring policy making or "planning" and those which were deemed to be "operational."\textsuperscript{173} The court approved a "preliminary test" which had been proposed in a Washington state case,\textsuperscript{174} but acknowledged that a case-by-case ap-

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\item 170. 472 So. 2d at 1173.
\item 171. 371 So. 2d 1010 (Fla. 1979).
\item 172. Id. at 1022.
\item 173. Id.
\item 174. Id. at 1019 (quoting Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965)).

Whatever the suitable characterization or label might be, it would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability is concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission,
The scope of the immunity waiver was tested when the First District Court of Appeals certified to the Florida Supreme Court the question: "May prisoner classifications ever give rise to tort liability, and, if so, under what circumstances?" The case was brought by Smith who was shot by one Prince during a robbery. Prince was an escaped prisoner with a history of violent crime and escape from jail. In 1976, one Reddish, an employee with the Department of Corrections (DOC) had had Prince's classification changed to minimum custody status and had arranged for Prince's transfer to a minimum custody situation from which Prince escaped. While on the loose, Prince shot Smith.

or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and non-tortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

Id.

175. 371 So. 2d at 1022.

So we, too, hold that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance. In order to identify those functions, we adopt the analysis of Johnson v. State, supra, which distinguishes between the "planning" and "operational" levels of decision-making by governmental agencies. In pursuance of this case-by-case method of proceeding, we commend utilization of the preliminary test iterated in Evangelical United Brethren Church v. State, supra, as a useful tool for analysis.

Id.


177. Id. at 1339. The court of appeal held "that there is no sovereign immunity when an inmate is negligently given preferential treatment and placed in inadequately supervised confinement." Id. at 1340.
The supreme court in *Reddish v. Smith* answered this certified question in the negative. "The administrative process in question is an inherent feature of the essential governmental role assigned to the Department of Corrections." Thus, the action against the DOC for wrongful classification of Prince and the action against Reddish "to the extent based upon negligent performance of duties within the scope of employment . . . are precluded by sovereign immunity." The court also articulated a second basis for its decision. The waiver of sovereign immunity essentially makes the state and its sub-divisions liable as a private person would be. It was not intended to create new causes of action in tort. To the extent that there is no analogy to the private sector from the particular act by the government at issue, immunity is not waived. Since, "the decision to transfer a prisoner from one correctional facility to another is an inherently governmental function not arising out of an activity normally engaged in by private persons . . . the statutory waiver of sovereign immunity does not apply."

Can the decision not to arrest a suspect give rise to tort liability or are such decisions protected by the doctrine of sovereign immunity? This question was raised by a number of cases, the principal one being *Everton v. Willard*. In *Everton*, a sheriff's deputy stopped an auto after it made an illegal turn. Although the driver admitted that he had

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178. 468 So. 2d 929 (Fla. 1985).
179. *Id.* at 931. The court reasoned that all four of the questions in the preliminary test of *Evangelical United Brethren Church* would be answered in the affirmative. FLA. STAT. § 944.012(6) (1977) contained statements of legislative intent setting out the policy considerations involving the classification of prisoners. The particular administrative processes were authorized by FLA. STAT. § 945.06 (1977).
180. 468 So. 2d at 931.
181. *Id.* at 932. The court also considered allegations of bad faith which suggested that Reddish had actually exceeded his authority but found the allegations without sufficient allegations of fact to state a cause of action. Further, even if the claims had been specific, the Court, in dicta, stated that it would have found that the causal link between the acts of transfer and the later escape and shooting was not foreseeable as a matter of law. *Id.* at 933. In a later case, *Ursin v. Law Enforcement Ins. Co.*, 469 So. 2d 1382 (Fla. 1985), in which a "mentally disordered sex offender" was improperly made a trustee, after which the inmate escaped and committed another crime, the supreme court, following the decision in *Reddish*, held in a two-paragraph opinion that sovereign immunity prevented the action. *Id.* In dissent, Justice Shaw observed: "If holding the government entity liable for negligence would ‘chill’ this type of government discretion, as the majority fears, I express a strong belief that this is precisely what the people and the legislature intended when they waived sovereign immunity." *Id.* at 1382-83 (Shaw, J., dissenting).
182. 468 So. 2d 936 (Fla. 1985).
been drinking, the officer merely gave the driver a ticket and allowed him to go on his way. A few minutes later, the driver was involved in an auto accident which caused serious injury and death to occupants in the other car. Plaintiffs alleged that the failure of the officer to take the driver into custody for intoxication was a proximate cause of the accident. The supreme court held that the actions of the officer in deciding whether or not to arrest the driver was protected by sovereign immunity.

The court felt that the enforcement of the criminal laws, the police function, was one of which the essence was discretion. Further, whatever duty can be said to grow out of the police function was not one which traditionally gave rise to tort duties absent some undertaking to protect a particular person. The immunity was analogized to that afforded to prosecutors and judges and spoke of in very broad terms. The court stated, "the basic principle involved concerns the liability of all governmental bodies and their taxpayers for the negligent failure of their law enforcement officers to protect their citizens from every type of criminal offense."

184. [We] hold that the decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune from suit, regardless of whether the decision is made by the officer on the street, by his sergeant, lieutenant or captain, or by the sheriff or chief of police. 468 So. 2d at 937.
185. Id. at 938. Among other sources, the court cited the ABA STANDARDS FOR CRIMINAL JUSTICE Standard 1-4.1 (2d ed. 1980), which states: "The nature of the responsibilities currently placed upon the police require that the police exercise a great deal of discretion — a situation that has long existed but is not always recognizable." The court disapproved Huhn v. Dixie Ins. Co., 453 So. 2d 70 (Fla. 5th Dist. Ct. App. 1984), which had held, on similar facts, that a police officer who stops an intoxicated driver does not have discretion to refuse to enforce the law as no legitimate policy of government could be furthered by such a decision. "Although the police officer had some discretion in how he would handle the matter, his duty was plain (and operational) — he could not turn this drunken driver loose on the street." Id. at 76.
186. 468 So. 2d at 938. However, the court stated: "We note as we did in Trianon that this is a narrow decision of making an arrest under the police power of a governmental entity. It does not have the broad ramifications attributed to it by the dissent, nor does it recede from Commercial Carrier." Id. at 939.

Several other cases were decided with brief opinions on the authority of Everton. In Duvall v. City of Cape Coral, 468 So. 2d 961 (Fla. 1985), a driver was apprehended after driving on the wrong side of the road.
In dissenting opinions, Justice Ehrlich and Justice Shaw drew a distinction, *inter alia*, between issues of the allocation of police resources (for example, a suit alleging negligence in failing to provide adequate police protection), and issues merely of the requirements for dealing with a law violator once actually apprehended. While immunity would shield the former, the dissenters argued that no immunity could be invoked in the latter situation. Justice Shaw argued more broadly that the entire approach to sovereign immunity questions, the standards set down in *Common Carrier*, were flawed and had to be altered. He argued, in essence, that the waiver statute, when combined with the "open court" policy in the constitution, creates a broad waiver to sovereign immunity and required the state courts to hear the actions. He argued that *Common Carrier* was based upon the notion that certain decisions of other branches of government were beyond the power of courts to review and the class of such cases was small, not encompassing decisions of the type raised in *Everton*. The justice pointed out that no discretionary exemption from the sovereign immunity waiver appeared in the statute. Justice Shaw’s basic point was that

The police apprehended McNally, whose estimated blood alcohol count of .34 placed him between a stupor and a coma. McNally was not arrested or placed in custody, but was turned over to a cab company to be driven home. Through a series of errors in judgment and execution on the part of both the police and the cab company, McNally was permitted to return to his car and drive away despite the timely efforts of onlookers to summon the police in order to reapprehend him. About four minutes after driving away McNally crashed into another car, killing two people and horribly injuring two others.

*Id.* at 962. The facts are from the dissent by Justice Shaw. Rodriguez v. City of Cape Coral, 468 So. 2d 963 (Fla. 1985) and City of Daytona Beach v. Huhn, 468 So. 2d 963 (Fla. 1983), also found the actions of officers in not taking intoxicated people into custody to be immune from suit on the authority of *Everton*.

187. 468 So. 2d at 939 (Ehrlich, J., dissenting) and 468 So. 2d at 940 (Shaw, J., dissenting).

188. FLA. CONST. art. I, § 21. Also cited was FLA. CONST. art. V, § 1, which establishes that the judicial power is vested in specified courts.

189. "The exception we carved out in *Commercial Carrier* can only be applicable to non-justiciable political questions which the courts are unable to answer: should a law be enacted, should a legislative bill be vetoed." 468 So. 2d at 946 (Shaw, J., dissenting).

190. "The decision to release or not release a drunk driver is not a political decision. The issues presented by this case are justiciable in a court of law applying traditional tort principles." *Id.* at 947.

191. The conflict between the approach taken by federal, California, and Massachusetts courts, on the one hand, and this Court, on the other hand,
the court had effectively castrated the sovereign immunity waiver\textsuperscript{192} and thwarted the intent of the legislature.\textsuperscript{193} His obvious frustration appeared to be based not on any one case, but rather on the pattern of decisions exemplified by cases such as \textit{Everton, Reddish,} and \textit{Trianon Park Condominium Association v. City of Hialeah},\textsuperscript{194} which were all decided the same day.\textsuperscript{195}

\textit{Trianon Park Condominium Association} involved negligent inspections of condominium units during their construction. It was alleged that the damage to the unit was caused by the defects which would have been discovered during a reasonable inspection by the city inspectors.\textsuperscript{196} The appellate court held that the city could be liable to the condominium unit owners for the damage caused by the negligent

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\textit{Id.} at 949.
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\textsuperscript{192.} After today a plaintiff suing a government tortfeasor will have to overcome a formidable series of hurdles which effectively restore full sovereign immunity to the state and its political subdivisions. First, there is the four-part \textit{Evangelical Brethren} test which is ambiguous enough to produce whatever answer is desired. If the wrong answer is produced, i.e., that the government is not immune, then the plaintiff must pass the discretionary action test of \textit{Commercial Carrier}, which has been so broadly interpreted as to include a dog catcher knowingly releasing a vicious pit bulldog on the public as a discretionary activity. In the extremely unlikely event the plaintiff's action survives these tests, the government by virtue of today's opinions is in a position to administer the \textit{coup de grace}; there is no liability where the injurious action is performed under the police powers of the state. If that is not enough, the plaintiff will also discover that governmental functions are also immune, as are all functions not performed by private persons.

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\textit{Id.} at 941-42.
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\textsuperscript{193.} "Given the sweep of discretionary activities and police power actions, I suggest that there is very little, if anything, left in the way of government action on which a tort victim could sue." 468 So. 2d at 942.

\textsuperscript{194.} 468 So. 2d 912 (Fla. 1985).

\textsuperscript{195.} April 4, 1985.

\textsuperscript{196.} 468 So. 2d at 914.
inspections but certified the question to the supreme court. The question reads:

Whether under section 768.28, Florida Statutes (1975), as construed in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979), a municipality retains its sovereign immunity from a suit predicated liability solely upon the allegedly negligent inspection of building, where that municipality played no part in the actual construction of the building. 197

The Florida Supreme Court, however, restated the question as follows: "Whether a governmental entity may be liable in tort to individual property owners for the negligent actions of its building inspectors in enforcing provisions of a building code enacted pursuant to the police powers vested in that governmental entity." 198

Not surprisingly, the court answered the question "no," making several points which it elaborated at length in its opinion. The points were: 199

1) The sovereign immunity waiver statute was not intended to create any new cause of action, but only to remove a bar which otherwise would have presented suit upon an already existing recognized tort action.

2) No duty was owed at common law to individuals in regard to the police power of the state.

3) The adoption of the building code did not create a statutory duty to individuals.

4) Unless there is a violation of "constitutional or statutory rights," the doctrine of separation of powers prevents interference in governmental discretionary functions of government. 200

5) Discretionary acts which are "inherent in the act of governing" retain immunity. 201

197. Id.
198. Id.
199. See also 468 So. 2d at 914-15.
200. See also Id. at 918.
201. Id. The court also noted:

[In rejecting the general duty/special duty dichotomy contained in Modlin v. City of Miami Beach, [we] did not discuss or consider conduct for which there would have been no underlying common law duty upon which to establish tort liability in the absence of sovereign immunity. Rather, we were dealing with a narrow factual situation in which there was a clear common law duty absent sovereign immunity. We expressly
The court restricted use of the four-part test in *Evangelical Brethren* (which assists in distinguishing between the discretionary/planning and the merely operational levels of governmental activity, a distinction made in the *Johnson* case and adopted by the Florida Court) to situations in which, absent sovereign immunity, there would be "an underlying common law or statutory duty of care."\(^{202}\) Despite this, the court characterized its decision as "narrow" and stated:

We caution trial and appellate courts who apply this decision that our holding does not have the broad ramifications characterized by the dissents, nor does it recede from *Commercial Carrier*. This decision addresses only the narrow issue of exercising basic discretionary judgments in the enforcement of the police power, public safety functions by a state, county, or municipal governmental entity.\(^{203}\)

In dissent, Justice Enrlich characterized the decision as one which "further eroded the legislature's unequivocal waiver of sovereign immunity and further reduced the rights of citizens of this state to be compensated for injury caused by negligent performance of statutorily mandated duties."\(^{204}\)

recognized that there were areas of governmental activity where "orthodox tort liability stops and the act of governing begins."

\(\text{Id.}\) (quoting Modlin v. City of Miami Beach, 371 So. 2d at 1018).

202. 468 So. 2d at 919. The *Evangelical Brethren* test "need not be applied in situations where no common law or statutory duty of care exists for a private person because there clearly is no governmental liability under those circumstances." \(\text{Id.}\)

203. \(\text{Id.}\) The court noted four kinds of governmental functions: "(I) legislative, permitting, licensing and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens." \(\text{Id.}\) at 919. Other cases decided on the authority of Tria non Park were; Department of Business Regulation v. Bryan, 474 So. 2d 807 (Fla. 1985) (per curiam) (negligent inspection of an elevator); and Johnson v. Collier County, 474 So. 2d 806 (Fla. 1985) (per curiam) (negligent inspection of a construction site).

204. 468 So. 2d at 923 (Ehrlich, J. dissenting). Justice Ehrlich raised the interesting point that the net effect of the immunization of the governmental entities, combined with the establishing of an immunity for the individual employees, an action which was available prior to the enactment of Fl. STAT. § 968.28(9), could very well render the latter statutory provision unconstitutional in that it deprived access to the courts in violation of article 1, § 21 of the Florida Constitution, which provides that: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."
If sovereign immunity protects officers deciding whether or not to arrest, and building inspectors in the course of their duties, it would come as no surprise to find that the failure of a city to enforce an ordinance is also immunized since it involves questions of enforcement priorities and the allocation of resources. The Florida Supreme Court so held in *Carter v. City of Stuart*, 206 in which an ordinance requiring the impoundment of dangerous dogs was not enforced against a pit bull which had bitten in the past.206 Somewhat surprisingly in light of the

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Justice Shaw also dissented with an opinion in which he charged that the majority had improperly mixed the issue of sovereign immunity with that of duty under traditional tort law. He agreed with Justice Ehrlich that by undertaking to conduct building inspections, a duty arose to conduct them reasonably, and a duty was owed to those who purchased units which were certified as complying with code requirements when, in fact, they did not. *Id.* at 926. He stated:

I differ from him in two basic respects. First, I am persuaded that the legislative waiver of sovereign immunity is comprehensive: neither operational nor planning functions are immune from suit. Government entities are subject to suit on planning level functions just as private persons are. The separation of powers doctrine can only bar suit on nonjusticiable political questions. To hold otherwise is to frustrate the constitutional and statutory provisions waiving sovereign immunity. Second, the operational/planning test is a failed instrument as demonstrated by the progeny of *Commercial Carrier*. The simple truth is that planning alone will very rarely if ever injure anyone and for that reason is extremely unlikely to become the subject of a tort suit. However, when the planning becomes operational, it is properly the subject of a suit if the elements of a tort can be proven. The attempts to distinguish between planning and operational functions is an elaborate but irrelevant artifact when the legislature has completely waived sovereign immunity. If a governmental entity 'plans' a tort and carries it out, thus injuring someone, the entity should be subject to suit just as a private person would be under the same circumstances.

468 So. 2d at 928 n.4 (Shaw, J. dissenting). (Justice Adkins concurred in the dissenting opinions of Justices Ehrlich and Shaw).

205. 468 So. 2d 955 (Fla. 1985).

206. *Carter v. City of Stuart*, 433 So. 2d 669 (Fla. 4th Dist. Ct. App. 1983). The opinion of Chief Judge Letts is noteworthy for its expressed frustration with the attempt to apply the test set down by the supreme court.

As to the overall question of what constitutes "planning" and what is "operational," it is our view that the Florida case law is in disarray. Indeed, the only way out of the impasse at the District Court level is to certify each and every case to the Supreme Court, on its particular facts, and let our superiors show us the way until the law is clarified or *Commercial Carrier* is receded from.

*Id.* at 670. Although the decisions reported here might help to clarify the situation somewhat, the extent to which they will do so is not entirely clear. In *Carter*, for exam-
above cases, the supreme court held that a city could be held liable and that sovereign immunity did not bar an action for the city’s failure to warn the public about a known hazard on its beaches. The case was Ralph v. City of Daytona Beach.\textsuperscript{207}

Plaintiff was run over by an automobile while sunbathing on the beach. A charter provision made the part of the beach within the city limits a public highway and authorized the city to regulate traffic. Plaintiff argued that this gave rise to a duty to do so and to warn those using the beach for non-traffic purposes that such traffic might be on the beach. Breaches of these duties was alleged to have been a proximate cause of the accident.\textsuperscript{208} The trial court dismissed the complaint and the appellate court affirmed.\textsuperscript{209} The appellate court reasoned that decisions about how much and what sort of resources to use for traffic regulation, and whether or not (or how) to limit beach vehicular traffic were seen as issues of policy not subject to second guessing in tort litigation.

The fact that the City has the power to curtail or regulate traffic on the beach cannot and should not make it liable in tort when the determination of when and how to exercise that power is a matter of governmental discretion, at least not under the facts presented here. It is not a tort for government to govern.\textsuperscript{210}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{207} 471 So. 2d 1 (Fla. 1983) (The case originally appeared at 8 FLA. L. WEEKLY 79 (1983), the revised version appeared at 10 FLA. L. WEEKLY 348 (1985)).
\item \textsuperscript{208} Ralph v. City of Daytona Beach, 412 So. 2d 875, 876 (Fla. 5th Dist. Ct. App. 1982).
\item \textsuperscript{209} Id. at 877.
\item \textsuperscript{210} Id. at 878. The court cited to Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970), in which the city was not liable for failing to have police present at a demonstration which got out of hand and became a riot. The case was approved in Commercial Carrier. It is worth noting that the appellate court carefully reviewed the facts and the supreme court tests. It concluded that the act was essentially one of discretion and governmental policy. It tested its view under the four part test in Evangelical United
\end{itemize}
\end{footnotesize}
In its revised opinion, the supreme court stated the issue to be this:

Whether a complaint that alleges that the City of Daytona Beach allowed a known hazardous condition to exist on the beach without warning the public invited to use the beach for recreational purposes of that known hazardous condition, states a cause of action able to withstand a motion to dismiss. We hold that it does.\textsuperscript{211}

The court suggested that the key was the allegation of a dangerous condition which was known to the city and for which no proper warning was given.\textsuperscript{212} The court also noted that it was not addressing the issue of whether there was, in fact, a breach of duty, considering the possible apparent nature of the danger. The only issue addressed was whether the complaint stated a cause of action or was barred by sovereign immunity.\textsuperscript{213} The result in this case is particularly interesting in light of \textit{Everton, supra}, in which the driver of the car was apprehended for an illegal u-turn and where, "[the deputy] knew, by his own observations and by . . . [the driver's] own admissions, that . . . [the driver] had been drinking to some extent,"\textsuperscript{214} and in which the driver was allowed to go on his way shortly after which he was involved in an accident in which third parties were injured and killed.\textsuperscript{215}

It would seem, after \textit{Ralph}, that if the complaint had stated that the officer knew the driver was intoxicated, then releasing him would be the creation of a known hazard for which a duty to warn would arise. Since there would be no effective way to warn in such a case,

\textit{Brethren Church}. Yet, the supreme court concluded it had arrived, through this process, at the wrong answer.

\textsuperscript{211} 471 So. 2d at 1.

\textsuperscript{212} \textit{Id.} at 2. The court cited with approval Department of Transp. v. Neilson, 419 So. 2d 1071 (Fla. 1982), which deemed failure to warn of a known danger to be "operational." The court also cited City of St. Petersburg v. Collom, 419 So. 2d 1082, 1083 (Fla. 1982), stating:

\begin{quote}
We hold that when a governmental entity creates a \textit{known} dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational level arises to warn the public of, or protect the public from, the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity.
\end{quote}

471 So. 2d at 2 (citing \textit{Collom}, 419 So. 2d at 1083).

\textsuperscript{213} 471 So. 2d at 3.


\textsuperscript{215} 468 So. 2d at 937.
other effective action would have to be taken which, for all practical purposes, would require the arrest of the driver for intoxication. Hence, the allegation of the officer would convert the issue from one dealing with discretion to make arrests to one dealing with failure to warn or act in relation to known hazards created by a defendant’s acts.

There is no doubt that the net effect of the above decisions has been to limit the scope of the immunity waiver statute and to continue immunity for a broad range of discretionary, political and policy decisions of government. It is not clear that the broad scope of this continuing immunity was intended by the legislature since no such exception appears in the statute. Further, decisions such as *Everton* and *Ralph* are likely to cause continuing confusion among lower courts and to lead to ingenious attempts on the part of plaintiffs’ counsel to somehow plead cases as ones dealing with failure to warn of known hazards. It is likely that the supreme court will have to continue to guide the development of this area of law closely for some time to come.

X. Statutes of Limitation and Repose

*Celotex Corporation v. Copeland,* 216 the case in which the issue of market share liability was considered, 217 also reviewed the question of whether the statute of limitations had run, thus barring the action. The applicable limitation period was four years. 218 In general, the period would run from the time that plaintiff discovered, or a reasonable person in plaintiff’s position would have discovered, the facts which would trigger a cause of action. 219

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216. 471 So. 2d 533 (Fla. 1985).
217. *See infra* notes 263 to 266 and accompanying text.
218. *Fla. Stat.* § 95.11(3) (1981), which was deemed to be the applicable limitation statute provided that a number of actions had to be brought “within four years.” Subsection (e) provided that the four year limitation would apply to “[a]n action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.” *Id.*
219. *Fla. Stat.* § 95.031 (1981) provided: “Except as provided in subsection (2) and in § 95.051 [concerning tolling of the statutes] and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.” Subsection (2) provided:

Actions for products liability and fraud under § 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered.
The facts showed that the plaintiff was exposed to asbestos in the course of his employment as a boilermaker from 1942 until 1975. Plaintiff became aware that there were potential health risks from asbestos exposure as early as 1958, but had no physical symptoms of any trouble until the late 1960's. The symptoms grew worse in 1972 and continued to do so. Plaintiff retired in 1975 and was finally diagnosed as having asbestosis in 1978. Suit was brought in 1979.220

Defendants moved for summary judgment which was granted by the circuit court on the ground that the applicable statute of limitations had run.221 The appellate court reversed, holding:

Where, as here, the claimed injury in a products liability action is a so-called "creeping disease," like asbestosis, acquired over a period of years as a result of long-term occupational exposure to injurious substances, such as asbestos dust, the courts have held that the action accrues for purposes of the statute of limitations "only when the accumulated effects of the deleterious substance manifest themselves [to the claimant]."222

Because the issue of just when the effects manifested themselves was one of fact and was in dispute, it was improper for the circuit court to grant a summary judgment on the issue.223 The supreme court agreed with the decision and the reasoning of the district court of appeals.224

The statute of limitations in a medical malpractice case was considered in Moore v. Morris.225 The petitioner (the action was commenced by her parents on her behalf) was born in 1973. At the time of the birth some problems developed and a Caesarean section was per-

or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in § 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

Id.

221. Id. at 925.
222. Id. at 926 (quoting in part Urie v. Thompson, 337 U.S. 163 (1949)).
223. 447 So. 2d at 926-28.
224. 471 So. 2d at 539.
225. 475 So. 2d 666 (Fla. 1985).
formed. The father noticed that the baby appeared to be blue and that oxygen was used. The baby then had to be transferred to Jackson Memorial Hospital's infant emergency unit. There was some thought that the baby would not live, and emergency surgery had to be performed to help her breathing.\textsuperscript{226}

The district court of appeals confirmed that the applicable statute of limitations was two years\textsuperscript{227} and that it had begun to run at the birth since there was notice of the injury at that time. Since the suit had not been commenced until 1978, the action could not be brought. The appellate court therefore affirmed the summary judgment which the trial court had entered.\textsuperscript{228}

The Florida Supreme Court quashed the appellate court's decision and remanded the case, holding that a summary judgment was not appropriate.\textsuperscript{229} Although the father could see that there were problems, the court said:

There is nothing about these facts which leads conclusively and inescapably to only one conclusion — that there was negligence or injury caused by negligence. To the contrary, these facts are totally consistent with a serious or life threatening situation which arose through natural causes during an operation. Serious medical circumstances arise daily in the practice of medicine and

\textsuperscript{226} Moore v. Morris, 429 So. 2d 1209, 1209-10 (Fla. 3d Dist. Ct. App. 1983).
\textsuperscript{227} The applicable statute at that time was FLA. STAT. § 95.11 (6), which provided:

\begin{quote}
WITHIN TWO YEARS — [A]n action to recover damages for injuries to the person arising from any medical, dental, optometric, chiropradal, or chiropractic treatment or surgical operation, the cause of action in such cases not to be deemed to have accrued until the plaintiff discovers, or through the use of reasonable care should have discovered, the injury.
\end{quote}

\textsuperscript{228} 429 So. 2d at 1210. In dissent, Chief Justice Schwartz noted that although the child's parents knew there was something wrong at the time, they did not appear to know that there was any permanent injury to her until years later. As the Chief Judge stated:

I very strongly dissent from the conclusion, inherent in the summary judgment below and its affirmance here, that one is obligated as a matter of law to bring an action before there is a clear indication that damages have even been sustained. Such a holding will require the bringing of protective actions in every case in which a supposed medical misadventure may have occurred, on the off chance that an injury will subsequently manifest itself.

\textit{Id.} at 1210 (Schwartz, C.J., dissenting).
\textsuperscript{229} 475 So. 2d at 667.
because they are so common in human experience, they cannot, without more, be deemed to impute notice of negligence or injury caused by negligence. 230

_Pullum v. Cincinnati, Inc._ 231 involved an equal protection challenge to the state’s statute of repose in product liability actions. The statute required, in addition to the restrictions imposed by the statute of limitations, that any products action had to be brought no later than twelve years after delivery of the product to the first purchaser. 232 The product which injured the plaintiff was a pressbrake machine which was delivered to the first purchaser in November 1966. The injury to the plaintiff occurred in April 1977. Suit was filed in November 1980. This was within the statute of limitations period, but after the time permitted by the statute of repose. The trial court entered a summary judgment and the appellate court affirmed. 233

Earlier, in _Overland Construction Co. v. Sirmons_, 234 the supreme

230. _Id._ at 668. In Taddiken v. Florida Patient's Compensation Fund, 478 So. 2d 1058 (Fla. 1985) (per curiam), the certified question was:

> Whether a claim against the Florida Patient's Compensation Fund arises at the time of the alleged medical malpractice, rather than when judgment is entered against the tortfeasor, and is governed by the two year statute of limitations provided by section 95.11(4)(b), Florida Statutes (1977), so that the Fund must be made or joined as a party defendant within two years after the malpractice action accrues?

_Id._

The court answered the question “yes,” holding that “the Fund is in privity with its participating health care providers and is subject to the same two-year statute of limitations period.” _Id._ at 572. Three other cases, Robison v. Florida Patient's Compensation Fund, 478 So. 2d 1062 (Fla. 1985); Florida Patient's Compensation Fund v. Isabella, 478 So. 2d 1063 (Fla. 1985); and Haftel v. Florida Patient's Compensation Fund, 478 So. 2d 350 (Fla. 1985), were affirmed on the authority of _Taddiken_, in per curiam opinions.

231. 476 So. 2d 657 (Fla. 1985).

232. FLA. STAT. § 95.031(2) (1979) provided:

> Actions for products liability and fraud under § 95.11(3) must be begun within the period proscribed in this chapter, with the period running from the time the facts give rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in § 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date the defect in the product or the fraud was or should have been discovered.


234. 369 So. 2d 572 (Fla. 1979).
court had considered an analogous statute of repose dealing with defects in improvements to real property, and held that when the statute had the effect of barring an action before it accrued, it was unconstitutional in that it violated the provision in the state constitution assuring the right of access to courts. The reasoning was extended to the products liability statute of repose in Battilla v. Allis Chalmers Manufacturing Co. By contrast, when the repose statute had the effect of shortening the existing time for bringing the action, but not of barring the action altogether, it had been upheld.

236. 369 So. 2d at 575. The Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Fla. Const. art. I, § 21.
237. 392 So. 2d 874 (Fla. 1980) (per curiam). The per curiam opinion in its entirety stated:

This cause is before the Court on appeal from a judgment of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. The judgment passed upon the validity of a state law. The notice of appeal was filed January 12, 1979. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. (1972).

The Circuit court held that this product liability action was barred by the statute of limitations, section 95.031, Florida Statutes (1975). We reverse on the authority of Overland Construction Company v. Sirmons, 369 So. 2d 572 (Fla. 1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution. See also Purk v. Federal Press Co., 387 So. 2d 354 (Fla. 1980); Bauld v. J.A. Jones Construction Co., 357 So. 2d 4012 (Fla. 1978).

It is so ordered.

Id. Justice McDonald dissented in an opinion joined by Justices Overton and Alderman, arguing that while a 12-year statute of repose might not be reasonable when improvements to real property were involved, it was when dealing with products. Justice McDonald suggested that the limitation was a reasonable compromise between alternative policies, one that recognized the need to compensate consumers for injuries from dangerous products and one which sought to avoid excessive and endless liability on manufacturers. "I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers." Battilla, 392 So. 2d at 875.

238. In Bauld v. J.A. Jones Constr. Co., 357 So. 2d 401 (Fla. 1978), plaintiff was injured by a pneumatic message conveyor system. The work was done in 1961, the injury occurred in 1972, and under the subsequently passed statute of repose with a special grace period applicable to actions which would otherwise have been barred by the passage of the act, the action had to be brought by January 1, 1976. The supreme court rejected the argument that the effect of this change — i.e., that plaintiff had about seven months less time to sue than under the statute of limitations alone — violated the state constitution. The court affirmed the summary judgment. Id. at 403.
In *Pullum*, the plaintiff conceded that the statute of repose itself was unconstitutional, but argued that after *Battilla*, the application of the statute amounted to a violation of equal protection.239 "Pullman argues that the statute now irrationally applies to a very limited class of persons, i.e., those persons injured during a time period of eight to twelve years after delivery of the completed product to its original purchaser."240

In *Purk v. Federal Press Co.*, 387 So. 2d 354 (Fla. 1980), a products liability action, the product which was injured was first sold in 1961. The injury took place in 1973. The statute of repose took effect in 1975, and under its grace period, the right to sue for an action otherwise barred under the new statute was extended until January 1, 1976. The action was brought on April 13, 1976. The supreme court contrasted *Bauld* with *Overland Constr. Co.*, and held that access to the courts was not denied. *Purk*, 387 So. 2d at 356-357. The repose statute was also upheld against an equal protection challenge. *Id.* at 357-58.

239.

He pointed out that if the accident had occurred twelve years or more after delivery of the machine, the statute of repose would not have barred his action, and he would have had, pursuant to Section 95.11(3), four years from the accident date within which to file his suit . . . . The results of the interplay among the regular four-year limitations statute, the twelve-year statute of repose and the holding in *Overland* are: (1) that a person who sustains an injury at any time within eight years from the product's initial delivery date will have four years from the date of injury within which to file suit; (2) that a person injured twelve years or more after the delivery date will also have four years from the date of injury to sue because *Overland* would preclude the operation of the twelve-year statute; provided, however, that such person might not have as many as four years to bring the action where his injury occurred prior to January 1, 1975, the effective date of Chapter 74-382, Laws of Florida (the law creating Section 95.031), and where he would be required to file suit by January 1, 1976, by virtue of the one-year savings clause provided for by Chapter 74-382, section 36; and (3) that those persons injured during the time frame of eight to twelve years after delivery date will be governed by a limitations period of something less than four years, such period depending upon the point, during that time frame, when the injury occurs (i.e., if the injury occurs nine years after delivery, the party would have three years to sue; if the date of injury was 10 years after delivery, suit would have to be brought within two years; etc.). *Pullum* complains that he is denied equal protection because he had only one and a half years from his injury within which to file suit, whereas a person injured by the same machine approximately two and one half years later (at least 12 years after delivery) would have, by virtue of the holding in *Overland*, four years within which to file.

*Pullum*, 458 So. 2d at 1138.

240. 476 So. 2d at 659.
In the face of this challenge, the supreme court reconsidered its decision in Battilla, and "receded" from it, holding that the repose statute is not violative of the Florida Constitution. The court stated: "[I]n enacting this statute of repose, [the legislature] reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." Since the supreme court had "receded from" the case which had, allegedly, created the problem, the basis of the equal protection argument was gone. Granting the summary judgment was, therefore, upheld.

XI. Causation: Market Share Liability

As a general proposition, it is fair to assert that plaintiff must

241. Id. The supreme court approved the result of the district court of appeal only. That court had found no violation of equal protection on the authority of Purk. The court noted that Justice McDonald, who had dissented in Battilla, had correctly analyzed the different considerations involved in a statute of repose for improvements to real property as contrasted with those applicable to a statute of repose dealing with manufactured goods. Id. at 659-60.

242. The court stated that it had "reconsidered" Battilla, twice that it had "receded" from Battilla, and "held" that section "95.031(2) is not unconstitutionally violative of article I, § 21 of the Florida Constitution." 476 So. 2d at 659. The court also dropped this interesting footnote:

Pullman also refers to Diamond v. E.R. Squibb and Sons, Inc., 397 So. 2d 671 (Fla. 1981), as being in accord with Battilla. In Diamond, we held that the operation of section 95.031(2) operated to bar a course of action before it accrued and thereby denied the aggrieved plaintiff access to the courts. But Diamond presents an entirely different factual context than existed in either Battilla or the present case where the product first inflicted injury many years after its sale. In Diamond, the defective product, a drug known as diethylstilbestrol produced by Squibb was ingested during plaintiff's pregnancy shortly after purchase of the drug between 1955-56. The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under these circumstances, if the statute applied, plaintiff's claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in Diamond. Were it applicable, there certainly would have been a denial of access to the courts.

Id.

243. 476 So. 2d at 660.
prove that defendant's act caused him harm.\textsuperscript{244} Even so, the realities of the world mean that factual situations arise in which the possibility of causation is high, but proof is difficult or impossible. Such situations have resulted at times in modifications of the basic causation doctrine. In the area of products liability, the most controversial modification of causation recently took place in California in \textit{Sindell v. Abbott Laboratories}.\textsuperscript{245} This doctrine, called "market share liability," was considered recently in Florida.

The facts of \textit{Sindell} were tragic. A number of different companies manufactured and sold a drug called diethylstilbestrol (DES). The drug was approved on an experimental basis although these companies allegedly sold it on an unlimited basis. The drug was administered to pregnant women to help prevent miscarriages. It allegedly continued to be marketed despite the fact that the companies "knew or should have known that it was a carcinogenic substance, that there was a grave danger after varying periods of latency it would cause cancerous and pre-cancerous growths in the daughters of the mothers who took it, and that it was ineffective to prevent miscarriage."\textsuperscript{246} The drug was manufactured by all of the companies from a single government-approved formula. Plaintiff (and those similarly situated, who were "DES daughters") had no way of knowing or proving exactly which company's product her mother had taken so many years before, prior to her own birth, yet her injury was real, caused by the DES which her mother had taken.\textsuperscript{247}

There are several possible solutions to the causation problem posed by these facts. One is that plaintiff loses and collects nothing since she is unable to prove exactly which company manufactured the actual

\textsuperscript{244} While the statement is accurate as a general principle in negligence and strict liability actions for damage to persons and property, a reference to the historical right of action for libel per se without proof of actual harm will serve as a necessary reminder that even such a basic principle may not be universal in the law of torts.


\textsuperscript{246} \textit{Id.} at 594, 607 P.2d at 925-926, 163 Cal. Rptr. at 133-134. It was alleged that the companies negligently failed to test the drug and "the tests performed by others, upon which they relied, indicated that it was not safe or effective." \textit{Id.} at 594, 607 P.2d at 926, 163 Cal. Rptr. at 134.

\textsuperscript{247} \textit{See} 26 Cal. 3d at 594-5, 607 P.2d at 925-926, 163 Cal. Rptr. at 133-134. DES was sold under many different names and was often prescribed generically by doctors. It was given to as many as three million pregnant women. \textit{See} 26 Cal. 3d at 597, 607 P.2d at 927, 163 Cal. Rptr. at 135.
doses of DES which her mother consumed. Under the basic causation rule, this would have been the result.\footnote{248} Generally, a plaintiff should not recover from a defendant unless she can show that the defendant caused the harm about which she complains. In most cases where causation cannot be proven, it is either because the defendant did nothing wrong at all or did nothing wrong with respect to the plaintiff. Defendant is, in essence, a stranger to the injury. In \textit{Sindell}, by contrast, it was clear that all of the defendants were negligent in manufacturing and marketing DES despite the evidence of danger. The negligence of each was alleged to be identical. Additionally, by marketing the drug so that it was mere happenstance which company’s product was actually consumed by the mother, each company was arguably negligent to the plaintiff. In such a situation, a result where plaintiff takes nothing and defendant pays nothing is not palatable. Perhaps for this reason, the California Supreme Court was moved to consider various theories under which the plaintiff might recover.

One possible approach would be to hold all of the defendants jointly and severally liable under a concert-of-action theory. The basis for this would be a finding that the defendants acted together to commit the tort and that was each active participant would, therefore, become liable for the acts of each member of the group.\footnote{249} This approach is quite harsh. If each defendant is part of a common tortious plan, then it would not matter whether a particular defendant could prove that he did not manufacture the doses which were consumed. “All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer’s acts done for their benefit, are equally liable.”\footnote{250} Without actual evidence that

\footnote{248. We begin with the proposition that, as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant’s control. The rule applies whether the injury resulted from an accidental event (e.g., Shunk v. Bosworth, 334 F.2d 309 (6th Cir. 1964)) or from the use of a defective product (e.g., Wetzel v. Eaton Corp., 62 F.R.D. 22, 29-30 (D. Minn. 1973); García v. Joseph Vince Co., 84 Cal. App. 3d 868, 873-875, 148 Cal. Rptr. 843 (1978)). See also Hursh and Bailey, \textit{American Law of Products Liability} 2d 125 (1974). 26 Cal. 3d at 597-98, 607 P.2d at 928, 163 Cal. Rptr. at 134.

\footnote{249. See generally \textit{Restatement (Second) of Torts} § 876 (1977).}

\footnote{250. W. Prosser & W. Keeton, \textit{Prosser and Keeton on Torts} § 46 (5th ed.)}
there was such a common plan, it would not be appropriate to apply the concert-of-action theory to the facts of Sindell.

Another approach is to hold the entire industry jointly and severally under a theory of "enterprise liability." This doctrine, which the court noted had been proposed in a federal district court decision, suggests that defendants who act independently can become liable as a group when an industry standard, to which they all independently adhere, is negligent.

The court reasoned as follows: there was evidence that defendants, acting independently, had adhered to an industry-wide standard with regard to the safety features of blasting caps, that they had in effect delegated some functions of safety investigation and design, such as labelling, to their trade association, and that there was industry-wide cooperation in the manufacture and design of blasting caps. In these circumstances, the evidence supported a conclusion that all the defendants jointly controlled the risk. Thus, if plaintiffs could establish by a preponderance of the evidence that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all the defendants.

The Sindell court rejected this theory on the facts. In the blasting cap case, there was a small number of manufacturers, while over two hundred companies were involved with DES. In the prior case, there was evidence of delegation of safety measures to a trade association, but no such evidence existed in Sindell.

Another approach used in these cases is sometimes called "alternative liability." When multiple defendants have all been independently negligent to the plaintiff and are all joined as party defendants, but when it is impossible for plaintiff to determine which of the defendants actually caused the injury, the burden of proof as to causation will be shifted to each defendant. If a defendant can carry the burden and show that he was not the cause of the injury, then that defendant is out of the case. Any defendants who are unable to meet the burden are

1984). [Footnotes omitted].


252. 26 Cal. 3d at 607-08, 607 P.2d at 934, 163 Cal. Rptr. at 142.

253. It was not held to be significant that all of the manufacturers of DES used the same formula because this was the government approved formula which manufacturers were required to use. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.
held jointly and severally liable. This doctrine was created by the California Supreme Court in *Summers v. Tice*, and was adopted by the Restatement.

In *Summers*, all of the possible people who could have injured the plaintiff were joined as defendants in the action. In *Sindell*, by contrast, only some of the DES manufacturers were joined. Thus, although arguably each of the joined defendants had been independently negligent toward the plaintiff, the actual manufacturer of the DES which plaintiff’s mother took might not have been among those joined in the suit. Balancing the factual differences between *Sindell* and *Summers* against a basic notion of fairness that “as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury,” the court applied the principles of *Summers* but in a modified form. The court held that:

1) Where the defendants, although acting independently, made an identical drug (and so were negligent in the same way to consumers and others affected, including in this case the daughters of consumers; and

2) Where plaintiff had managed to join defendants who collectively accounted for a “substantial share” of the total DES market, but less than all such defendants; then

3) The burden of proof on causation is shifted to the defendants and all defendants will be held liable for the injuries, except those who can prove that they did not manufacture the DES which was taken by plaintiff’s mother; however

4) Joint and several liability would not be applied. Rather, each defendant will be held liable only for a percentage of the damage equal to the percentage of the market in DES which the defendant had.

Besides the general fairness issue raised by the court, it also sug-

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254. 33 Cal. 2d 80, 199 P.2d 1 (1948). In *Summers*, two different defendants, acting independently, negligently fired guns in plaintiff’s direction, but it was impossible for plaintiff to determine which shot or shots injured him.


256. 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

257. Id. at 611-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46. Plaintiff alleged that six or seven companies were responsible for 90% of the DES market. Without adopting any particular percentage necessary to meet the “substantial” share of the market requirement, the court noted that if these manufacturers could be joined in the suit, the chance that the manufacturer which had actually made the particular DES taken by plaintiff was absent would be only 10%.
gested that the doctrine was necessary to protect consumers in an increasingly complex society, and that the defendants were in the best position to discover the problems and to insure against them.

*Sindell* received mixed reviews, and the eventual reception of

258.

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs.

*Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

259. "These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs." *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court discounted defendant's arguments.

Most of their arguments, however, are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers if plaintiff ultimately prevails. But under the rule we adopt, each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured.

*Id.* at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146. (Footnote omitted).


[W]e are unable to give a definitive answer on this record whether the manufacturers of DES named as defendants (who probably supplied some of the DES ingested by the mothers of the plaintiffs) can or cannot be held liable to the members of the plaintiff's class when neither the plaintiffs nor the defendants can identify which manufacturers' DES was ingested by the mothers of the plaintiffs. We have indicated, however, the view that we might permit recovery from those defendants shown to be negligent to the extent of their participation in the DES market, even though the plaintiffs cannot identify the particular source of DES which their mothers ingested.

*Id.*

*See also* Tidler v. Eli Lilly and Co., 95 F.R.D. 332 (D.C. 1982) (refusing to require defendants to answer interrogatories about their market shares, and deeming the
the doctrine in DES litigation is still somewhat in doubt. Consideration of the doctrine has also begun in the context of litigation over injuries received due to long-term exposure to asbestos. The reception in this context has been decidedly chilly.\footnote{[Footnote omitted]. See also In re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Ca. 1982), which rejected market share partly because it appeared that plaintiff would be able to identify which defendant(s) caused the injury. The court also rejected the theory because:}

Difficulties arise because of the theory a "radical departure from the body of products liability law"). \textit{Id.} at 336. See also Pipon \textit{v.} Burroughs-Wellcome Co., 532 F. Supp. 637 (D.N.J. 1982) (rejecting the doctrine); Morton \textit{v.} Abbott Laboratories, 538 F. Supp. 593, 599-600 (M.D. Fla. 1982) ("This Court finds no indication in the decisions of the courts of this state that they would follow Sindell in departing from the fundamental requirement of causation) (footnote omitted); Collins \textit{v.} Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (Wis. 1984), \textit{cert. denied}, 105 S. Ct. 107 (1984) (rejecting Sindell, but fashioning its own requirements which would also not require plaintiff to prove that defendant made the precise doses which the mother consumed, and permitting action either in negligence or strict liability); and Zafft \textit{v.} Eli Lilly, 676 S.W.2d 241 (Mo. 1984) (en banc) (rejecting the doctrine).

"The market share liability theory is a dangerous step towards just such a conversion [of the tort system into one purely of compensation and eliminating the element of resolution of disputes between individuals], and courts in the future should reject it as a method of imposing liability in civil cases." Fischer, \textit{Products Liability — An Analysis of Market Share Liability}, 34 VAND. L. REV. 1623, 1662 (1981). "Market share liability may well create more injustices than it eliminates, because it is the first doctrine to completely divorce liability from responsibility." Comment, \textit{Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification}, 76 NW. U.L. REV. 300, 330 (1981). "The market share approach not only provides compensation to victims of DES, but may promote deterrence of similar occurrences in the future. The significance of Sindell may be the court's demonstrated willingness to use probability to resolve causation problems when inequity would result from the mechanical application of traditional doctrine." Note, \textit{Market Share Liability: An Answer to the DES Causation Problem}, 94 HARV. L. REV. 668, 680 (1981).

261. See, e.g., Starling \textit{v.} Seaboard Coast Line R.R., 533 F. Supp. 183, 191 (S.D. Georgia, Brunswick Division 1982). The court rejected market share in general but also noted its particular non-applicability to cases dealing with asbestos exposure because "asbestos products are not fungible commodities. The injuries caused by asbestos exposure are not restricted to asbestos products — other products, such as cigarettes, may have caused or contributed to the injury. Additionally, products containing asbestos are not uniformly harmful — many products contain different degrees of asbestos." [Footnote omitted]. See also Pipon \textit{v.} Burroughs-Wellcome Co., 532 F. Supp. 637 (D.N.J. 1982), which rejected market share partly because it appeared that plaintiff would be able to identify which defendant(s) caused the injury. The court also rejected the theory because:

Where asbestos is the product in question, numerous factors would make it exceedingly difficult to ascertain an accurate division of liability along market share lines. For example, unlike DES, which is a fungible commodity, asbestos fibers are of several varieties, each used in varying quantities by defendants in their products, and each differing in its harmful effects. Second, defining the relevant product and geographic markets
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many different kinds of products which incorporate asbestos, each with varying levels of danger to the plaintiff. This is a problem which does not exist in DES litigation.

It is within the context of the continuing debate about this controversial doctrine that the Florida Supreme Court considered market share for the first time in Colotex Corp. v. Copeland. The case was brought by "a former asbestos worker, who contracted asbestosis and asbestos-related cancer, and his wife, against sixteen manufacturers of asbestos products." The court of appeals essentially adopted the mar-

would be an extremely complex task due to the numerous uses to which asbestos is put, and to the fact that some of the products to which the plaintiffs were exposed were undoubtedly purchased out of state sometime prior to the plaintiff's exposure. A third factor contributing to the difficulty in calculating market shares is the fact that some plaintiffs were exposed to asbestos over a period of many years, during which time some defendants began or discontinued making asbestos products.

Id. at 1158.

See also Hannon v. Waterman Steamship Corp., 567 F. Supp. 90 (E.D. Louisiana, 1983); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 583 (5th Cir. 1983), cert. denied, 104 S. Ct. 1598 (1984). The Thompson court stated: "We see little purpose in discussing in detail the potential applicability of these theories to Mr. Thompson's case; writing in diversity, we write on the wind." But see Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1359 (E.D. Texas 1981), where the court stated: "In summary, the Court holds that the Erie-indicators support a conclusion that the Texas court would adopt some form of Sindell liability in the asbestos-related cases." The application of market share was not challenged on appeal but the case was reversed on other grounds in Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982).


263. 471 So. 2d 533 (Fla. 1985). The case involved review of two decisions. The first was Copeland v. Celotex Corp., 447 So. 2d 908 (Fla. 3d Dist. Ct. App. 1984), in which plaintiff sued sixteen corporations involved in the manufacture/distribution of asbestos insulation products. Plaintiff alleged that he could identify some but not all of the products, and he further alleged that determining the brand name of various products became virtually impossible once the products were removed from their original packaging. The second case was Copeland v. Armstrong Cork Co., 417 So. 2d 922 (Fla. 3d Dist. Ct. App. 1984).

264. 471 So. 2d at 534.

The facts of this cause are as follows. Copeland worked from 1942 until 1975 as a boilermaker. During this time he was exposed to various asbestos products while employed in from 50 to 100 different jobs. Copeland became aware of the possible health hazards of asbestos dust in 1958 or 1959, but he did not suffer any physical problems until the late 1960's, and he was not conclusively diagnosed as having asbestosis until 1978.
ket share approach and, in a separate order, certified the question to the Florida Supreme Court.\footnote{265} The Florida Supreme Court reviewed the Sindell decision, as well as the approach to the problem adopted by the court of appeals, and decided not to decide the issue. Although it answered the certified question in the negative and quashed the appellate court decision in Celotex, it stated that "[o]ur holding is based principally upon the fact that Copeland was able to identify many of the manufacturers of the products to which he was exposed."\footnote{266}

The Florida Supreme Court noted the differences between the facts in DES and asbestos cases. Because there was a single formula for DES, the risk to a plaintiff was the same for each defendant. In the asbestos cases, by contrast, there were differences in the degree of risk.\footnote{267} Additionally, the administrative aspects of the market share

\textit{Id.} The couple filed suit in 1979 against sixteen companies, on negligence, warranty, and strict liability theories. Plaintiffs were able to identify some but not all of the defendants as those which had supplied various asbestos products with which plaintiff had come in contact during his work. \textit{Id.} at 534-35.

\footnote{265} The certified question was "[w]hether market share liability as announced in Sindell v. Abbott Laboratories . . . should be adopted in Florida." [Citation omitted]. The court of appeals noted that the modification of alternate liability made good sense in cases of cancer where even a single exposure to asbestos would be enough to trigger the disease but where it would be impossible to know which of the defendants' fiber had been the one which plaintiff inhaled. In the case of asbestosis, however, where the cause of the disease is exposure over a long period of time to all of the products, the better approach was to consider the problem as one of apportionment of damages under \textit{Re}statement (Second) of Torts § 433B, which states:

Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

The court modified the section to apply market share principles to the apportionment. Copeland v. Celotex Corp., 447 So. 2d 908, 916 (Fla. 3d Dist. Ct. App. 1984).

\footnote{266} 471 So. 2d at 537.

\footnote{267} This divergence is caused by a combination of factors, including: the specific type of asbestos fiber incorporated into the product; the physical properties of the product itself; and the percentage of asbestos used in the product. There are six different asbestos silicates used in industrial applications and each presents a distinct degree of toxicity in accordance with the shape and aerodynamics of the individual fibers. Further, it has been established that the geographical origin of the mineral can affect the substance's harmful effects. A product's toxicity is also related to whether the product is in the form of a solid block or a loosely packed insulating blan-
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doctrine, while perhaps not easy to define in any case, appeared to the court to be particularly difficult in the asbestos context. While clearly concerned about problems which the doctrine could entail, the court declined to take a final position on it, stating:

While we recognize the clearly established majority view on this issue [against adoption of the doctrine] . . . we do not find it necessary to accept or reject the market theory approach; rather, we find that, since Copeland has identified several of the named defendants as having manufactured the products that caused his injury, this case neither requires nor justifies the major policy changes necessary to adopt the market share theory in Florida.

While the issue of market share can still be considered an open one, it seems unlikely that the court will adopt it in the asbestos context. On the other hand, many of the court’s reasons against the doctrine would not apply to a DES case where all of the defendants produced identical products and so exposed plaintiff to the same risk. In such a case, the market share doctrine could have more appeal.

XII. The Seat Belt Defense

The Florida Supreme Court adopted the “seat belt defense” in Insurance Co. of North America v. Pasakarnis. The court considered possible ways to treat the failure to use an available operational seat belt (negligence per se, contributory negligence, and mitigation of damages) and adopted the position that, unless failure to use the belt actually caused the accident, it should be considered in the mitigation of damages. The court stated that defendant had:

471 So. 2d at 538.
268. Id.
269. Id. at 539.
270. 451 So. 2d 447 (Fla. 1984).
271.

If there is competent evidence to prove that the failure to use an available and operational seat belt produced or contributed substantially to producing at least a portion of plaintiff’s damages, then the jury should be permitted to consider this factor, along with all other facts in evidence, in deciding whether the damages for which defendant may otherwise be liable should be reduced. Nonuse of an available seat belt, however, should not be considered by the triers of fact in resolving the issue of liability.
The burden of pleading and proving that the plaintiff did not use an available and operational seat belt, that the plaintiff’s failure to use the seat belt was unreasonable under the circumstances, and that there was a causal relationship between the injuries sustained by the plaintiff and plaintiff’s failure to buckle up.\textsuperscript{272}

The meaning of \textit{Pasakarnis}\textsuperscript{273} was tested in \textit{Volkswagen of
America v. Long. In that case, defendant failed to specifically plead the seat belt defense but did generally plead the contributory negligence of the plaintiff as the proximate cause of the accident and the injuries. The question was whether this was sufficient, and the Florida Supreme Court held that it was not. "The record clearly reflects that the seat belt issue was not specifically asserted as a defense either in the pleadings or by pretrial motions. We reject the argument by Volkswagen that an allegation of comparative negligence includes the seat belt defense."

XIII. Injury From Contaminated Food

It is clear that one who consumes contaminated food and suffers injury thereby may recover against the manufacturer of the food product. Doyle v. Pillsbury Co. considered the issue of whether the

274. 476 So. 2d 1267 (Fla. 1985).
275. The key portion of the defendant's answer alleged in part that "Plaintiffs...so carelessly and negligently conducted themselves in the operation of the motor vehicle...as to proximately cause or contribute to the accident and injuries complained of." Id. at 1268.
276. Id. at 1269. The district court of appeals had based its decision in the case on pre-Pasakarnis authority which rejected any use of the "seat belt defense" at all. Thus, the supreme court upheld the result only of the lower court decision. Id. The decision was consistent with an earlier decision by the supreme court, Protective Casualty Ins. Co. v. Killane, 459 So. 2d 1037 (Fla. 1984), in which the court agreed that the issue could not be raised at trial when it had not been mentioned in the pleadings or in the pretrial stipulation. The trial judge had ordered that all issues be included in the stipulation whether they were issues of law or of fact. Id. at 1038.
277. An implied warranty action was recognized in favor of a non-purchaser member of the household of the purchaser against the manufacturer of an unwholesome food product which the plaintiff partially consumed, in Blanton v. Cudahy Packing Co., 19 So. 2d 313 (Fla. 1944); against retailers in Sencer v. Carl's Markets, Inc., 45 So. 2d 671 (Fla. 1950) (en banc), and against restaurants in Cliett v. Lauderdale Biltmore Corp., 39 So. 2d 476 (Fla. 1949).

In Food Fair Stores of Fla., Inc. v. Macurda, 93 So. 2d 860 (Fla. 1957), a breach of warranty action was allowed against the retailer for nausea, vomiting, diarrhea and related injuries caused by ingesting a portion of canned spinach only to discover worms and worm pieces in the remainder. The court discussed the question of whether worms made the spinach "deleterious, unwholesome or unfit for human consumption," as follows:

Admittedly we are no connoisseurs of cuisine that qualifies us to view as delicacies some foodstuffs that might be indigestible by others. To certain tribes of American Indians we understand that such creatures as worms, grasshoppers, snails and the like are acceptable as delicious mor-
food must actually be ingested in order for recovery to be permitted.

*Doyle* involved a can of peas contaminated with an insect. Upon opening the can, the plaintiff saw an insect floating in it. This startled plaintiff, who "jumped back in alarm, fell over a chair and suffered physical injuries." The courts below considered the issue one of lack of "impact." The trial court granted a summary judgment and the appellate court affirmed on that basis. The appellate court used the case, however, to add its voice to others who were questioning the continued validity of the impact rule in Florida.

The Florida Supreme Court declined to see the issue as one of "impact" and saw it, instead, as one of foreseeability. When part of the unwholesome food is consumed, the illness of the consumer is foreseeable. Merely observing such food is not generally as traumatic, and so the requisite foreseeability necessary to hold the defendant liable is lacking. For this reason, the court felt the granting of summary judgment to the defendants was proper.

We are told that canned Mexican worms grace the shelves of many delicatessens and in certain swank social levels, which few of us ever reach, it is said that roasted snails are available with the trays of hors d'ouvres at pre-dinner cocktail parties. However, for the masses who have moved ahead of the Indians but who perhaps have not yet reached the "snail set," such invertebrates as worms and snails are generally frowned upon as totally unwholesome and unfit for human consumption. Indeed they are in a class with roaches, mice, flies and other nauseous intruders that the cases indicate have at times found their way into bottles, cans or other foodstuff containers.

*Id.* at 861.

278. 476 So. 2d 1271 (Fla. 1985).

279. *Id*.

280. *Id*.

281. The question certified as one of great public importance was: "Should Florida abrogate the 'impact rule' and allow recovery for physical injuries caused by a defendant's negligence in the absence of physical impact upon the plaintiff?" *Id.* See the discussion of the partial abrogation of the impact rule, *supra* text accompanying notes 26 through 56.

282. 476 So. 2d at 1271. While noting in a footnote that "the impact rule itself is a convenient means of determining foreseeability," the court, while approving the affirmance of the summary judgment, "quash[ed] that portion [of the district court opinion] applying the impact rule to the circumstances of this case." *Id*. at 1272.
XIV. Defamation

Mid-Florida Television Corp. v. Boyles considered the status of the libel per se action and of pleading libel per se in light of the United States Supreme Court decision in Gertz v. Robert Welch, Inc. In Florida:

Words [are] actionable per se [if] their injurious character is a fact of common notoriety, established by the general consent of men, and the courts consequently take judicial notice of it. Words amounting to a libel per se necessarily import damage and malice in legal contemplation, so these elements need not be pleaded or proved, as they are conclusively presumed as a matter of law in such cases.

Common law defamation action by private plaintiffs against media defendants seemed to be altered when the United States Supreme Court balanced the traditional right to protect oneself against being defamed with the freedom of speech and press guaranteed by the first amendment. In Gertz, the Court held on the facts that liability without fault was not permissible under the first amendment, and that neither presumed nor punitive damages were constitutional unless plaintiff could show malice as that term was defined by New York Times Co. v. Sullivan.

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283. 467 So. 2d 282 (Fla. 1985).
285. Layne v. Tribune Co., 146 So. 234, 236 (Fla. 1933). "But words or publications actionable only per quod are those whose injurious effect must be established by due allegation and proof." Id.
286. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347 [Footnote omitted].
287. 376 U.S. 254, 280 (1963) ("'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 418 U.S. at 349). "It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." Id. Gertz also states, "We also find no justification for allowing awards of punitive damages . . . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury." Id. at 350.

Recently, in Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985), the Supreme Court narrowed the presumed application of Gertz. Dun and
In light of Gertz, what is the effect of pleading negligence and actual damage, as required by that case? Also, what is the effect of characterizing the action, in the pleadings, as one which was “defamatory per se . . . libel per se, and slander per se”? The district court of appeal held that Gertz had not abolished the libel per se section but had merely altered the pleading requirements for the action. It stated that “[a] distinction still remains between libel per se and libel per quod: the necessity in the latter action for pleading and proving the innuendo.”

The Florida Supreme Court stated that as long as the complaint satisfied the Gertz requirements, there was nothing wrong with characterizing the action as one of libel per se, and that the term “remains a useful shorthand for giving a media defendant notice that the plaintiff is relying upon the words sued upon as facially defamatory and therefore actionable without resort to innuendo.”

XV. Interference With Business Relationships

The Florida Supreme Court considered the pleading requirements for tortious interference with a business relationship in its review of the First District Court of Appeal decision in Tamiami Trail Tours, Inc. v. Cotton. Plaintiff essentially alleged that defendants engaged in a smear campaign against plaintiff’s taxi cabs, designed to steer business

Bradstreet involved the publication of credit reports by Dun and Bradstreet to five subscribers. The Supreme Court upheld an award of presumed and punitive damages absent proof of actual malice. The plurality opinion by Justice Powell, joined by Justices Rehnquist and O'Connor stated: “[W]e conclude that permitting recovery of presumed a punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.” Id. at 2943. In separate opinions, Chief Justice Burger and Justice White concurred in the judgment and in the limitation of Gertz to matters of public concern. Both, however, would go further and overrule Gertz entirely. Id. at 2943 and 2946.

288. Boyles v. Mid-Florida Television Corp., 431 So. 2d 627, 634 (Fla. 5th Dist. Ct. App. 1983). These allegations were included in count one. Count four incorporated count one by reference and also alleged “New York Times” malice. Id.
289. Boyles, 431 So. 2d at 632 (Fla. 1983).
290. Id. at 633. “'Innuendo' simply means that facts extrinsic to those published must be known in order to inflict an injury.” Id.
291. 467 So. 2d at 283. Justice Ehrlich, concurring specially, wisely argued that the term was not useful and would tend to confuse parties and courts alike. Id.
away from the plaintiff. The campaign included sabotage, verbal harassment, speaking ill of plaintiff to prospective customers, and assault.\textsuperscript{293} Plaintiff's income allegedly dropped substantially and eventually the plaintiff filed suit.\textsuperscript{294} There was a jury verdict for plaintiff.\textsuperscript{295} Defendants appealed, arguing, \textit{inter alia}, that the case for tortious interference with a business relationship could not be made out without a showing that they acted to obtain a business advantage over the plaintiff.\textsuperscript{296} The appellate court rejected defendant's position, stating the four elements necessary to make out the prima facie case: "1) the existence of a business relationship not necessarily evidenced by an enforceable contract; 2) knowledge of the relationship on the part of the defendant; 3) an intentional and unjustified interference with that relationship by the defendant; and 4) damage to the plaintiff as a result of the breach of the relationship."\textsuperscript{297} The supreme court agreed, stating: "We approve that portion of the decision of the district court and, to the extent they conflict, disapprove the decisions of the Third District Court of Appeal in \textit{Hales},\textsuperscript{298} \textit{John B. Reid and Associates, Inc.}\textsuperscript{299} and \textit{Berenson}.\textsuperscript{300}

\begin{itemize}
  \item \textsuperscript{293} \textit{Id.} at 150.
  \item \textsuperscript{294} \textit{Id.}
  \item \textsuperscript{295} \textit{Id.} at 151.
  \item \textsuperscript{296} \textit{Id.}
  \item \textsuperscript{297} \textit{Id.}
  \item \textsuperscript{298} \textit{Hales} v. \textit{Ashland Oil, Inc.}, 342 So. 2d 984 (Fla. 3d Dist. Ct. App. 1977), \textit{cert. denied}, 359 So. 2d 1214 (Fla. 1978).
  \item \textsuperscript{299} \textit{John B. Reid and Assoc's} v. \textit{Jimenez}, 181 So. 2d 575 (Fla. 3d Dist. Ct. App. 1965).
  \item \textsuperscript{300} \textit{Berenson} v. \textit{World Jail-Alai, Inc.}, 374 So. 2d 35 (Fla. 3d Dist. Ct. App. 1979) (quoting \textit{Tamiami Trail Tours, Inc.} v. \textit{Cotton}, 463 So. 2d, 1126, 1127 (Fla. 1985) (per curiam)). The court quoted with approval the four factors listed in the appellate court opinion.
  
  It may well be that most such cases will involve proof that the defendant's motive was to secure a business advantage and, thus, that the interference was intentional. However, we see no logical reason why one who damages another in his business relationships should escape liability because his motive is malice rather than greed.
  
  \textit{Id.} at 1128. "This issue is controlled by our decision in \textit{Dade Enterprises} [Inc. v. \textit{Wometco Theatres, Inc.}, 119 Fla. 70, 160 So. 209 (1935)] which does not require that the plaintiff in such suit establish that the defendant interfered with the business relationship in order to secure a business advantage." \textit{Id.} at 1127-28.

  In \textit{The Florida Bar Standard Jury Instructions Civil} 85-1, 475 So. 2d 682, 689-91 (Fla. 1985), two new jury instructions were approved for publication.

  MI 7.1 \textit{Interference With A Contract Not Terminable At Will}
XVI. Strict Liability for Damage by Dogs

Florida provides by statute that “[o]wners of dogs shall be liable

The issue(s) for your determination on the claim of (claimant) against (defendant) are whether (defendant) interfered with a contract between (claimant) and (name) and did so intentionally; and, if so, whether such interference caused damage to (claimant).

A person interferes with a contract between two [or more] persons if he induces or otherwise causes one of them to breach or refuse to perform the contract.

Intentional interference with another person’s contract is improper. Interference is intentional if the person interfering knows of the contract with which he is interfering, knows he is interfering, and desires to interfere or knows that interference is substantially certain to occur as a result of his actions.

If the greater weight of the evidence does not support the claim of (claimant) then your verdict should be for (defendant). However, if the greater weight of the evidence does not support the claim of (claimant), then your verdict should be for (claimant) and against (defendant).

“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.

If you find for (defendant), you will not consider the matter of damages. But, if you find for (claimant), you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate (claimant) for such [loss] [or] [damage] as was caused by the intentional interference. Such interference is the cause of [loss] [or] [damage] if it directly and in a natural continuous sequence produces or contributes substantially to producing such [loss] [or] [damage].

Id.

MI 7.2 Interference With Contract Terminable At Will Or With Prospective Business Relations; Competition Or Financial Interest Defense.

The issues for your determination on the claim of (claimant) against (defendant) are whether (defendant) interfered with business relations between (claimant) and (name) and did so improperly and intentionally; and if so, whether such interference caused damage to (claimant).

The first question is whether (defendant) interfered with (claimant’s) business relations with (name) by inducing or otherwise causing (name) [not to enter into a contract with (claimant)] [not to continue doing business with (claimant)] [to terminate or bring to an end a contract which (name) was not bound to continue with (claimant)] [(describe other interference)].

If (defendant) did [interfere with (claimant’s) business relations with (name)] [cause (name) to cease doing business with (claimant)], then the next question is whether, as contended by (claimant), the interference by (defendant) was improper. A person who enjoys business relations with
for any damage done by their dogs to . . . persons." The construction of that statute was tested by the Florida Supreme Court in Jones

another is entitled to protection from improper interference with that relationship. However, another person is entitled to [compete for business] [or] [advance his own financial interest] so long as he has a proper reason or motive and he uses proper methods.

A person who interferes with the business relations of another with the motive and purpose, at least in part, to advance [or protect] his own business [or financial] interests, does not interfere with an improper motive. But one who interferes only out of spite, or to do injury to others, or for other bad motive, has no justification, and his interference is improper.

So also, a person who interferes with another's business relations using ordinary business methods [of competition] does not interfere by an improper method. But one who uses physical violence, misrepresentations, illegal conduct or threats of illegal conduct, and the like, has no privilege to use those methods, and his interference using such methods is improper.

If (defendant's) interference was improper, the last question is whether it was intentional as well. Interference is intentional if the person interfering knows of the business relationship with which he is interfering, knows he is interfering with that relationship, and desires to interfere or knows that interference is substantially certain to occur as a result of his action.

If the greater weight of the evidence does not support the claim of (claimant), [that (defendant) intentionally interfered with (claimant's) [contract] [business relationship] with (name),] then your verdict should be for (defendant).

“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence of the case.

[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense of (defendant). On the defense, the issue for your determination is whether (defendant) acted properly in interfering as he did.]

If the greater weight of the evidence [does not support the defense of (defendant) and the greater weight of the evidence] does support the claim of (claimant), the [sic] your verdict should be for (claimant).

If you find for (defendant), you will not consider the matter of damages. But, if you find for (claimant), you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate (claimant) for such [loss] [or] [damage] as was caused by the intentional interference. Such interference is the cause of [loss] [or] [damage] if it directly and in a natural and continuous sequence produces or contributes substantially to producing such [loss] [or] [damage].

Id. [Notes and Comments omitted].

301. FLA. STAT. § 767.01 (1985).
v. Utica Mutual Insurance Co.\textsuperscript{302} Several boys, one of them the son of Roy Davis, the respondent's insured, hitched the dog owned by the Davis family to a wagon. While so hitched, the dog chased another dog. The wagon hit and injured another one of the boys, Donnie Jones. The dog itself never touched Jones.\textsuperscript{303} The major questions raised before the supreme court\textsuperscript{304} were whether the statute should be interpreted as broadly as its words, or restricted to risks associated particularly with dog ownership and whether the dog was a cause of the injury.\textsuperscript{305}

Arguably, these two issues blend into each other. Dean Prosser has stated the issue to be one of the limits of liability for injuries caused without fault:

> The intentional wrongdoer is commonly held liable for consequences extending beyond the scope of the foreseeable risk he creates, and many courts have carried negligence liability beyond the risk to some extent. But where there is neither intentional harm nor negligence, the line is generally drawn at the limits of the risk, or even within it. This limitation has been expressed by saying that the defendant's duty to insure safety extends only to certain consequences. More commonly, it is said that the defendant's conduct is not the "proximate cause" of the damage. But ordinarily in such cases no question of causation is involved, and the limitation is one of policy underlying liability.\textsuperscript{306}

Generally, strict liability is imposed upon some activity which it is reasonable but highly dangerous to do.\textsuperscript{307} Thus, if this reasoning were followed, the statute would apply only if the injury was caused by a

\textsuperscript{302} 463 So. 2d 1153 (Fla. 1985).
\textsuperscript{303} Id.
\textsuperscript{304} The trial court directed a verdict for Jones but the Second District Court of Appeal reversed in Utica Mut. Ins. Co. v. Jones, 408 So. 2d 769, 772 (Fla. 2d Dist. Ct. App. 1982).
\textsuperscript{305} Jones, 463 So. 2d at 1155. Another issue considered was whether the policy of insurance covered the accident at all. The policy had been issued to cover accidents in relation to a nursery business, and the supreme court found that since the dog involved was a watchdog, the function of which was to run free in the nursery, and since the dog was doing so at the time of the injury, the issue of whether the facts showed that the dog's action was within the scope of coverage of the policy had been properly left by the trial court to the jury. Id. at 1156.
\textsuperscript{307} "In general, strict liability has been confined to consequences which lie within the extraordinary risk whose existence calls for such special responsibility." PROSSER, THE LAW OF TORTS 518 (4th ed. 1971).
peculiar characteristic of dogs.\textsuperscript{308} The Second District Court of Appeal acknowledged that a dog chasing another dog is a "canine characteristic."\textsuperscript{309} The dog, however, did not, itself, hit the boy. Only because the dog was hooked to a wagon was there an injury. Therefore, said the Second District Court, the canine characteristic did not cause the injury.\textsuperscript{310}

The supreme court rejected this argument, holding that the statute imposes strict liability in any situation where, by the normal rules of causation, the dog was a proximate cause of the injury.\textsuperscript{311} Thus, while some "affirmative or aggressive act by the dog is required,"\textsuperscript{312} it is not required that the act be directed specifically against the one injured, as had been required by some earlier cases.\textsuperscript{313} The supreme court found by implication, that contrary appellate court opinions had improperly ignored doctrines of concurrent causation, holding that only one of the two actual causes was the proximate cause of the injury.\textsuperscript{314}

\begin{itemize}
\item \textsuperscript{308} Utica Mutual Ins. Co. v. Jones, 408 So. 2d 769, 771 (Fla. 2d Dist. Ct. App. 1982).
\item \textsuperscript{309} Id.
\item \textsuperscript{310} Id. The Second District Court of Appeal also argued for a narrow interpretation because of the interesting enacting history of the statute. On two different occasions, the statute, as enacted, applied to damage to livestock only and each time the compiler had added language making the statute applicable to people. Id. The Second District Court of Appeal answered this objection by noting that the statute in its present form had been re-enacted and was, therefore, valid. Id. The supreme court did not address the point directly, only noting that "plain and unambiguous language in a statute needs no construction and creates the obvious duty to enforce the law according to its terms." Jones v. Utica Mut. Ins. Co., 463 So. 2d 1153, 1156 (Fla. 1985).
\item \textsuperscript{311} Id.
\item \textsuperscript{312} Id.
\item \textsuperscript{313} See, e.g., Rutland v. Biuel, 277 So. 2d 807 (Fla. 2d Dist. Ct. App. 1973) (plaintiff heard a dog cry out, looked down, saw the dog, stepped down and tripped over the animal) The Second District held "that F.S. section 767.01 F.S.A. is not applicable to a situation where the dog takes no affirmative or aggressive action toward the injured party. Id. at 809. [Emphasis added].
\item \textsuperscript{314} In the ordinary negligence context, a defendant is liable for injury produced or substantially produced in a natural and continuous sequence by his conduct, such that "but for" such conduct, the injury would not have occurred. Such liability is not escaped in the recognition that the injury would not have occurred "but for" the concurrence or intervention of some other cause as well. The defendant is liable when his act of negligence combines with some other concurring or intervening cause in the sense that, "but for" the other cause as well, injury would not have occurred.
\end{itemize}
One reason for adopting "negligence" proximate cause standards in this strict liability context was "the difficulty of fashioning a workable and administrable alternative to the traditional notion of proximate cause." The court was concerned about the struggle to define just what is and is not a canine characteristic, and shied away from the horrific vision of expert witnesses endlessly debating the true limits of behavior dubbed "Canine."

An example of the problem can be seen in Mapoles v. Mapoles. A dog in a car managed somehow to discharge a shotgun (probably by bumping it) which was also in the car. The majority opinion, later approved by the supreme court in Jones, simply held that as long as "the injury resulted from the affirmative act of the dog," the owner would be liable. By contrast, the dissent was led to reject liability because "dogness played no more a part than if the trigger had been jostled by a cat or a falling sack of groceries." Such an approach invites speculation about what is unique "dogness" as opposed to characteristics which are to be found both in dogs (covered by the statute) and cats (not covered by the statute). It would require, in effect, that a court define the essence of "dog." It is this philosophical quagmire that the supreme court declined to enter.

Jones, 463 So. 2d at 1156. The court apparently adopted this same proximate cause rule for the strict liability statutory action, rejecting by implication any narrowly drawn proximate cause rules. The court stated, "The standards of causation applicable in the case of ordinary negligence were amply satisfied in this case." Id.

Id. In dissent, Justice Overton found no such problem, arguing that such characteristics were things such as "biting, barking, chasing, jumping, vicious or rambunctious conduct." Id. at 1161. Of course, the majority's point might well be made out of the dissenting position. It could easily be argued that the injury was, at least in part, caused by "chasing" and the court would then have to decide whether the fact that the dog was hitched to a wagon when it exhibited its "chasing" behavior ought to be deemed legally significant. Id. at 1160. It was precisely to avoid such issues that the majority held as it did. Id.

318. Id. at 1138.
319. It was the conflict between Mapoles and Jones which brought the issue before the supreme court.
320. Id. The court noted that, in its view, the statute essentially had the effect of making dog owners insurers for damage done by their dog.
321. Id.
322. Id. (Smith, J., dissenting).
323. The facts of other cases are also instructive. In Smith v. Allison, 332 So. 2d 631 (Fla. 3d Dist. Ct. App. 1976), a dog on the road and the attempt of a vehicle to
Thus, dog owners in Florida are strictly liable\textsuperscript{324} for damage caused by their dogs, and the liability is recognized to be very broadly construed.\textsuperscript{325} This decision will make it easier for plaintiffs to prove avoid it resulted in a crash. The district court of appeals rejected the notion that the dog had inflicted the damage and saw the case rather as one where “the damage resulted from some physical agency set into motion by a chain of events which may have been triggered by the presence of the dog,” \textit{id.} at 634, and so declined to apply the statute.

By contrast, in English v. Seachord, 243 So. 2d 193 (Fla. 4th Dist. Ct. App. 1971), plaintiff jumped up on a car and injured himself after defendant’s dog growled at him. The court reversed the jury verdict for defendant because the charge to the jury by the trial judge had permitted the jury to consider plaintiff’s alleged contributory negligence. \textit{id.} at 195. The court stressed that contributory negligence was not a defence as such and that only plaintiff’s provocation of the dog or other conduct which would be “so blatant as to supersede the dog’s behavior as the legal or proximate cause of plaintiff’s injuries,” would be a defense. The court noted that the statute made the dog owner “virtually an insurer,” as to injuries caused by the dog. This opinion was cited with approval in dicta in a per curiam opinion dismissing a writ of certiorari previously issued, because of a finding that no conflict among the circuits actually existed. Seachord v. English, 359 So. 2d 136 (Fla. 1972). “[T]he scholarly opinion by the District Court of Appeals Judge David L. McCain [in English] is eminently correct in enunciating the law.” \textit{id.} (English was also cited with approval in Jones).

In Brandeis v. Felcher, 211 So. 2d 606 (Fla. 3d Dist. Ct. App. 1968), dogs were jumping at a four feet high fence along a sidewalk. This scared children who ran into the street where one of them was hit by a truck. \textit{id.} at 606-07. The court of appeals reversed the summary judgment granted by the Dade County Circuit Court and remanded the case. \textit{id.} at 609. The court held that liability under the statute was not predicated on contact between the dog and the plaintiff and that the only question was whether the dog was a proximate cause of the injury. \textit{id.} at 608. The court applied a “substantial factor” test, as used in negligence when concurrent causes are present, and argued that the issue of causation was the same under the statute as in a negligence case. \textit{id.} at 609. The court followed a trend it perceived in Florida toward permitting juries to decide such questions. “The Courts of Florida have become increasingly liberal in allowing a jury to pass upon questions similar to this.” \textit{id.}

The statute was held to apply by the Third District Court of Appeal when a Great Dane ran into the street and plaintiff’s car swerved to avoid it causing him to strike a power pole. The court noted that the dog had taken an “aggressive action,” and that under the statute, defendant remained liable in a multiple cause situation. The court also noted that comparative negligence was not a defense to the action. Allstate Ins. Co. v. Greenstein, 308 So. 2d 561 (Fla. 3d Dist. Ct. App. 1975).

324. “Section 767.01 is a strict liability statute which has consistently been construed to virtually make an owner the insurer of the dog’s conduct.” Jones v. Utica Mut. Ins. Co., 463 So. 2d at 1156.

325. The court displayed an understanding of the multiplicity of ways in which a causative agent can result in an injury. “Thus, it also cannot be said that liability is only appropriate when the animal actually touches the plaintiff, for animals and people
such cases.\textsuperscript{326}

XVII. Medical Malpractice

The Florida legislature has provided a detailed statutory scheme to regulate actions for medical malpractice.\textsuperscript{327} Parts of that scheme were examined in a series of cases by the Florida Supreme Court during the last year. Section 768.56 provides for court-ordered attorney’s fees to the victorious party in medical malpractice actions and regulates the awarding of said fees.\textsuperscript{328} In \textit{Florida Patient’s Compensation Fund v. Rowe},\textsuperscript{329} the constitutionality of that section was tested.

The court upheld the section against due process and equal protection claims, as well as the claim that the provision denied access to the courts in violation of the Florida Constitution.\textsuperscript{330} The court rejected the notion that the attorney’s fee provision was an unlawful penalty. Although the statute might deter the filing of some claims (particularly those where chance of success was slight), it could also encourage others (particularly those in which the chance of success was high).\textsuperscript{331}

can cause injuries in a variety of ways without actually touching the injured party." \textit{Id.}

This same understanding was present when the supreme court extended liability for bystander emotional distress and adopted the tort of intentional infliction of emotional distress. \textit{See supra} sections II and III.

326. It should be noted that earlier supreme court decisions relating to dog bites determined that a related statute, Fla. Stat. § 767.04 (1975), dealing with liability for dog bites, superseded the common law, Belcher v. Stickney, 450 So. 2d 1111 (Fla. 1984) and also superseded common law defenses, leaving only statutory defenses available. Donner v. Arkwright-Boston Mfg. Mut., 358 So. 2d 21 (1978).


328. Fla. Stat. § 768.56 (1981). In Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985), the supreme court held that the section could not be applied to actions which accrued before the effective date of the statute. The court noted the general rule that statutes which “interfere with vested rights,” or which are “substantial in nature,” will only be applied prospectively while those which “relate only to the procedure or remedy are generally held applicable to all pending cases.” \textit{Id.} at 1154. Since there had been no obligation to pay the opposing party’s attorney’s fees before the statute, the statute could be applied only prospectively. \textit{Id.} On the authority of Rowe and Young, the supreme court upheld a decision of the Fourth District Court of Appeal which had held the section to be constitutional. The case was Karlin v. Denson, 472 So. 2d 1155 (Fla. 1985). The Fourth District Court of Appeal decision can be found at 447 So. 2d 897 (Fla. 4th Dist. Ct. App. 1983).

329. 472 So. 2d 1145 (Fla. 1985).

330. \textit{Id.} at 1146.

331. The court also noted other examples of attorney’s fees statutes in Florida.
The court also considered how a determination of the amount of attorney's fees was to be made. The approach requires a court to "determine the number of hours reasonably expended on the litigation." 332 The court must then set a reasonable hourly rate for the work done. 333

The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, which is an objective basis for the award of attorney fees. Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained." 334

More generally, the court saw the issue of two competing rules (the "English" rule, that the victor obtains attorney's fees from the vanquished, and the "American," that each side pay its own fees), with the choice solidly within the scope of legislative decision. 472 So. 2d at 1147-48.

332. Id. at 1150. The supreme court stressed the necessity of accurate and complete record-keeping by attorneys and that the attorney could include only hours which could be "properly" billed to the client. The court noted that failure to maintain such records could result in the total hours allowed by a court being reduced. Id.

333. Id.

334. Id. at 1151. In general, the court instructed that the criteria in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility be used. These are:

(1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

Id. The first part of the process would be determined using factor number one, the second part, by using the rest with the exception of "time and labor required," the 'novelty and difficulty of the question involved,' the 'results obtained,' and 'whether the fee is fixed or contingent.'" 334 Id. at 1150-51. The court stated that the fee calculated by the court should be increased in contingency cases by a "contributory risk factor," somewhere between 1.5 and 3 inclusive, and that when it would seem that the chance for success at the start was about even, the correct multiplier would be 2. The amount of the award may not exceed that which was stipulated in the fee agreement between attorney and client, but is not strictly governed by it either because it is being paid by the other party which was not a party to the agreement. Id. The computed figure can also be reduced if there was a failure to prevail on some of the claims of relief. Id.
Other key provisions in the statute were upheld in *Florida Patient's Compensation Fund v. Von Stetina*. The case involved medical malpractice which left a 27-year-old woman with irreversible brain damage, blindness in one eye, and a refractured leg. The jury awarded a total of over twelve million dollars.

Florida's statutory scheme establishes a patient's compensation fund. The primary defendants are directly responsible only for the first one hundred thousand dollars and the fund becomes responsible for the rest. The statute also permits the court to determine the manner of payment for liabilities over two hundred thousand dollars. The court noted that the purpose of the act was to spread the losses from medical malpractice in a way which benefits both the patients and the health care providers, and that plaintiff is not denied recovery of her claim under the fund system. The various methods of payment were also upheld. "We find the legislation at issue does not implicate a funda-

In summary, in computing an attorney fee, the trial judge should (1) determine the number of hours reasonably expended on the litigation; (2) determine the reasonable hourly rate for this type of litigation; (3) multiply the result of (1) and (2); and, when appropriate, (4) adjust the fee on the basis of the contingent nature of the litigation or the failure to prevail on a claim or claims. Application of the Disciplinary Rule 2-106 criteria in this manner will provide trial judges with objective guidance in the awarding of reasonable attorney fees and allow parties an opportunity for meaningful appellate review.

*Id.* at 1151-52.


336. 474 So. 2d 783 (Fla. 1985) (per curiam).

337. The young woman will need round the clock nursing care and has a life expectancy of 40 years. The award reflected past and future medical/nursing care, past and future lost earnings, and past and future pain and suffering. *Id.* at 785-86.

338. *Id.* at 786. The trial court also held unconstitutional a cap of one hundred thousand dollars to be paid from the fund in any given year on a claim. This cap was repealed in 1982, but the trial court ruled that the earlier provision applied to the case. The supreme court disagreed, holding that the cap provision and the later amendment repealing it were statutes which controlled procedure or remedies, and thus applied to all cases pending at the time of the change. Since the 1982 amendment to section 768.54 applied, it did not have to evaluate the earlier form of the statute. The court did note, however, that the cap on payments per year would have prevented the fund from paying even the actual costs of the patient's care. *Id.* at 787. Payment may be ordered to make a lump-sum payment or to make periodic payments. Fla. Stat. § 768.51 (1981).

339. The court noted, however, that it was not considering what might be the result if the fund proved to be insolvent or for other reasons could not pay the claim. 474 So. 2d at 789.
mental right or suspect classification." The court found that the legislation had a rational relation to the interest in protecting public health by easing the upward trend in medical and insurance costs. "We specifically uphold the constitutionality of sections 768.54(2)(b), 768.54(3)(a)3, and 768.51, Florida Statutes (1981)."

340. Id.
341. Id.
342. Id. The judgment was vacated on the grounds that some evidence had been improperly admitted and that the error was not harmless. The court did not address the issue of damages because the judgment had been vacated. Finally, the court noted that the issue of attorney's fees, if any, would be governed by the process set out in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). 474 So. 2d at 790.

Justice Ehrlich had not participated in Rowe or Young, but did participate in all except the attorney's fees section of Von Stetina. Justice Ehrlich explained his reasons for recusing himself on the attorney fee issue:

I had been a witness in the trial of a case wherein a former law partner, John E. Mathews, Jr., was plaintiff and a number of doctors were defendants. The trial of that case resulted in a favorable verdict for the doctors, who, post-judgment sought to assess attorney's fees against plaintiff Mathews pursuant to section 768.56. While the trial court refused to assess attorney's fees on constitutional grounds, the DCA in Polhman v. Mathews, 440 So. 2d 681 (Fla. 1st DCA 1985), reversed the trial judge on that issue, and discretionary review was sought and accepted by this Court. Counsel for Mathews filed an amicus brief in this case on that one issue. That was the reason for my recusal.

474 So. 2d at 794. Since the issue of attorney's fees had been settled, Justice Ehrlich saw no reason why he could not participate in the remainder of the issues raised in Von Stetina. On rehearing, Justice Ehrlich elaborated upon his decision. Justice Ehrlich acknowledged that when a recusal was mandated, a change of condition did not permit a judge to re-qualify to hear the case, but:

Here, I recused for cause on only one issue of Von Stetina. That issue was legally and procedurally severable from the remaining issues. As a matter of judicial economy, I withdrew from consideration of any issue in that case. There was no legal bar to my considering issues relating to liability and damages, but my presence during argument and conference on those issues and my recusal during argument and conference on the attorneys' fees would have been awkward and inefficient. As noted in my explanation appended to the Court's opinion in Von Stetina, there came a time when judicial economy would no longer be served by my withdrawal from consideration of issues unrelated to attorneys' fees in this case. Rather, as a matter of judicial economy, it was necessary that I consider these issues. No legal bar had been removed. There was no change in circumstances which allowed me to 'requalify.' I have never considered any aspect of the issue from which I was legally and ethically required to recuse myself.

474 So. 2d at 795-96. The other members of the court expressed their "full approval" of Justice Ehrlich's explanation in a short per curiam opinion. Id. at 795.
XVIII. Conclusion

The tort issues confronting the Florida Supreme Court in 1985 ranged widely over the diverse landscape of this interesting area of law. Almost invariably, the question which will be asked is "Who won?" Did plaintiffs or defendants make the most gains?

This question is not easily answered. Plaintiffs made gains by convincing the court to recognize new duties in the emotional distress area, for example, while defendants won a round on causation with the refusal to recognize the market share theory. The state, as a defendant, was granted significant protection from liability with the interpretation of the sovereign immunity waiver statute, and there may be some debate about which interests were protected when the medical malpractice provisions were upheld.

While no group will be completely pleased with all of the 1985 supreme court decisions, each side can claim some significant victories during the year. The situation is analogous to that of Alice and the various creatures which she encountered in Wonderland. After swimming in the pool of tears, the group held a "caucus race" to get dry. There was no set course in the race and the runners, who were placed at various points randomly around the course, started and stopped running whenever they liked. Eventually, the question was asked, "Who has won?" The answer was, "Everybody has won, and all must have prizes."343

343. L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 31 (1898).
If It Moves, Search It: *California v. Carney* Applies the Automobile Exception to Motor Homes

I. Introduction

The fourth amendment is a revolutionary construct. It was intended by the constitutional framers to safeguard the people of the republic from the arbitrary exercise of governmental authority. Among the most offensive abuses during colonial history which motivated its ratification were writs of assistance and general warrants. Under color of the crown, agents of the sovereign exposed the colonists to indiscriminate general rummaging and ransacking. At will, and oftentimes without a whisper of suspicion, petty tyrants could enter homes and destroy possessions under guise of a sanctioned contraband search. A man's home was, to be sure, no longer his castle.

The attitude of the constitutional framers was forcefully restated by the Supreme Court ninety five years later in *Boyd v. United States:*

1. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.


3. Writs of assistance were used by custom house officers for the purpose of detecting goods smuggled into the colonies. The writ was not returnable to the sovereign's magistrate following its execution, operated as a continuing license to search and seize, and empowered the executing official to search wherever goods were suspected. N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 59-60 (1937).

4. See id. at 81 n.10 and E. Corwin, *The Constitution and What It Means Today* 301 (13th ed. 1973). General warrants are defined as English process which was issued for the arrest of persons charged with having libeled the state. The warrants were issued officially and without naming an individual sought. In 1766, the House of Commons voided their further usage. Black's Law Dictionary 1422 (5th ed. 1979).

a person's security, liberty, and the privacy of his property were sacred rights, not to be defeased by the invasions of government. The use of warrants might seem inimical when the Court has so clearly interpreted the fourth amendment as subordinating the authority of the government to the rights of its citizens. The amendment, however, does not proscribe all searches, only those which are unreasonable. And when a warrant to search is sought, the neutrality of the judiciary is interposed between public authority and the individual. In recent times, the rationale of the warrant process has been explained simply in the following manner. The requirement that a warrant be secured from a magistrate before a search, is justified on the theoretical premise that a neutral and detached magistrate is more impartial than an officer whose duty is to zealously enforce criminal laws. This requirement also provides some assurance that the information giving rise to the search request was not manufactured after the event.

In 1919, with the attention of the nation no longer diverted to the war in Europe, its focus was drawn to another conflict, the war of prohibition at home. The eighteenth amendment was ratified in that year as a proscription against the "manufacture, sale, or transportation of intoxicating liquors." That addition was anomalous to the Constitution. To the mind of one observer, it was ill-considered and had nothing to do with regulating the exercise of the federal powers, or with the

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6. The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its ambitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense. Boyd v. United States, 116 U.S. 616, 630 (1886).


9. "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1.
To augment the eighteenth amendment, Congress passed the National Prohibition Act. This enactment provided, in part, a directive to seize, take possession, and arrest any person discovered in the act of transporting illegal intoxicating liquor. In 1925, the Supreme Court was asked to consider an arrest made under authority of the Act. At the horns of the legal dilemma was a basic contradiction represented by the fourth amendment on the one hand and the National Prohibition Act as the handmaid of the eighteenth amendment on the other. It was against the backdrop of the fourth amendment's time honored protections from unreasonable searches and the Court's later restatement of those guarantees in Boyd that the arrest would be measured.

In its 1925 landmark decision, United States v. Carroll, the Supreme Court favored federal agents engaged in the war against the transportation of intoxicating liquors and thereby sharpened the teeth of the National Prohibition Act. When a federal agent had probable cause to believe that a particular vehicle was transporting contraband, the vehicle's ready mobility practically precluded the agent's securing a warrant to search. Automobiles, the Court concluded, must necessarily be excepted from the warrant requirement.

Although sixty years have passed, Carroll's principal tenet has survived. The lynchpin which continues to justify warrantless automobile searches is mobility of the vehicle. It should be noted in passing that the eighteenth amendment and the National Prohibition Act

12. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. 41 Stat. 305, 315 (1919).
14. The eighteenth amendment was repealed effective December 5, 1933 by U.S. Const. amend. XXI.
15. The National Prohibition Act was repealed in large part by ch. 740 title I, §
which gave form to the opinion were repealed in the 1930's. Carroll's continuing viability serves to underscore the significance of the Supreme Court's contribution to the evolving character of the fourth amendment.

It is not surprising that the automobile exception would one day be tested on what has in the 1980's become a common place user of the roadways— the motor home. The Court in California v. Carney16 recently concluded that a motor home, within the context of the fourth amendment, is more like a car than a home. Although the decision attempts to define an objective standard under which a motor home may be searched without a warrant, it must appear to some that the fourth amendment protections against the indiscriminate and arbitrary exercise of governmental authority— those evils which fired the cauldron of revolution— have paled in significance.

This Case Comment will examine the Carney decision and offer an historical recounting of the automobile exception in the context of its fourth amendment origin.

II. The Automobile Exception

Only under limited circumstances have warrantless searches received the Court's imprimatur. In Katz v. United States, Justice Stewart wrote, "[s]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment— subject only to a few specifically established and well-delineated exceptions."17 Among those appears the automobile exception, which was established by the Court in Carroll. Excepted from the warrant requirement was the search of an automobile "for contraband goods where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."18 This language provides

1, 49 Stat. 872 (1935).
17. Katz v. United States, 389 U.S. 347, 357 (1967). For a commentary on the circumstances when warrantless searches and seizures have been authorized, see W. La Fave, 2 Search and Seizure 3-6 (1978). Major exceptions to the warrant requirement were noted to be, search incident to a lawful arrest, search under an emergency setting where loss or destruction of evidence is feared, and search with consent. See also Comment, The Automobile Exception: A Contradiction in Fourth Amendment Principles 17 San Diego L. Rev. 933, 934-935 (1980).
the precise point from which the automobile exception developed. Because a motor home can be quickly moved, *Carroll's* principal holding, the Court reasoned, was equally applicable to motor homes. 19 *Carroll's* precedential value demands its review in this Comment.

The *Carroll* decision arose out of the prohibition era seizure of bootleg whisky. Carroll and his companion were stopped by prohibition agents and a state officer as their Oldsmobile roadster was enroute from Detroit to Grand Rapids, Michigan on December 15, 1921. 20 A search of the vehicle was conducted without a warrant. The search extended behind the seat upholstery of the lazyback where the agents uncovered sixty-eight bottles of concealed contraband whisky and gin. 21

Appealing their convictions, the defendants contended that the search and seizure violated their fourth amendment rights. 22 The Court affirmed the convictions and held that the officers were justified in conducting the search and seizure, 23 though no precedent was cited. 24 It further held that the National Prohibition Act expressly provided for the seizure and arrest. 25

The *Carroll* Court's creativity appears in its analysis of Congress' intent. Congress, the Court inferred, intended to except road vehicles from the warrant requirement. 26 The Court acknowledged that fourth amendment constructions since the founding of the republic focused upon the reasonableness of searches while also distinguishing searches

21. *Id.* at 136. On redirect examination, one officer who was present at the scene, described the *Carroll* roadster search in the following manner: "[t]he lazyback was awfully hard when I struck it with my fist. It was harder than upholstery ordinarily is in those backs; a great deal harder. It was practically solid. Sixty-nine [sic] quarts of whiskey in one lazyback." *Id.* at 174 (Reynolds, J., separate opinion).
22. *Id.* at 135.
23. *Id.* at 162. The Court took judicial notice of the fact that Detroit's position on the international border with Canada made it an active smuggling center. See *Brinegar v. United States*, 338 U.S. 160, 166 (1949). The *Carroll* court found probable cause existed because Carroll and his companion were known to have been principals in a proposed undercover sale two months previous, the automobile was identical to that Carroll was seen in the night of the proposed sale, and the automobile was traveling westerly from the direction of Detroit. *Carroll*, 267 U.S. at 160. In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), Justice Powell (concurring) adds clarification, noting that a *Carroll* search necessarily requires that probable cause be supported by "specific knowledge about a particular automobile." *Id.* at 281.
of structures and vehicles. An amendment to the Act imposed misdemeanor penalties upon officers who conducted building searches "maliciously and without probable cause." However, both the Act and its Amendment were mute as to searches of vehicles. Congress was inferred therefore to have left the way open for the holding in Carroll. Because Carroll's roadster could be quickly moved, prohibition agents were justified in conducting a search of the entire vehicle for contraband liquor and foregoing the rigors of the warrant process.

One interesting development in the Carroll analysis was fashioned by a divided Court in Chambers v. Maroney. In 1970, the Justices considered a challenge to the admission of evidence which had been seized without a warrant from the defendant's automobile. It is noteworthy that the vehicle was impounded at the police station at the time of the search, and not on the open road. What exigencies existed to justify the vehicle search in Carroll all but evaporated with the vehicle seizure in Chambers. Police had probable cause however to arrest the defendant. Justice White wrote: "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." Justice Stewart later characterized Chambers in the following way: "where the police may stop and search an automobile under Carroll, they may also seize it and search it later at the police station."

In 1974, a second prong in the search analysis emerged. Justice Blackmun, writing for a plurality in Cardwell v. Lewis, reasoned that since a car's occupants and contents were in plain view and cannot evade public scrutiny, one's expectation of privacy was less than in a

27. Id. at 153.
29. Carroll, 267 U.S. at 147.
30. For a reference of other Supreme Court decisions which relied upon vehicular mobility, see infra note 56 and accompanying text.
32. Id. at 44.
33. Id. at 46-47. Observers in addition to the victim of the armed robbery reported to police that one of the four suspects was wearing a sweater, another a trench coat, and that they had fled in a "light blue compact station wagon." Within an hour, police stopped a vehicle which, along with its occupants, matched the description provided.
34. Id. at 52.
home. The case differed factually from all car search cases which had been decided to that point. The defendant was requested to appear at the Office of the Division of Criminal Activities for questioning in connection with a murder investigation. Later police executed an arrest warrant. The defendant released his car keys and claim check from a nearby public lot in which his car was parked. The car was then impounded. Without a warrant, police examined the car's exterior by matching tire tread impressions and paint scrapings with crime scene samples. The defendant objected unsuccessfully to the admission of evidence from this "search." Justice Blackmun concluded that the examination of a car's exterior was not unreasonable under the circumstances.

In what was prophetic dictum, Justice Blackmun observed that a motor vehicle "seldom serves as one's residence." As a legal conclusion, the Justice's prescience was realized eleven years later in Carney. The rationale of the two decisions differed in one major respect, however. Since the clear emphasis of the Court's reasoning in Carney was on vehicular mobility, Cardwell's plain view rationale serves little to advance one's understanding of how the Carney motor home exhibited a reduced expectation of privacy with the interior drapes drawn. A reasonable conclusion is that, as to motor homes, mobility and not plain view justifies the application of the warrant exception.

One further automobile case, Coolidge v. New Hampshire, helps to make clear the foundation upon which Carney was formed. In yet another plurality opinion, Justice Stewart applied the brakes to the automobile exception. Carroll, the Justice concluded, was not intended

36. Cardwell v. Lewis, 417 U.S. 583 (1974). Justice Blackmun was joined by Chief Justice Burger, Justice White and Justice Rehnquist. Justice Powell filed a concurrence. General guidelines in this area were provided in Katz v. United States, 389 U.S. 347 (1967). "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. at 351.

37. Cardwell, 417 U.S. at 588.

38. Id. at 587.

39. Id. at 588.

40. Id. at 592.

41. Id. at 590.

42. See infra note 67.


44. Justice Stewart delivered the opinion, parts of which were joined by Justices Douglas, Brennan and Marshall.
to extend to the *Coolidge* facts. Approximately two hours after the defendant’s arrest pursuant to a magistrate’s warrant, police impounded his two automobiles under authority of a search warrant. Over the following fourteen months, police conducted three vehicle searches. Both the seizure and subsequent station house searches were held unconstitutional. In what has become often quoted rhetoric, Justice Stewart remarked that “*t*he word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away and disappears.” The absence of exigent circumstances rendered the *Carroll* search standard inappropriate. The defendant posed no police threat because he had been cooperative throughout the police murder investigation although he was presented with sufficient opportunity to have destroyed incriminating evidence. Furthermore, because police suspected for a period of time that the defendant’s car was related to the crime, ample opportunity existed to secure a valid search warrant.

III. *California v. Carney*, The Case

The Drug Enforcement Agency (DEA) received uncorroborated information that a motor home had been used for the purpose of exchanging marijuana for sex. A private organization known as “*We Tip,*” an acronym for We Turn In Pushers, furnished DEA with this information in previous communications by letter and telephone. As the Dodge Mini Motor Home stood parked in a downtown San Diego public lot on May 31, 1979, surveilling agents noted the correspondence of its license plate and that of the motor home described in the earlier tips. Mr. Carney and another person entered the home and drew the interior window shades. The companion exited one and one-

45. *Coolidge*, 403 U.S. at 458.
46. *Id.* at 447.
47. *Id.* at 448.
48. *Id.* at 473.
49. *Id.* at 461.
50. *Id.* at 462.
51. *Id.* at 460.
52. *Id.* at 472.
55. *Carney*, 34 Cal. 3d at 602, 668 P.2d at 809, 194 Cal. Rptr. at 502.
56. *Carney*, 105 S. Ct. at 2067.
quarter hours later, and when challenged by the agents, related the account of an exchange. Sexual contacts had been bartered for marijuana. At the agents’ request, the companion returned and knocked on the door. The knock brought Carney who then stepped outside where the waiting agents confronted him.

An initial search was immediately made of the motor home’s interior without a warrant and without consent. The agent observed “marijuana, plastic bags, and a scale of the kind used in weighing drugs on a table,” and then placed Carney in custody. A subsequent search at the police station revealed additional marijuana concealed in the cupboards and refrigerator.

Carney’s state court history began in the Superior Court of San Diego County by information charging possession of marijuana for sale. At the preliminary hearing, Carney sought unsuccessfully to suppress the evidence of the two searches. The magistrate concluded that the evidence seized in the initial search was admissible because the agent who entered the vehicle was entitled to ascertain the presence or absence of others. The subsequent search, the magistrate concluded, was a permissible routine inventory search. The sole evidentiary basis upon which the superior court later denied Carney’s motion to suppress was the reporter’s transcript of testimony taken at the preliminary hearing. From that record, the superior court decided that probable

57. Id.
58. Id.
59. Id.
60. Id. An agent testified at the preliminary hearing that he “stepped one step up” to determine for “safety reasons” whether other persons were present. People v. Carney, 117 Cal. App. 3d 36 (opinion omitted), 172 Cal. Rptr. 430, 433 (1981).
61. Carney, 105 S. Ct. at 2067.
62. Id.
63. Id.
64. The specific section provides as follows: “[e]very person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison.” CAL. HEALTH & SAFETY CODE § 11359 (Deering 1984).
65. Carney, 105 S. Ct. at 2068. Federal courts justify protective sweep searches as a means of preventing the destruction of evidence and also when particular circumstances pose a threat to police or third persons. See United States v. Kunkler, 679 F.2d 187, 191-192 (9th Cir. 1982). For a good analysis of the merits of a general versus a per se rule authorizing protective sweep searches and practical concerns for their application, see Joseph, The Protective Sweep Doctrine: Protecting Arresting Officers from Attack by Persons Other than the Arrestee, 33 CATH. U.L. REV. 95 (1983).
cause existed,\textsuperscript{68} that the warrantless search was authorized by the automobile exception, and as an instrumentality of the crime, the motor home was subject to seizure.\textsuperscript{69}

Carney pled \textit{nolo contendere} and was placed on probation for three years. The state's appellate court affirmed the trial court's order.\textsuperscript{70}

Holding that Carney enjoyed fourth amendment protections which were violated by the warrantless search, the California Supreme Court reversed Carney's conviction.\textsuperscript{71} The state's high court perceived a shift in the line of cases extending from \textit{Carroll}. The automobile exception was no longer principally justified by mobility; instead, the emerging rationale was the diminished expectation of privacy associated with the automobile.\textsuperscript{72} In addition, the prosecution failed its burden of justifying the warrantless entry of Carney's motor home under the facts presented.\textsuperscript{73}

When confronted with the prospect of enlarging the automobile exception to include motor homes, the California Supreme Court recognized their hybrid nature — motor homes possess a car's attributes of mobility as well as a home's privacy characteristics.\textsuperscript{74} Ultimately, the court concluded that "a motor home is fully protected by the fourth amendment and is not subject to the 'automobile exception.'"\textsuperscript{75} This conclusion rested squarely on its opinion that the "essential purpose [of a motor home] is to provide the occupant with living quarters."\textsuperscript{76}

On review granted to the State of California, a six to three justice majority of the United States Supreme Court rejected the state court's
According to *California v. Carney*, law enforcement officers need not secure a warrant to search a motor home as long as probable cause to believe the vehicle contains contraband and exigent circumstances coexist. Although it was a case of first impression, the decision was clearly premised upon those tenets fashioned by the Court sixty years earlier in *Carroll*.

A. The Burger Majority

Writing for the majority, Chief Justice Burger commenced with a review of the cases adhering to *Carroll* as their precedent. In so doing, the majority exposed its predisposition for resolving *Carney* along the identical lines used to judge the reasonableness of warrantless searches of automobiles. The opinion recites earlier decisions which traditionally justified such searches.

A vehicle's potential for mobility distinguishes it from a stationary structure. Consequently different considerations have been furthered to justify the vehicle's being accorded a lesser degree of fourth amendment protection. While a warrant to search one's home may be presumptively required, the exigent circumstances created by a vehicle with contraband serve to justify its search without one. The litany recited by *Carroll* and its line — including *Chambers v. Maroney*, *Cady v. Dombrowski*, *Cardwell v. Lewis*, *South Dakota v. Opperman*, and *United States v. Ross* — has done little to alter this conclusion over the past sixty years.

78. *Id.* at 2069.
79. Cited for this proposition are the following cases, each of which expressly relies upon *Carroll*: Chambers v. Maroney, 399 U.S. 42, 51 (1970) ("the opportunity to search is fleeting since a car is readily movable"); Cady v. Dombrowski, 413 U.S. 433, 441 (1973) ("the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former"); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality) ("[a]n underlying factor in the 'Carroll-Chambers' line of decisions has been the exigent circumstances that exist in connection with movable vehicles"); South Dakota v. Opperman, 428 U.S. 364, 367 (1976) ("the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible"); United States v. Ross, 456 U.S. 798, 806-807 (1982) ("[g]iven the nature of an automobile in transit . . . an immediate intrusion is necessary if police officers are to secure the illicit substance"). Also cited is Cooper v. State of California, 386 U.S. 58 (1967), but it is properly distinguished from the rest. The *Cooper* Court opined "that searches of cars..."
Chambers provides an appropriate case model to illustrate these points. Justice White expressly declined to indicate "every conceivable circumstance" when a warrantless automobile search could be conducted. Clearly when there is a "fleeting target" or when the "opportunity to search is fleeting since a car is readily movable," a search of an auto for particular articles under circumstances of probable cause must be made immediately. Alternatively, the auto must be seized and held pending receipt of the magistrate's warrant. In Chambers, police were on the lookout for a "light blue compact station wagon" within an hour of an armed robbery. At the time it was stopped, probable cause existed to arrest the occupants and search the passenger compartment for weapons and stolen property. The vehicle, however, was not searched until its impoundment and the arrest of its occupants an unspecified time afterward. Justice White concluded: "[t]he probable-cause factor still obtained at the station house and so did the mobility of the car." This clear reference to mobility patronizes its historical utility as a justification for warrantless open road searches. Of curiosity, however, is its relevance in the setting of a station house impoundment yard.

Two additional rationale explain warrantless vehicle searches. Because a vehicle's use on the public roadways necessarily exposes it to pervasive regulation, such as state and local vehicle codes, an occu-
pant does not enjoy the same expectation of privacy she would in her home. Another explanation is premised upon the vehicle's configuration; since the car's passenger compartment is in plain view it is subject to public scrutiny.\textsuperscript{91} Of the two explanations the former proved more applicable to \textit{Carney}. The majority was direct in noting that vehicle regulation arises out of a "compelling governmental need" and derives its justification from "overriding societal interests in effective law enforcement."\textsuperscript{92}

The Court also took note of its prior statements on the scope of vehicle searches. A \textit{Carroll} search would appear to extend to the entire interior of the vehicle.\textsuperscript{93} In other cases, the Court has upheld searches of concealed compartments and repository areas within the vehicle.\textsuperscript{94} Inquiry into the scope of a search may also take into account the legal status of the occupants relative to the vehicle. Carney's connection with the motor home is unclear. He was known to have been inside the living quarters before his arrest. There is also a suggestion that he was not the registered owner.\textsuperscript{95} If the incidence of governmental regulation upon owners and operators is offered to explain their reduced privacy expectations, it does not necessarily follow that other individuals' expectations are concomitantly reduced. This contention is irrelevant, however, in those jurisdictions which hold that no occupant of a vehicle

\begin{itemize}
\item \textsuperscript{91} \textit{Cardwell}, 417 U.S. at 590.
\item \textsuperscript{92} \textit{Carney}, 105 S. Ct. at 2070.
\item \textsuperscript{93} \textit{See supra} text accompanying note 21. The \textit{Carroll} search was conducted under express authority of the National Prohibition Act. The reduced expectation of privacy rationale was unnecessary to justify the search without a warrant.
\item \textsuperscript{94} \textit{See}, \textit{Ross}, 456 U.S. at 825 ("[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search"); \textit{Cady}, 413 U.S. at 433 (police, without a warrant, conducted a search of the locked trunk to locate a comatose accident victim's service revolver. The search of the trunk was justified because police exercised custody of the vehicle which had been disabled along the highway and, according to standard departmental procedure, such a search was designed to avert the potential that the weapon would fall into irresponsible hands); \textit{Chambers}, 399 U.S. at 47 (police had probable cause to arrest the occupants of a car suspected of being involved in a recent robbery and the search of a compartment beneath the dashboard for weapons and fruits of the crime was justified); United States v. Johns, 105 S. Ct. 881 (1985) (the initial search of a pickup truck was conducted by customs agents in removing sealed packages from the vehicle and since the vehicle was reasonably believed to contain contraband, the warrantless search was held to be not unreasonable).
\item \textsuperscript{95} \textit{See supra} note 54.
\end{itemize}
As to Carney's circumstances, the majority concluded that the search of the motor home was not unreasonable and was conducted with abundant probable cause. Despite the similarities between a motor home and a stationary home, the majority was convinced that a motor home was aptly suited to the rationale offered by Carroll and its line of cases. The Dodge Mini Motor Home was readily mobile, its license subjected the vehicle to governmental regulation, and an objective observer could conclude from its location in a public lot that the motor home was being used for transportation, as distinguished from residential use.

As evidenced by the lack of unanimity in the Carney Court, decisions concerning warrantless vehicle searches have engendered disparate positions. Commentators, as well as the Court itself, chronicle confusion in this area. In an apparent attempt to reduce potential uncertainty, the majority did speculate as to indicia which might objectively indicate whether or not a warrant need be secured. Objective factors suggesting the use of a motor home as a residence appear in a terse footnote. These include its placement on blocks; lack of a license; connection to utilities; and difficulty in accessing public roads.

B. The Stevens Dissent

The dissent attacked the majority on several bases. The automobile exception doctrine relied upon by the majority impliedly favors governmental interests. Without the exception, government officers would be hamstrung in their efforts to enforce laws in those settings.
where a vehicle was transporting contraband. The majority erred for the following reasons. Because *Carney* presents facts which concern the search of a home, albeit motorized, the traditional rationale supporting the automobile exception is not applicable.103 Furthermore, the absence of valuable trial court experience and precedent delimiting motor home searches necessarily foregoes the evolution of reasoned guiding principles.104 Controlling precedent, the dissent offered, was established by the Court's earlier decision of *Payton v. New York*,105 with its bright line test holding that warrantless searches of a home are presumptively unreasonable.106 Evaluation of the reasonableness of any search must necessarily include the surroundings in which it is executed.107

Justice Stevens criticized the majority's general willingness to entertain minimally significant fourth amendment cases, such as *Carney*. By having granted discretionary review of a state court decision which would only modestly extend precedent in the subject area, the decision was improvident.108 In addition, principles of sound court administration militated against granting review because the conflict was not then fully percolated.109

Motor homes are hybrids which possess characteristics of both permanent structures and vehicles. This prompted Justice Stevens to encourage the delineation of meaningful guidelines to denote the presence of fourth amendment interests.110 Relevant lines of separation in-

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106. *Id.* at 586.


109. *Id.* at 2073. Justification for immediate intervention is rare. The Court should decline review until a conflict has fully percolated. Such a strategy assures that its decision on matters of national significance will have the benefit of a conflict which has developed as a result of trial court experimentation and explanation. *See*, Estreicher & Sexton, *New York University Supreme Court Project*, Appendix to the Executive Summary A-4 at 22-23 (198_...) as cited in *Carney*, 105 S. Ct. at 2073, n. 8. This epoch undertaking on the Supreme Court's workload appears in published form. *See*, Estreicher and Sexton, *New York University Supreme Court Project*, 59 N.Y.U. L. Rev. (1984). The authors address two points of contention argued by the *Carney* dissent for declining to accept jurisdiction (i.e. the conflict was not "fully percolated" and was "improvident"). *Id.* at 720-744.

clude noting whether the vehicle is in motion or at a standstill; the manner in which it is fixed to the land and its potential to be quickly moved; characteristics lending to its service as a residence, and the means of mobility; and finally, whether it is fashioned for use on land or water. Lines of distinction can be drawn. The California Vehicle Code offers evidence. Instead, the majority's categorical treatment of motor homes summarily denies distinctions which might be applied to differentiate the diverse lifestyles known to benefit from mobile living and the variety of uses to which motor homes are suited.

The focal point of the dissent's argument is the recognition that at the time a motor home's owner dwells within, there exists a "substantial and legitimate expectation of privacy." No doubt such vehicles are susceptible to warrantless searches, but only when traveling on a public thoroughfare or when an immediate search is necessitated by exigent circumstances. The Carney facts were noted to lack exigency for three reasons: first, the motor home was parked in a public lot and not traveling on a public roadway; second, a warrant could have been secured from a magistrate available in the courthouse only a few blocks distant; and third, a statutory procedure existed to secure a warrant over the telephone.

111. Id.
112. See, e.g., CAL. VEH. CODE § 243 (Deering 1984) ("A 'camper' is a structure designed to be mounted upon a motor vehicle and to provide facilities for human habitation or camping purposes. A camper having one axle shall not be considered a vehicle"); and CAL. VEH. CODE § 362 (Deering 1984) ("[a] house car is a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached. . . .").
113. Carney, 105 S. Ct. at 2073.
114. Id. at 2075.
115. Id.
116. Id. at 2076.
117. Id. at n. 16. This argument does not appear in Respondent's briefs. The dissent relied upon CAL. PENAL CODE § 1526(b) (Deering 1983) ("[i]n lieu of the written affidavit . . . the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter."). This telephone warrant procedure was considered sufficient to protect fourth amendment rights as well as satisfy police concerns regarding loss of evidence. Significantly, exigent circumstances which give rise to warrantless searches necessarily are limited by this procedure. People v. Morrongiello, 145 Cal. App. 3d 1, 12-13, 193 Cal. Rptr. 105, 111 (Cal. Ct. App. 1983). By way of further illustration, the federal courts also permit the issuance of a warrant upon oral testimony. FED. R. CRIM. P. 41(c)(2)(D). The procedure is "intended for situations in which it is not practicable to present a written affidavit to a magistrate or judge, and is
Because no exigency existed, the dissenters argued that the majority's decision rested upon a conclusive presumption. That is, exigency arises solely as a result of a motor home's inherent mobility. This conclusion, they insist, offends *Carroll*\(^{118}\) where exigency arose not from mere mobility but due to practical necessity. It also is contrary to the Court's holding in *United States v. Chadwick*,\(^{119}\) where a footlocker stored in a car trunk was subjected to a warrantless search by federal agents. Like a motor vehicle, a footlocker is inherently mobile. However, the *Chadwick* Court noted that the footlocker was double-locked and as such demonstrated the owner's desire that its contents remain free from public inspection. Mobility alone offers an insufficient basis for abandoning the warrant requirement.\(^{120}\)

Carney's Dodge Mini Motor Home exhibited both exterior and interior clues that it contained a living space.\(^{121}\) These indications were sufficient to communicate the need for obtaining a warrant, failing which the search without coexistent exigency became "presumptively unreasonable."\(^{122}\)

IV. The *Carney* Search Standard

Searches of motor homes are justified only to the extent that they are reasonable.\(^{123}\) The standard of reasonableness articulated by the *Carney* Court demands an inquiry by the prospective searcher into circumstances regarding the vehicle's mobility and its location.\(^{124}\)

A vehicle's ready mobility has been used to justify warrantless searches for sixty years.\(^{125}\) Although the degree of mobility\(^{126}\) was un-

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121. *Carney*, 105 S. Ct. at 2077. The dissent noted appointments within the vehicle which were designed to accommodate habitation, such as stuffed chairs, table, bunk-beds, kitchen, etc.
123. *See supra* note 1.
defined in the seminal case of *United States v. Carroll,* this aspect of the inquiry is clearly founded upon long established precedent. The record’s silence concerning mobility of the *Carney* motor home and the Court’s bare conclusion that it evidenced ready mobility suggest that *Carney’s* contribution to the notion of mobility must await case-by-case decision making. Adding to the uncertainty are interpretive difficulties with the search standard. The dissent interpreted the Court’s opinion as creating a *per se* rule: if a motor home is mobile, treat it like a car. Period. Or restated, a motor home’s inherent mobility creates a conclusive presumption of exigency. Another interpretation defines mobility as active use for transportation. Between the two interpretations lie the as yet unreported questions of fact. The following points serve to illustrate. One can easily distinguish a motor home on the move and a motor home at a standstill. The former satisfies the standard yet the latter may not. If a parked motor home possesses the capacity for ready mobility, arguably the standard is met. If a motor home lacks the capacity for ready mobility, as when it is mechanically disabled, a warrantless search under *Carney* is, arguably, unreasonable. These distinctions between ready mobility and immobility are more than academic. Because they may reveal the existence of a protected constitutional interest, inquiry cannot be made cavalierly.

To justify a warrantless search of a motor home, in addition to its being readily mobile, Chief Justice Burger implied that it must be situated in a location which objectively indicates active use for transportation rather than residence. Because the Carney motor home was parked in a public lot, its setting objectively indicated its use for transportation. Consequently, the majority found it unnecessary to consider the application of the warrant exception to a motor home found in a setting which objectively indicated its use as a residence. The decision however did propose distinctions to aid in identifying residential versus transportation use. Indicia of a motor home’s use for transportation include the display of a license and convenient access to public roads. A motor home elevated on blocks and hooked up to utilities

128. *Carney,* 105 S. Ct. at 2071. Historically, the automobile exception has turned on the vehicle’s presence in a “setting that objectively indicates that [it] is being used for transportation” (emphasis supplied). *Id.* at 2070-2071.
129. *Id.* at 2071 n.3.
130. *Id.*
131. *Id.*
suggests its use for residential purposes. However, the Court expressly declined to decide which motor homes were "worthy" or "unworthy" of fourth amendment protections. Because a Carney search demands objective analysis on the part of the prospective searcher, the general nature of the standard theoretically permits its practical use in the varied circumstances in which a motor home might be found. Nevertheless, for the explanations offered above, practitioners must look beyond the limited Carney facts and opinion to find reasoned guiding principles.

More fundamental than the concerns for the conceptual and mechanical application of the Carney search standard is the impact of the Burger Court's decision upon fourth amendment doctrine. How do protected individual interests fare under the standard? Two cases suggest the answer. In Cardwell v. Lewis, the Court considered the search of the automobile which was found in a public parking lot. Though seized from a public setting, the Cardwell auto posed no threat of flight. The search consisted of paint scrapings taken from the exterior and a tire tread observation made while the vehicle was impounded and its owner in police custody. There was no privacy infringement. Nor was there any impermissible privacy infringement in Carney where an interior cabin search was conducted in a public parking lot for "safety reasons." The motor home did exhibit a potential for ready movement. In combination, these two cases expose an ever broadening perspective from which the Court will assess future warrantless vehicle searches. Ultimately, critical fourth amendment analysis will not be lost on distinctions between interior and exterior searches, between automobile and mobile residence searches, for they will have become one. Carroll and Carney however most vividly illustrate the extent to which individual interests have yielded to the Court's construction of the fourth amendment.

In 1925, the Carroll Court considered a roadside warrantless search of an Oldsmobile roadster smuggling bootleg whiskey. In 1985, the Carney Court considered a warrantless search of a parked Dodge

132. Id.
133. Id. at 2070.
134. Cardwell, 417 U.S. at 585.
135. See supra text accompanying note 39.
137. Id. at 591.
138. See supra text accompanying note 60.
139. Carney, 105 S. Ct. at 2070.
Mini Motor Home containing marijuana. In each case, the Court justified the respective search principally on the grounds that the vehicle's potential for ready movement forewarned potential for flight. This logic derives from an historic anomaly and is inapposite to the fourth amendment protections which were designed to insulate the individual from arbitrary and indiscriminate exercise of governmental authority. Insofar as one's home happens to be mobile, the *Carney* search formulation seems to have left a gaping hole in his constitutional guarantees against such an exercise.

What privacy interests a motor home owner may have, are protected, if at all, by the requirement that a prospective searcher objectively conclude that the vehicle's location in a setting suggests its use as a residence. With that thread, *Carney* has sought to restitch the constitutional protective fabric left tattered by the unfortunate application of the *Carroll* automobile exception to a modern-day phenomenon, the motor home.

V. Summary

*California v. Carney* is a bold addition to fourth amendment doctrine. Since the early history of our Republic, the home has been regarded as the area most deserving protection from governmental intrusion. In 1985, however, to the extent one's home evinces ready mobility, the Supreme Court by the force of a 6:3 decision held that such protection is no longer assured.

*Carney*'s holding is uncomplicated. In the context of the fourth amendment, a motor home is more like a car than a home. And like a car, a motor home is presumptively susceptible to being searched without a warrant, assuming the presence of probable cause to search in the first place.

In the main, the fourth amendment requires law enforcement officers to secure a warrant before conducting a search. To uphold the warrantless search in *Carney*, the Court relied upon the automobile exception doctrine. Automobiles are excepted for essentially two reasons. The same rationale now obtains to motor home searches. First, a vehi-

140. See supra notes 10, 28 and 29 and accompanying text.
141. See supra notes 3-5 and accompanying text.
142. *Carney*, 105 S. Ct. at 2066.
143. Id.
cle's intrinsic mobility oftentimes makes securing a warrant futile.144 Potential for ready movement forewarns potential for flight. Second, a vehicle's exposure to pervasive governmental regulation of the roadways creates a reduced expectation of privacy.145 Similarly, a vehicle's configuration exposes the passenger compartment to public view which in turn reduces the privacy expectations of the occupant.146

The challenged governmental actions in Carney were the warrant-less search of the Dodge Mini Motor Home, as it stood parked in a public lot in downtown San Diego, and the seizure of an unspecified quantity of marijuana from the living area.147 The Carney search standard required that Drug Enforcement Administration agents secure a warrant to search unless circumstances permitted two objective conclusions—that the motor home was readily mobile and that the vehicle's location indicates its active use for transportation rather than residence.148

The sole evidentiary basis for Carney's conviction appears in a suppression hearing transcript.149 That probable cause existed to search is abundantly clear.150 Left unclear are facts which convincingly support the Court's reliance upon the automobile exception. To the contrary, the following suggest that this doctrine is illsuited to the Carney record; for example, drawn interior window shades reflect the occupants' heightened, not reduced, privacy expectations; a motor home parked within the confines of a public lot, in excess of the 75 minutes from the time agents first suspected ongoing illicit activity, failed to present exigency of such practical necessity that the rule requiring the securing of a search warrant should be circumvented. The outcome compels support from an altogether different rationale.161

The automobile exception is a judicial creation. Its aim—to aid legitimate law enforcement interests—was first expressed in the prohibition era case, United States v. Carroll.162 In that decision, the Court sharpened the teeth of the National Prohibition Act163 by upholding

144. Caroll, 267 U.S. at 153.
145. See supra note 90.
146. Cardwell, 417 U.S. at 590.
147. Carney, 105 S. Ct. at 2067.
148. Id. at 2070-2071.
149. See supra note 67.
150. See supra note 68.
151. See supra note 65 and accompanying text.
152. Caroll, 267 U.S. at 153.
153. See supra note 11.
federal agents' action in conducting a warrantless roadside search of an Oldsmobile roadster transporting bootleg whiskey.154 Though both the Act and the constitutional mandate which authorized it have long since been repealed,155 the legacy continues. Sixty years after Carroll, Chief Justice Burger reasserted its aim by allowing "the essential purposes served by the exception to be fulfilled."156

Carney's contribution to the evolving character of the fourth amendment suggests a paradoxical result. Despite its boldness, the Court's predisposed assertion favoring governmental anti-crime pursuits will likely yield only nominal influence on law enforcement practice. As the record demonstrates, other exceptions may more clearly legitimize warrantless searches. Carney's principal legacy is the shift which it reflects in the doctrinal perspective of the Court. Traditional safeguards respecting the search of one's home are today less assured. The decision offers a head-on challenge to the certainty of Justice Brandeis' caveat — "in every extention of governmental functions lurks a new danger to civil liberty."157

David C. Hawkins

155. See supra notes 14 and 15.
156. Carney, 105 S. Ct. at 2071.

I. Introduction

In Lowe v. Securities and Exchange Commission, the Supreme Court granted certiorari to determine whether the Securities and Exchange Commission (hereinafter the SEC) had the authority under the Investment Adviser's Act (hereinafter the Act) to enjoin the publication of a financial newsletter by an unregistered financial adviser. The SEC's activities, designed to protect unsophisticated investors through the regulation of financial newsletters, threatened to collide with the first amendment freedom of the press. In a decision labelled as one of statutory construction, the Lowe Court interpreted the Act to exclude publishers of impersonal financial newsletters. Justice White, while concurring in the result, criticized the majority and concluded that the majority's decision, "[i]s in fact based on a thinly disguised conviction that the Act is unconstitutional as applied to prohibit publication of

3. The Act's provision on the findings of the SEC suggests concern over the availability of the mail to disseminate financial advice. According to the act:
   Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission . . . and facts otherwise disclosed and ascertained, it is found that investment advisers are of national concern, in that, among other things - (1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, . . . by the use of the mails and means . . . of interstate commerce.
4. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.
5. The Investment Adviser's Act of 1940 regulates the profession of investment advising. The statute codified at 15 U.S.C. § 80-b (1982), sets forth procedural guidelines to regulate this profession. This includes a registration requirement for those persons who render financial advice through verbal or written means for a consideration. An unregistered adviser who renders investment advice is subject to both civil and criminal sanctions under the Act.
newsletters by unregistered advisers."

In order to understand the Lowe decision, this comment begins with an overview of the Act and its application to investment newsletters prior to this Supreme Court decision. A separate evaluation of the "bona fide" newspaper exclusion is included because of its significance in the Court's ultimate construction of the Act. Next, legislative history concerning the purpose and proposed application of the Act is analyzed in an effort to understand its intended scope. The lower court opinions resulting in the Supreme Court's grant of certiorari are then summarily discussed with a focus towards the divergence of opinion between and within the courts.

The majority opinion delivered by Justice Stevens and joined by Justices Brennan, Marshall, Blackmun and O'Connor is then examined and evaluated in view of the strong concurring opinion delivered by Justice White and joined by Chief Justice Burger and Justice Rehnquist. Although the majority decision states a conclusion based on statutory construction, this comment will examine the influential nature of first amendment concerns in the majority's decision.

In conclusion, this comment articulates some possible ramifications of the Lowe decision that may have been produced unnecessarily through the majority's determination to avoid the first amendment issue. An effort is made to determine whether confronting the constitutional issue would have better balanced the competing interests of first amendment concerns and the protection of the investing public.

II. The Investment Adviser's Act

The Investment Adviser's Act of 1940 was enacted to protect the public from abuses in the securities industry. The stock market crash of 1929 brought a new awareness of the influence investment advisers were capable of wielding. Abuses of this influence were thought to have contributed in large part to the crash of 1929. As the activities of investment adviser's resumed and then increased following the crash, the need for federal legislation to protect unsophisticated investors became apparent.

7. Id. at 2581 (White, J., concurring).
8. See supra note 5.
10. Id. at 186.
According to a House Report, "The essential purpose of [this legislation] is to protect the public from the frauds and misrepresentations of unscrupulous tipsters and touts and to safeguard the honest investment adviser against the stigma of the activities of these individuals by making fraudulent practices by investment advisers unlawful."\textsuperscript{12} In the drafting of the Act, the primary goal of protecting the public from fraud and manipulation was balanced with the need to protect the fiduciary nature of an adviser-client relationship.\textsuperscript{13}

The Act, codified at title 15, section 80b of the United States Code requires investment advisers to file a registration with the SEC.\textsuperscript{14} The registration application requires disclosure of past misconduct involving financial matters as well as information on the adviser's current business.\textsuperscript{15} "Investment advisers,"\textsuperscript{16} as defined by the Act, must be registered with the SEC or they will be prohibited from engaging in advisory activities. This prohibition extends to the use of the mail to disseminate financial advice.\textsuperscript{17}

Investment advisers registered under the Act must keep records and may be required to file reports when the SEC deems it necessary to protect the public.\textsuperscript{18} Both reports and records must be made available for public inspection.\textsuperscript{19} The Act's regulatory power includes injunctive relief available whenever the SEC finds that an adviser is, or is about to, violate a provision of the Act.\textsuperscript{20} According to the Act, upon a showing that a violation has occurred or is about to occur, an injunction shall issue without bond.\textsuperscript{21} This order can require compliance with the Act, prohibit future violations, or both. Additionally, criminal proceedings can be instituted for violations of the Act.\textsuperscript{22}

Under the Act, the SEC is given the power to revoke, suspend or deny the registration of an investment adviser. If the adviser has been convicted of a felony or misdemeanor involving the purchase or sale of securities within ten years preceding the filing of the application, he

\begin{itemize}
  \item \textsuperscript{12} H.R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (1940).
  \item \textsuperscript{13} Capital Gains Research Bureau, Inc., 375 U.S. at 191.
  \item \textsuperscript{14} 15 U.S.C. § 80b-3(a) (1982).
  \item \textsuperscript{15} 15 U.S.C. § 80b-3(c) (1982).
  \item \textsuperscript{16} See infra text accompanying note 25.
  \item \textsuperscript{17} 15 U.S.C. § 80b-3(a) (1982).
  \item \textsuperscript{18} 15 U.S.C. § 80b-4 (1982).
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} 15 U.S.C. § 80b-9(e) (1982).
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id.
\end{itemize}
may be barred from registering under the Act. If the adviser is convicted of a felony or misdemeanor involving securities while he is registered, his registration may be revoked or suspended. Before such disciplinary measures are taken the SEC must also determine that the public interest is benefitted by the revocation or denial of registration and that the misconduct took place within the scope of the adviser's business. The SEC is also granted these powers upon a finding that the adviser has falsified material information on an application or in a report filed with the SEC.

An investment adviser is defined under the Act as:

[An]y person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities.

The first element of this definition involves the rendering of investment advice to others. Exactly what qualifies as investment advice is not clear. For example, a publication containing information on a variety of investments may or may not qualify as an investment advisory publication under the Act.

The SEC has concluded that a person who provides advice, recommendations or analyses, concerning securities, but not relating to specific securities, would generally be deemed an investment adviser, assuming such services are performed as part of a business and for compensation. This definition includes persons who advise clients directly or through publications or writings. The advice can be specific or can be related to the general advantages or disadvantages of investing in securities compared to other investment opportunities.

The second element in the definition of an investment adviser re-

24. Id.
quires that the person be "engaged in the business" of advising others. The SEC views someone as "in the business" if he gives advice more than incidentally in the course of his business. Other determinative factors are how specific the advice is and whether any special compensation is received for the advice. According to the SEC, a person is in the business "if, on anything other than rare and isolated instances, he discusses the advisability of investing in, or issues reports or analyses as to, specific securities or specific categories of securities. . . ."28

Finally, a person must receive compensation for his financial advice to qualify as an investment adviser. Any economic benefit received as a result of financial advice or in payment for a package of services including financial advice, is sufficient compensation for purposes of the Act. This compensation does not have to be attributed to a specific item of information. Commission payments resulting from investment information qualify as an economic benefit for purposes of the definition.30

Some investment advisers are excluded from the registration requirements of the Act. Among those excluded are advisers who do not engage in interstate business transactions (including use of the mail) and those who had fewer than fifteen clients in the preceding year. Others excluded from registration include advisers having only insurance companies as clients, banks or lending institutions, and attorneys who give investment advice only incidentally to their profession. Arguably, the most ambiguous exception applies to publishers of "bona fide" newspapers and news magazines of general and regular circulation.31

III. The "Bona Fide" Newspaper Exception

According to the Act, publishers of "bona fide" newspapers, news magazines and business or financial publications are excepted from the

28. Id.
29. Id.
30. Id.

Note: Other investment advisers excluded from the provisions of the Act are: a) banks or bank holding companies, lawyers, accountants, engineers, or teachers whose performance of such service is incidental to the practice of the profession; b) brokers and dealers who receive no special compensation and engage in the activity only incidentally to their profession; c) persons who engage solely in activities relating to securities guaranteed by the United States or securities issued or guaranteed by corporations, in which the United States has an interest and d) such other persons not within the intent of this Act as the SEC may designate.
definition of investment adviser if these publications are of general and regular circulation. However, the Act does not explicitly set forth what qualifies as a “bona fide” newspaper.

In Securities and Exchange Commission v. Wall Street Transcript Corp., the leading case raising this issue, the “bona fide” newspaper exception was defined as “those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred.” The Second Circuit indicated that the format or appearance of the publication was not the critical issue in determining whether a publication was “bona fide.” According to Wall Street Transcript, the question of whether a publication is a bona fide newspaper is made by examining the nature of the publication’s practices.

The Wall Street Transcript court studied the contents of the publication and the likelihood that readers would respond to this information as financial advice. If the contents warrant such a conclusion then the publication is not a “bona fide” newspaper for purposes of the Act. Further, no reason was found to substantiate the argument that Congress intended to exclude all newspaper publications from the requirements of the Act. The court explained in a note, “[i]t appears rather that those newspapers referred to as ‘bona fide’ were considered to be those outside the regulatory intent of the Act.” The court reached this conclusion by applying the language of the Act which excludes “bona fide” newspapers from regulation as well as “such other persons not within the intent of this paragraph. . . .” The Second Circuit interpreted this language to mean that the validity of an exclusion can be determined by examining what the Act was logically created to regulate. If the publication falls within an area which the Act was intended to regulate, then it is probably subject to the registration requirements.

The SEC has ruled that publishers of books and periodical articles are excluded from the Act in a number of situations. According to the SEC, the definition of an investment adviser does not include the au-

34. Id. at 1377.
35. Id. at 1378.
36. Id.
37. Id. at 1377, n.9.
39. Wall Street Transcript Corp., 422 F.2d at 1377.
IV. SEC v. Lowe

In 1983 the SEC brought suit in federal district court to enjoin Christopher Lowe and Lowe Management Corporation from publishing investment newsletters as an unregistered financial adviser. In 1981 Lowe's registration was revoked and he was barred from associating with any financial adviser. This action followed the discovery of Lowe's failure to disclose prior criminal convictions in New York and an administrative finding that he had misappropriated client funds.

Lowe continued to publish advisory newsletters after the revocation of his license. These newsletters included the Lowe Investment and Financial Letter and the Lowe Stock Advisory. A third publication was in the planning stages but no issues had been distributed at the time the SEC brought suit. Lowe also offered a telephone "hotline" for subscribers of six months or more.

The Lowe Investment and Financial Letter had between 3,000 and 19,000 subscribers. A subscription cost thirty-nine dollars for one year and seventy-nine dollars for three years. The publication included advice on investing in treasury bills, stocks and money market funds. It also recommended the desirability of purchasing or selling specific stocks.

The Lowe Stock Advisory contained purchase, sale and hold recommendations on low-priced stocks. It also analyzed the general trend of the market. A few hundred clients subscribed to this service. The SEC did not allege that fraudulent or misleading information was contained in any of these publications.

42. Id. at 1361.
43. Id.
44. Subscribers only complaints about Lowe's services concerned the lack of regular publication. The District Court explains this problem, "[t]he lack of regularity of publication — an understandable problem in view if the amount of time the publisher
The district court defined the central issue as whether the SEC could restrain Lowe from publishing his newsletters, which the court termed impersonal financial advice, by denying him registration status under the Act. To reach his decision, Judge Weinstein construed the statute as differentiating between personal and impersonal advice offered through publications although the statute itself contained no justification for this approach. He suggested, however, that this construction was necessary to prevent a ruling that the Act as applied to all publications is unconstitutional.

The court's rationale evolved around a belief that the Act may involve an unconstitutional prior restraint on publication. The SEC argued that the publication of financial newsletters constitutes a category of commercial speech and thus can be regulated more closely than other areas of first amendment protection. The district court disagreed with the SEC's analysis and concluded that publishers of financial newsletters are entitled to full first amendment protection. The district court concluded that even under a commercial speech doctrine the publication of Lowe's newsletters could not be constitutionally enjoined. The court adhered to the doctrine developed in Central Hudson Gas & Electric Corp. v. Public Service Commission, which established guidelines for regulating commercial speech. Under these guidelines the restraint must not be more extensive than necessary to achieve the desired purpose. Since the SEC can require Lowe to disclose his past misdeeds, Judge Weinstein reasoned that a total

has been devoting in recent years to defending himself before federal and state law enforcement agencies." Id. at 1361-62.

45. Id. at 1362.
46. Id. at 1365.
47. Id.
48. Id. Commercial Speech is an evolving doctrine which involves a degree of permissible regulation of speech which would normally be wholly protected by the first amendment. Prior applications have largely been related to commercial advertising of products or services. See, e.g., Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

51. Id. The requirements outlined in Central Hudson are: 1) whether the publication concerns lawful activity and is not misleading; If it meets the first criteria, a restraint will be allowed only if 2) the government interest is substantial; 3) the regulation directly advances the government's interests and 4) is not more extensive than necessary to achieve the desired goal.
prohibition on publishing is unnecessarily harsh.\textsuperscript{52}

To prevent a conclusion that the Act is unconstitutional as applied to advisory publishers, the statute was interpreted to mean that registration can be required but cannot be denied.\textsuperscript{53} Therefore, if Lowe reported his previous criminal convictions in his application and also met the other SEC requirements, then he must be allowed to register for the purpose of publishing his newsletters. The court concluded that the sanctions of denial of registration, suspension or revocation of registration and bar from association with an investment adviser would not be applicable to advisers who render only impersonal advice. Impersonal advice meant advice which was not formulated for a particular person but was offered through a subscription list to a group of people.\textsuperscript{54}

The SEC appealed this decision to the Second Circuit Court of Appeals. The circuit court disagreed with the district court's analysis and viewed the central issue as "whether the publication of such advice is protected by the first amendment so as to preclude the SEC from seeking to enjoin its continuance."\textsuperscript{55} The Second Circuit found no substantive basis for the district court's interpretation of the Act which excluded impersonal investment publications from the Act's injunctive power. The circuit court examined the "bona fide" newspaper exclusion and found that Lowe was not engaged in customary newspaper activities. In fact, his activities were exactly the type of activity the Act was intended to regulate. The circuit court decided that the SEC has the statutory authority to revoke Lowe's registration and prohibit the publication of his newsletter.\textsuperscript{56}

The Second Circuit began by reasoning that the Act serves as a permissible regulation of economic activity.\textsuperscript{57} It then recognized that regulation of commercial activity cannot be denied simply because it involves the press.\textsuperscript{58} The court found that in the interests of protecting the public, the government is able to regulate commercial activity involving speech.\textsuperscript{59} The decision was based in part on the case of \textit{Wall Street Transcript}\textsuperscript{60} which held that the Investment Advisers Act is not

\textsuperscript{52} Lowe, 556 F. Supp. at 1366.
\textsuperscript{53} Id. at 1369.
\textsuperscript{54} Id.
\textsuperscript{56} Id. at 898.
\textsuperscript{57} Id. at 900.
\textsuperscript{58} Id. at 899-900.
\textsuperscript{59} Id. at 899.
\textsuperscript{60} 422 F.2d at 1371.
unconstitutional simply because it regulates certain kinds of publications. As the *Wall Street Transcript* court explained, "[i]t is not necessary to base a construction of the Act on the assumption that the activities involved in giving commercial investment advice are entitled to the identical constitutional protection provided for certain forms of social, political or religious expression." To determine whether a publication is "bona fide" and thus exempt from regulation under the *Wall Street* analysis, a distinction must be drawn between ideological expressions which should be protected and merchandising activities which are subject to regulation.

Lowe argued that the prohibition against publishing constitutes an unconstitutional prior restraint. The SEC argued that Lowe's newsletters consisted of commercial speech and are thus subject to greater control than other publications. The circuit court defined commercial speech as speech that involves commercial activity and influences the economic interests of both the speaker and his audience. The application of the doctrine depends on the contents of a publication and its relationship to an economic activity of the publisher or his readers. According to the Second Circuit, Lowe's publications could be characterized as commercial speech since they relate to the economic interests of Lowe and his readers. The court reasoned that because Lowe's publications were potentially deceptive they could be enjoined under the commercial speech doctrine. The court explained, "[j]ust as the potential for deception may justify the regulation of a profession, . . . so, too, the potential for deception permits government to ban potentially deceptive commercial speech."

The Second Circuit decided that the Act is analagous to the licensing of professionals in that past conduct can bar the granting of a license or registration. Since Lowe's past behavior involved among other things, misappropriating client funds and a larceny conviction,

61. *Id.* at 1379.
62. *Id.*
63. *Id.*
64. Lowe, 725 F.2d at 901.
67. Lowe, 725 F.2d at 900.
68. *Id.*
69. *Id.* at 901 (footnote omitted).
there is substantive rationale to justify barring his registration as an adviser. The doctrine of commercial speech was interpreted to allow the government to ban such publications to prevent future deceptive practices. The court reasoned that it was ridiculous to allow Lowe to publish misleading advice, and then punish him after the fact since the public would already be harmed by his fraudulent practices.70

A. The Circuit Court Dissent

Judge Brieant, in dissent, disagreed with the majority's determination that Lowe's newsletters were commercial speech. He argued "[i]nvestment opinion . . . is as much speech protected from prior restraint as is political opinion, philosophy or gibberish. Not only for the Zengers, the Patrick Henrys and the Ellsbergs was this basic freedom secured, but also for an ex-convict whom the majority assumes to be motivated towards recidivism."71

Judge Brieant interpreted the majority decision to "impose an injunction upon appellee Lowe . . . , which at best, will be illusory and unenforceable, and at worst, constitutes a prior judicial restraint upon the publication of regularly issued journals of fact and opinion. . . ."72 He found this result both unconstitutional and unnecessary in light of the language of the statute which he interpreted to exclude Lowe.73

The dissenting judge discussed the licensing of professionals to determine if Lowe can be subjected to regulation as a professional. According to Judge Brieant, Lowe and his publications were offering a general information service of fact and opinion. Because Lowe's publications were available to anyone who subscribed, were received several days after the news was public and could readily be examined and criticized at the time of publication, they were more like an ordinary newspaper than a professional opinion. To require Lowe to register in order to publish these newsletters would be extending a licensing scheme to the press. Judge Brieant concluded that this result would virtually disregard the enactment of the first amendment.74

The majority's interpretation of commercial speech was also criti-

70. Id.
71. Lowe, 725 F.2d at 907 (Brieant, J., dissenting).
72. Id. at 903 (Brieant, J., dissenting).
73. Id.
74. Id.
cized by Judge Brieant. He construed recent cases which discuss the doctrine to apply only to advertising and closely related ways of approaching potential customers. He considers this construction to be particularly appropriate in view of the Supreme Court’s attempts to define commercial speech in these cases. The Supreme Court’s definition of commercial speech has been closely intertwined with advertising and commercial activities according to the dissent.

Judge Brieant concluded that Lowe’s newsletters were more than a commercial endeavor. In fact, he finds Lowe’s publications were comparable to other financial magazines such as Forbes or Barron’s since they offer impersonal third party analysis of stocks. To require these magazines to register in order to be published would clearly be an unconstitutional prior restraint.

Judge Brieant continued by arguing that even if Lowe’s publications constituted commercial speech, the injunction failed to meet the criteria outlined in Central Hudson and therefore could not be upheld. Accordingly, he found that the injunction does not directly advance a governmental interest and is in fact more severe than necessary to effectuate a legitimate purpose.

In conclusion, Judge Brieant agreed with the statutory construction and ultimate decision of the district court. He found that the Act is not unconstitutional on its face and should not be interpreted as inconsistent with the first amendment if another construction is possible. Judge Brieant considered the injunction to be too vague to be either effective or enforceable and because it served no legitimate purpose it


76. Lowe, 725 F.2d at 905 (Brieant, J., dissenting).

77. Id.

78. Id. at 906 (Brieant, J., dissenting).

79. See supra note 51.

80. Lowe, 725 F.2d at 907 (Brieant, J., dissenting).

81. Id.

82. Id. at 910.
should not have been issued. 83

V. The Supreme Court Decision

Although the Supreme Court granted certiorari to determine whether "an injunction against the publication and distribution of petitioner's newsletters is prohibited by the first amendment," 84 the majority ultimately decided that Lowe was not an investment adviser and thus avoided the first amendment issue. 85 Three justices agreed that Lowe should not be prohibited from publishing his newsletters but would have held that the Act was unconstitutional to the extent it prohibits an unregistered person from furnishing impersonal investment advice through publications. 86

A. The Lowe Majority

The Lowe Court began by examining the legislative history to determine the purpose and intended scope of the Investment Adviser's Act. 87 This first step was necessitated by the Court's desire to avoid, if possible, the first amendment question. 88 The Court focused on language in the history indicating that person to person investment advice was conducive to fraudulent practices and thus regulation was needed to protect investors. The Lowe Court appeared to formulate a definition of investment adviser which was based on personal interaction and trust between investor and adviser. This definition places the adviser and investor in a fiduciary relationship. Frequent personal contact is an important element of this definition. The Lowe Court concluded, "petitioners' publications do not fit within the central purpose of the Act because they do not offer individualized advice attuned to any specific

83. Id.
84. Lowe, 105 S. Ct. at 2562.
85. Id. at 2573-74. Justices Stevens, Brennan, Marshall, Blackmun and O'Connor joined in the majority opinion (Justice Powell took no part in the decision).
86. Justice Rehnquist and Chief Justice Burger joined with Justice White in a concurring opinion. Although they concurred in the result, they did not agree with the reasoning of the majority.
87. Lowe, 105 S. Ct. at 2563.
88. Id. The Court recognizes a duty to avoid a constitutional issue if there is a reasonable alternative. Since both the district court and the dissenting judge in the court of appeals asserted that the case should be decided on statutory grounds, the majority believed the constitutional issue may well be eliminated or narrowed through statutory analysis.
portfolio or to any client's particular needs."

To reach this characterization of an investment adviser the Lowe Court examined congressional reports containing opinions on what type of legislation was needed and who it should include. The Court began its survey by examining a 1940 study conducted by the Securities and Exchange Commission on investment trusts and investment companies. This report analyzed problems in the investment industry. The Lowe majority found language in the Report which suggested that the application of the regulations be limited to personal advice and subscription-list publications were specifically excluded. Representatives of the investment counselors stated in the report that the primary purpose of an investment counselor was to provide personalized investment advice to clients.

The 1940 SEC report concluded that there were two main categories of concern in the investment industry: 1) distinguishing the legitimate counselors from the fraudulent ones and 2) organization and management of investment firms. The Investment Adviser's Act was intended to address these problems.

The Lowe majority found further support for its position in the hearings on the bill which resulted from the SEC's study. Descriptions of the advisory profession stressed person to person, individually tailored advice. The Court stressed the importance of language in a House Report discussing the revised bill which became the Act. The report states, "[t]he title also recognizes the personalized character of the services of investment advisers and especial care has been taken . . . to respect this relationship between investment advisers and their clients." The Court interpreted this language to imply that only personal advice rendered through publication is meant to be regulated. The House Report goes on to say, however, that investment advisers utilizing the mails for transacting their business must register with the

89. Id. at 2572.
90. Id. at 2563. See S. Rep. No. 1775, supra note 11.
91. Lowe, 105 S. Ct. at 2563.
92. Id. at 2564.
93. Id. at 2565.
94. The bill which resulted from the SEC's Report was introduced by Senator Wagner.
95. Lowe, 105 S. Ct. at 2566.
96. Id.
97. Id. at 2569.
Arguably, the language "respect this relationship" was intended to prevent unreasonable encroachment or interference in the business dealings between adviser and advisee.

The majority definition appears to overlook the language of the statute which clearly includes persons who advise others, "either directly or through publications. . ." as investment advisers. The language also includes a person who "promulgates analyses or reports. . ." The Court also overlooks the fact that a report or analysis is often tailored to general needs and not individualized recommendations. In addition, the introductory portion of the Act reflects the congressional intent to include publications. The Act reads, "it is found that investment advisers are of national concern, in that, among other things - (1) their advice, counsel, publications, writings and analyses and reports are furnished and distributed . . . by the use of the mails and means and instrumentalities of interstate commerce . . . ."

Legislative material includes impersonal publications and cites examples of the manipulative power of these advisory services. A Senate Report expressed the need for regulation of financial publications because of "their potential influence on security markets and the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors. . . ." It is also significant that these Senate Committee reports define an investment adviser as anyone falling within a wide range of classifications, including those offering impersonal advice to a specified category of clientele and those sending advice through the mail. This definition appears to include publishers of impersonal newsletters.

In *S.E.C. v. Capital Gains Research Bureau*, the Supreme Court construed the Investment Advisers Act broadly to effectuate the purpose of preventing the perpetration of fraud upon the public. In *Capital Gains* the Court granted the SEC the power to compel the

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99. *Id.*
101. *Id.*
106. 375 U.S. at 180.
107. *Id.* at 195.
defendant to disclose his trading activities of the stocks he recommended in his publication.\textsuperscript{108} The Court specifically mentioned the language of the statute in a note, indicating that publications were intended to be included in the Act.\textsuperscript{109}

The \textit{Lowe} majority concluded that the Act's definition of investment adviser, read without knowledge of the drafter's intent, appeared to include Lowe, unless he was entitled to the "bona fide" newspaper exclusion. To determine the parameters of the exclusion, the majority read the language of the Act in light of what they viewed as legislative concern over first amendment violations. The Court believed this concern stemmed from a 1940 report prepared by the Illinois Research Council, discussing the possible constitutional ramifications of including impersonal advice within Illinois' regulation of investment counselors. This report was submitted to and examined by Congress. The report recommended the exclusion of impersonal publications from the definition of investment counselor to prevent the possibility of first amendment infringement.\textsuperscript{110} The \textit{Lowe} majority apparently concluded that the Illinois Report was persuasive evidence of the congressional intent to limit the scope of the Act to personal publications. Because Congress was made aware of the possible constitutional ramifications of including impersonal advice within the Act, the Court reasoned that they must have taken a course designed to avoid this undesirable result. Therefore, Congress must have intended to exclude impersonal publications from the requirements of the Act.

The Court recalled that prior to the adoption of the Act, two cases recognizing prior restraint on speech as unconstitutional had emerged as landmark decisions.\textsuperscript{111} One case was specifically mentioned in the

\begin{flushleft}
\textsuperscript{108} \textit{Id.} at 181-82.
\textsuperscript{109} \textit{Id.} at 187 n.15.
\textsuperscript{110} \textit{Lowe}, 105 S. Ct. at 2567-68 (citing \textit{Hearings on S. 3580 Before the Subcommittee on Securities and Exchange of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. pt 1, p. 27 (1940)}). Note: The Court finds significance in the difference between the original draft of the "bona fide" newspaper exclusion which read, "the publisher of any bona fide newspaper or newsmagazine of general circulation" and the final version which reads, "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation. . . ." The majority notes the broadening of the exclusion following the introduction of the Illinois report thereby indicating the legislators concern that they draft legislation consistent with constitutional principles.
\textsuperscript{111} \textit{Id.} at 2570; see \textit{Lovell v. City of Griffin}, 303 U.S. 444 (1938); \textit{Near v. Minnesota ex. rel. Olson}, 283 U.S. 697 (1931).
\end{flushleft}
legislative history which the Lowe Court found to be indicative of the legislators' intention to avoid constitutional implications.112 According to the majority, "[C]ongress, plainly sensitive to first amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities."113

Since Lowe's newsletters were impersonal in character and published on a regular schedule, the Court felt they fit within the "bona fide" newspaper exclusion.114 According to the majority, "bona fide" was defined to be most closely analogous to the term "genuine." Since Lowe's publications "are not personal communications masquerading in the clothing of newspapers, news magazines or financial publications,"115 they are genuine. The majority concluded that the plain language of the exclusion, read with the intent of Congress to prevent constitutional problems, justified this result. The Lowe Court reasoned that "[t]o the extent that the chart service (Lowe's publication) contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications, a matter that concerned Congress when the exclusion was drafted."116

The majority's definition seems to overrule the SEC's decision on who must register as an investment adviser. Prior to Lowe, the SEC required impersonal financial publications which were addressed primarily to investors to register.117 The SEC grants a "bona fide" publication exception only where a publication judged by its content, promotion, readership and other matters, does not appeal to readers generally as an investment advisory publication.118 Thus the SEC concentrates its analysis on whether the publication would be used by an investor for making decisions on buying, selling, or otherwise handling securities.119 The decision in Wall Street Transcript120 helped to define the parame-

113. Lowe, 105 S. Ct. at 2570.
114. Id. at 2572-73.
115. Id. at 2572.
116. Id. at 2573.
118. Applicability of Investment Adviser's Act to Certain Publications, supra note 26 at n. 1. See also Wall Street Transcript Corp., 422 F.2d 1371.
119. Id.
120. 422 F.2d at 1371.
ters of the "bona fide" newspaper exclusion. The Wall Street Transcript court held that "bona fide" was meant to include publications engaged in ordinary newspaper activities and which are not likely to engage in the improper behavior envisioned by the Act. 121

The Lowe Court explained their variance with these definitions by reasoning that the former guidelines lacked insight into the purpose of the legislation and the intent of Congress when they drafted the Act. According to the Lowe Court, Congress did not intend to regulate impersonal publications because they were aware of the likelihood of first amendment infringement. The Lowe majority also concluded that the creators of the Investment Adviser's Act had no intention of regulating impersonal investment advice because this would not serve the public purpose of protecting those involved in a fiduciary relationship. A fiduciary relationship is characteristic of an adviser-client relationship. The majority determined that Congress enacted the exclusion to prevent intrusion into the protected area of public acquisition of information through publications. Therefore, the Court concluded that Lowe is entitled to the "bona fide" newspaper exclusion and is not an investment adviser within the definition of the Act. 122

The majority's construction of the history of the Act is similar to that made by the district court. Both identify two distinct categories of regulation within the Act; one dealing with personal advice and one dealing with impersonal advice through publication. As the district court recognized, the language of the statute does not support this construction of the Act. 123 Both courts seem to agree, however, that Congress must have intended this result to prevent an intrusion into the rights guaranteed by the first amendment.

B. Justice White's Concurrence

Justice White would categorize Lowe as an investment adviser

121. Id. at 1377; See also Securities and Exchange Commission v. Suter, 732 F.2d 1294 (1984) (holding that investment adviser's publication was not "bona fide" newspaper).

122. Lowe, 105 S. Ct. at 2573.

123. Lowe, 556 F. Supp. at 1365. "Admittedly there is no suggestion on the face of the statute that persons whose only advisory capacity is the publication of impersonal investment suggestions, reports and analyses should be treated differently . . . from other persons within the definition of investment adviser. . . . Nevertheless, this interpretation is suggested by constitutional considerations." Id.
within the jurisdiction of the Act. He concurred with the majority result because he believes that the Act's prohibition on publishing by unregistered advisers engaged in rendering impersonal investment advice is unconstitutional.

He agreed with the majority on the proposition that a statute should not be construed to conflict with constitutional objectives if an alternative construction is possible. He emphasized however, that the construction must be "fairly possible." The duty of the court he concluded, is not to rewrite legislation but to construe it in accordance with legislative objectives since it is the legislature's duty to define public policy.

Turning to the plain language of the Act, Justice White found that Lowe is an adviser unless his newsletter is a "bona fide" publication of general and regular circulation. Justice White believed Lowe clearly met the Act's initial criteria of engaging in the business of rendering investment advice through publications or writings. According to Justice White, the critical issue was "whether the 'bona fide publications' exception is to be construed so broadly as to exclude from the definition all persons whose advisory activities are carried out solely through publications offering impersonal investment advice to their subscribers."

Justice White thought substantial weight should be given to the SEC's interpretation of the applicability of the Act to publishers. The SEC has included publishers of newsletters and market advice in the definition of investment adviser since the enactment of the legislation. The SEC has defined the "bona fide" newspaper exclusion "as applicable only where, based on the content, advertising material, readership and other relevant factors, a publication is not primarily a vehicle for distributing investment advice."

The majority appeared to adopt a broader interpretation of the

125. *Id.* at 2587.
126. *Id.* at 2574 (White, J., concurring).
127. *Id.*
128. *Id.* at 2574-75 (White, J., concurring).
129. *Id.*
130. *Id.* at 2576.
“bona fide” publication exception than the SEC had allowed. Justice White construed the majority's expanded definition as broad enough to encompass all publications that do not offer personal investment advice. This broadening of the definition, according to him, appears both illogical and inconsistent with the language of the Act, which defines investment adviser as one who renders advice either directly or through publications or writings, or who issues analyses or reports.133

Justice White felt that if Congress intended the “bona fide” newspaper exception to include all publications there would have been no reason to include the language “or through publications” in the statute itself. He determined that the specific nature of the language indicates that both direct advice or advice issued through publication was to be included in the scope of the Act. He could find no logical reason for the “bona fide” term if Congress had not intended that the content of a publication be examined to determine if it fit the exclusion. Justice White concluded that the majority's interpretation fails to recognize the fundamental principle of giving effect to all the language of a statute.134

In Justice White's view, the Act's history does not support the conclusion that persons who engage in giving investment advice through publication are to be excluded from the definition of investment adviser.135 In fact, representatives of both the SEC and the investment advisers thought that the Act would include these publications.136 Douglas T. Johnston, the Vice President of the Investment Counsel of America stated in a subcommittee hearing:

The definition of investment adviser as given in the bill, in spite of certain exclusions, is quite broad and covers a number of services which are entirely different in their scope and in their methods of operation. For example, as we read the definition, among others, it would include those companies which publish manuals of securities such as Moody's, Poor's and so forth; it would include those companies issuing weekly investment letters such as Babson's, United Business Service, Standard Statistics, and so forth . . . .137

133. **Lowe**, 105 S. Ct. at 2576-77 (White, J., concurring).
134. **Id.** at 2577-78 (White, J., concurring).
135. **Id.** at 2578 (White, J., concurring).
136. **Id.**
137. **Id.** at 2565 n.38 (quoting *Hearings on S. 3580 Before the Subcommittee on Securities and Exchange of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. p. 711-712 (1940)).
Justice White points to language in a Senate Report preceding the final draft of the Act which says, "[w]ith respect to a certain class of investment advisers, a type of personalized relationship may exist with their clients." He emphasizes the phrases "a certain class" and "may exist" to demonstrate a legislative intent to recognize both personal and impersonal advisory services in the Act. The majority relies on a subsequent committee report, accompanying the final draft of the Act, which they construe as recognizing only the personal services of an investment adviser within its language.

According to Justice White, the history of subsequent revisions of the Act seems to include these impersonal publications. Language in a Senate Report included "financial publishing houses not of general circulation" in the scope of the Act. Nearly ten years later a Senate Report again describes the Act as relating to "the business of issuing analysis or reports concerning securities."

Justice White found the purposes of the Act frustrated by the majority's interpretation. A construction of the Act which excludes publishers of impersonal advice from regulation renders the SEC ineffective in its attempts to protect investors who read these publications. The SEC has consistently tried to protect the public from fraud and manipulative practices, particularly scalping. In scalping, an adviser purchases a stock and then begins recommending it to his clients. When the price rises the adviser sells his stock at a profit. Justice White concluded that the majority effectively overruled Capital Gains Research Bureau, leaving the SEC with little effective means of

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139. Lowe, 105 S. Ct. at 2579 (White, J., concurring).
141. Lowe, 105 S. Ct. at 2569 n. 46 (White, J., concurring).
142. Id. at 2580 (White, J., concurring).
144. Lowe, 105 S. Ct. at 2580 (White, J., concurring).
145. Id. at 2580 (White, J., concurring).
146. Id.
147. According to Capital Gains Research Bureau, Inc., 375 U.S. at 181, scalping is the practice of buying securities shortly before recommending them as investments to clients. As soon as the market price of the recommended stocks rise, the adviser sells his shares at a profit.
148. Lowe, 105 S. Ct. at 2581 (White, J., concurring). Justice White recalls the holding of Capital Gains Research Bureau:

[In which we held] that the antifraud provisions of the [Act] could be invoked against the publisher of an investment advisory newsletter who
preventing serious fraud or self-serving manipulation through these publications.\textsuperscript{149}

According to Justice White, the majority's efforts to avoid the constitutional question led the Court to adopt a construction of the Act which is unnecessarily narrow.\textsuperscript{150} He points to the Court's traditional policy of construing securities statutes broadly to enable them to effectively achieve their purposes.\textsuperscript{151} As Justice White explained:

The certainty that the Advisers Act provides a remedy against scalping thus remains, for me, a persuasive reason for not adopting a construction of the Act that would exclude petitioner. In addition, the antifraud provisions of the Act are supplemented by reporting requirements that may be used [to] aid the SEC in uncovering scalping. By taking petitioner outside the category of investment advisers, the Court places him beyond the reach of these additional tools for uncovering deceit.\textsuperscript{152}

Justice White argued that the Lowe majority assumed Congress enacted the legislation in 1940 with first amendment constitutional issues in mind.\textsuperscript{153} He concluded that the majority's construction of the Act empowered the legislature with constitutional foresight, because the majority assumed Congress would not have drafted an Act violative of the first amendment.\textsuperscript{154} Justice White found this reasoning far-fetched. As he explained, "[t]he court thus attributes to the 76th Congress a clairvoyance the Solicitor General and the Second Circuit apparently lack - that is the ability to predict our constitutional holdings 45 years in advance of our declining to reach them."\textsuperscript{155} In light of the legislative history and the language and purpose behind the Act, he concluded that the Act should be reasonably construed so as to include Lowe within its parameters.\textsuperscript{156}

Justice White next turned to the question of whether the first

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  \item had engaged in scalping, and that such an advisor could be required to make full and frank disclosure of his practice of trading on the effect of his recommendations.
  \item \textsuperscript{149} \textit{Id}.\textsuperscript{149}
  \item \textsuperscript{150} \textit{Id}.\textsuperscript{150}
  \item \textsuperscript{151} \textit{Id}.\textsuperscript{151}
  \item \textsuperscript{152} \textit{Id}. n.9.\textsuperscript{152}
  \item \textsuperscript{153} \textit{Id}. at 2582 (White, J., concurring).\textsuperscript{153}
  \item \textsuperscript{154} \textit{Id}.\textsuperscript{154}
  \item \textsuperscript{155} \textit{Id}.\textsuperscript{155}
  \item \textsuperscript{156} \textit{Id}.\textsuperscript{156}
\end{itemize}
amendment permits the SEC to permanently enjoin Lowe from publishing his impersonal financial newsletters. He explained that the Lowe Court is required to balance two important competing goals in this case. One is the protection of first amendment privileges. The other is the governmental right to protect the public through regulation and licensing. Justice White recognized that professional licensing has been held constitutional, and the government does not lose its right to license simply because speech or publication is involved in the activities of a profession.\textsuperscript{187}

Justice White used the example of an attorney as a constitutionally licensed professional. Although an attorney is involved in speaking and writing, high moral and educational qualifications can be required of entrants. The SEC argued that it has the same right to require high ethical and moral standards of investment advisers. These advisers are in a position to harm the public both through publication and personal communication of fraudulent or misleading material. The SEC believes that the government has a compelling interest in the protection of the public. Therefore, a licensing requirement is justified, as in other professions, regardless of the element of speech used in the practice of this profession.\textsuperscript{158}

The SEC suggests that an invalidation of the licensing requirements for publishers of impersonal advice would render other licensing provisions open to attack.\textsuperscript{159} As an example, the SEC refers to an attorney who distributes an impersonal newsletter regarding recent law developments.\textsuperscript{160} An attorney is required to be licensed as a professional engaged in the practice of law even though his newsletter is not tailored to an individual's needs.\textsuperscript{161} The SEC would question the validity of such a licensing provision if the Lowe Court held that it is unconstitutional to require impersonal publishers to be registered.\textsuperscript{162} Justice White found the argument flawed however, because there is no precedent for extending a licensing scheme to publication or speech themselves.\textsuperscript{163} He apparently concluded that the Act's registration requirements are not limited to the regulation of professionals but appear to

\textsuperscript{157} Id. at 2582 (White, J., concurring).
\textsuperscript{158} Id. at 2583.
\textsuperscript{160} Id. at 34, n.44.
\textsuperscript{161} Id. at 34.
\textsuperscript{162} Id.
\textsuperscript{163} Lowe, 105 S. Ct. at 2583 (White, J., concurring).
extend to anyone who desires to publish information concerning securities.

Justice White pointed to an imaginary line which must be drawn; dividing the regulation of a profession from the regulation of free speech. He appeared to draw a distinction between a professional giving personal advice and someone giving general information to whoever will listen.

The SEC argued that an investment adviser is a fiduciary and the legislature intended broad regulatory powers be given the SEC to protect the public. According to the SEC, the legislature is the proper forum to determine the purpose and extent of a statute and their decision should be respected. Justice White found this argument unpersuasive, apparently because it assumes Congress writes only constitutional legislation and ignores the constitutional system of checks and balances. He pointed out that the judiciary function of reviewing legislation is to ensure that it is constitutional.\(^{164}\)

Relying in part on an analysis by Justice Jackson in *Thomas v. Collins*,\(^{165}\) Justice White explained that a regulation of speech can stand only if it is in conjunction with the valid regulation of a profession. He reasoned that someone who renders individualized advice to a client can be properly regarded as engaged in a profession. Justice White characterized the speech used by a professional as a by-product of the practice of the profession. He concluded that a licensing statute prohibiting these personal communications in the absence of the required license, is constitutionally based on the government’s right to regulate a profession. He cautioned, however, that where no personal relationship exists and the publisher does not purport to render advice for any specific individual, then a license requirement ceases to be a regulation of a profession and deteriorates into a prior restraint on protected speech.\(^{166}\)

Justice White was careful to point out the distinction between a licensing scheme to regulate a profession and a licensing scheme that restricts publishing of impersonal information to those who obtain a license. The Act’s requirement of a license for one who engages in giving person to person, individually tailored advice is constitutional, the same as requiring a physician to obtain a license.\(^{167}\) What becomes ob-

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164. Id. at 2583-84 (White, J., concurring).
166. Id. at 2584-85 (White, J., concurring).
167. Id. at 2585 (White, J., concurring).
jectionable is the Act's ability to prevent unregistered advisers from publishing impersonal investment advice for a general audience.168

Justice White continued his analysis by examining the SEC's contention that Lowe's newsletters could be regulated in the context of commercial speech.169 Under a commercial speech theory,170 if the prohibition advances a substantial government interest, then it may be permissible.171 Lowe argued that his newsletters were fully protected speech because they did not involve a commercial transaction.172 Justice White concluded that there is no reason to categorize these newsletters to reach a decision.173 Since the Act makes it unlawful for an unregistered adviser to publish both personal and impersonal investment advice, it cannot be constitutional as it exists.174 Justice White explained, "[s]uch a flat prohibition or prior restraint on speech is, as applied to fully protected speech presumptively invalid and may be sustained only under the most extraordinary circumstances."175

Justice White reasoned that even under a commercial speech theory, the Act's remedy is too extreme. A total prohibition on publishing, because the SEC fears Lowe may one day defraud or mislead, is unreasonable. Although a legitimate government purpose is served by the Act, the proposed restraint is too broad. According to Justice White, "[o]ur commercial speech cases have consistently rejected the proposition that such drastic prohibitions on speech may be justified by a mere possibility that the prohibited speech will be fraudulent."176 He suggested application of the Act's antifraud provisions as an acceptable alternative to a total prohibition on newsletter publishing.177

Justice White would define investment adviser to include publishers of impersonal investment advice. He found the provisions of the Act pertaining to the antifraud and reporting sections constitutional and reasoned that these provisions could be applied to both registered and

168. Id.
169. Id.
170. See supra note 48.
172. Lowe, 105 S. Ct. at 2585 (White, J., concurring).
173. Id. at 2586 (White, J., concurring).
174. Id.
175. Id.
176. Id.
177. Id.
unregistered investment advisers engaged in publication. Justice White's constitutional objection is expressly limited to that portion of the Act which requires advisers giving impersonal investment advice through publication to register with the SEC. In conclusion he emphasized, "I would hold only that the Act may not constitutionally be applied to prevent persons who are unregistered (including persons whose registration has been denied or revoked) from offering impersonal investment advice through publications such as the newsletters published by petitioner."\textsuperscript{178}

VI. Effect of the \textit{Lowe} Decision

The Supreme Court's decision in \textit{Lowe} broadens the scope of the "bona fide" newspaper exception to include all publishers of impersonal investment advice. This interpretation of the Act will probably result in the extinction of newsletter regulation under the Act. The \textit{Lowe} decision may well inspire a new proliferation of self-serving, manipulative publications disguised as financial newsletters. Under the Act's new interpretation, the SEC may be powerless to control or regulate these impersonal publications.

The \textit{Lowe} Court derived its "impersonal" distinction from the legislative history of the Act. The Court construed this history as limiting the scope of the Act to individually-tailored advice rather than the general information offered in Lowe's newsletters.\textsuperscript{179} However, the concurrence in \textit{Lowe} cited numerous examples of legislative history which indicated an intent to include these impersonal publications.\textsuperscript{180} Also, the clear language of the Act defines an adviser as one who renders advice "either directly or through publications."\textsuperscript{181} Furthermore, the Act's scope as indicated in the section of the Act relating to the findings of the SEC, clearly includes publications.\textsuperscript{182} These sections of the Act draw no distinction between publications offering personal advice as compared to impersonal advice. As the district court admitted, the Act itself provides no justification for such a distinction.\textsuperscript{183}

The \textit{Lowe} Court's construction of the Act made only brief mention

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\textsuperscript{178}. \textit{Lowe}, 105 S. Ct. at 2587 (White, J., concurring).
\textsuperscript{179}. \textit{Id}. at 2572.
\textsuperscript{180}. \textit{Id}. at 2578-80 (White, J., concurring).
\textsuperscript{183}. \textit{Lowe}, 556 F. Supp. at 1365.
\end{flushright}
of the SEC’s rulings on the applicability of the Act. Previous court decisions applying the Act to newsletter publishers, were granted only minimal consideration in the majority’s reasoning. In a surprising reversal, the Supreme Court apparently overruled an early Supreme Court interpretation of the Act in the case of Capital Gains Research Bureau. The decision rendered under the Act in 1963, held that a financial newsletter publisher could be required to disclose his personal interests in the securities he recommended to his subscribers. Following the Lowe decision, the SEC may have no recourse under the Act against impersonal newsletter publishers who engage in self-serving activities such as scalping.

Prior to Lowe many states, including Florida, had required newsletter publishers to comply with the registration provisions of the Act. By denying registration status to those advisers convicted of financial-type crimes and by requiring advisers to disclose possible conflicts of interest, investors were given both protection and forewarning of the likelihood of deceptive or fraudulently published advice. As described in Capital Gains, “[a] fundamental purpose . . . [of the Act] was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.” It now appears that this fundamental purpose of the Act, protection of the public, will erode under the Supreme Court’s analysis.

Justice White concluded that a less onerous and more defensible ruling would have been a decision that held unconstitutional the portion of the Act which prevents unregistered publishers from publishing impersonal newsletters. According to Justice White, had the majority held that portion of the Act unconstitutional, these publishers could still be controlled through the reporting and antifraud provisions of the Act. Under this analysis, the original purpose of the Act, which was to protect the investing public, could still be effectuated although to

185. 375 U.S. at 180.
186. Id.
187. See supra note 147.
190. Lowe, 105 S. Ct. at 2586-87 (White, J., concurring).
191. Id.
The decision of the Supreme Court in *Lowe* was arguably too broad in that it undermines the purposes of the Act and results in the deregulation of a potentially harmful interstate activity. A newsletter is inherently dangerous because of the wide range of investors that can be readily approached through its subscribers. A compelling example of the need to protect readers of financial newsletters was presented in 1981 when one man "was credited with singlehandedly knocking 23.8 points off the Dow Jones Industrial Average . . . by advising subscribers to his Early Warning Service . . . to sell everything and short stocks." This was a reversal of the advice he issued on the preceding day which indicated that the next 50 points on the Industrial Average would "be a piece of cake."

The practice prior to *Lowe* was to require investment publishers to register and to bar the registration of those advisers who have been convicted of financial misdealings. This policy provided some protection for investors since an adviser was forced to disclose his previous misconduct and could be barred from acting as an adviser if the SEC deemed the sanction appropriate. Following *Lowe*, these subscribers will have no help in gauging the reliability or truthfulness of a financial newsletter or its publisher. To determine the soundness of a publishers advice, investors will have to rely on their common sense, a method which apparently failed to work in the 1920's.

VII. Conclusion

The *Lowe* decision is apparently an unwarranted break with the modern trend of protecting the public and stabilizing our economy though the regulation of investment activity. The old era of *caveat emptor* has reemerged under the majority's decision to exempt impersonal newsletter publishers from regulation under the Act. Until

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2d Sess. 3 (1960); S. REP. No. 792, 73rd Cong., 2d Sess. 1-3 (1934).


195. *Id.*

196. *Caveat emptor* is defined as "let the purchaser beware." *Black's Law Dictionary* 202 (5th ed. 1979).
new regulations designed to prevent fraudulent practices through these publications emerge from Congress, investors should not trust the publications' so-called "advice." These newsletters can be published by virtually anyone and there is no guarantee that such "advice" is anything more than a publisher's not-too honest effort to get rich quick.

Lori Denise Coffman
When an accident occurs which results in injuries or property damage an investigation is usually conducted within a short period of time to determine the rights and liabilities of the parties involved. Depending on the magnitude of the harm, the likelihood that some legal action will be taken by one of the parties is high. Many businesses, aware of this potential, often conduct in-house investigations of accidents involving their employees or occurring on their premises to determine the cause and prevent recurrences. Once an action is ultimately filed, one of the questions which frequently arises is whether a party may obtain witness statements and reports gathered by the adverse party during its preliminary investigations.

Section 1.280(b)(2) of the Florida Rules of Civil Procedure\(^1\) provides that “documents and tangible things prepared in anticipation of litigation” are considered work product, and are therefore protected from discovery.\(^2\) Unfortunately, the phrase “prepared in anticipation of

1. **FLA. R. CIV. P. 1.280(b)(2)** states in part:

   Trial Preparation: Materials. Subject to the provisions of subdivision (b)(3) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or trial by or for another party or by or for that party’s representative, including his attorney, consultant, surety, indemnitor, insurer or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

2. The protection from discovery is not absolute. Once a showing has been made by the party resisting discovery that the materials were prepared in anticipation of litigation, the burden then shifts to the party seeking discovery to show that there is substantial need for the material, and that the substantial equivalent cannot be obtained without undue hardship. If this showing is established, production will be ordered. **FLA. R. CIV. P. 1.280(b)(2)**.
" litigation" has created considerable confusion among Florida's courts. Some cases are in direct conflict with each other, while others simply lack clarity.

Despite this continued confusion, the Supreme Court of Florida has yet to interpret Rule 1.280(b)(2). Therefore, the only source of guidance has been conflicting decisions from the state's district courts of appeal and the federal courts. Some courts have held that since not all accidents lead to litigation, an investigation following an occurrence is not necessarily prepared in anticipation of litigation. These cases look at the facts of the case before determining whether to accord the material "work product" protection. However, other courts have held that all statements and information secured after an occurrence which might give rise to a claim are prepared in anticipation of litigation. The result is a split among Florida courts.

This Note will focus on Florida's application of work product protection to materials prepared before litigation commenced. First, it will examine the history and development of the protection afforded trial preparation materials, which is essential for an understanding of the policies underlying the protection from discovery provided by Rule 1.280(b)(2). Second, it will discuss the applicable case law in Florida, focusing on the inconsistencies and confusion among the district courts of appeal in applying the work product rule to trial preparation materials. Third, there will be an analysis of the decisions addressing this issue in federal court and the highest courts of other states. Next, this


Note will suggest methods to clarify the existing confusion as to which materials have been prepared in anticipation of litigation. The proposed standards will require a distinction between cases brought by a third party against a liability insurer and those which are claims by the insured against its insurer. It will demonstrate that because the primary purpose of the initial investigation conducted by a liability insurer is different from an insurer's investigation of its insured's loss, a different standard of discovery protection is required. As to other types of businesses which conduct investigations following accidents, this Note will suggest that the courts take a case by case approach focusing on the facts before determining whether materials should be accorded work product protection. Various factors are set forth to aid the court in making the determination. Finally, a suggestion is made that the Florida Supreme Court should adopt these standards, thereby providing a clear precedent for the lower courts to follow. The proposed standards will assure a proper and predictable application of work product protection throughout the state.

II. Development of the Work Product Concept

A. Pre-Hickman v. Taylor

"The adoption in 1937 of the Federal Rules of Civil Procedure initiated a slow revolution in attitude toward pretrial discovery that led to the development of a work product doctrine in the United States." Through the Federal Rules, discovery rather than pleadings became the primary method for adversarial parties in a lawsuit to gather information. Shortly after the enactment of the Federal Rules, district courts often faced situations where the provisions of the Rules were invoked by a party who wanted to prevent the production of his trial preparation material. Discovery of documents was restricted under Rule 34 unless a showing of good cause was made. This showing of

11. Fed. R. Civ. P. 34 was amended in 1970. The amendment eliminated the requirement of "good cause" and made ordinary documents routinely discoverable upon a showing of relevance.
good cause for the production of all documents and things was required whether or not trial preparation material was involved.\textsuperscript{12} However, the courts differed as to the required showing under the "good cause" test.\textsuperscript{13}

The split in the courts led the Federal Rules Advisory Committee to suggest changes in the Rules, which would clear up the confusion over the proper protection to be afforded to trial preparation materials.\textsuperscript{14} However, such changes were not adopted by the United States Supreme Court. Instead, the court "chose to articulate the standard of protection for work product in its forthcoming decision"\textsuperscript{15} of Hickman v. Taylor.\textsuperscript{16}

B. Hickman v. Taylor

Hickman v. Taylor\textsuperscript{17} is the leading case setting the standards of the work product concept. In Hickman, the tug "J.M. Taylor" sank while towing a car float across the Delaware River.\textsuperscript{18} Five of the nine crew members drowned.\textsuperscript{19} Shortly thereafter counsel for the defendant tug owners interviewed each survivor and obtained statements from them.\textsuperscript{20} One year later plaintiff attempted to obtain copies of the written statements of the witnesses and copies of the memoranda of counsel regarding the oral statements and other matters.\textsuperscript{21} The defendants refused to comply claiming such reports called for "privileged matter obtained in preparation of litigation."\textsuperscript{22}

The issue in Hickman was to determine to what "extent . . . a party may inquire into the oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course

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\textsuperscript{13} Since "Rule 34 require[d] a showing of 'good cause' for the production of all documents and things, whether or not trial preparation is involved, courts . . . differed over whether a showing of relevance and lack of privilege [was] enough or whether more . . . [was needed]." Id.

\textsuperscript{14} Special Project, supra note 8, at 771.

\textsuperscript{15} Id. at 773.

\textsuperscript{16} 329 U.S. 495 (1947).

\textsuperscript{17} Id.

\textsuperscript{18} Id. at 498.

\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id. at 499.
of preparation for possible litigation after a claim has arisen."\(^{23}\) Although the United States Supreme Court affirmed the holding of the Third Circuit Court of Appeals denying discovery, it did so on a different basis. While the appellate court previously broadened the attorney-client privilege\(^{24}\) in discovery proceedings, the Supreme Court instead "created a new privilege to meet the situation opened up by the new breath of discovery."\(^{25}\)

The Supreme Court declined to extend the attorney-client privilege beyond its traditional boundaries.\(^{26}\) The material being sought in *Hickman* was not information disclosed by a client to his attorney, but instead, was information gathered by the attorney from "a witness while acting for his client in anticipation of litigation."\(^{27}\) However, even though the material sought was not privileged, in the traditional sense, the Court nevertheless held discovery was not proper. Instead of adopting the traditional and absolute privilege, which would deny discovery under all circumstances, the United States Supreme Court created a qualified privilege which would generally bar discovery. However, it left the possibility of work product discovery open where the need is great enough.\(^{28}\)

In *Hickman*, the United States Supreme Court recognized a difference between "written materials obtained or prepared by an adversary's counsel with an eye toward litigation"\(^{29}\) and "oral statements made by a witness to [the attorney], whether . . . in the form of mental impressions or memoranda."\(^{30}\) In making the distinction the Court suggested that the written materials may more often be discoverable than oral statements. Written materials were found to be discoverable "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the

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23. *Id.* at 497.
24. The court of appeals recognized that the conventional attorney-client privilege was not applicable because the materials in question were obtained by the attorney from third parties, and not the client. Nevertheless, the court stated that the attorney-client privilege should be broader in discovery proceedings than in the law of evidence to exclude testimony. *Hickman* v. *Taylor*, 153 F.2d 212, 222 (3d Cir. 1945).
27. *Id*.
30. *Id.* at 512.
preparation of one's case." Other circumstances under which such statements may be discoverable are found where the document is admissible in evidence: if it "give[s] clues as to the existence or location of relevant facts . . . [if it is] useful for purposes of impeachment or corroboration, [or if] the witnesses are no longer available or can be reached only with difficulty." However, the Court found that the discoverability of oral statements would be justified only in a "rare situation." The Court stated that if any attorney is forced to "repeat or write out all that witnesses have told him . . . grave dangers of inaccuracy and untrustworthiness" would arise.

Although the Supreme Court noted that discovery rules were to be accorded a "broad and liberal treatment", it stressed that "like all matters of procedure, [discovery] has ultimate and necessary boundaries." Further, it noted that in applying this new qualified privilege to limit discovery, various important policies are being furthered. First, lawyers will be free to develop their theories, strategies, and approaches without fear that the opposing party may gain access to same. The Court states "[w]here such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten; . . . [t]he effect on the legal profession would be demoralizing." Secondly, Hickman's policies serve to encourage individual research and investigation, and discourage the use of an opponent's work as a substitute for their own efforts. Finally, the Court believed that the "interests of the clients and the cause of justice would be poorly served" by unrestricted discovery practices. Much litigation subsequent to the Hickman decision sought to further these policies in applying the new qualified rule. However, for over twenty years the matter was left to the federal courts to decide on a case by case basis.

31. Id. at 511.
32. Id.
33. Id.
34. Id. at 513.
35. Id. at 512-513.
36. Id. at 507.
37. Id.
38. Id. at 511.
39. Id.
41. Hickman, 329 U.S. at 511.
43. Id. Many states enacted rules to solve some of the troublesome areas left by
C. After Hickman - Rule 26(b)(3)\textsuperscript{44}

Some of the post-Hickman problems were eliminated by certain 1980 Amendments to the Federal Rules. Federal Rule of Civil Procedure 26(b)(3)\textsuperscript{46} partially codified\textsuperscript{46} the Hickman decision. Rule 26(b)(3) extended the work product immunity to non-attorneys engaged in trial preparation.\textsuperscript{47} Additionally, the requirement of "good cause" under the old federal rule was eliminated for one of relevance and absence of privilege.\textsuperscript{48} However, the new rule explicitly required a special showing for trial preparation materials. Therefore, where one party attempts to obtain materials prepared in anticipation of litigation by the opponent, the party seeking discovery must make a "showing of substantial need . . . and an inability without undue hardship to obtain the substantial equivalent of the materials by other means."\textsuperscript{49} The required special showing before allowing discovery of materials prepared in anticipation of litigation reflects the Federal Rules Advisory Committee's view that the informal evaluation and investigation of each side should be protected thereby encouraging independent preparation and avoiding one side relying and obtaining the benefit of the other side's detailed preparatory work.\textsuperscript{50} Further, an even greater protection is given to materials prepared by an attorney or other representative of the client, which reflects their opinions, mental impressions, conclusions or legal theories.\textsuperscript{51}

Despite attempted clarification of the Hickman decision, Rule
26(b)(3) left ambiguities with which the courts must deal. One such ambiguity arises in restricting its scope to materials "prepared in anticipation of litigation." The explicit restriction in the rule adds emphasis to the determination of when anticipation of litigation begins. The determination is difficult to ascertain in many cases where the investigation following an occurrence may have multiple purposes.

In making the determination of whether or not the material should be afforded work product protection it is important for the courts to base their decision on the policy justifications of the work product doctrine. The central justification of the work product doctrine is to protect a party's preparatory work from his adversary. Although open and liberal discovery practices are promoted in our system, a party should not be penalized for his promptness in investigating an accident. The U.S. Supreme Court has reaffirmed the Hickman rationales in its most recent decision of Upjohn Co. v. United States. In Upjohn, the Court explicitly stated that the policies underlying the work product doctrine furthered a "strong public policy."

D. Florida's Rule 1.280(b)(2)

Florida's Rule 1.280(b)(2) was enacted to conform with Federal Rule 26(b)(3). The latter codified the principles of the work product doctrine set forth in Hickman. An analysis of a work product claim under Rule 1.280(b)(2) of the Florida Rules is bifurcated between a determination of whether documents constitute work product, and if so, whether the party seeking production is unable to obtain the substantial equivalent of the document by other means.

52. Ambiguities which are beyond the scope of this Note involve the standard of protection to be given to oral statements and other intangible work product; whether use of the material in subsequent litigation should be protected; and the ownership of the work product immunity.
53. Special Project, supra note 8, at 784.
55. Id. at 398.
56. FLA. R. CIV. P. 1.280(b)(2).
57. FED. R. CIV. P. 26(b)(3).
58. See supra note 46.
59. Hickman, 329 U.S. at 495.
60. The focus of this Note is on the first issue under Rule 1.280(b)(2): whether materials were prepared in anticipation of litigation. This Note does not discuss the criteria required to show substantial need and undue hardship. The determination of whether the material was prepared in anticipation of litigation does not affect the reso-
III. Florida Law

Presently, no Florida court has established a clear precedent on the issue of the discoverability of prelitigation material. The existing case law is composed of various confusing and conflicting decisions. Because the facts of each case are important for a proper application of the work product protection, Florida cases will be examined to illustrate how similar cases are yielding different results.

Winn Dixie Stores, Inc. v. Nakutis, a Fifth District Court of Appeal case addressing the issue of the discoverability of prelitigation material, stands for the proposition that accident reports are prepared in anticipation of litigation. Winn Dixie involves a slip and fall accident at a grocery store. The plaintiff sought accident reports relating to the same store for a number of years prior to his alleged injury. A discovery order was entered and defendant sought review by way of writ of certiorari. The plaintiff contended that the reports were prepared by Winn Dixie or its agents in the ordinary course of business, and thus discoverable. The court dismissed this argument with the following statement:

It is hardly arguable that an accident report of a slip and fall incident in a grocery store, prepared by the grocery store employees or agents, is not a document prepared in anticipation of litigation. Those reports certainly are not prepared because of some morbid curiosity about how people fall at the market. Experience has shown all retail stores that people who fall in their stores try to be

[1.280(b)(2) which concerns the showing required for discovery of work product. See, 8 C. Wright & A. Miller, Federal Practice and Procedure § 2025 (1970 & Supp. 1985). Also beyond the scope of this Note is the application of work product in the insurance bad faith context. For information on this issue, see J. McCarthy, Punitive Damages in Bad Faith Cases § 3.71 (1983).]

64. Id.
65. Id.
compensated for their injuries. Experience has also shown those stores that bogus or frivolous or exaggerated claims might be made. A potential defendant's right to fully investigate and memorialize the results of the investigation should not be restricted any more than should a potential plaintiff's. Our system of advocacy and dispute settlement by trial mandates that each side should be able to use its sources of investigation without fear of having to disclose it all to its opponents. This allows for free discussion and communication during preparation for litigation. If all reports and other communications of the litigants were available to the opposition then those communications would certainly be stilted, unrevealing and thus self-defeating in their purpose.\textsuperscript{66}

The Second\textsuperscript{67} and Fifth\textsuperscript{68} District Courts of Appeal have followed this approach.

However, in\textit{ Hartford Accident & Indemnity Company v. McGann},\textsuperscript{69} the Fourth District Court of Appeal, also faced with a slip and fall case at a supermarket, did not follow the\textit{ Winn Dixie} standard. The court in reviewing the trial court's discovery order did not make the presumption made by the court in\textit{ Winn Dixie}, that all accident reports are prepared in anticipation of litigation. Instead, it found that the defendant failed to make the required showing that the statements taken by employees or agents of the store concerning the accident were prepared in anticipation of litigation, and thus were not protected from discovery.\textsuperscript{70} This standard has been consistently followed in the Fourth District Court of Appeals.\textsuperscript{71}

The\textit{ Winn Dixie} and\textit{ McGann} cases are a clear illustration of a conflicting interpretation and application of the work product rule in factually identical cases. The position taken by the court in\textit{ Winn Dixie} seeks to protect a litigant's informal evaluation of his case and encourages independent preparation for trial. Additionally, such a view prevents one side from obtaining automatic access to the preparatory work

\textsuperscript{66} Id.
\textsuperscript{67} See, e.g.,\textit{ Florida Cypress Gardens, Inc.}, 471 So. 2d at 203;\textit{ Winn-Dixie Stores, Inc.}, 455 So. 2d at 1342;\textit{ Nationwide Ins. Co.}, 276 So. 2d at 547.
\textsuperscript{68} See, e.g.,\textit{ Winn-Dixie Stores, Inc.}, 435 So. 2d at 307;\textit{ Walt Disney World Co.}, 462 So. 2d at 486.
\textsuperscript{69} 402 So. 2d 1361 (Fla. 4th Dist. Ct. App. 1981).
\textsuperscript{70} Id. at 1362.
of the other side upon a simple showing of relevance, which is the
standard required when the material is not considered work product.
However, one major criticism of the approach taken by Winn Dixie is
that it fails to consider that there may be circumstances where reports
are prepared for reasons other than litigation. For example, there are
situations where accident reports are prepared for reasons pertaining to
safety, public relations, or possibly in an attempt to amicably resolve
a claim. It is argued that a rule of thumb approach can foreclose such
considerations and may lead to an improper application of the work
product rule.

Other cases which have generated much confusion are those in-
volving insurance companies. Courts have failed to recognize that the
standards used in evaluating these cases must take into account the
nature of the insurance business. Unlike other businesses, an insurance
company’s regular course of business is to investigate claims. Further-
more, courts often neglect to distinguish between the discoverability of
a liability insurer’s investigation material and an insurer’s investigation
material pertaining to a claim brought by its policyholder. The result is
confusing precedent which provides little predictability of the protec-
tion an insurance company may expect of its investigation material.

An example of a case involving an insurance company, which is
confusing and unclear as to its scope, is Cotton States Mutual Insur-
ance Co. v. Turtle Reef. The case involved an action by an insured
against its insurer. The Fourth District Court of Appeal held that
statements and materials prepared by a party’s investigator or insurer
are protected from discovery only when prepared in contemplation of

72. When the materials being sought are not privileged, Florida Rule
1.280(b)(1) requires, in addition to relevancy, that the information sought be “reasona-
ibly calculated to lead to discovery of admissible evidence.”
Rule 1.280(b)(1) states in part:
Parties may obtain discovery regarding any matter, not privileged, that is
relevant to the subject matter of the pending action, whether it relates to
the claim or defense . . . of any other party . . . [and] is not ground for
objection that the information sought will be inadmissible at the trial if the
information sought appears reasonably calculated to lead to the discovery
of admissible evidence.

Id.

74. 245 ACAD. FLA. TRIAL LAW J. 10 (February 1983).
75. Spaulding, 68 F.R.D. at 345.
76. 444 So. 2d 595 (Fla. 4th Dist. Ct. App. 1984).
litigation. The court further explained that "mere likelihood of litigation does not satisfy this qualification." The case was remanded to determine if the investigation material was of the type insurance companies conduct in the ordinary course of business, or whether the investigation file was prepared in anticipation of litigation.

The decision is confusing as it suggests that documents prepared in the ordinary course of business cannot also be prepared in anticipation of litigation. An argument can be made that such an analysis overlooks the possibility that in certain situations the ordinary course of business is anticipation of legal claims. An insurance company's ordinary course of business is to investigate accidents and claims. This does not mean that such an investigation may not also be in anticipation of legal action. Therefore, courts should arguably eliminate the ordinary course of business exception when determining the discoverability of insurance companies' files.

Another ambiguity created by the Cotton States case is whether the standard set forth by the court extends to cases involving actions by a third party against a liability insurer. In Florida Cypress Gardens v. Murphy, a husband and wife brought an action for injuries the husband suffered from an accident in which he was thrown out of a wheelchair at Cypress Gardens. The Second District Court of Appeal reversed the trial court's order to produce the investigation file of Florida Cypress Garden's liability insurer. The court refused to follow the Cotton--

77. Id. at 596.
78. Id.
79. Id.
80. The "ordinary course of business" exception is attributable to the statement used by the Advisory Committee on the Proposed Amendments to the Federal Rules indicating that materials assembled in the ordinary course of business are considered equivalent of materials not prepared in anticipation of litigation. Proposed Amendments, supra note 12, at 501. Although this exception is not stated in the Federal Rule, nor the Florida Rule on work product, some courts have used the rationale in deciding whether the material should be protected from discovery. E.g. Thomas Organ Co. v. Jadranska Slobodna Plovdb, 54 F.R.D. 367, 371 (N.D. Ill. 1972); Proctor & Gamble Co. v. Swilley, 462 So. 2d 1188, 1193 (Fla. 5th Dist. Ct. App. 1985).
82. Special Project, supra note 8, at 855. The Special Project proposes a complete abandonment of the ordinary course of business exception. It suggests an analysis of each case on its facts. Id.
83. 471 So. 2d 203 (Fla. 2d Dist. Ct. App. 1985).
84. Id. at 204.
Without citing Florida law on the point, [Cotton States] relied on two federal court interpretations of the comparable federal discovery rule. With all due respect, we cannot accept the proposition that the investigation file of an insurance company concerning an accident involving its insured was not prepared in anticipation of litigation simply because its contents may have been obtained prior to the filing of a formal claim.85

The court's analysis reflects a misinterpretation of the Cotton States case. The court failed to factually distinguish Cotton States and Florida Cypress Gardens. Cotton States involved an action by an insured against its insurer, while Florida Cypress Gardens involved a claim by a third party injured at Cypress Garden against Cypress Gardens' liability insurer. Notwithstanding the fact that in both cases the material sought was prepared by or for the insurer, the primary purpose for the investigation was different. In Cotton States, it is suggested that the primary purpose of an insurer's investigation into its policyholder's claim is to determine whether to honor the claim or resist it.86 Although it is true that litigation may result from denial of a claim by an insurer, this decision is reached after preliminary investigation not related to litigation.87 In Florida Cypress Gardens, the primary purpose of the investigation was, arguably, anticipating some legal action by the injured party, and thus the test of Cotton States was not applicable.88

However, the standard followed by the court in Florida Cypress Gardens has been rejected by other courts in determining the extent of protection a liability insurer's file should receive. Florida Cypress Gardens followed the Winn-Dixie89 standard, which held that all investigative material gathered by a liability insurer is prepared in anticipation of legal action. This standard was not followed by the Fourth District Court of Appeal in Surette v. Galiardo,90 which involved an action brought by the mother of a minor child who was struck and killed by a school bus. In Surette, the plaintiff sought to obtain the accident report

85. Id. at 206.
87. E.g., Carver, 94 F.R.D. at 134.
88. Florida Cypress Gardens, 471 So. 2d at 206.
90. Surette, 323 So. 2d at 53.
prepared by the school board and submitted to its liability insurance carrier.\textsuperscript{91} Rather than make a presumption that the accident report was privileged, the court required a showing that the report was submitted to the insurer for use in connection with an anticipated settlement or defense of a claim, before protecting the material from discovery.\textsuperscript{92}

The interpretation of the work product rule is far from consistent. While some courts make a presumption that witness statement and reports are always taken in anticipation of legal action,\textsuperscript{93} other courts focus on the facts of each case before making the determination.\textsuperscript{94} Additionally, courts have not clearly distinguished actions brought by third parties against a liability insurer from those brought by a policyholder against its insurer.\textsuperscript{95} This generates confusion among the lower courts\textsuperscript{96} which tend to apply the same standard in both situations.

IV. The Law in Federal and State Courts Applying Work Product Protection to Prelitigation Material

A. Federal Courts

State courts tend to follow federal court decisions in the application of work product protection to trial preparation material. However, the federal courts offer equally conflicting and confusing precedent which has not helped the state courts in resolving the anticipation of litigation issue.\textsuperscript{97}

There are various positions taken by the federal courts in applying work product protection to trial preparation materials. One approach is to hold that the material cannot be protected under the work product theory unless the reports or statements reflect the employment of an attorney.\textsuperscript{98} This view directly contradicts the rule, which explicitly provides protection to documents prepared by or for a party's "attorney, consultant, surety, indemnitor, insurer or agent."\textsuperscript{99} Other federal courts

\begin{itemize}
  \item \textsuperscript{91} \textit{Id.} at 57.
  \item \textsuperscript{92} \textit{Id.} at 58.
  \item \textsuperscript{93} \textit{See supra} text accompanying notes 61-68.
  \item \textsuperscript{94} \textit{See supra} text accompanying notes 69-70.
  \item \textsuperscript{95} \textit{See supra} text accompanying notes 76-88.
  \item \textsuperscript{96} \textit{See Florida Cypress Gardens,} 471 So. 2d at 203.
  \item \textsuperscript{97} \textit{Fontaine,} 87 F.R.D. at 89; \textit{Brown,} 137 Ariz. at 327, 670 P.2d at 725.
  \item \textsuperscript{98} \textit{E.g., Thomas Organ Co.,} 54 F.R.D. at 367; McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972).
  \item \textsuperscript{99} FlA. R. CIV. P. 26(b)(3). \textit{See, Fontaine,} 87 F.R.D. at 92.
\end{itemize}
have held that investigative material prepared by a company following an occurrence is protected by the work product doctrine.\(^{100}\) This test "creates a potential for abuse in the hands of companies seeking to classify virtually everything in their files as work product."\(^{101}\) A different standard adopted by federal courts is that enunciated by the Delaware District Court in *Hercules Inc. v. Exxon Corp.*\(^ {102}\) In *Hercules*, the determination of the anticipation of litigation issue is made by examining the nature of the document and facts of the case.\(^ {103}\) A similar approach was followed in *Spaulding v. Denton*,\(^ {104}\) where the United States District Court stated: "Should any rule of thumb approach become the general rule, it is not hard to imagine insurers mechanically forming their practices so as to make all documents appear to be prepared "in anticipation of litigation"."\(^ {105}\) Other federal courts have required the presence of specific claims prior to the preparation of the documents in order to accord the material work product protection.\(^ {106}\) Although the presence of a specific claim makes the determination of the anticipation of litigation issue easier to resolve, it may frustrate the policy of the work product rule which encourages complete trial preparation.\(^ {107}\)

Furthermore, in *Upjohn Co. v. United States*,\(^ {108}\) the U.S. Supreme Court implied that it is not required that specific claims exist before documents are protected from discovery. In *Upjohn*, the government sought production of documents relating to an internal corporate investigation concerning unauthorized payments to foreign government offi-


\(^{103}\) Id. at 151.

\(^{104}\) 68 F.R.D. at 342.

\(^{105}\) Id. at 345.


cials in order to secure government business. Notwithstanding the fact that the company had conducted its investigation prior to the presence of a specific claim, the Supreme Court held that work product immunity applied to the facts of *Upjohn*. Therefore the case suggests that materials can be prepared in anticipation of litigation although a specific claim is not present.

Finally, some federal courts have attempted to solve the problem by redefining the phrase "anticipation of litigation." For example, some courts provide that there must be "some possibility" of litigation, an "eye toward litigation" or "substantial probability" of "imminent" litigation. As one commentator put it, this does nothing more than say that "litigation is anticipated when litigation is anticipated." Thus, courts are free to choose among the wide variety of approaches provided by the cases addressing this issue. The result is a lack of uniformity providing poor guidance for the state courts and confusion among the federal courts.

B. State Supreme Courts

Various state supreme courts have addressed the issue of whether witness statements and reports taken after the occurrence of an accident should be considered prepared in anticipation of litigation. The supreme courts in these states found it necessary to address the issue due to the confusing and conflicting precedent in the lower courts. However, the issue in these states is not completely resolved. The cases decided often involved the discoverability of an insurance company's investigation material. The issue is still unresolved as to the proper

109. *Id.* at 387-88.
110. *Id.*
111. *Id.* at 398-403.
standard of protection to be accorded to materials prepared prior to litigation by businesses other than insurance companies.

In those states ruling on the discoverability of investigative material prepared by a liability insurer the trend is to accord them work product protection. However, as to prelitigation material prepared by an insurer responding to its insured's claim, the court holdings have varied from state to state. The case of *Fireman's Fund Insurance Company v. McAlpine*\(^{117}\) is an example of a situation where the investigation conducted by a liability insurer was found to be an investigation conducted in anticipation of litigation. The Rhode Island Supreme Court rejected the case by case approach noting that “it provides for no uniformity in the manner in which the issue is resolved in the lower tribunals.”\(^{118}\) Although a similar approach was taken by the Iowa Supreme Court in *Ashmead v. Harris*,\(^{119}\) that court clearly stated that its decision was limited to cases involving “routine investigation of an accident by a liability insurer.”\(^{120}\) The court's language indicated that a different test may well apply when it involves the “investigations initiated to adjust the insured’s own loss.”\(^{121}\)

In *Brown v. Superior Court In and For Maricopa County*,\(^{122}\) the Arizona Supreme Court rejected a single test approach. It criticized, as too broad, the approach taken by those courts which hold that “all statements and information secured by insurance company after an occurrence . . . are made in anticipation of litigation.”\(^{123}\) However, the *Brown* case involved an action by various policyholders against their insurer, and not one by a third party against a liability insurer. The approach suggested by the *Brown* court is one which considers various factors before determining whether to accord the material work product protection. Those factors are: 1) the nature of the event that prompted preparation of materials; 2) whether requested materials contain legal analyses and opinions or purely factual contents; 3) whether material was requested or prepared by a party or its representatives; 4) whether the investigative material was routinely prepared; and 5) whether specific claims or settlement negotiations existed at the time


\(^{118}\) *Fireman's Fund Ins. Co.*, 120 R.I. at 753, 391 A.2d at 89.

\(^{119}\) *Ashmead*, 336 N.W.2d at 197.

\(^{120}\) Id. at 201.

\(^{121}\) Id.

\(^{122}\) *Brown*, 137 Ariz. at 327, 670 P.2d at 725.

\(^{123}\) Id. at 328, 670 P.2d at 726.

http://nsuworks.nova.edu/nlr/vol10/iss3/15
the materials were prepared.\textsuperscript{124}

However, in \textit{Hawkins v. District Court, Inc.},\textsuperscript{125} Colorado's Supreme Court also faced with a claim by an insured against his insurer, adopted a different test in determining whether the material sought to be discovered was work product. The test enunciated by the court was whether the "document was prepared or obtained in order to defend a specific claim . . . [and whether] a substantial probability of imminent litigation. . ."\textsuperscript{126} existed when the documents were prepared. Arguably, this is an opinion which will give Colorado little guidance, and will likely continue the inconsistent application of work product protection in its lower courts.

It is evident that even the state supreme court holdings are not completely uniform. Nevertheless, in those states where the supreme court establishes a clear test, there is a precedent set for lower courts to follow in applying work product protection to cases covered by the scope of the opinion. Furthermore, insurance companies and other businesses conducting preliminary investigations in these states will know with more certainty whether or not their work product will be freely discoverable by the opponent in litigation. Unfortunately, the confusion and misapplication of the work product rule in the lower courts of Florida will continue as long as the Florida Supreme Court continues to deny review\textsuperscript{127} of the anticipation of litigation issue.

V. Suggested Approaches to the Anticipation of Litigation Issue

The anticipation of litigation issue requires application of different standards of protection in order to encompass the variety of factual situations which confront the courts. The following are proposed approaches to three distinguishable and frequently encountered circumstances.

A. \textit{Materials Prepared by Liability Insurers}

"There is little, if any, reason to question . . . that a routine inves-
tigation by a liability insurer is conducted in anticipation of litigation.” 128 Although it is possible that an action may be settled short of litigation, there is always the possibility that a claim may result in legal action. 129 The fact that some cases are settled while others may never result in a claim does not negate the fact that a liability insurer's initial investigation is conducted to determine its insured's liability in the event of lawsuit. With this in mind, it seems logical that the material gathered by a liability insurer's investigation should be protected from discovery.

The proposed approach will eliminate the "ordinary course of business” exception. This frequently criticized exception 130 is not an appropriate test to determine the protection insurance files merit since it overlooks the possibility that a liability insurer's ordinary course of business is anticipating legal claims. Finally, protecting a liability insurer's files assures that routine investigations are thorough and effective, thereby upholding the policy of Hickman v. Taylor. 131 It should be noted, however, that by adopting this approach the opponent may still have access to the material, but only upon the proper showing of substantial need and undue hardship. 132

B. Material Prepared by Insurer in Response to Insured's Loss

In contrast to the investigation conducted by a liability insurer, the investigation conducted by an insurance company in response to a claim brought by its policyholder presents a different situation. 133 An insurer is under a contractual obligation to reimburse its insured, assuming the claim is a valid one. Accordingly, its primary purpose during preliminary investigation is to determine whether its insured's claim will be honored. Although it is possible that legal action may result from a denial of a claim, this determination is reached only after an insurance company decides not to honor a claim. Therefore, the proper approach to take in determining which material should be given work

130. See supra note 80 and accompanying text.
131. Hickman, 329 U.S. at 495.
132. See supra note 60 and accompanying text.

http://nsuworks.nova.edu/nlr/vol10/iss3/15
product protection will require a temporal analysis. This test should be one which ascertains the point at which the insurer's focus shifts from investigating a claim for settlement purposes to an investigation in preparation of litigation. An insurer's denial of a claim or some other action indicating to the insured that the claim will not be honored to the extent expected, is an indication of such change. From this point forward, any material prepared by the insurer should be protected.

C. Material Prepared by a Business Other than an Insurance Company

The material prepared by employees of a store, an employer, a company's agents or other businesses not involving an insurance company may have multiple purposes besides litigation. As such, an absolute rule would be inappropriate. The soundest approach for courts to take is to consider each case on its facts. There are several factors which may serve as guidelines for the court in making a determination of the discoverability of these materials. First, the court must consider the nature and magnitude of the event that prompted the investigation. The greater the degree of injury or loss the more likely it is that a party conducted the investigation anticipating legal action. Second, the content of the document being sought through discovery should be analyzed. For example, where a document contains legal analyses and opinions a clearer showing that the material was prepared in anticipation of litigation is made. Third, a determination must be made as to who requested the investigation or prepared the document. Although it is not required that an attorney be involved before protection is accorded, the presence of an attorney may be an important factor in resolving the anticipation of litigation issue. Finally, the court should determine whether the materials were of the type that the business routinely prepared for reasons other than litigation.
V. Conclusion

Proper application of Florida Rule 1.280(b)(2)\textsuperscript{141} will require clarification of the anticipation of litigation issue. To date, the existing precedent is generating conflicting and unclear decisions.\textsuperscript{142} Such results "undermine the predictability of work product decisions and the atmosphere of security that predictability fosters."\textsuperscript{143}

To provide uniformity in the application of work product protection throughout the state, the Florida Supreme Court must set standards which recognize the factual differences among the cases. In doing so it is important to focus on the primary purpose of a business in conducting an investigation following an accident. A logical and proper application of work product protection will require that courts distinguish between cases involving third party actions against liability insurers and those where insureds bring legal actions against their own insurer following the denial of a claim. As previously noted, the two have different purposes in conducting an initial investigation.\textsuperscript{144} Failure to make a distinction may unduly penalize a liability insurer who diligently and promptly investigated a potential claim while unfairly benefitting a plaintiff who would be able to take advantage of the insurance company’s diligence. Therefore, courts must protect the preliminary investigation of a liability insurer. On the other hand, investigations conducted by an insurer of its policyholder’s claim requires a temporal analysis to determine at which point the insurer’s focus shifted from evaluating the claim to preparing for litigation. As to cases involving prelitigation material gathered by one other than an insurance company, an individual analysis of each case is necessary due to the multiple purposes for which an investigation may have been conducted. Various factors are proposed as guidelines for the courts to follow in analyzing the facts of the case.\textsuperscript{145}

Once Florida courts establish clear standards, the application of the work product rule will be more logical and consistent. Furthermore, the suggested standards offer those who routinely investigate accidents

\textsuperscript{141} FLA. R. CIV. P. 1.280(b)(2).
\textsuperscript{142} See supra text accompanying notes 61-115.
\textsuperscript{143} Special Project, supra note 8, at 854.
\textsuperscript{144} See supra text accompanying notes 128-133.
\textsuperscript{145} See supra text accompanying notes 135-140.
an accurate idea of when their investigative material will be protected from discovery.

Maria del Carmen Dantes
911: The Call That No One Answered

I. Introduction

Across the country, municipalities are updating their public service agencies with the addition of advanced "911" emergency telephone systems. The systems are designed to immediately dispatch assistance to community members who have become victims of tragedy. Reduced response time offered by the "911" system is the primary reason for its popularity.

As a result of municipal involvement in implementation of "911" systems, local governments operating emergency assistance systems may suffer tort liability for negligent failure to properly respond to a call. Jurisdictions responding to this dilemma have done so differently. Courts holding municipalities liable in tort for mishandling "911" calls predicate their findings on the special duty doctrine and the waiver of sovereign immunity. Other jurisdictions relieve municipalities of all liability based on the doctrines of public duty and common law governmental immunity.

With other jurisdictions responding differently to the issue of whether tort liability should attach, predicting how Florida courts will

1. There are more than 1,100 "911" systems on line serving more than 45% of United States residents. Hackworth, 9-1-1: Antidote to Amnesia, 1984 JEMS 24. In 1984, 67.5% of the citizens from thirty-one Florida counties were served by "911" systems. Division of Communications, State of Florida Department of General Services, Florida 911 Program (1984). Presently, approximately one-half of Florida's counties, nearly 80% of Florida's citizens, are served by "911" systems. Telephone interview with Edward J. Telander, P.E., Communications Engineer, Division of Communications (Dec. 4, 1985).

2. "Response time has different meanings. It can be 1) the time an incident occurs to the time it is reported, 2) the time it is reported until help is dispatched, or 3) the time dispatch occurs until help arrives at the scene." Because the person dialing only has to dial three numbers rather than seven, reporting time is shorter. Also, all calls go to one center equipped with a multitude of emergency resources utilized to reduce dispatch time. Hackworth, supra note 1, at 25.


4. See infra text accompanying notes 19-22.

5. See infra text accompanying notes 109-12.

6. See infra text accompanying notes 84-94.

7. See infra text accompanying notes 65-69.
respond is a difficult task. The Florida legislature has taken affirmative action in developing a statewide emergency telephone assistance plan, and has also waived municipal sovereign immunity in tort actions. Although the Florida Supreme Court seems to have given new life to the doctrine of sovereign immunity in Commercial Carrier Corp. v. Indian River County, the district courts of appeal still ponder the decision’s full effects.

This note demonstrates the potential for civil action against Florida municipalities for failing to properly respond to emergency assistance calls. This note predicts how Florida courts may respond to this dilemma. In addition, this note will provide an approach which includes compensating victims of mishandled emergency calls while deferring to the intent of Florida’s legislature.

A. Historical Overview of Florida Municipal Liability

Florida municipalities have not always enjoyed sovereign immunity to the extent the state has. Prior to the enactment of Florida’s

9. FLA. STAT. § 768.28 (1985). The statute provides in part:
   (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.
11. This article does not purport to cover the doctrine of sovereign immunity in depth. For an historical overview of the doctrine of sovereign immunity, see Van Alstyne, Governmental Tort Liability: Judicial Law Making in a Statutory Milieu, 15 STAN. L. REV. 163 (1962); Jaffe, Suits Against Governments and Officers: Damage Actions, 77 HARV. L. REV. 209 (1963); Spader, Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding, 61 CHI.-KENT
waiver statute, traditional common law municipal immunity only attached for governmental functions, as opposed to proprietary functions. Governmental functions are those functions exercised on behalf of the state for the benefit of the general public or those done in furtherance of the public welfare. Thus, while pursuing this type of state objective, a municipality was shielded from tort action.

A municipality was subject to tort liability if injury resulted from the negligent performance of a proprietary function. Proprietary functions are "those done for the public's convenience and enjoyment." When a municipality is performing functions for the specific benefit of a community embraced within its municipal boundaries rather than for the general public, the municipality is exercising a proprietary function. Thus, under the governmental-proprietary distinction, only tortious acts committed in furtherance of a proprietary function were actionable.

Municipal liability in Florida has also been predicated on the doctrine of respondeat superior. The governmental-proprietary distinction was totally ignored in Hargrove v. Town of Cocoa Beach. The Florida Supreme Court held that an individual suffering injury as a direct result of a municipal employee's negligence would have an actionable claim against the municipality, as long as the employee acted within the scope of his employment. However, the court did continue to recognize immunity for municipalities for actions taken in the exercise of judicial, legislative, quasi-legislative, or quasi-judicial functions.

Although respondeat superior remains a separate tort claim in Florida for municipal liability, the application is greatly restricted.

The special duty doctrine, as developed by the Florida Supreme


14. Id. at 361.

15. Budetti & Knight, supra note 12, at 929.


17. 96 So. 2d 130 (Fla. 1957).

18. Id. at 133.
Court in *Modlin v. City of Miami Beach*,¹⁹ supplanted the governmental-proprietary distinction as a premise for governmental immunity from tort liability. The *Modlin* court limited those situations in which an injured individual could recover from a municipality.²⁰ Only when the municipality or its employee owed a specific duty to the individual complaining could the municipality’s negligence be actionable.²¹ The duty must be something more than that owed by a public officer to the public generally.²²

With little resistance, the special duty doctrine remained the source of municipal tort liability until the *Commercial Carrier Corp.* decision in 1979.²³ Unsatisfied with the present state of municipal tort law at that time, due in part to enactment of the sovereign immunity statute, the Florida Supreme Court disposed of the special duty doctrine. Now when dealing with municipal liability, courts are to determine whether the decision to further governmental actions is accomplished at either a planning level or operational level.²⁴ Negligence resulting from furtherance of planning level decisions is not actionable because the public importance of these decisions requires governmental immunization from tort liability. However, any injuries incurred during promotion of governmental interests at an operational level are subject to tort liability. Because these acts are ministerial in nature, the sovereign immunity doctrine is inapplicable.

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¹⁹. 201 So. 2d 70 (Fla. 1967).
²⁰. *Id.* at 76.
²¹. *Id.* at 75; see Sapp v. Tallahassee, 348 So. 2d 363 (Fla. 1st Dist. Ct. App.), cert. denied, 354 So. 2d 985 (Fla. 1977). The Florida Supreme Court held that before a municipality could be held liable for the negligence of its employees, a special duty must be shown. A special duty is something more than the duty a municipality owes the general public. See also City of Tampa v. Davis, 226 So. 2d 450 (Fla. 2d Dist. Ct. App. 1969). The Second District Court of Appeal decided that a municipality could be liable in tort, under the doctrine of respondeat superior, only when the complainant was in privity with the municipal employee.
²². *Modlin*, 201 So. 2d at 76. See, e.g., Evett v. Inverness, 224 So. 2d 365 (Fla. 2d Dist. Ct. App. 1969). The court held the city owed no duty, other than that owed to the general public, to plaintiff’s decedent, killed by an intoxicated driver previously stopped but released by police.
²³. See Note, *supra* note 13, at 362-63. The Florida waiver statute was enacted in 1975. *Commercial Carrier Corp.* was not decided until 1979. During this time period, there was little deviation from the special duty doctrine. See generally Pennington v. Serig, 353 So. 2d 107 (Fla. 3d Dist. Ct. App. 1977); Metropolitan Dade County v. Kelly, 348 So. 2d 49 (Fla. 1st Dist. Ct. App. 1979).
²⁴. *Commercial Carrier Corp.*, 371 So. 2d at 1018-19. See also *infra* text accompanying notes 115-32.
Although the *Commercial Carrier Corp.* court attempted to settle the confusion surrounding Florida municipal tort liability, the law seems more unsettled now than previously. This uncertainty, which arises from the lower courts’ inability to distinguish planning level and operational level functions, creates a dilemma when courts are faced with a tort action arising out of a municipality’s failure to properly respond to a “911” emergency call. As the “911” issue has yet to receive judicial attention by Florida courts, the ensuing sections survey how courts of other jurisdictions have reacted to cases involving a municipality’s failure to properly answer emergency calls.

B. Municipal Liability for Failing to Respond Properly to an Emergency Assistance Call

A municipality’s decision to develop a “911” emergency reporting system to counter “increased incidence of crimes, accidents and medical emergencies, inadequacy of existing emergency reporting methods and the continual growth and mobility of the population,”25 is beneficial to recipients of the service. The “911” system, however, is not flawless. Specific instances of the system’s shortcomings have left courts throughout the United States confronted with issues of negligence, municipal tort liability and sovereign immunity in cases where emergency calls are mishandled.

The New York Court of Appeals examined these issues in *De Long v. County of Erie*.26 The *De Long* court upheld an award of damages to the husband and children of a woman brutally victimized in their home by an intruder.27 The decedent, Amelia De Long, was in her home on the morning of October 25.28 Hearing a burglar in her home, she immediately dialed “911.”29 After receiving assurance that assistance had been dispatched, De Long remained in her home awaiting police arrival.30 Unfortunately, the complaint writer incorrectly recorded the complaint.31 Emergency assistance was dispatched to an in-
correct address in the wrong city.\textsuperscript{32} The police finally arrived, but Amelia De Long was pronounced dead on the scene.\textsuperscript{33}

Amelia De Long’s family sued for negligence. Affirming the lower court opinion, the court recognized that the county and city developed a special relationship with Amelia De Long.\textsuperscript{34} The city and the county implemented a special emergency service designed to take calls at a designated center and then relay them to the proper public safety agency.\textsuperscript{35} The public safety agencies offered the “911” plan as the system to utilize in an emergency situation.\textsuperscript{36} In addition, a dispatcher personally assured the victim that help was on the way, furthering her reliance upon police.\textsuperscript{37} These factors created a special duty\textsuperscript{38} owed to the victim by the city and the county. Each entity breached its duty.\textsuperscript{39} Thus, compensation was awarded to the victim’s family for her wrongful death.

The Washington Supreme Court has also confronted the issue of

\begin{itemize}
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Id. Kenmore police arrived on the scene after a neighbor made a direct call to the police department. By the time paramedics arrived, the victim was dead.
  \item \textsuperscript{34} Cf. Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968). The New York Court of Appeals held that the city was not liable in tort to an assault victim who had requested police protection on a number of previous occasions. “[T]here is no warrant in judicial tradition or in the proper allocation of the powers of government for the courts, in the absence of legislation, to carve out an area in tort liability for police protection to members of the public.” Id. at 583, 240 N.E.2d at 861, 293 N.Y.S.2d at 899. But see Judge Keating dissenting: “[t]he essence of the city’s case [suggests] . . . ‘[b]ecause we owe a duty to everybody, we owe a duty to nobody.’” Id. at 585, 240 N.E.2d at 862, 293 N.Y.S.2d at 901.
  \item \textsuperscript{35} De Long, 60 N.Y.2d at 302-03, 457 N.E.2d at 720-21, 469 N.Y.S.2d at 614-15.
  \item \textsuperscript{36} Id. at 302, 457 N.E.2d at 719, 469 N.Y.S.2d at 614.
  \item \textsuperscript{37} Id. at 301, 457 N.E.2d at 719, 469 N.Y.S.2d at 614.
  \item \textsuperscript{38} See Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). The city was liable for the wrongful death of plaintiff’s intestate. An actionable special duty was created when police failed to provide promised protection after decedent aided police in arresting and convicting a fugitive from justice. See also supra text accompanying notes 19-22.
  \item \textsuperscript{39} De Long, 60 N.Y.2d at 305, 457 N.E.2d at 722, 469 N.Y.S.2d at 616. Also, at the time this action was instituted by Dennis De Long, there was in existence, within the laws of New York, a waiver of immunity statute. N.Y. JURISDICTION LAW § 8 (McKinney 1983), in part, provides that “[t]he state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations. . . .” However, the De Long court never referenced this statute in its opinion.
\end{itemize}
police failure to properly respond to an emergency call. In *Chambers-Castanes v. King County*, plaintiffs, a married couple, were proceeding through a small Washington town when they were stopped in traffic behind a pick-up truck. Two men exited the truck and began to manhandle the couple. When the men finally retreated from the scene, the wife phoned for assistance. After numerous calls requesting assistance, police finally responded to the call. Unfortunately, the assailants fled, avoiding apprehension.

In plaintiffs' action for negligence, the *Chambers-Castanes* court concluded that the doctrine of sovereign immunity was inapplicable and held King County subject to liability in tort. Because the legislature had abolished the sovereign immunity doctrine, the court carved out a narrowly circumscribed exception. High level discretionary acts exercised at an executive level remained cloaked with sovereign immunity. In comparison, operational level decisions, such as dispatching a police officer to the scene of a crime, were not cloaked with immunity. The two are distinguished as follows: a decision to dispatch an officer in response to an emergency call involves the type of discretion exercised every day, not a decision involving a basic governmental planning consideration. Therefore, the operator's failure to properly dispatch

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41. *Id.* at 278, 669 P.2d at 454.
42. *Id.*
43. *Id.* A number of other persons witnessing the events also phoned for police assistance. They were assured, as was plaintiff, that help was on its way.
44. *Id.* at 280, 669 P.2d at 454.
45. *Id.*
46. *Id.* at 281, 669 P.2d at 457. The Washington Supreme Court has accepted the test established in *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 250, 407 P.2d 440, 444 (1965), as an exception to the rule that the doctrine of sovereign immunity is abolished. See *infra* text accompanying notes 129-31.
47. 100 Wash. 2d at 281, 669 P.2d at 456. *WASH. REV. CODE ANN § 4.92.090* (1986) states "[t]he State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."
48. 100 Wash. 2d at 281, 669 P.2d at 456.
49. *Id.* at 282, 669 P.2d at 456. In a footnote, the court explained high level discretionary acts. To determine whether acts were exercised at a truly executive level, the court should apply the four-prong test established in *Evangelical United Brethren Church*. See *infra* text accompanying notes 129-31 and 145-50.
50. *Id.*
51. *Id.*
52. *Id.* The court noted that "[t]o fall within the exception . . . , the discretion-
an emergency assistance call is an operational level determination subject to liability.\textsuperscript{53}

The Washington Supreme Court also recognized the creation of a special relationship between plaintiffs and the county.\textsuperscript{54} The operators assured plaintiffs after each call that assistance had been dispatched.\textsuperscript{55} Since plaintiffs continually sought assistance, a nexus developed giving rise to reliance on the part of the plaintiffs.\textsuperscript{56} Consequently, the court recognized plaintiffs' claim for damages pursuant to the special duty doctrine.\textsuperscript{57}

C. Municipalities Enjoying Immunity for Failing to Respond to Emergency Calls

While some jurisdictions refuse municipalities and their entities sovereign immunity for the performance of discretionary governmental functions,\textsuperscript{58} others continue to protect municipalities from tort liability regarding public safety decisions.\textsuperscript{59}
In *Trezzi v. City of Detroit*, the Michigan Court of Appeals supported the decision of the City of Detroit to install a “911” emergency system. Plaintiff in *Trezzi* complained that the “911” operators attached an unjustifiably low priority rating to emergency calls. A “911” operator passed the call to a police dispatcher who did not dispatch assistance for nearly one and a half hours. As a result of the police dispatcher’s dereliction, plaintiff’s decedents suffered numerous injuries, resulting in their deaths.

The *Trezzi* court maintained that operating a “911” emergency assistance system constitutes a governmental function by a municipality protected by Michigan law. The operation of an emergency dispatch plan is an indispensable element in managing a police department. The system’s operation involves decision making regarding the seriousness of each call for police assistance. Immediately upon receipt of a call, an order of priority for response is attached. The court determined that this type of system is unique activity associated with unattended, a fire occurred at a building 300 feet from the station. As the response time was greatly increased, it was alleged that unnecessary property damage had occurred. The California Court of Appeal, First District, dismissed the complaint based on the public entity’s absolute immunity from tort liability for failure to provide fire protection and/or from negligence in the provision of such protection. See also *Hartzler v. City of San Jose*, 46 Cal. App. 3d 6, 120 Cal. Rptr. 5 (Cal. Ct. App. 1975). In *Hartzler*, a woman allegedly called police twenty times concerning problems she was having with her estranged husband. The court held that police enjoyed sovereign immunity from liability. In the absence of evidence showing that police promised the victim protection and the woman relied on such promise, a special relationship had not been created.

61. Id. at 509, 328 N.W.2d at 71. There may have been a number of unidentified operators taking calls. Operators attach priority ratings to each call based upon its nature, and police are dispatched accordingly.
62. Id. at 509-10, 328 N.W.2d at 71.
63. Id. at 509, 328 N.W.2d at 71.
64. Id. at 511, 328 N.W.2d at 72.
65. Mich. Comp. Laws § 691.1407 (1985) (providing that all governmental agencies shall be “immune from tort liability... [in] discharge of a governmental function...”).
66. *Trezzi*, 120 Mich. App. at 512, 328 N.W.2d at 72 (Bronson, J., dissenting). The dissent asks the question “[i]f ‘911’ system is ‘indispensable’ to police operations, how did Detroit manage to muddle through the many decades in which no system existed?” Id. at 517, 328 N.W.2d at 74.
67. Id. at 512, 328 N.W.2d at 72.
68. Id. at 513, 328 N.W.2d at 72.
operation of a police department. Logically, the city and its police department are afforded immunity.

The District of Columbia Court of Appeals reached the same result as Trezzi but through different reasoning. Plaintiffs in Warren v. District of Columbia, two of whom were sharing a third floor room, all resided in the same boarding house. The third plaintiff and her daughter occupied a second floor room. During the night, the sound of the back door being broken down awakened the women. Two men entered the house, made their way to the second floor, then raped and sodomized one of the plaintiffs.

Hearing screams from the floor below, plaintiffs on the third floor telephoned police, requesting immediate help. The police dispatcher provided assurance that police assistance would be dispatched promptly. From their third floor room, plaintiffs crawled through their window to an adjoining roof. Four police cruisers, responding to the broadcast, arrived at the boarding house. While on the roof plaintiffs watched the police arrive, conduct a cursory investigation and then leave the scene.

Plaintiffs crawled back inside their room and again phoned for help. Once more they were assured that police assistance was on the way. Believing police had arrived, and in an attempt to ascertain the conditions of the victimized women, plaintiffs called to the second floor, thereby alerting the intruders to their presence. The abductors then forced all three women, at knife point, to accompany them to an apartment belonging to one of the men. The abductors held the three women captive for fourteen hours, robbing and sexually assaulting them.

The three plaintiffs instituted actions against the city and its police department. Plaintiffs based their claims on the negligent investigation conducted by police once they were dispatched to the scene and the

69. Id.
70. See supra text accompanying notes 40-57. The court in Chambers-Castanes flatly rejected the reasoning in Warren as being wholly at odds with its decision.
72. Id. at 2.
73. Id.
74. Id. The two men who broke down the door were later identified and charged.
75. Id.
76. Id. One officer drove through the alley behind the house, and proceeded to the front of the house without stopping. Another officer knocked on the front door, but departed when no one answered. All the officers left within five minutes of their arrival.
77. Id. Actually, assistance was not dispatched the second time.
failure to respond properly to the second emergency call.78

The District of Columbia Court of Appeals upheld the trial court's dismissal of the complaint.79 The court in Warren based its opinion on the "fundamental principle that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen."80 The court denied plaintiffs' contention that their telephone call requesting assistance created a special relationship.81 The police did not owe any single individual the duty to provide police protection.82 The acts and omissions of defendant police department constituted no more than nonactionable withholding of a benefit.83 Thus, without the establishment of a special duty, plaintiffs' complaint could not stand.84

The three dissenting judges in Warren85 reasoned that if certain factors are present, a general, nonactionable duty to provide police services may narrow to a special actionable duty.86 First, some sort of privity must exist between the police department and the victim.87 This relationship must set the victim apart from the general public.88 Sec-

78. Id.
79. Id. Notwithstanding their sympathy for appellants who were tragic victims of despicable criminal acts, the appellate court affirmed the judgment of dismissal.
80. Id. at 3. The District of Columbia Court of Appeals decided this case based solely on common law municipal tort liability. At the time this suit was commenced by plaintiffs, the District of Columbia had yet to waive sovereign immunity by statute. The only limitation on any negligence action against the District of Columbia is governed by D.C. CODE § 12-309 (1985). In part, this section provides that "[a]n action may not be maintained against the District of Columbia unless, within six months of the claimant, his agent, or attorney has given notice in writing to the Commissioner [Mayor] of the District of Columbia." This section of the code was never referenced by the court in Warren.
81. Id. at 4.
82. Id. at 7.
83. Id. See also H.R. Moch Co., Inc. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). In Moch, the Rensselaer Water Co. had contracted with the city to provide them with an adequate water supply. Plaintiff's property caught fire but there was an insufficient amount of water to extinguish the fire. Justice Cardozo found that the failure to provide an adequate water supply was, at most, a nonactionable withholding of a benefit. Id. at 167-68, 159 N.E. at 897-98.
84. Warren, 444 A.2d at 9.
85. Id. Associate Judge Kelly wrote the opinion with whom Associate Judge Moch and Chief Judge Newman concurred in part and dissented in part.
86. Id. at 9.
87. Id. See also Davis, 226 So. 2d at 451; Sapp, 348 So. 2d at 365-66.
88. Warren, 444 A.2d at 10.
ond, the public agency must have offered assurances which would cause the victim's justifiable reliance.89

The dissenters in *Warren* asserted that the complaint alleged sufficient facts which, if proven, established a legal relationship.80 The police department owed a special duty to the plaintiff placing the emergency call. Also, after receiving guarantees on two separate occasions that help was dispatched, the victims chose not to leave the scene, justifiably relying on the dispatcher's assurances that help was coming. Therefore, the dissenters concluded that an actionable special duty existed.91

The New Mexico Court of Appeals also refused to acknowledge the existence of a special duty in *Doe v. Hendricks*.92 The court denied the award of damages to a boy who had been sexually assaulted by a stranger, even though a call for assistance was placed immediately after the boy's abduction.93 Stating that police owed no special duty to the boy, the court granted the city's motion for summary judgment.94

In rationalizing its position, the *Doe* court applied the two-step special duty test.95 The majority decided no relationship existed between police and the boy.96 No prior circumstances between the victim and the officer imposed a duty on the police to protect the boy.97 In addition, police made no specific promises which would create justifiable reliance on the part of the victim.98 Thus, without a special rela-

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89. *Id. See Sapp*, 348 So. 2d at 365-66.
90. 444 A.2d at 12.
91. *Id.*
93. *Id.* at 500, 590 P.2d at 649. Two teenagers witnessed the youth being dragged into an abandoned house by an adult male. The teenagers relayed their story to their brother and sister. The sister called police and further relayed the story. The dispatcher took the message into the office of the chief. The chief was the only officer available to answer the call. However, the chief was in conference with an out-of-state sheriff and did not respond to the call. When assistance did not arrive, the two boys ran to the police station, relayed their story to another officer, who proceeded to the house, and effectuated the arrest.
94. *Id.* at 500, 590 P.2d at 649. The court relied on the Peace Officers Liability Act of 1973, N.M. STAT. ANN.f § 39-8-2, 39-8-4 (repealed 1976). The Act was designed to protect officers from personal liability arising out of acts committed during the performance of their activities and within the course and scope of their profession.
95. *See supra* text accompanying notes 19-22.
96. *Doe*, 92 N.M. at 503, 590 P.2d at 651.
97. *Id.*
98. *Id.*
tionship or justifiable reliance, the only duty owed by police was a non-actionable public duty.\textsuperscript{99}

II. Florida’s Response to Municipal Liability In Failing to Answer Emergency Assistance Calls

Florida courts have yet to answer the question of whether a municipality is liable for failing to properly respond to an emergency assistance call. With a statute that encourages Florida counties to install “911” emergency systems,\textsuperscript{100} and a statute that permits the state and its entities to be sued,\textsuperscript{101} Florida courts will eventually face this predicament.

In 1974, the Florida legislature enacted the Florida Emergency Telephone Act.\textsuperscript{102} The Act’s purpose is “to shorten time required for a citizen to request and receive emergency”\textsuperscript{103} medical or police assistance. Prior to this enactment, thousands of emergency assistance numbers were used statewide.\textsuperscript{104} The implementation of a three-digit number system immensely benefits both law enforcement agencies and public service personnel.\textsuperscript{105}

The enactment of the Florida Emergency Telephone Act gave a statewide system of emergency assistance to the general public. The plan includes a firm implementation schedule requiring local communities to direct the telephone utility to install a “911” system within twenty-four months following receipt of a local government order.\textsuperscript{106} The system must include specific local government requirements for

\textsuperscript{99} Id. The court said, “[i]f and when the people of New Mexico desire a change in the public vs. special duty concept, they must seek relief from the legislature...[that] fix[es] the public policy of the State.” Id. at 503, 590 P.2d at 651.

\textsuperscript{100} See supra note 8.

\textsuperscript{101} See supra note 9.

\textsuperscript{102} FLA. STAT. §365.171(1) (1985).

\textsuperscript{103} Id. § 365.171(2).

\textsuperscript{104} Id. This “simplified means of procuring emergency service will result in the saving of life, a reduction in the destruction of property, and a quicker apprehension of criminals.” The legislature’s intent is to establish an emergency “number (911) plan which will provide citizens with rapid, direct access to public safety agencies.” Id.

\textsuperscript{105} Id.

\textsuperscript{106} Id. § 365.171(4)(e). See also § 365.171(10) (“All public agencies shall assist the division in their efforts to carry out the intent of this section, and such agencies shall comply with the developed plan.”); It is no longer mandatory for counties to install a “911” system. The expense of installing and operating a “911” system is too great for some of Florida’s rural counties. Telander, supra note 1.
Law enforcement, firefighting and emergency medical services, and may also include poison control, suicide prevention and emergency management services.107

Lawmakers enacted legislation aimed at assuring an accessible remedy to those in immediate emergency need. The majority of the systems developed in Florida are extremely efficient.108 This is generally the reason a municipality encourages the use of the “911” system as opposed to direct dialing. However, if a Florida municipality holds out the “911” system as preferable to another system in time of emergency, a question arises regarding the municipality’s liability when the victim dials “911” seeking help and none arrives.

The issues surrounding Florida municipal liability have not been clearly decided. First, the Florida legislature, in accordance with the State Constitution, waived sovereign immunity for tort liability for itself and for its agencies and subdivisions.109 In essence, the State permitted itself and its agencies and subdivisions to be sued in tort for money damages arising out of the wrongful acts or omissions of any agency’s or subdivision’s employee while acting within the scope of his employment.110 As long as the injured plaintiff retains eligibility pursuant to section 768.28,111 he may sue the governmental entity as if the entity were an individual.112

The statute also allows the state to be self-insured by allowing it to purchase liability insurance for whatever coverage it chooses in antici-

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107. Id. at § 365.171(4)(b).
108. Florida 911 Program, supra note 1, at 2. At least seven Florida counties have an enhanced “911” (E911) system. This system includes selective routing which guarantees that only the calls originating within a certain jurisdiction are routed to the Public Safety Answering Point (PSAP) responsible for that particular jurisdiction. E911 systems also include automatic number identification (ANI) which provides the dispatcher with a display of the caller’s telephone number and automatic location identification (ALI) which provides a display of the caller’s address.
110. Id.
111. Id. § 768.28(6)(a). This section states that “[a]n action may not be instituted against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency. . . .” Section 5 further provides that the state is not liable for punitive damages or interest for the period before judgment. Also, the state is not liable to any one person for a claim exceeding $100,000 or a total of claims in excess of $200,000. Section 7 further states that “process shall be served upon the head of the agency. . . .” In addition, Section 9(a) provides that individuals, unless acting maliciously and willfully, shall not be held personally liable.
112. Id. § 768.28(2).
pation of any claim. Agencies, subdivisions and sheriffs may purchase liability insurance together, or jointly provide other means of protection against tort liability arising out of their official capacity. The language of section 768.28 is explicit with respect to the state’s desire to retreat from the doctrine of sovereign immunity and allow compensation for valid claims arising against the state.

The Supreme Court of Florida, however, does not interpret section 768.28 as totally abrogating the doctrine of sovereign immunity. In Commercial Carrier Corp. v. Indian River County, the Florida Supreme Court had an opportunity to construe the sovereign immunity statute. The supreme court decided that section 768.28 was broadly written and the doctrine of sovereign immunity was not totally abolished.

Commercial Carrier Corp. reached the Florida Supreme Court on writ of certiorari where it was consolidated with a Third District Court of Appeal case, Cheney v. Dade County. Commercial Carrier Corporation and its insurer were named defendants in a wrongful death action. Commercial Carrier Corporation then filed a third-party complaint naming Indian River County and the Florida Department of Transportation (DOT) as third-party defendants. DOT failed to install a stop sign or provide pavement markings at the intersection where the accident occurred. The third-party complaint sought con-

113. Id. § 768.28(13).
114. Id.
117. Id. at 1012-13. Commercial Carrier Corp. allegedly was in conflict with Gordon v. City of West Palm Beach, 321 So. 2d 78 (Fla. 4th Dist. Ct. App. 1975). In Gordon, the Fourth District Court of Appeal held that a city could be liable for negligence in design, construction or maintenance of streets, but that it could not be liable for failing to install traffic devices at an intersection.
118. 353 So. 2d 623 (Fla. 3d Dist. Ct. App. 1977), rev’d sub nom. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla.), vacated, 372 So. 2d 1182 (Fla. 3d Dist. Ct. App. 1979). In Cheney, a third party complaint had been filed by Cheney and its insurer against Dade County. The complaint alleged that the sole cause of an intersection collision was Dade County’s negligence in maintaining the intersection with proper traffic signals. The trial court held that no cause of action existed to maintain the third party complaint. The Third District Court, while upholding the dismissal, certified the question as one of great public interest.
119. Commercial Carrier Corp., 371 So. 2d at 1013.
120. Id.
121. Id.
tribution and indemnification from Indian River County and DOT for their negligence in failing to properly maintain the intersection.\footnote{122} The Third District Court of Appeal affirmed the trial court’s dismissal of the third-party complaint.\footnote{123}

The main issue the \textit{Commercial Carrier Corp.} court addressed was the status of municipal tort liability under the governmental versus proprietary analysis since the enactment of section 768.28.\footnote{124} The supreme court concluded that because section 768.28\footnote{125} unequivocally includes municipalities within the definition of state entities subject to waiver of immunity,\footnote{126} this distinction died when Section 768.28 became law. In the same breath, the \textit{Commercial Carrier Corp.} court also decided that the special duty-general duty dichotomy had no continuing vitality since section 768.28 became effective.\footnote{127} Traditional municipal tort liability in Florida was subject to a third analysis.\footnote{128}

The Florida Supreme Court adopted a test that considers certain discretionary governmental functions as either planning-level or operational-level functions. Planning-level functions enjoy immunity from

\begin{footnotes}
122. \textit{Id.}
123. \textit{Id.}
125. \textit{FLA. STAT.} § 768.28(2) (1985) states: “(2) As used in this act, ‘state agencies or subdivisions’ including the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities.”
126. \textit{Commercial Carrier Corp.}, 371 So. 2d at 1016.
127. \textit{Id.} “Predicating liability upon the ‘governmental-proprietary’ and ‘special duty-general duty’ analyses has drawn severe criticism from numerous courts and commentators.” \textit{Id.} at 1016, n.8. Therefore, “\textit{Modlin} and its ancestry and progeny have no continuing vitality subsequent to the effective date of section 768.28.” 371 So. 2d at 1016.
128. Another problem the \textit{Commercial Carrier Corp.} court faced was Section 768.28, which unlike the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1975), does not contain an express exception for discretionary acts to which immunity attaches. The court responded, however, that the absence of a “discretionary exception” in the waiver statute does not necessarily preclude immunity. Certain areas of governmental conduct must remain immune from judicial scrutiny. \textit{Commercial Carrier Corp.}, 371 So. 2d at 1017-18. \textit{See infra} text accompanying notes 135-39 for application of the test established in \textit{Evangelical United Brethren Church}. \textit{See also} \textit{Evangelical United Brethren Church}, 67 Wash. 2d at 246, 407 P.2d at 440; Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).
\end{footnotes}
tort liability and comprise those basic policy decisions in which a governmental branch makes a conscious decision, balancing the risks and advantages. Operation-level decisions are characterized as those made on an every day basis implementing broad policy plans. Operational-level decision-making remains subject to tort liability.

To assist the lower courts in their understanding of the distinction between planning-level or operational-level decisions, the Commercial Carrier Corp. court recommended application of a four question test established in Evangelical United Brethren Church v. State. The four question test asks: (1) Does the challenged act necessarily involve a basic governmental program? (2) Is the act or decision essential to the accomplishment of that program as opposed to one which would change the course of the program? (3) Does the act or decision require the exercise of a basic policy evaluation, expertise or judgment? (4) Does the governmental agency have the constitutional or statutory authority to make this decision? If all four preliminary questions clearly and unequivocally draw affirmative responses, the challenged discretionary act is not likely to be subject to tort liability. If one or more of the questions suggest a negative answer, depending upon the facts of the case, further inquiry may be necessary.

In the event a Florida court were confronted with a tort action arising out of the mishandling of an emergency assistance call, the

129. Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). Two examples of planning-level decisions are Elmer v. City of St. Petersburg, 378 So. 2d 825 (Fla. 2d Dist. Ct. App. 1979) and Everton v. Willard, 468 So. 2d 936 (Fla. 1985). In Elmer, the city allegedly failed to give its citizens adequate warnings of riot conditions; this was a discretionary, planning-level decision, not to incite community havoc, cloaked with immunity. In Everton, an officer's choice not to issue a citation to an intoxicated driver and to allow him to continue his travels rather than arrest him was discretionary and cloaked with sovereign immunity.

130. Department of Transp. v. Neilson, 419 So. 2d 1071, 1075 (Fla. 1982). Two examples of operational-level decisions are Weisburg v. City of Miami Beach, 383 So. 2d 1158 (Fla. 3d Dist. Ct. App. 1980) and Sintres v. LaValle, 406 So. 2d 483 (Fla. 5th Dist. Ct. App. 1981). Weisburg held that a police department's decision to have its officers direct traffic is an operational-level decision subject to tort liability if negligently conducted. Sintres held that a government employee's operation of a vehicle within the scope of his employment is an operational-level decision subject to tort liability.

131. Commercial Carrier Corp., 371 So. 2d at 1019.


133. Commercial Carrier Corp., 371 So. 2d at 1019. The test established in Evangelical United Brethren Church was applied by the Washington Supreme Court in Chambers-Castanes. See supra text accompanying notes 40-57.
analysis adopted by the Commercial Carrier Corp. court should be the
controlling precedent.134 If, for instance, a Florida resident dials "911"
to report an emergency situation, an operator will likely answer, provid-
ing assurance that assistance will be dispatched. If the operator negli-
gently dispatches police to the wrong address, causing a delay resulting
in injury, the victim may file suit against the police department and the
county as defendants in a civil suit for damages.

The liability of the police department and the county rests with a
court's determination of whether operating a "911" emergency system
is a judgmental, policy making decision, or whether the operation of
the "911" system is merely the implementation of a broad policy deci-
sion subject to tort liability. Defendants should move for dismissal and
a court should base its decision on Commercial Carrier Corp. and its
progeny.

In all likelihood, a court will apply the four prong Evangelical
United Brethren Church test adopted by Commercial Carrier Corp.: First, does the challenged act necessarily involve a basic governmental
program?135 In the hypothetical, the county and the police department
developed a system of law enforcement designed to secure safety to the
public. The "911" system is part of that overall plan. The language of
the Florida Emergency Telephone Act also indicates that the imple-
mentation of a statewide "911" emergency system involves broad pol-
icy or planning decisions.

Second, is the act or decision essential to the accomplishment of
that program as opposed to one which would change the course of the
program?136 Discretion is fundamental; any limit on discretion would
greatly hinder a system of law enforcement. Also, the directing of
emergency assistance to people in need is the primary goal of the
"911" statute. The plan is designed to serve the public, as are the pub-
lic service agencies responsible for responding to calls for help. There-
fore, broad tort liability would defeat the program's objective.

Third, does the act or decision require the exercise of basic policy
evaluation, expertise or judgment?137 Because most decisions in law en-
forcement affect the rights of citizens, there is a great need for expert-
tise, evaluation and judgment in these decisions. The decision to dis-

134. Evangelical United Brethren Church, 407 P.2d at 445; Commercial Carrier
Corp., 371 So. 2d at 1019.
135. Id. at 445; 371 So. 2d at 1019.
136. Id.
137. Id.
patch help to a resident as quickly and efficiently as possible is but a small part of an entire system designed to provide public services. However, to attach liability where calls are mishandled would undermine the entire system.

Lastly, does the governmental agency have the constitutional or statutory authority to make the decision? The Florida Emergency Telephone Act encourages municipalities to adopt the “911” system. Thus, each municipality has an affirmative duty to establish a comprehensive, statewide emergency assistance plan. Also, law enforcement is given a high level of discretion, because to do otherwise would cause the system to undergo substantial unknown changes.

With affirmative responses to all four prongs of this preliminary test, a court, with a reasonable degree of assurance, would classify this as discretionary, nontortious, governmental conduct. Thus, it would be a planning-level decision cloaked with sovereign immunity.

The preceding example illustrates that under the Commercial Carrier Corp. rationale, the municipality in the hypothetical would be free from liability. Although the resident properly dialed “911” and reported a burglary, inadequate attention to his call resulted in financial and physical injury.

Further evidence of the Florida Supreme Court’s desire to immunize municipalities from tort liability is found in a recent court opinion, Trianon Park Condominium v. City of Hialeah. In Trianon Park, due to a severe roof leakage and other building defects, the condominium owners sustained extensive damage to their property. The owners brought an action against the City of Hialeah, alleging that the city was negligent in inspecting the condominiums and in enforcing specific provisions of the building code pursuant to the city’s police power.

Recognizing sovereign immunity for the city, the supreme court held that the sovereign immunity statute did not create any new causes of action, “but merely eliminated the immunity which prevented recovery for existing common law torts committed by the government.” As the city did not owe a common law duty to the individual owners for the enforcement of police power functions, it was unnecessary for the court to reach the planning level versus operational level analysis. The lack of a common law duty to exercise police power functions,
which include building inspections, immediately immunizes the city from tort liability. The supreme court did, however, state that where a common law duty existed, or where a statutory duty had been created, application of the four prong test developed in *Evangelical United Brethren Church* was necessary to determine whether the city acted in furtherance of a planning-level or operational-level function.

The *Trianon Park* decision suggests that should a court determine the state's creation of a "911" emergency system constitutes an exercise of a police power function, a common law duty to provide emergency assistance does not exist, and immunity from a negligence action arising out of a mishandled "911" emergency call would be afforded the city. However, should the court determine that "911" emergency assistance could be provided by private persons as well as governmental entities, the court, recognizing a common law duty, would determine municipal tort liability in accordance with *Commercial Carrier Corp.* and its progeny. Application of either rationale ultimately produces harsh results for the victim.

When a municipality decides to adopt a plan for emergency telephone assistance, decided authority leaves little doubt that the municipality has made a decision for which immunity attaches. Whether immunity is justifiable because of the public duty doctrine, or because the decision is quasi-legislative or legislative, or because it is a planning-level function, the activity remains immunized from judicial scrutiny.

However, the addition of other factors, such as those presented in the hypothetical, invoke the need to reexamine the sovereign immunity doctrine. Since the Florida legislature enacted the "911" plan, more than one-half of municipalities statewide have adopted the system. The systems are highly sophisticated and efficient, shortening response time for calls and providing more protection for the victim. When a "911" call is placed in some counties, the residence from which the call

141. *See supra* text accompanying notes 132-33.
142. *Trianon Park*, 468 So. 2d at 918-19.
144. *Warren*, 444 A.2d at 4; *Doe*, 92 N.M. at 503, 590 P.2d at 651. *See also supra* text accompanying notes 87-103.
145. *Hargrove*, 96 So. 2d at 133. *See also supra* text accompanying notes 17-18.
147. *Florida 911 Program*, *supra* note 1, at 1.
originated is immediately recorded by computer and operators know
the immediate source of the call. 149 Most counties utilizing "911" sys-
tems urge their use as opposed to direct dialing to police. These and
many other factors establish a nexus between the public and the public
service agencies. As such a nexus is necessary to create an actionable
duty, the coalition of all these factors may impose liability on a
municipality.

Individuals dialing "911" in times of crisis are relying on the sys-
tem to afford themselves needed assistance. Injustice occurs if these
individuals, not given assistance when dialing "911", are refused com-
ensation for their injuries because the acts of the municipality are im-
mune from tort liability. This injustice calls for a re-evaluation of mu-
nicipal sovereign immunity in Florida. 150

Decisions that followed the Commercial Carrier Corp. rationale
have left the doctrine of sovereign immunity in Florida in a confused
state. There is uncertainty among lower courts as to what constitutes
judgmental, nontortious planning-level functions. Commercial Carrier
Corp. calls for a case-by-case application of the test emanating from its
opinion, 151 so that a victim of a municipality's negligence for failing to
properly handle a "911" emergency call could be entitled to compensa-
tion, although it is unlikely he will receive it. Compensation for injuries
resulting from mishandling of a "911" call is unlikely. Yet, the munici-
pality, rather than the individual, is in a better financial position to
bear the loss for injuries resulting from its own negligence. The time
for victims to be compensated for injuries arising out of a municipal-
y's negligent operation of a public service function is upon us. The
Florida Supreme Court must eliminate confusion in the lower courts by
clarifying the applicability of sovereign immunity to municipalities. 152

149. Id.

150. The scope of this article does not purport to be all inclusive. There could be
instances when the doctrine of sovereign immunity should be applicable. For example,
should an emergency call not be communicated because the "911" computer system is
nonfunctional or because telephone lines are down, the municipality should not be lia-
ble for injury resulting from the "911" call not being handled properly. Injury in this
instance is not the fault of the municipality. But see Galuszynski v. City of Chicago,
elapsed from the time the "911" call was placed until police responded. The court
dismissed plaintiffs' action for failing to allege the existence of a special duty owed by
the police department to complainants.

151. Commercial Carrier Corp., 371 So. 2d at 1022.

152. Before Payne was decided by the Florida Supreme Court, the Fourth Dis-
The planning-level versus operational-level dichotomy may be the rationale for deciding municipal tort liability, but it must first be understood before it can be effectuated.

Legislative action would be an alternative solution to the supreme court's reluctance to clarify confusion circling municipal sovereign immunity. The legislature has the power to express to Florida courts its intent behind section 768.28. The Commercial Carrier Corp. court has carved out an exception to the waiver statute. Since then, district courts have followed suit by carving out exceptions to the Commercial Carrier Corp. opinion. To rectify a situation which has left Florida courts clueless as to the meaning of municipal sovereign immunity, and a situation which disfavors compensation to individuals injured because of municipal negligence, the Florida legislature could take affirmative measures to clarify the sovereign immunity doctrine. Without such action, the position of a municipality and a victim remains uncertain and confused. If the Florida Supreme Court continues to avoid clarifying the Commercial Carrier Corp. decision, the Florida legislature should act. It should exercise its official duty and pass legislation which provides victims of mishandled "911" calls to compensation for injuries sustained by a municipality's negligence.

III. Conclusion

Municipalities nationwide are utilizing "911" systems to assure community members rapid access to medical and police services. "911" allows municipalities to dispatch emergency assistance to injured individuals with greater accuracy and efficiency. At the suggestion of local governments, individuals in the community are dialing "911" rather than direct dialing to receive emergency services.

However, a municipality's mishandling of an emergency call raises the issue of whether tort liability should attach to this negligent conduct. As Florida has yet to deal with this issue, and other jurisdictions are divided on the liability issue, an interesting problem may confront Florida courts. The legislature encourages the use of the "911" system, yet seemingly shields municipalities from liability for negligently operating the system. This legislative protection potentially creates a situa-

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[153. FLA. CONST. art. III.]
tion where a person injured as a result of a municipality’s negligence is denied compensation. A re-evaluation of the Florida sovereign immunity doctrine, by either the Florida Supreme Court or the Florida legislature, is the only opportunity an injured victim has to recover damages resulting from this negligence.

Douglas L. Bates
The Reemergence of Implied Assumption of Risk in Florida

I. Introduction

Florida plaintiffs injured by the negligence of others face a familiar obstacle in our court system in their pursuit of compensation for their injuries. Florida is experiencing the reemergence of the traditional defense of assumption of risk. This defense, if proved, can completely bar a plaintiff's recovery of damages.¹

In 1977, the Florida Supreme Court, in the landmark case of Blackburn v. Dorta,² sought to eliminate the confusion arising from judicial applications of the defense by merging the defense of implied assumption of risk³ into the defense of contributory negligence.⁴ Since the plaintiff's recovery could be reduced according to fault, although not completely prohibited,⁵ legal commentators believed that the elimination of this defense would benefit the treatment of a negligence action.⁶

¹. Restatement (Second) of Torts § 496A (1956); See generally Comment, Assumption of Risk — Adoption of Comparative Negligence, 6 Fla. St. L. Rev. 211 (1978); James, Assumption of Risk, 61 Yale L.J. 141 (1952).
². 348 So. 2d 287 (Fla. 1977).
³. Implied assumption of risk exists when the plaintiff's consent to assume a risk is implied from his conduct, rather than from an express agreement. For example, a person playing golf assumes all obvious and ordinary risks of the game even though he has not entered into an actual agreement to do so. Brady v. Kane, 111 So. 2d 472 (Fla. 3d Dist. Ct. App. 1959).
⁴. The defense of contributory negligence eliminates or reduces the defendant's liability because the plaintiff contributed to his own injury by failing to act reasonably. For example, a person who is injured by walking in a dangerously darkened area may be contributorily negligent because he failed to look out for his own safety. Brandt v. Van Zandt, 77 So. 2d 858 (Fla. 1954) (en banc).
⁶. Legal commentators have stated their dissatisfaction with the doctrine of assumption of risk:

The expression, assumption of risk, is a very confusing one. In application it conceals many policy issues, and it is constantly being used to beg the real question. Accurate analysis in the law of negligence would probably
However, the *Blackburn* holding did not address the separate defense of express assumption of risk,\(^7\) which remains a total bar to the recovery of damages in negligence actions. Unfortunately, the *Blackburn* court's statement in dicta, concerning the disposition of express assumption of risk,\(^8\) has resulted in a plethora of interpretations which have led to an expansion of the doctrine beyond its traditional and historic meaning.\(^9\)

be advanced if the term were eradicated and the cases divided under the topic of consent, lack of duty, and contributory negligence. Then the true issues involved would be more clearly presented and the determinations, whether by judge or jury, could be more accurately and realistically rendered.


"Except for express assumption of risk, the term and concept, assumption of risk, should be abolished. It adds nothing to modern law except confusion." James, *Assumption of Risk*, 61 YALE L. J. 141, 169 (1952).

Upon close analysis, it becomes apparent that the defense traditionally known as 'implied assumption of risk' is in reality nothing more than a particular form of contributory negligence . . . . Since in negligence cases, with the advent of comparative fault, it has become totally superfluous, it should be abolished by name in these cases. Its perpetuation can only lead to confusion and error.


In the decade . . . [since] . . . 1956 there came to be substantial judicial and scholarly support for the point of view . . . that the doctrine deserves no existence (except for express assumption of risk) and is simply a confusing way of stating no duty rules or, where there has been a breach of duty toward plaintiff, simply one kind of contributory negligence.


7. *Blackburn*, 348 So. 2d at 290. The defense of express assumption of risk is characterized by an actual agreement, made in advance, that the defendant will not be responsible for injuries to the plaintiff caused by specific risks. See generally McClain, *Contractual Limitation of Liability for Negligence*, 28 HARV. L. REV. 550 (1915).

8. *Blackburn*, 348 So. 2d at 290.

9. As a general rule, the doctrine of assumption of risk pertains to controversies between masters and servants, though circumstances may arise between parties other than masters and servants when the doctrine may apply; but such defense is never available, unless it rests on contract, or . . . an act done so spontaneously by the party against whom the defense is invoked that he was volunteer, and any bad result of the act must be attributed to an exercise of his free volition, instead of to the conduct of his
The effect of this expansion can be devastating to injured plaintiffs. For example, a jockey was paralyzed as a result of an incident which occurred during a race. The jury decided that the cause of this injury was the negligence of the owners of the racetrack. They also found that the jockey was not at fault. The jury awarded the jockey ten million in damages. However, the Third District Court of Appeal held that the jockey should be denied recovery because the jury found that he had expressly assumed the risk of injury.

This note suggests that Florida court decisions since Blackburn have clouded the distinction between express and implied assumption of risk. Consequently, what the Blackburn court sought to eliminate from Florida tort law has now been revived by judicial opinions enlarging the conduct which can be labeled as express assumption of risk.

This avoidance of the Blackburn mandate can be seen by an examination of recent decisions which expand and redefine a plaintiff's express assumption of the risk of injury. This note will examine Florida decisions conflicting with Blackburn, as well as possible options available to the supreme court concerning the doctrine of assumption of risk.

II. The Doctrine of Assumption of Risk

A. History

The doctrine of assumption of risk emerged from the master-servant relationship in the late nineteenth century. This doctrine was

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adversary.


11. Id. at 1252.


used in several distinct ways to excuse the master from liability when a servant was injured because of the master’s negligence. The application of assumption of risk eased the development of the Industrial Revolution by reducing the cost of “human overhead.” The added expense of compensating an employee for injuries which occurred at work was avoided. As a result, the cost of doing business was lowered.  

The employer owed the employee the duty to act as a reasonable person in a comparable situation. For example, the master’s duty to his servant was to provide a reasonably safe place to work. However, the master did not have a duty to protect his servants from risks which were inherent in the particular employment. In order to hold a master responsible for negligence the servant would have to demonstrate that his injuries did not result from these inherent risks. Consequently, either the master had not violated his obligation to the servant or he had no duty to protect the servant from the cause of his injury.  

In addition, if the servant proved that the master was negligent, the master could employ the doctrine of assumption of risk as a defense. This aspect of the doctrine stated that if the servant continued to work at the master’s place of business despite knowledge of the danger, the master was absolved from liability.

305 (2d ed. 1913).
16. “The assumption of risk doctrine . . . was attributed by this Court to a rule of public policy insomuch as an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business but would also encourage carelessness on the part of the employee.” Tiller v. Atlantic Coastline Ry. Co., 318 U.S. 54, 59 (1943) (quoting Mr. Justice Bradley in Tuttle v. Detroit, Grand Haven & Milwaukee Ry., 122 U.S. 189, 196 (1887)).
17. Martin, 106 N.W. at 361.
20. 3 H. Labatt, supra note 13, at 3188. See, e.g., Swanson v. Miami Home Milk Producers’ Ass’n, 117 Fla. 110, 157 So. 415 (1934).
21. The first case of note in this area was Priestly v. Fowler, 150 Eng. Rep. 1030 (1837).
23. Id.
The basis of the master-servant relationship is contractual. The master agrees to pay the servant and the servant agrees to perform specific tasks for the master. Logically, the doctrine of assumption of risk was also implemented in contractual agreements independent of master-servant relationships. Parties were free to enter into contracts which contained exculpatory clauses. These clauses shifted the burden of loss or injury. The party was said to have assumed the risk.

As assumption of risk evolved, the courts utilized the doctrine to describe different concepts. Courts used assumption of risk to define the scope of the master’s duty, the consent of the servant to work with knowledge of specific dangers, and express agreements to shift the risk of loss. Courts and commentators attempted to clarify the ensuing confusion by assigning labels and differentiating among several variations of the doctrine. This effort was unsuccessful, however, and assumption of risk became commingled with other traditional defenses to negligence.

B. Assumption of Risk: A General Definition

The doctrine of assumption of risk includes several concepts. Generally, the doctrine refers to situations where a party voluntarily consents to encounter a known risk. The doctrine is divided into two basic areas: implied and express assumption of risk.

Express assumption of risk is traditionally characterized as an actual agreement between two parties who agree to shift the risk of loss. One party agrees to assume the risk of injury, and the other party is relieved from liability. The agreement may be either oral or written. Although these agreements are not favored by the courts, they will be

29. Bartholf, 71 So. 2d at 483.
30. Restatement (Second) of Torts § 496A (1965).
31. Id.
upheld if certain conditions are met. First, the intention of assuming the risk must be clear and unequivocal. Second, the parties to the agreement must have comparable bargaining power. Third, the agreement must not be against public policy. For example, an agreement between an employer and employee whereby the employee assumes all risks of injury will not be upheld. The employer would be using his superior bargaining position to take advantage of an employee; the employee's agreement may be the result of economic necessity.

Implied assumption of risk is divided into two subcategories: primary and secondary implied assumption of risk. In a negligence action, primary implied assumption of risk focuses on the scope of the defendant's duty. It is used when the defendant either had no duty to prevent the plaintiff's injury, or he had a duty but did not breach it. For example, if a train passenger falls as a result of the normal jostling movement of the train, the passenger can not recover damages from the railway company. The train company does not have a duty to protect its passengers from normal movement of the train.

Primary implied assumption of risk, like negligence, focuses on the duty owed by a negligent defendant to the injured party. This doctrine applies to activities which have built-in and unavoidable risks. Therefore, the scope of the defendant's duty does not extend to protecting the plaintiff from injuries caused by these specific dangers. In this context, assumption of risk is just another way of saying that the defendant is not negligent, since no breach of duty could have caused the plaintiff to suffer injury.

Secondary implied assumption of risk is an affirmative defense which can be raised by the defendant to bar the plaintiff from recovery.

33. O'Connell v. Walt Disney World Co., 413 So. 2d 444, 447 (Fla. 5th Dist. Ct. App. 1982).
34. Ivey Plants, 282 So. 2d at 208. See Blanton v. Dold, 109 Mo. 64, 65, 18 S.W. 1149, 1151 (1892).
35. RESTATEMENT (SECOND) OF TORTS § 496B comment e (1965).
36. Id. § 496B comment f.
37. 2 F. HARPER & F. JAMES, LAW OF TORTS § 21.6 at 1185-87 (1956).
40. Meistrich, 31 N.J. at 56, 155 A.2d at 97.
41. Blackburn, 348 So. 2d at 290.
42. See O'Connell, 413 So. 2d 444, 448 (Fla. 5th Dist. Ct. App. 1982).
A party who does not expressly assume the risk of injury, but voluntarily encounters a known risk, has impliedly assumed the risk. His conduct creates an inference that he has consented to assume the risk. This segment of the doctrine focuses on the plaintiff's behavior. The plaintiff's conduct may be reasonable (strict) or unreasonable (qualified).

For example, if a person accepts a ride in a car which he knows has defective brakes, his behavior may be characterized as unreasonable secondary implied assumption of risk. However, if he accepts a ride in the same car because it is late at night and it is the only available transportation, his behavior may be described as reasonable secondary implied assumption of risk.

As indicated, secondary assumption of risk may be characterized as reasonable or unreasonable. When the plaintiff voluntarily encounters a known risk in an unreasonable manner, the defendant may raise the defense of assumption of risk. In addition, the plaintiff is contributorily negligent because he failed to act as a reasonable person. However, the latter defense cannot be raised if the plaintiff's behavior in assuming the risk was reasonable.

In Florida, the defenses of secondary (unreasonable) implied assumption of risk and contributory fault both served to completely absolve the defendant from liability in spite of his negligence. Although the Florida courts reached conflicting conclusions as to the similarity and differences of these doctrines, the findings were not crucial to the

43. Restatement (Second) of Torts § 496C (1965).
44. Id.
45. See Parker v. Redden, 421 S.W.2d 586 (Ky. 1967).
47. Blackburn, 348 So. 2d at 291.
48. Id.
49. Id. at 292.
51. The distinctions between assumption of risk and contributory negligence have been clouded by Florida courts. "The doctrine of assumption of risk is only an engrainment upon the well-established law applicable to contributory negligence." Martin v. Plymouth Cordage Co., 209 So. 2d 481, 483 (Fla. 1st Dist. Ct. App. 1968).
52. [S]ince both [assumption of risk and contributory negligence] are available to bar the action, it makes no differences what the defense is called." Kaplan v. Wolff, 198 So. 2d 103, 107 (Fla. 3d Dist. Ct. App. 1967).
53. "There is little distinction between the two defenses of [assumption of risk and
outcome of these cases because the effect was the same. The plaintiff was barred from recovery regardless of which defense was successfully pled.

III. *Hoffman v. Jones*: Elimination of Contributory Negligence

In 1973, the importance of distinguishing between these defenses became crucial when the Supreme Court of Florida decided the landmark case of *Hoffman v. Jones*. 52 In *Hoffman*, a widow was precluded from recovering damages for her husband's death, which was the result of the defendant's negligence, because the plaintiff's decedent was found to be contributorily negligent. 53 In order to alleviate the "harshness" 54 of this result, the court held that contributory negligence was no longer a complete bar to recovery. The principles of pure comparative negligence would apply whenever the defense of contributory negligence was raised. 55 Therefore, if both the plaintiff and the defendant were negligent, the plaintiff's recovery would merely be reduced in proportion to the degree that his negligence contributed to the injury.

The court stated that they adopted the system of comparative negligence because it was the most equitable system. 56 Since comparative negligence "equate[s] liability with fault," 57 the court concluded that contributory negligence]. Both partake of exposure by a plaintiff to danger, knowledge of which is attributed to plaintiff; actual knowledge in assumption of risk, and at least constructive knowledge in contributory negligence." Rickerton v. Seaboard Airline R.R. Co., 403 F.2d 836, 839 n. 3 (5th Cir. 1968).

In attempting to differentiate between contributory negligence and assumption of risk, the *Blackburn* court stated, "[t]he leading case in Florida dealing with the distinction between the doctrines recognizes that 'at times the line of demarcation between contributory negligence and assumption of risk is exceedingly difficult to define.'" *Blackburn*, 348 So. 2d at 289 (quoting Byers v. Gunn, 81 So. 2d 723, 727 (Fla. 1955)).


53. *Hoffman*, 280 So. 2d at 437.

54. Id.

55. *See* Timmons & Silvis, *supra* note 52, at 743-749.

56. *Hoffman*, 280 So. 2d at 438.

57. Id.

http://nsuworks.nova.edu/nlr/vol10/iss3/15
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this was "the better doctrine." 58

Although the implementation of this system raised questions about corollary doctrines, the court did not answer these questions. 59 The court suggested that the lower courts look to the case law decided under a Florida railroad statute. 60 This statute delineated a comparative negligence system in the limited area of negligence actions against the railroad companies. However, there are no cases dealing with assumption of risk under this statute. A provision of the statute stated that a person who consents to the injury cannot recover. 61 It has been suggested that this exclusionary provision resulted in the absence of any case law applicable to assumption of risk. 62

With the adoption of comparative negligence, the courts were faced with two threshold problems: 1) the courts had to reexamine the differences between assumption of risk and contributory negligence; and 2) the courts had to determine whether assumption of risk survived the adoption of comparative negligence. Predictably the confusion surrounding assumption of risk generated conflicting trial and appellate court decisions. 63

58. Id.

59. Id. at 439.

60. Fla. Stat. § 768.06 (1977), repealed by 1979 Fla. Laws C. 79-163 § 6. This statute was passed in 1887. It applied only to actions involving the railroads. The statute was held unconstitutional in Georgia S. & Fla. R.R. v. Seven-Up Bottling Co., 175 So. 2d 39 (Fla. 1965), based on due process and equal protective grounds.

61. "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence." Fla. Stat. § 768.06 (1977), repealed by 1979 Fla. Laws C. 79-163 § 6.


63. See, e.g., Dorta v. Blackburn, 302 So. 2d 450 (Fla. 3d Dist. Ct. App. 1974) (rev'd 348 So. 2d 287, on remand 350 So. 2d 25) held that defense of assumption of risk continues to bar recovery in negligence actions despite adoption of a comparative negligence system.


These decisions stated that the defense of assumption of risk was no longer a complete bar to recovery.
IV. Assumption of Risk in Florida

A. Blackburn v. Dorta

1. Elimination of Implied Assumption of Risk

In 1977, the Florida Supreme Court sought to eliminate resulting inconsistencies by determining the effect of the adoption of comparative negligence on the doctrine of assumption of risk. The court granted certiorari under conflict certiorari jurisdiction to review three conflicting District Court of Appeal decisions. The cases of Dorta v. Blackburn, Leadership Housing v. Rea, and Maule Industries v. Parker were consolidated for review.

In the landmark case of Blackburn v. Dorta, the Florida Supreme Court held that the doctrine of implied assumption of risk did not survive the adoption of comparative negligence. The court based its opinion on the premise that if the defenses of implied assumption of risk and contributory negligence are the same then assumption of risk must be abolished pursuant to the holding in Hoffman v. Jones. In addition, the Blackburn court stated that aspects of implied assumption of risk which overlap other principles of negligence will also be eliminated. To reach this decision, the court systematically defined "a potpourri of labels, concepts, definitions, thoughts and doctrines" which comprise the doctrine of assumption of risk.

64. See FLA. CONST. art. V, § 3(b)(3).
65. 302 So. 2d 450. The plaintiff, Kevin Blackburn, was injured while he was a passenger in a dune buggy operated by the defendant. The trial court refused to give an instruction on assumption of risk and the Florida Third District Court of Appeal affirmed the trial court's action.
66. 312 So. 2d 818 (Fla. 4th Dist. Ct. App. 1975). The plaintiff was injured when she tripped in a hole in her driveway. She alleged the defendant negligently installed the driveway. The trial court granted a summary judgment to the defendant. However, the Fourth District Court of Appeal reversed and stated that assumption of risk was not a bar to recovery.
67. 321 So. 2d 106 (Fla. 1st Dist. Ct. App. 1975). Plaintiff was injured because of the defendant's negligent operation of a truck. At trial, the defendant prevailed. However, the plaintiff contended that it was error to instruct the jury that if plaintiff assumed the risk of injury, he was completely barred from recovery. The Fourth District Court of Appeal agreed and reversed the decision.
68. Blackburn, 348 So. 2d at 293.
69. Id. at 289.
70. Id. at 291.
71. Id. at 290.
After excluding express assumption of risk from their analysis, the court discarded each aspect of implied assumption of risk for various reasons. The court described primary implied assumption of risk as either a lack of duty to protect the plaintiff from the inherent risks of the plaintiff's activities or that the duty owed by the defendant was not breached. This aspect of assumption of risk is abrogated because the concepts of duty and breach are already included in the analysis to determine the defendant's negligence.

Secondary implied assumption of risk included reasonable and unreasonable behavior. Since unreasonable implied assumption of risk is so similar to contributory negligence and it espouses no separate function, the court merged this aspect of secondary implied assumption of risk into contributory negligence. Reasonable implied assumption of risk is also eliminated. The court reasoned that the retention of this concept would be unfair and inconsistent with the explicit equitable reasoning applied in *Hoffman v. Jones*. The inequity of granting recovery to a plaintiff who unreasonably assumed a risk and denying recovery to a plaintiff whose behavior was reasonable is readily apparent.

Equitable considerations were a collateral basis of the court's decision. The court clearly stated that their decision would have been the same based on the reasoning in *Hoffman v. Jones*.

The *Hoffman* decision underscored the court's determination to resolve cases as equitably as possible. In adopting comparative negligence, the *Hoffman* court indicated that the "equation of liability with fault" to determine the plaintiff's recovery achieves this goal. The *Blackburn* court adopted this formula. The court held that the defenses of implied assumption of risk and contributory negligence are merged. Thereafter, when the defense of implied assumption of risk is successfully raised, the principles of comparative negligence will govern the effect of this defense on the plaintiff's recovery.

72. *Id.*
73. *Id.* at 291.
74. *Id.* at 291-92.
75. *Id.* at 293. The *Blackburn* court stated: "There is little to commend this doctrine of implied-pure or strict assumption of risk and our research discloses no Florida cases in which it has been applied." *Id.* at 291.
76. *Id.* at 292.
77. *Hoffman*, 280 So. 2d at 438.
78. *Id.*
79. *Blackburn*, 348 So. 2d at 293.
2. **Treatment of Express Assumption of Risk**

Although express assumption of risk generally encompassed only a contractual concept based on actual oral or written consent to a risk of injury,\(^{80}\) the confusion as to the parameters of this doctrine was fostered by dicta in the *Blackburn* decision. The court stated:

> It should be pointed out that we are not here concerned with express assumption of risk which is a contractual concept outside the purview of this inquiry and upon which we express no opinion herein. ... Included within the definition of express assumption of risk are express contracts not to sue for injury or loss which may thereafter be occasioned by the convenantee’s negligence as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport.\(^{81}\)

The trial and appellate courts in Florida have viewed the non-inclusive words “such as” as an invitation to expand the doctrine of express assumption of risk beyond the *Blackburn* definition.

Traditionally, the courts applied express assumption of risk to contracts, releases and waivers.\(^{82}\) Implied assumption of risk was applied in all other situations in which a person voluntarily encountered a known risk and therefore, indicated his consent to assume the risk. These cases included sporting and recreational activities. Historically, however, the lower courts often used the generic term assumption of risk without indicating which facet of the doctrine they were applying.\(^{83}\)

Prior to *Blackburn* the commingling of these terms was not critical to the outcome of the case. However, after *Blackburn*, the distinctions were crucial as to whether the plaintiff was precluded from recovering damages for his injury.

**B. Interpretation of Blackburn: Definition of Express Assumption of Risk by Florida Courts**

Subsequently, the trial and appellate courts interpreted the defini-

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80. City of Jacksonville Beach v. Jones, 101 Fla. 96, 133 So. 562 (1931).
81. *Blackburn*, 348 So. 2d at 290.
82. *Restatement (Second) of Torts* § 496B comment a (1965).
tion of express assumption of risk as stated in *Blackburn* in a decidedly expansive manner. Florida courts have determined that express assumption of risk remains a total bar to recovery in four situations: contractual waivers, contact sports, aberrant forms of non-contact sports, and professional non-contact sports. An examination of the cases which comprise this area is helpful to understand the present status of the doctrine.

1. **Contracts**

The Fifth District Court Appeal addressed the issue of express assumption of risk in *O'Connell v. Walt Disney World.* In this case the plaintiff, a minor, was injured while on a guided horseback ride. The plaintiffs alleged that the negligent actions of the defendant caused the horses to stampede, resulting in plaintiff’s injury. The trial court granted summary judgment to the defendant, and the plaintiff appealed. The appellate court reversed the trial court, holding that the release signed by the plaintiff’s parents did not contain the specific language necessary to absolve the defendants from liability.

The court added to the expansion of the doctrine in two ways. The opinion repeatedly altered the *Blackburn* definition of express assumption of risk. The court incorrectly characterized the defense as applying to participation in a “sport,” “sport situation,” “contact or competitive sports,” and “an activity such as a sport.” The court also examined plaintiff’s behavior to determine if the defense of express assumption of risk could be applied because the plaintiff was engaged in an aberrant form of horseback riding. However, there was no evidence of participation in an unusual or aberrant form of horseback riding. Therefore, the court stated that the defense did not apply in this situation. This analysis serves to add momentum to the use of a concept which is outside the supreme court’s definition of the defense.

The opinion does lend some insight into the reasons for the courts advocatio of the expansion of the doctrine. The court stated that the theory of primary implied assumption of risk is more applicable to this

84. 413 So. 2d 444 (Fla. Dist. Ct. App. 1982).
85. *Id.* at 447.
86. *Id.* at 447-48.
87. *Id.* at 447.
88. Although the plaintiff in this case was not barred from recovery, the court’s language may be indicative of its inclination to apply the defense of express assumption of risk if the plaintiff participated in an aberrant form of horseback riding.
situation. This theory is usually applied to inherently dangerous activities. If the plaintiff was engaged in such an activity, the defendant would have no duty to protect him from these risks unless the defendant added to these risks. However, this defense is no longer available because Blackburn held that "[t]his branch or trunk of assumption of risk is subsumed in the principle of negligence itself." Therefore, in order to continue to bar the plaintiff from recovery, the courts must resort to the legal fiction of applying express assumption of risk.

Contractual assumption of risk is discussed further in Van Tuyn v. Zurich American Insurance Co. The Fourth District Court of Appeal stated that the waiver signed by the plaintiff before she rode and was injured by a mechanical bull ride at defendant's club did not bar recovery. The court held that the trial court erred in granting summary judgment to the defendant. The waiver was invalid because it did not contain specific language manifesting intent to either release or indemnify the club for its own negligence.

After concluding that the release did not preclude recovery, the court sought to determine whether the plaintiff expressly assumed the risk by riding the mechanical bull. They stated that this defense was unavailable unless plaintiff subjectively understood the risks inherent in mechanical bull riding and actually intended to assume these risks. Therefore, the case was remanded to determine whether these factors could be proven.

Although the plaintiff was not denied recovery, it is disconcerting that the court attempted to apply the defense to this case since mechanical bull riding is not a contact sport. The court's discussion may be explained by its statement of the facets of the defense. The court states, "[f]or express assumption of risk to be valid, either by contract or by voluntary participation in an activity, it must be clear that the plaintiff understood that she was assuming the particular conduct by the defendant which caused her injury." It should be noted that the court abandoned the Blackburn definition and substituted the

89. Id. at 448.
90. Blackburn, 348 So. 2d at 291.
91. 447 So. 2d 318 (Fla. 4th Dist. Ct. App. 1984).
92. Id. at 320.
93. Of course it is arguable whether mechanical bull riding is a contact sport. This author views a contact sport as one in which contact is a certainty (part of the game) and not merely a possibility. Otherwise, all recreational activities could be viewed as contact sports.
94. Id. (emphasis added).
word "activity" in place of "contact sport." Furthermore, in dicta, the Fourth District Court of Appeal in Van Tuyn agreed with the Fifth District Court of Appeal in O'Connell that this situation is more clearly analyzed as primary implied assumption of risk.\footnote{Id. at 321.}

2. Aberrant Forms of Non-Contact Sports

In Strickland v. Roberts,\footnote{382 So. 2d 1338 (Fla. 5th Dist. Ct. App.), petition for rev. denied, 389 So. 2d 1115 (Fla. 1980).} the plaintiff, a waterskier, was injured when he hit a stationary dock. Strickland was trying to spray water on some youngsters sunbathing on the dock by skiing as close as possible to the dock. The trial court granted summary judgment to the defendant who was driving the tow boat. On appeal, the Fifth District Court of Appeal agreed with the trial court that the defendant was not negligent. Although this finding resolved all the issues raised on appeal, the District Court seized the opportunity to discuss the application of express assumption of risk to the facts before it.

In dictum, the court noted that Blackburn excluded contact sports from the abrogation of assumption of risk as a defense. Judge Cobb, writing for the majority, stated that usually waterskiing was not a contact sport. However, the plaintiff was engaged in an aberrant form of the sport. Therefore, the court inferred that the consequence of engaging in unusual forms of sport was the application of express assumption of risk. The court concluded that "[t]he risk of hitting a dock inheres in the sport of narrowly missing it. Strickland having assumed the risk of his game, played it one too often and lost."\footnote{Id. at 1340.} Thus the expansion of express assumption of risk to include aberrant forms of non-contact sports was implemented.

In Gary v. Party-time Co.,\footnote{Strickland, 434 So. 2d 338 (Fla. 3d Dist. Ct. App. 1983).} the plaintiff was injured while roller-skating down a ramp holding ski poles. The trial court granted a directed verdict to the defendant based solely on a release signed by the plaintiff. The Third District Court of Appeal, without discussion, affirmed the trial court's determination as to the sufficiency of the written release.\footnote{Id. at 339-40.} Although the trial court rejected the validity of express assumption of risk (based on participation in a situation such as a contact}

95. Id. at 321.
96. 382 So. 2d 1338 (Fla. 5th Dist. Ct. App.), petition for rev. denied, 389 So. 2d 1115 (Fla. 1980).
97. Id. at 1340.
99. Id. at 339-40.
sport) and it was not an issue on appeal,\(^{100}\) the appellate court took this opportunity to interpret the non-contractual aspect of express assumption of risk as stated in \textit{Blackburn}. This discussion is premised by the court’s approval of the \textit{Strickland} court’s expansion of the doctrine to include “aberrant forms of non-contact sports.”\(^{101}\) The court then applied the \textit{Strickland} rationale to this case. The court stated that roller skating down a ramp holding ski poles is aberrant behavior. Therefore, the court concluded that the plaintiff’s action was within \textit{Strickland}’s definition of express assumption of risk. In a confusing attempt to justify the \textit{Strickland} conclusion, the \textit{Gary} court indicated that participation in an aberrant form of non-contact sport is somehow analogous to participation in contact sports.

The Third District Court of Appeal further confused the issue by stating that the plaintiff is barred from recovery on the basis of the release “coupled”\(^{102}\) or “combined”\(^{103}\) with voluntary aberrant acts.\(^{104}\) However, \textit{Blackburn} states that express assumption of risk is a valid defense on the basis of “express contracts not to sue as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport.”\(^{105}\) The \textit{Gary} court circumvented the release as the sole basis for the directed verdict in order to reinforce the inclusion of aberrant forms of non-contact sports within the definition of express assumption of risk. It characterized the release merely as additional “evidence of actual consent to assume the risk of injury”\(^{106}\) and not as an express contract not to sue.\(^{107}\)

In \textit{Caravel v. Alvarez},\(^{108}\) aberrant forms of non-contact sports were again included within the scope of express assumption of risk. Plaintiff’s decedent died as a result of a fall while horseback riding. The jury determined that the plaintiff expressly assumed the risk of his injuries. The trial court then granted a judgment in favor of the defendant. Appellants argued that the court erred in giving the instruction on express assumption of risk to the jury, since horsebacking riding could not be considered a contact sport. In affirming the trial court’s

\(^{100}\) \textit{Id.} at 339 n.3.
\(^{101}\) \textit{Id.} at 339-40.
\(^{102}\) \textit{Id.} at 340.
\(^{103}\) \textit{Id.} at 339.
\(^{104}\) \textit{Id.}
\(^{105}\) \textit{Blackburn}, 348 So. 2d at 290.
\(^{106}\) \textit{Gary}, 434 So. 2d at 339 n.3.
\(^{107}\) \textit{Blackburn}, 348 So. 2d at 290.
\(^{108}\) 462 So. 2d 1156 (Fla. 3d Dist. Ct. App. 1984).
decision, the Third District Court of Appeal stated that the jury may have decided that riding double on one horse was "an aberrant form of the sport of horseback riding." Therefore, the instruction was proper. The concurrence implied that this situation was more applicable to the theory of primary implied assumption of risk. Judge Ferguson stated that "appellees breached no duty owed to the deceased." Although this theory was raised by the defendant, the majority opinion stated that it was unnecessary to address this issue.

In Robbins v. Department of Natural Resources, the First District Court of Appeal joined the Third, Fourth and Fifth District Courts of Appeal in Florida in agreement that the doctrine of express assumption of risk may be raised when the situation involves aberrant forms of activities. In Robbins, the plaintiff became a quadriplegic as a result of diving into shallow water at a public park. The accident occurred the second time he went into the lake. However, he testified that he was not aware of the depth of the water. The trial court granted the defendant's motion for summary judgment. The DNR successfully argued that Robbins should be barred recovery because he had expressly assumed the risk of injury. The First District Court of Appeal reversed the lower court's decision. On appeal, the court held that summary judgment was precluded because the evidence presented material issues of fact. Robbins argued further that, as a matter of law, the doctrine of express assumption of risk was not applicable in this case. The District Court of Appeals rejected this argument. The court emphatically endorsed the application of this doctrine to aberrant forms of activities.

Such an aberrant form of participation in the recreational activity of diving would be an appropriate occasion for the application of the defense of express assumption of risk, notwithstanding the fact that diving is, of course, not a contact sport and involves no other participants, and that no formal release, consent or waiver form was involved.

109. Id. at 1157.
110. Id.
111. Id. at 1157 n.1.
113. Id. at 1043.
114. Id. at 1044.
115. Id. at 1043.
116. Id.
The Robbins court stated that if Robbins was subjectively aware of the depth of the water and the presence of rocks on the bottom of the lake, and he knew of the risks but voluntarily dove into the water anyway, the defense of express assumption of risk could be raised.\footnote{117} The court cited Kuehner in support of this conclusion. The application of Kuehner to this case is disconcerting. Kuehner applied this criteria to a case in which the injury was caused by participation in a contact sport—karate.\footnote{118} The injury in the Robbins case occurred while the plaintiff was diving. Clearly, diving is not a contact sport. Although the Robbins court noted this significant difference, the court did not support their statement by further reasoning. This decision lends additional encouragement to the inclusion of aberrant forms of activities within the limits of the assumption of risk doctrine.

3. Contact Sports

An opportunity to clarify the status of this defense was presented when the supreme court granted certiorari to answer the following certified question asked by the Third District Court of Appeal in Kuehner v. Green:\footnote{119} "Does express assumption of risk absolutely bar a plaintiff's recovery where he engages in a contact sport with another participant who injures him without deliberate attempt to injure?"\footnote{120}

In Kuehner, a participant in a karate practice session was injured when his partner performed a "leg sweep." The Third District Court of Appeal affirmed the trial court's decision that express assumption of risk served to absolve the defendant from liability. The Florida Supreme Court reviewed and affirmed the decision but did not answer the certified question.\footnote{121} The court stated that the question was "inapposite"\footnote{122} to the present case. Since the plaintiff was absolutely barred from recovery and the evidence did not show that the defendant intended to injure the plaintiff this conclusion is unclear. The supreme court's reasoning failed to clarify the issue and, in fact, added to the increasing confusion surrounding the doctrine of express assumption of risk.

\footnotesize{\begin{itemize}
\item[117] Id. at 1043-44.
\item[118] Kuehner, 436 So. 2d at 80-81.
\item[119] 406 So. 2d 1160 (Fla. 5th Dist. Ct. App. 1981).
\item[120] Id. at 1161 (emphasis added).
\item[121] Kuehner v. Green, 436 So. 2d 78 (Fla. 1983).
\item[122] Id. at 81.
\end{itemize}}
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The supreme court did take this opportunity to extrapolate on the impact of the doctrine of express assumption of risk as it arises in "situations in which actual consent exists such as where one voluntarily participates in a contact sport." The court stated that the viability of contact sports as recreation is dependent on the defense of express assumption of risk. However, since the basis of the adoption of comparative negligence was the desire to foster an equitable relationship between liability and fault, the court warned that the doctrine of express assumption of risk must not be used to incur the same harsh unfairness as contributory negligence. The doctrine must be "compatible" with the comparative negligence system. If express assumption of risk is expanded beyond its intended scope, it may evade the intention of the court's adoption of comparative negligence as evidenced by the subsequent merger of assumption of risk and contributory negligence.

In defining the boundaries of the doctrine of express assumption of risk, the court emphatically stated that the contact sport participant "does not automatically assume all risks" merely by participation. It noted that voluntary consent to a specific risk is the foundation of express assumption of risk. The jury must address several issues in determining whether the participant actually consented to a specific risk. If the jury finds that the plaintiff subjectively appreciated the risk which caused the injury and voluntarily participated, express assumption of risk can be raised by the defendant. The plaintiff's consent relieves the defendant of liability from the latter's negligence. But if the injury-causing risk would not have been foreseen by a reasonable man, the plaintiff's recovery is not affected. However, if a reasonable man would have expected the risk, the plaintiff's recovery is governed by compara-

123. Id. at 79 (quoting Blackburn, 348 So. 2d at 290).
124. Kuehner, 436 So. 2d at 79. It would be easier to implement this interest in a recreational sport by simply holding that the defendant had no duty not to physically make contact with the plaintiff.
125. Id. at 79-80.
126. Comment, Torts-Assumption of Risk-Comparative Negligence, 16 Duq. L. Rev. 417, 424 n.38 (1978). The Supreme Court of Florida expressed its interest in this problem in the Kuehner opinion. The court stated "for express assumption of risk to operate compatibly within our comparative negligence system, courts of law must fully appreciate the scope and proper applications of the doctrine." Kuehner, 436 So. 2d at 80.
127. Kuehner, 436 So. 2d at 80.
tive negligence principles.\textsuperscript{128} The state high court concluded that the special verdict submitted to the \textit{Kuehner} jury included the factors necessary to make a proper analysis of the application of express assumption of risk.\textsuperscript{129} Therefore, the decision of the Third District Court of Appeal was affirmed.

It is significant that the factors that the court examined to determine the appropriate application of express assumption of risk in the context of contact sports are the very same factors which were necessary before \textit{Blackburn} to support the defense of implied assumption of risk.\textsuperscript{130}

In addition, the inclusion of contact sports within the context of express assumption of risk, instead of implied assumption of risk, is important. It is suggested that consent to actual contact which is necessitated by this type of activity justifies this placement.\textsuperscript{131} However, this reasoning cannot be similarly justified relative to non-contact recreational activities.\textsuperscript{132} Unlike contact sports, participation in non-contact activities does not constitute the same consent.

The special concurring opinion of Justice Boyd in \textit{Kuehner}\textsuperscript{133} addressed the goal the lower courts are trying to achieve by their interpretation of \textit{Blackburn}.\textsuperscript{134} The Justice reiterated that traditional reluctance to allow recovery for injuries incurred by sports participants. In order to retain this policy, Justice Boyd suggested an alternative. Rather than the "absurd legal semantics which classify voluntary participation in a contact sport as an 'express' assumption of the risk," the Justice recommended that the scope of liability may be reduced by holding that "[t]he only duty that a person participating in a contact sport has toward a fellow participant is to refrain from intentional or

\textsuperscript{128} Id.

\textsuperscript{129} "Did the Plaintiff, CLIFFORD R. KUEHNER, know of the existence of the danger complained of, realize and appreciate the possibility of injury as a result of such danger; and, having reasonable opportunity to avoid it, voluntarily and deliberately exposed himself to the danger complained of?" \textit{Id.} at 79.

\textsuperscript{130} The defense of assumption of risk is applicable when the plaintiff knows and appreciates the risk of danger and voluntarily consents to exposure to that particular risk. Bartholf v. Baker, 71 So. 2d 480 (Fla. 1954); Byers v. Gunn, 81 So. 2d 723 (Fla. 1955); Brady v. Kane, 111 So. 2d 472 (Fla. 3d Dist. Ct. App. 1959).

\textsuperscript{131} Petitioner's Initial Brief on the Merits at 11, Ashcroft v. Calder Race Course, Inc., 464 So. 2d 1250 (Fla. 3d Dist. Ct. App. 1985), \textit{rev'd}, 492 So. 2d 1309 (Fla. 1986).

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Kuehner}, 436 So. 2d at 81.

\textsuperscript{134} \textit{Id.} at 81-82.
reckless misconduct that is not customary to the sport game.” 135

In Kuehner, the court limited the application of the doctrine to contact sports and the inherent risks associated with them. 136 It did not answer the certified question or clarify the limitations of the application of the doctrine beyond Kuehner or contact sports.

4. Professional Non-Contact Sports

Possible devastating consequences can result from the application of express assumption of risk to professional non-contact sports. In Ashcroft v. Calder Race Course, Inc., 137 a jockey at the defendant’s track received injuries during a race which resulted in his becoming a quadriplegic. The jury found that the negligent design of the track caused his injury. However, the jury also found that although the plaintiff was not negligent, he assumed the risk of injury. Plaintiff and defendant both appealed. 138 Notwithstanding the fact that Ashcroft had not signed a release and that horse racing is not a contact sport, the Third District Court of Appeal held that the defense of express assumption of risk was applicable to professional horse racing, and thereby completely barred Ashcroft from any recovery. 139

The Third District relied upon Blackburn and Kuehner. The court stated that the Blackburn court did not limit express assumption of risk to contracts and contact sports. The appellate court stated that such an interpretation would be too constricted: “The Blackburn court clearly contemplated other professional sporting activity when it used the term ‘such as’ when defining those cases in which actual consent exists and the express assumption-of-risk defense is available.” 140 The court also held that the special verdict given to the jury was within the standard expressed by Kuehner.

The Ashcroft court’s interpretation of the Blackburn and Kuehner opinions is confusing. The Ashcroft court ascribes an intention to the

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135. Id. at 81.
136. Id. at 80.
138. The trial judge refused to apply the jury’s finding of express assumption of risk. Instead, the judge granted a remittitur reducing the plaintiff’s award from the jury of $10 million to $5 million. The plaintiff refused to accept the remittitur. Ashcroft, 464 So. 2d at 1253-54 (Baskin, J. dissenting).
139. Ashcroft, 464 So. 2d at 1251.
140. Id.
supreme court to include professional non-contact sports within the definition of express assumption of risk.\textsuperscript{141} This conclusion seems faulty in light of the supreme court's concern that "[i]f contact sports are to continue to serve a legitimate recreational function in our society express assumption of risk must remain a viable defense to negligence actions spawned from these athletic endeavors."\textsuperscript{142} In addition, although the jury instruction\textsuperscript{143} was in accordance with the \textit{Kuehner} standard,\textsuperscript{144} \textit{Kuehner} applied this instruction to a fact pattern involving karate, a contact sport. The \textit{Ashcroft} court ignored the threshold requirement that the injury resulted from participation in a contact sport.

Also, the \textit{Kuehner} court clearly limited the application of the doctrine to "those bodily contacts inherent in the chances taken."\textsuperscript{145} Since negligent track design is not within the inherent risks of horse racing, Calder should not have been allowed to raise the defense which barred Ashcroft's recovery.

Most important, \textit{Ashcroft} ignores the \textit{Kuehner} reiteration of the supreme court's equitable objectives as stated in \textit{Hoffman v. Jones}.

This equitable concept was advanced by \textit{Hoffman's} abrogation of contributory negligence and the discarding of implied assumption of risk in \textit{Blackburn}.

In her \textit{Ashcroft} dissent,\textsuperscript{147} Judge Baskin stated that she "would narrow the focus of the inquiry to the propriety of the jury instruction on express assumption of risk under the facts of this case."\textsuperscript{148} In a straightforward analysis, she concluded that Ashcroft did not assume the risk of injury by express contract or participation in a contact sport. A further examination of the facts in light of the inherent risks of horse racing also does not absolve Calder of liability. Although a participant may assume inherent risks, Judge Baskin concluded that "the dangerous condition created by Calder [is not] an inherent danger in the sport of horse racing."\textsuperscript{149} Finally, Ashcroft's behavior was neither unusual nor aberrant. Therefore, according to Judge Baskin, the jury instruction was incorrect and a new trial should have been granted.

\textsuperscript{141} \textit{See supra} text accompanying note 125.
\textsuperscript{142} \textit{Kuehner}, 436 So. 2d at 79.
\textsuperscript{143} Fla. Standard Jury Instruction (Civil) § 3.8.
\textsuperscript{144} \textit{See supra} text accompanying note 128.
\textsuperscript{145} \textit{Kuehner}, 436 So. 2d at 80.
\textsuperscript{146} \textit{Id}.
\textsuperscript{147} \textit{Ashcroft}, 464 So. 2d at 1252.
\textsuperscript{148} \textit{Id.} at 1254.
\textsuperscript{149} \textit{Id.} at 1255.
The Supreme Court of Florida granted review in *Ashcroft v. Calder Race Course, Inc.*\(^{150}\) It was hoped that this opinion would give explicit guidance to the lower courts as to the application of express assumption of risk in Florida.

The Florida Supreme Court’s review of *Ashcroft* did not result in an emphatical clarification of contexts in which the doctrine of express assumption of risk may be viable. In its reconsideration of the *Ashcroft* decision by the Third District Court of Appeal, the supreme court held that “there was no express assumption of risk with respect to the negligent placement of the exit gap and it was error for the judge to instruct the jury on assumption of risk.”\(^{151}\) Pursuant to *Kuehner*, the court stated that the doctrine only applies to risks inherent in the particular sport.\(^{152}\) The court agreed with Judge Baskin’s dissent\(^{153}\) that negligent placement of the exit gap was not such a risk.\(^{154}\) Therefore, the court reversed the decision of the lower court and ordered the reinstatement of the $10 million jury award to Ashcroft.\(^{155}\)

However the supreme court did not expressly state that the doctrine of express assumption of risk is applicable to horse racing. In beginning their analysis by stating that they are “[a]ssuming that express assumption of risk applies to horse racing. . . ,”\(^{156}\) the court extenuates the inclusion of the sport of horse racing within the doctrine. Arguably, the court has failed to make a policy decision concerning the doctrine’s applicability to horse racing. The court has skirted that issue by holding that the negligent placement of the exit gap wasn’t an inherent risk of horse racing. Therefore, it was unnecessary for the court to decide if express assumption of risk was applicable to the activity in which the plaintiff was participating when he was injured.

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152. *Id.* at 307 (quoting *Kuehner v. Green*, 436 So. 2d 78, 80 (Fla. 1983)).

153. *See supra* notes 147-149 and accompanying text.

154. *Ashcroft*, 492 So. 2d at 1311.

155. *Id.* at 1314. The court also based their decision on the duty of reasonable care which a landowner owes to an invitee. Further the court held that the trial judge had abused his discretion in granting a remittitur. *Id.* at 1313.

156. *Id.* at 1311.
V. Options

There is a myriad of approaches available to the Supreme Court of Florida to resolve the confusion regarding the parameters of express assumption of risk. Although the particular approach chosen may be disadvantageous to plaintiffs, it is of paramount importance that the court delineate a clear standard that the lower courts can follow in a consistent and predictable manner. Further, injured parties will be better able to judge the viability of a possible complaint if a straightforward test is adopted by the court.

The Supreme Court of Florida may choose to put its seal of approval on the application of express assumption of risk to situations involving contracts and contact sports. However, even in cases involving contracts and contact sports, courts will have to decide on the scope of the doctrine on a case-by-case adjudication.

The doctrine will preclude recovery in those instances when a party has expressly consented to expose himself to a particular risk, either by contract or participation in a contact sport. These sports may include wrestling, football, karate, hockey, and similar activities where consent to contact is a necessary part of the game.

However, if the contact which was the proximate cause of his injury was not a normal part of the sporting activity, then the injured plaintiff will be allowed to recover. These instances may include intentional or reckless conduct, and behavior which is a violation of the rules. A case-by-case examination of the type of action which caused the injury would determine whether the defense of express assumption of risk should be applied to bar the plaintiff's recovery.

The obvious weakness of this proposal is that determinations based on this method may yield inconsistent rulings which would create confusion as to the parties rights and obligations under Florida law. Numerous decisions would be necessary before a framework of consented behavior could be formulated. In addition, this option abandons the traditional legal theory which limited express assumption of risk to contracts or other forms of express agreement.

However, this course is in accordance with the Florida Supreme Court's decision in Kuehner v. Green. The fact situation in Kuehner involved a contact sport and the court did not give any indication of an

157. The proposal is merely consistent with the treatment of express assumption of risk by the Florida Supreme Court. The supreme court has never applied the doctrine of express assumption of risk beyond contracts or contact sports.
intention to further expand the doctrine of express assumption of risk beyond contracts and contact sports.

The supreme court may also attempt to reconcile the various lower court decisions by reaffirming the fact that Florida has adopted a system of comparative negligence and, consequently, assumption of risk is no longer a viable defense. Therefore, in those situations where the defense of assumption of risk would have been raised, a correct analysis would require a finding of no duty owed.

In theory, this option revives primary assumption of risk. In other words, it is lack of duty owed by the defendant to the plaintiff that precludes recovery rather than a finding that the plaintiff had expressly assumed the risk of injury. For example, in the context of football, the players have no duty to protect each other from anticipated contact.

Several states have totally abolished all assumption of risk terminology on the rationale that "the bench and bar . . . unhappily cling to the terminology of assumption of risk and continue to be misled by it even while purporting to think of it as merely a convertible equivalent of negligence . . . ." It is suggested that contract law competently governs express assumption of risk. 159

The Utah Supreme Court in \textit{Jacobson Construction v. Structo-Lite Engineering} 160 stated that "[w]hat is important is the concept embodied in the comparative negligence statute, and the particular labels assigned to the type of fault should not interfere therewith." 161

This proposition 162 is consistent with the evolution of Florida negligence law. It avoids a departure from the principles of a comparative negligence system which eschews the complete denial of recovery to an injured plaintiff. Yet, this option also allows the Florida Supreme Court to make a more definitive public policy statement.

The trial court's analysis would begin with an inquiry into the scope of duty owed by the defendant to the plaintiff under each particular fact situation. This eliminates the necessity for the jury to consider the application of assumption of risk in reaching its verdict.

When the jury makes its determination as to the defendant's negli-

\begin{quote}
161. \textit{Id}.
162. See, \textit{e.g.}, McGrath, 41 N.J. at 272, 196 A.2d at 238.
\end{quote}
gence, it will be resolving as well the issue of whether the plaintiff is precluded from recovering damages. Therefore, the jury’s findings as to damages will be in keeping with the equity of comparative negligence principles.

Under existing decisions the jury can easily become confused by the process of determining defendant’s negligence, plaintiff’s contributory negligence, as well as considering non-contractual express assumption of risk.

An example of this confusion is demonstrated by the verdict in Ashcroft. Although defendant Calder Race Course, Inc. was negligent, plaintiff Ashcroft, who was not negligent, was completely barred from recovery because the jury found that Ashcroft had expressly assumed that risk of injury. 163

Finally, the supreme court may choose to allow the expansion of express assumption of risk in negligence actions to include contracts as well as all recreational and sports activities. Defendants will be permitted to raise the defense of contributory negligence to reduce the plaintiff’s recovery and assumption of risk to bar recovery.

The plaintiff will be prevented from recovering damages in a wide range of activities. Since these activities were formerly included within the area of implied assumption of risk, this would signal a re-examination of Blackburn. A clear statement of the risks which the plaintiff is deemed to have assumed is required. Otherwise, participation in recreational activities may be discouraged by the certain preclusion of recovery for injuries suffered.

This approach is especially harmful because participation in recreational sports activities has a positive effect on the individual as well as the entire community. This type of activity should be fostered and not discouraged. 164

VI. Conclusion

Throughout the State of Florida, the doctrine of express assumption of risk has been expanding haphazardly. The Florida Supreme

163. Ashcroft, 464 So. 2d at 1251. Ashcroft knew and appreciated the specific danger caused by the design defect in the track. It is arguable whether his choice to ride was voluntary. However, the issue is whether the jury should have been instructed as to the defense of express assumption of risk.

Court should define the parameters of the doctrine in a clear and definite manner to avoid the abrogation of the comparative negligence system. The stature of this system must be supported by the body which created it. Not only is it unfair to bar recovery to a party in a negligence action, merely because he has made the reasonable decision to participate in a sporting activity, but it is not in keeping with the spirit of the supreme court's decision in *Hoffman v. Jones* to adopt a comparative negligence system in Florida which "equate[s] liability with fault."¹⁶²

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¹⁶⁵. *Hoffman*, 280 So. 2d at 438.
Congress Demands Stricter Child-Support Enforcement: Florida Requires Major Reforms to Comply

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I. Introduction

Millions of American children live in poverty. Many of these children live in single-parent families and receive little or no support from their absent parent. The number of families headed by a single-parent, usually the mother, is steadily increasing due to the rising number of divorces, desertions and out-of-wedlock births. Lack of support from the absent parent is often the cause of the children's poverty. Surprisingly, only a little more than half of the single mothers with minor children have support orders from a court, and of the women who have court awards for support, fewer than half receive full payment. Even more shocking is that nearly one third of the fathers under court order...


4. “From 1970 to 1981, the number of divorces in the United States more than doubled, and the number of children living with one parent increased by fifty-four percent, to a total of 12.6 million children, or one child in five.” Id. at 1. It is estimated that half the children born today will live at some point in their life in a single-parent family headed by a female. Chambers, Child Support in the Twenty-First Century, in The Parental Child Support Obligation 284 (J. Cassetty ed. 1983) (citing Moynihan, Children and Welfare Reports, 6 J. Inst. Socioecon. Stud. 1 (Spring 1981)).


7. Id.
to pay child support fail to make a single payment.⁸

Parental failure to support children forces many single-parent families onto the welfare roles. Congress, concerned with the growing welfare budget, has attempted to shift the burden of support back to where it belongs — on the parents. The various provisions of the Child Support Enforcement Amendments of 1984⁹ are Congress’ latest attempts to force the states to adopt effective legislation designed to remedy this serious, nation-wide child-support enforcement problem. A state’s failure to comply with the child-support enforcement sections of the Social Security Act¹⁰ could result in a reduction of federal welfare funds.¹¹

After a brief description of the history of the child-support enforcement laws, this note focuses on the legislative efforts to alleviate the enforcement problem. The major concentration of this note is a presentation and analysis of Congress’ 1984 Amendments to the child-support enforcement section of the Social Security Act. Finally, this note discusses what Florida must do to comply with Congress’ mandate.

II. History of Child-Support Responsibility

A. The Duty to Support

Many of the current child-support enforcement problems are deeply rooted in the common law. Historically, the common-law duty to support children rested primarily on the father.¹² The father owed this duty not only to the child, but to the state,¹³ to prevent the child from becoming a public burden.¹⁴ Some courts held that the duty to support children is both a legal and a moral duty¹⁵ while other courts

8. Id.
held it is merely a moral duty. The moral duty to care for children too young to care for themselves was often based on the reciprocal right of a parent to receive the services and earnings of his children. Some early court decisions extended to the mother the duty to support if the father failed to fulfill it; however, other decisions held that since a father's duty to support his children rested on his reciprocal right to receive the value of their services and the mother did not have that right, the mother was not obligated to provide child support. Recent court decisions, on the other hand, have shown a trend toward holding both parents responsible for the support of their children. Many states have enacted statutes which equalize the obligation.

Generally, the parental support obligation continues until the children attain the age of legal majority. Divorce does not terminate the obligation. It can extend beyond the age of majority if the parent so agrees in a separation agreement or if the child is physically or mentally impaired and therefore incapable of self-support.

Another support problem concerns the duty to support illegitimate children. At English common law, an illegitimate child was called nullius filius, son of no one. The court imposed no obligation on either parent to support the child. A later English statute imposed on the mother the duty to support the illegitimate child. In the United States some jurisdictions required the mother to support her illegitimate child,

22. Dunbar, 190 U.S. at 351.
27. Tieman, 32 Wash. at 299, 73 P. at 376.
28. Id.
but other jurisdictions did not. Absent a statute, the father had no duty to support his illegitimate children. However, in 1973 the United States Supreme Court held that a child cannot be denied support from the father "simply because its natural father has not married its mother."

B. Reasons for the Failure to Meet Support Obligations: Correcting a Myth

Statistics show that the popular belief that fathers fail to pay their support obligations because they cannot afford to pay is a myth. If that belief were true, men with lower incomes, arguably, would have higher failure rates. However, a Los Angeles study found little relationship between income and noncompliance with court-ordered support payments. Other researchers found that men who failed to pay any child support had incomes higher than men who had fair or poor records of payment. Furthermore, the amount of the award is often low and sometimes inadequate to cover the costs of raising a child. For example, a study revealed that in Denver, Colorado, two-thirds of the fathers ordered to pay child support had monthly support orders which amounted to less than their monthly car payments. Ironically, the ac-

29. Id.
33. Id. A 1978 study in Los Angeles County found that of fathers making $20,000 or less per year, twenty-seven percent made either irregular or no child-support payments at all; of fathers making between $20,000 and $30,000, twenty-two percent made irregular or no child-support payments; of fathers making between $30,000 and $50,000 per year, twenty-nine percent made irregular or no payments. Id.
34. Id. That same study showed that eighty percent of fathers had the ability to pay. Id. at 1239 n.205.
35. In 1983 the U.S. Census Bureau reported that of 8.4 million female-headed families, 5.5 million received no support from the absent parent, 1.9 million received an average of $100 per month and only 1 million received up to $200 per month for child support. W. DIXON, THE CHILD SUPPORT ENFORCEMENT PROGRAM: UNEQUAL PROTECTION UNDER THE LAW v (J. Duggan ed. 1985) (available through the National Forum Foundation). Court awards for support cover less than fifty percent of the cost of raising a child. Hunter, supra note 3, at 1.
tual standard of living for men actually rises after a divorce. Therefore, the inability to fulfill support obligations does not appear to be the major reason fathers fail to meet their support obligations. "A better explanation for the lack of compliance lies in the absence of . . . effective enforcement procedures." 

C. States' Attempts to Alleviate the Child-Support Enforcement Problem

Only in the last twenty years has the federal government provided assistance to children left destitute by their parents' deaths or desertions. Prior to that, states shouldered the entire responsibility of providing support for these destitute children. Traditional state remedies include criminal nonsupport statutes penalizing the parents' willful failure to provide support and the use of civil contempt to enforce child-support orders. Judges, however, have been reluctant to jail absent parents for willful noncompliance. Although incarceration for contempt or neglect is sometimes an effective means of enforcement, that subject is beyond the scope of this note.

One of the problems inherent in state regulation of child support is that the lack of uniformity among state laws results in unequal protection for children. States' responses to the problem of nonsupport vary widely. Some states have enacted strong legislation and have invested substantial sums to enforce child support while other states have ineffective enforcement laws and have made little financial commitment. Studies show that states which have enabling legislation and make adequate financial commitments to enforce the support legislation collect more money from absent parents than do states without similar legisla-


37. Weitzman, supra note 32, at 1250. A California study revealed that divorced men showed a forty-two percent improvement in their standard of living while their ex-family's standard dropped a dramatic seventy-three percent. Id.

38. Id. at 1257.


41. FLORIDA GOVERNOR'S COMM'N ON CHILD SUPPORT, FINAL REPORT app. C. 3 (1985) [hereinafter cited as FLORIDA REPORT].

tion and commitments. 43

In many states a factor contributing to the support problem is the apathy among those charged with enforcing support laws. For example, judges and legislators have often been reluctant to become involved in what they consider a family dispute. 44 A report to the Senate showed that “judges and lawyers found support cases boring and in some instances were hostile to the idea that fathers are responsible for their children . . . .” 45 Furthermore, even “state welfare agencies seem uninterested in enforcing child-support obligations.” 46 Arguably, a significant number of fathers simply fail to pay support because they know they can do it with impunity. 47 Recognizing this as the real reason for noncompliance with support orders, Congress enacted legislation designed to force states to enact their own laws to ensure compliance with child-support orders. Sections III and IV of this note discuss Congress’ legislation and the recent amendments.

43. See, e.g., W. DIXON, supra note 35 at 65-77.

“Probably the most interesting contrast in the Nation is between two nearby midwestern States: Michigan and Illinois. Michigan invested $123.67 per female-headed household in 1984, compared to $42.29 for Illinois, a factor of nearly 3 to 1. Michigan’s results were that the average weekly collection per female-headed household was $17.74, compared to Illinois’s $1.87, a factor of more than 9 to 1. Michigan collected $7.46 for every dollar in administrative costs, while Illinois spent a dollar to collect only $2.30 in child support.” Id. at 66-67.

44. See H. KRAUSE, supra note 40, at 51.

Thousands of unserved child support warrants pile up in many jurisdictions and often traffic cases have a higher priority. The blame for this situation is shared by judges, prosecutors and welfare officials alike, and is reinforced by certain myths which have grown up about deserting fathers.


46. Id. at 20.

47. See D. CHAMBERS, MAKING FATHERS PAY 100 (1979). Chambers compares the support payments made in Genessee County, Michigan to those made in Wastenaw County, Wisconsin. In Genessee County, which had a rigorous support enforcement system, men made payments at high levels. In Washtenaw, which had a passive support system, low levels of payment were made and “many who paid erratically apparently found that their haphazard payments were ignored or followed by hollow threats or that, even if they were arrested, they were released and then forgotten.” Id. at 100.
III. Early Amendments to the Social Security Act: (Titles IV-A and IV-D)

The federal government first became involved in the support of needy children when it passed an amendment to the Social Security Act. Title IV-A, Aid to Dependent Children, now called Aid to Families with Dependent Children (AFDC). 48 Simply stated, an AFDC family is one which receives welfare funds under Title IV-A. The Social Security Act encouraged state participation in the AFDC program by reimbursing state funds used in support of needy families with a parent absent from the home. Over the years, the reason for requesting this aid has changed dramatically. Congress originally designed AFDC to assist the widows and children of deceased or disabled men. However, AFDC now provides aid primarily to low-income families where there is a living father who is voluntarily absent from the home. 49

In 1974, Congress, motivated by a skyrocketing AFDC budget, 50 attempted to jolt the states out of their apathetic attitude towards child-support enforcement. Senator Long, the chairman of the Senate Finance Committee, expressing congressional dissatisfaction with widespread noncompliance, stated: “Is it fair to ask the American taxpayer — who works hard to support his own family and to carry his own burden — to carry the burden of the deserting father as well? . . . We can — and we must — take the financial reward out of desertions.” 51

In an attempt to alleviate the burden on the American taxpayer, Congress passed a comprehensive law dealing with child support: Title IV-D of the Social Security Act. 52 Title IV-D created a federal and

49. C. ADAMS & D. COOPER, A GUIDE FOR JUDGES IN CHILD SUPPORT ENFORCEMENT 5 (A. Kaye ed. 1982) (Available through Child Support Enforcement, U.S. Department of Health and Human Services). In eighty-seven percent of the AFDC cases, the reason for receiving aid is the father’s absence from the house. Id. “The portion of the caseload eligible because of father’s death was 42% in 1940, 7.7% in 1961 and 4% in 1973.” Note, Enforcement of Child Support Obligations of Absent Parents — Social Service Amendments of 1974, 30 SW. L.J. 625, 632 (1976).
51. Katz, supra note 45, at 19, citing the 118 CONG. REC. 8291 (1972).
state partnership to establish and enforce awards for child support. Under Title IV-D, states retained primary responsibility for the collection of child support, while the Department of Health, Education and Welfare, now called the Department of Health and Human Services (HHS), imposed standards and made regulations through the newly created Office of Child Support Enforcement (OCSE). The OCSE is responsible for national administration of the child-support enforcement program, which required each state to establish its own IV-D agency. The state IV-D agencies are responsible for making regulations for locating absent parents, establishing paternity and support obligations, and for enforcing child-support orders. Title IV-D also established the Federal Parent Locator Service and mandated each state to establish a parent locator service. States in compliance with OCSE standards received federal incentive payments of seventy-five percent of their costs.

The 1974 Title IV-D legislation provides services to all families, including those not receiving AFDC assistance. The procedures AFDC families must follow are different from other families. To be eligible for child-support services, AFDC recipients must cooperate

53. See W. Dixon, supra note 35, at 7, which states:

How States are forced to comply with federal requirements for child support enforcement is a brief, but interesting story. Title IV-A (AFDC) reimburses the States for at least half the cost of AFDC through a contract between the federal government and each State, called the “State Plan for AFDC”. One provision of this State Plan permits Congress to modify it (by legislation) without the State’s being able to reject the changes.

To implement Title 4D, Congress modified Title IV-A by requiring States to accept the new Title 4D, OR ELSE! The “or else”, of course, was risking the loss of millions of dollars of federal money for AFDC. All States accepted Title 4D.

Title 4D, on the other hand, established the need for a “State Plan for Child Support”. You guessed right. States must accept new 4D amendments by Congress in order to be in compliance with Title 4D to be in compliance with Title IV-A.

55. Id. § 652(a)(1).
56. Id.
57. Id. § 653.
58. Id. § 654(8).
with the state. As a condition for AFDC eligibility, a mother must provide information to help the state locate the absent father, or in cases where it is first necessary to establish paternity, the mother must identify the father. Furthermore, the custodial parent must assign to the state her rights to child support owed by the absent parent. The money collected by the state from the absent parent is used to offset AFDC payments made to the family. Families not receiving AFDC assistance may apply to the state IV-D agency for child-support services. A fee for child-support services may be charged to families not receiving AFDC.

IV. Child Support Enforcement Amendments of 1984

Although the 1974 social security amendments helped establish and enforce child-support orders, ten years later the nation-wide support problem remained. Parents under court orders for support continued to avoid making payments, and states did not have effective enforcement procedures or laws. Congress, concerned about the social and economic effects of nonsupport, began a bi-partisan effort to force states to collect support payments more aggressively and efficiently. This effort resulted in the unanimous passage of the Child Support Enforcement Amendments of 1984. President Reagan signed the bill into law commenting that "[i]t's an unfortunate fact of our times that one in four American children live in single-parent homes and millions of these children endure needless deprivation and hardship due to the lack of support by their absent parent . . . ." Through the 1984 Amend-

61. Id. § 602(a)(26)(B).
62. Id. § 602(a)(26)(A).
63. Id. § 658(a).
64. Id. § 654(6)(A).
65. Id. § 654(6)(B).
67. The census bureau reports that only $6.1 billion was collected out of $9.9 billion owed in child-support payments in 1981. Heckler Announces Initiative, supra note 6, at 2. In 1984, state agencies opened up over two and a half million new cases to establish and collect support which resulted in less than 100,000 successful collection cases. Dixon, supra, note 35 at 2.
Child-Support Enforcement

ments, Congress almost completely overhauled Title IV-D of the Social Security Act.\textsuperscript{70} Title IV-D deals with federal grants given to states to aid needy families with children in their area of child support and establishment of paternity.\textsuperscript{71}

The 1984 Amendments have four primary objectives: 1) to require all states to use specific child-support enforcement procedures, which have proven successful in the states which have employed them; 2) to provide equal availability of enforcement services for non-welfare, as well as welfare, families; 3) to improve interstate support services; and 4) to force states to improve child-support enforcement performances through periodic auditing and a reduction of federal financial assistance to states.\textsuperscript{72} This section will discuss and analyze these objectives seriatim.

A. Utilization of Specific Enforcement Procedures

The 1984 Amendments require states to enact specific legislation and implement procedures to improve their child-support services as a condition to continued receipt of federal AFDC funds.\textsuperscript{73} The deadline for compliance for most provisions was October 1, 1985.\textsuperscript{74} However, if a state proved to the Secretary of Health and Human Services that legislation was needed to bring the state plan into compliance with federal requirements, the state was given until four months after the end of the state’s first legislative session held after October 1, 1985 to pass whatever legislation was necessary to comply with the 1984 Amend-
ments' requirements.\textsuperscript{76}

Although the 1974 Title IV-D legislation permitted the states to use existing state laws, the 1984 Amendments to Title IV-D require states to enact specific legislation designed to strengthen child-support enforcement. The specific enforcement procedures mandated by the 1984 Amendments are those procedures successfully used by states with high collection rates. This section reviews the major enforcement requirements.

1. \textit{Mandatory Wage Withholding}

The most important new tool for enforcement is the mandatory wage withholding provision. The court orders for child support or modifications must automatically include a conditional provision for wage withholding to collect delinquent support obligations.\textsuperscript{76} This requirement enables all support recipients, including those represented by private counsel, to have some method of initiating wage withholding in the event of a support delinquency. Although all families qualify for wage withholding, the procedures for obtaining wage withholding differ, depending on whether the family is on AFDC or registered with the local IV-D agency. Non-AFDC recipients must register with the state IV-D agency when the support order is entered to initiate automatic wage withholding.\textsuperscript{77} Once a family has registered for IV-D services withhold-

\begin{footnotes}
\textsuperscript{75} 50 Fed. Reg. 19,608.
\textsuperscript{77} Id. § 666(b)(1)(2). These subsections provide:

(1) In the case of each absent parent against whom a support order is or has been issued or modified in the State, and is being enforced under the State plan, so much of such parent's wages (as defined by the State for purposes of this section) must be withheld, in accordance with the succeeding provisions of this subsection, as is necessary to comply with the order and provide for the payment of any fee to the employer which may be required under paragraph (6)(A), up to the maximum amount permitted under section 1673(b) of Title 15. If there are arrearages to be collected, amounts withheld to satisfy such arrearages, when added to the amounts withheld to pay current support and provide for the fee, may not exceed the limit permitted under such section 1673(b), but the State need not withhold up to the maximum amount permitted under such section in order to satisfy arrearages.

(2) Such withholding must be provided without the necessity of any application therefor in the case of a child (whether or not eligible for aid under part A) with respect to whom services are already being provided under the State plan under this part, and must be provided in accordance
\end{footnotes}
ing triggers automatically, requiring no further court action, when the support becomes overdue in an amount equal to one month's payment. Automatic withholding can trigger earlier at the state's option or at the option of the absent parent. Families not already registered with the IV-D agency may apply for services to trigger automatic withholding after an arrearage occurs, and the agency will initiate the withholding at that time.

The amount withheld must equal the amount of support due and at the state's option may include a fee to cover the employer's costs of withholding. Additionally, the amount must be within the limits set by section 303(b) of the Consumer Credit Protection Act. Withholding must comply with state procedural due process requirements. The

with this subsection on the basis of an application for services under the State plan in the case of any other child in whose behalf a support order has been issued or modified in the State. In either case such withholding must occur without the need for any amendment to the support order involved or for any further action (other than those actions required under this part) by the court or other entity which issued such order. Although the language of this section does not distinguish between IV-D and non-IV-D families, the legislative history clearly does.

Withholding must occur without amendment of the order or further action by the court. The Committee believes that this requirement is particularly crucial to the effectiveness of any income withholding provision, because it means that the custodial parent will not have to experience the costs and delays involved in returning to court to get a garnishment decree or a new support order. Under the Committee provision, the required withholding procedures must be provided without the need for any application therefor on behalf of all IV-D (both AFDC and non-AFDC) families. Families who are not receiving IV-D services may file an application for such services to trigger the initiation of withholding by the agency on their behalf.


78. Id. § 666(b)(2).
79. Id. § 666(b)(3)(A).
80. Id. § 666(b)(3)(B),(C).
81. Id. § 666(b)(2).
82. Id. § 666(b)(1).
83. Id. § 666(b)(6)(A)(1).
84. Id. § 666(b)(1). The Consumer Credit Protection Act section 5.303(b) states that fifty percent of the disposable income for an obligor with a second family may be garnished and sixty percent for an obligor without a second family. The percentages increased by five percent if the arrearage accrues at a certain time in the pay period. 15 U.S.C. § 1673(b)(1982).
85. 42 U.S.C.A. § 666(b)(4)(A) (West Supp. 1985). Once the state law grants
obligor must be given advance notice of the withholding and an opportunity to contest it.\textsuperscript{86} Moreover, the obligor's only grounds for contesting the withholding is that there is a mistake of fact.\textsuperscript{87} If the withholding is contested, the state must notify the obligor of the results of its decision within forty-five days of the advance notice.\textsuperscript{88}

If the obligor does not contest the withholding, a notice, containing only enough information to enable compliance, is sent to the employer.\textsuperscript{89} An employer who fails to withhold wages after proper notification is liable for the amount which should have been withheld.\textsuperscript{90} An employer must withhold wages for child support before complying with any other obligation because withholding for child support \textsuperscript{91} "must have priority over any other legal process under state law against the same wages . . . ."\textsuperscript{92} An employer may aggregate all support monies he is obligated to disburse for all employees into one check.\textsuperscript{93} If an obligor terminates his employment, the employer must notify the state and forward his last known address and the address of the new employer if known.\textsuperscript{94} Additionally, to prevent retaliation by the employer, any employer who fires or disciplines an employee as a result of a withholding order is subject to a fine.\textsuperscript{95}

A state is free to extend its withholding provision to other sources of income.\textsuperscript{96} Therefore, commissions, bonuses, retirement benefits, pen-

\textsuperscript{86} 42 U.S.C.A. § 666 (b)(4)(B) (West Supp. 1985). The notice must inform the obligor of the amount owed and the amount to be withheld. \textit{Id}.


\textsuperscript{89} \textit{Id.} § 666 (b)(6)(A)(ii).

\textsuperscript{90} \textit{Id.} § 666 (b)(4)(C).

\textsuperscript{91} \textit{Id.} § 666 (b)(7).


\textsuperscript{94} 45 C.F.R. § 303.100(d)(x) (1985).


\textsuperscript{96} \textit{Id.} § 666 (b)(8).
sions, unemployment benefits, worker's compensation, dividends, royalties, and trust accounts may be considered income by the states and subject to wage withholding. This provision is particularly important in cases where the obligor does not receive a regular salary or is self-employed. Each state must designate a public agency to receive, record and forward payments. There must be a provision in the state laws for the termination of withholding under certain conditions.

2. Liens, Bonds, Security, and Guarantees

Other procedures mandated by the 1984 Amendments, which are useful tools against obligors who are not salaried employees, are the procedures for the imposition of liens and the posting of security bonds or guarantees. As previously stated, high-income, self-employed absent parents obligated to pay child support have as poor a record of nonpayment as any other class, perhaps even the worst. Because these individuals are not salaried employees, the wage withholding provision of the 1984 Amendments will not enforce their payments. Aware of this fact, Congress included in the 1984 Amendments the requirement that states must have and use “[p]rocedures under which liens are imposed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the State.” Under these procedures, the liens, which may attach prior to a default or arrearage, provide not only a means of enforcing support obligations, but also may deter the absent parent from defaulting.

The problem, however, is that neither the 1984 Amendments nor the federal regulation implementing the requirement for lien procedures provides any guidance for uniformity among the states. States are apparently free to use either existing lien laws and procedures or implement new ones. Neither the statute nor the rule mandates a specific method for perfecting these liens, and neither requires that child-support liens acquire a higher priority against the property than other

99. Id. § 666(b)(10). These conditions are limited to such circumstances as “the disappearance of the custodial parent and child for an extended period so that it becomes impossible to forward payments, the child reaching the age specified, or the child being legally adopted by someone else.” Dodson, supra note 87, at 3,053.
100. See supra text accompanying notes 32-38.
liens. Just as current lien laws vary from state to state, the child-support lien procedures will also vary greatly. Nonetheless, the child-support lien requirement may greatly improve the effectiveness of child-support enforcement throughout the country.

Another requirement of the 1984 Amendments which targets, but is not limited to, the higher income, self-employed child-support obligor, is the posting of bonds, security or some type of guarantee. States must use "[p]rocedures which require that an absent parent give security, post a bond, or give some other guarantee to secure payment of overdue support . . . ."108 The Office of Child Support Enforcement recognized a difficulty with the bonding procedure104 when implementing regulations for this requirement. "The majority [of] commenters expressed concern that no bonding company will risk underwriting child-support payments because of the long-term commitment of the support obligation and the high rate of noncompliance with these obligations."105 Clearly, this reality represents a major drawback to an otherwise tremendously useful enforcement device. Nonetheless, the OCSE "urge[s] States and local IV-D agencies to educate local bonding companies of the efficacy of underwriting child-support obligations in cases where the absent parent has been a minimal credit risk in other credit ventures."106 Because these minimal-credit-risk absent parents are as delinquent as any other class when it comes to making their support payments, the bonding procedure could be a valuable enforcement tool if utilized effectively.107

In addition to the bonding procedure, the procedures for providing security or a guarantee may be equally effective for improving child-support enforcement. The OCSE recognized that the state IV-D agency could hold in escrow various assets of the obligor parent, i.e. stocks, bonds and other negotiable instruments.108 As it did with the

105. Id.
106. Id.
107 These parents can get bonded because of their good credit ratings. The bonding companies should realize that the reason these parents are as delinquent as any other group in child support payments is that they have traditionally been able to be delinquent with impunity. Bonding companies should further recognize that if these parents are bonded, a motivation exists to keep payments current. These parents may gain satisfaction from tormenting their ex-spouses with delinquent payments, but they will not risk their credit rating or the wrath of the bonding companies for that pleasure.
108. Id.
requirement of imposing liens, however, the OCSE fell short of enacting specific regulations for states to follow, opting instead "[t]o provide States with flexibility in this area . . . ." 109 Although there is something to be said in favor of permitting states the flexibility to develop their own procedures, by doing so the OCSE has fallen short of its obligation to ensure improvement of child-support enforcement. By permitting state legislators to compromise these procedures, the OCSE missed the opportunity to require states to adopt specific, efficient procedures to ensure enforcement of child-support obligations and, in turn, save the taxpayer money. On the other hand, the 1984 Amendments' requirements of procedures for imposing liens, posting bonds, and giving security or other guarantees have the potential to greatly reduce the nation-wide support enforcement problem. Of course, states are required to ensure other requirements of due process before using these procedures. 110

Still another enforcement tool which the 1984 Amendments require states to use is a state income tax refund offset. 111 Anyone who has registered with the IV-D agency in a state that has state income taxes qualifies for the state income tax refund offset program. 112 The state tax program permits states to intercept state tax refunds owed to parents who are in arrears with child support and use the refund to offset the overdue support payment. 113 Advance notice and an opportunity to contest the offset must be provided to the obligor. 114

3. Reporting to Consumer Credit Agencies

An additional feature of the 1984 Amendments requires states to report support arrearages to consumer credit reporting agencies when the agency requests the information and when the amount of overdue support is more than $1,000. 115 States may, however, report arrearages of less than $1,000. 116 States may also charge the credit reporting agency a fee for providing the information. 117 States must provide the

109. Id.
111. Id. § 666 (a)(3); 45 C.F.R. § 303.102 (1985).
113. Id.
114. Id.
115. Id. § 666 (a)(7).
116. Id. § 666 (a)(7)(A).
117. Id. § 666 (a)(7)(C).
obligor advance notice and an opportunity to contest.\textsuperscript{118} The potential problem with this tool is that states are required to report arrearages only when the agencies request the information. There is fear that the agencies will have no interest in requesting the information, particularly when they are required to pay a fee.\textsuperscript{119} Although states apparently may provide the information voluntarily,\textsuperscript{120} the OCSE stopped short of requiring states to report support payment arrearages to the credit agencies.\textsuperscript{121}

4. Expedited Procedures

Another extremely valuable, yet somewhat complicated, enforcement technique which the 1984 Amendments require is the use of expedited procedures for the establishment and enforcement of support orders.\textsuperscript{122} By requiring states to use expedited legal procedures to obtain and enforce orders for child support, Congress has attempted to remedy another problem often encountered by custodial parents. In jurisdictions with crowded court dockets, parents often experience long delays in obtaining support orders.\textsuperscript{123} Not only does judicial delay cause financial hardship on custodial parents and their children, but delay also exacerbates the support enforcement problem.\textsuperscript{124} Delays can cause the custodial parent to lose contact with the absent parent, thereby jeopardizing the establishment of the support order.\textsuperscript{125}

\begin{enumerate}
\item \textsuperscript{118} Id. § 666 (a)(7)(B).
\item \textsuperscript{119} 50 Fed. Reg. 19,631-32 (1985). On the other hand, consumer credit reporting agencies should be interested in this information because under the 1984 Amendments, wage withholding for child support has priority over any other legal process against those same wages, therefore arrearages in child support payments will affect the obligor's ability to satisfy other debts. Id.
\item \textsuperscript{120} Id. at 19,632.
\item \textsuperscript{121} Id. at 16,931.
\item \textsuperscript{123} FLORIDA GOVERNOR'S COMM'N ON CHILD SUPPORT, FINAL REPORT app. C.3 (1985) [hereinafter cited as FLORIDA REPORT]. In Florida "6.2 weeks was estimated as the average time it took to arrange for a court hearing in child-support enforcement matters." Office of the Auditor General, State of Florida, Performance Audit of the Child Support Enforcement Program Administered by the Department of Health and Rehabilitative Services in Conjunction with Various Other State and Local Agencies 18 (Dec. 18, 1985) [hereinafter referred to as PERFORMANCE AUDIT].
\item \textsuperscript{124} PERFORMANCE AUDIT, supra note 123, at 17.
\item \textsuperscript{125} Id.
\end{enumerate}
more, court delay can result in such substantial arrearages that the absent parent is unable to pay the past-due amounts.\textsuperscript{126} Under the rules adopted pursuant to the 1984 Amendments, states must use either expedited administrative or expedited quasi-judicial procedures in lieu of standard full judicial procedures in all IV-D cases.\textsuperscript{127} However, political subdivisions which can prove they already have effective and timely court systems may apply for an exemption from expedited procedures.\textsuperscript{128} Decisions resulting from expedited procedures have the same force and effect as full judicial decisions.\textsuperscript{129} Of course, the expedited procedure must provide due process to all parties involved.\textsuperscript{130} Decisions reached under expedited procedures may be ratified by a judge and are then subject to appellate review.\textsuperscript{131} If a case is inappropriate for expedited procedures, perhaps because it deals with complex issues, it may be decided pursuant to traditional judicial proceedings.\textsuperscript{132} However, a state must first use expedited procedures to establish temporary support orders in complex cases.\textsuperscript{133} Congress provides financial incentives for cases heard under expedited procedures. Federal funds are available to pay a portion of the salaries of administrative or quasi-judicial officials such as special masters or family court commissioners, but not for the salaries of judges in child-support matters.\textsuperscript{134}

Expedited procedures are an important tool for states to improve support enforcement because custodial parents will begin receiving payments after dissolution or separation much sooner than in the past. Arguably, however, the expedited procedures have an inherent drawback. The proper, equitable amount of a support order is often one of the most contested issues of a dissolution proceeding and the discovery of assets, the valuation of assets, the determination of the paying parent’s ability to pay and the custodial parent’s needs are understandably time-consuming.\textsuperscript{135} The OCSE regulations may be too ambitious by requiring completion of ninety percent of the IV-D cases in three months,\textsuperscript{136}

\begin{itemize}
  \item [126.] \textit{Id.}
  \item [130.] \textit{Id.} § 303.101(c)(2).
  \item [131.] 45 C.F.R. § 303.101(c)(5),(6) (1985).
  \item [132.] \textit{Id.} § 303.101(b)(4).
  \item [133.] \textit{Id.}
  \item [134.] 45 C.F.R. §§ 304.21(a), (b)(2) (1985).
\end{itemize}
ninety-eight percent within six months, and one hundred percent within twelve months. Although AFDC cases may not require the depth of discovery or time that other cases may require, states that use expedited procedures for all child-support orders are equitable determinations which require careful analysis. By reducing these determinations to formulas in expedited hearings, states run the risk of sacrificing true equity for speed and convenience.

On the other hand, the expedited procedure has the potential to be a more effective and more equitable means of making support determinations than the current system if certain standards are met. For example, the quasi-judicial officials must be well-qualified and develop expertise in the area of child support. That many circuit court trial judges do not relish presiding over domestic relation contests is no secret. A circuit court judge's distaste for support proceedings may actually reduce his determinations to formulas lacking careful analysis. An expert quasi-judicial official whose sole responsibility is to preside over child-support cases may well be the best person to make equitable determinations.

B. Equalization of Enforcement Services for Welfare and Non-Welfare Families

While the 1974 IV-D legislation provided for services to non-welfare families as a preventive welfare measure, the federal fiscal

137. Id. § 303.101(b)(2)(ii).
138. Id. § 303.101(b)(2)(iii).
139. In New York, hearing examiners have been assigned to hear IV-D support cases.

Hearing examiners do not hear matters relating to custody or visitation, contested paternity, requests for orders of protection or for exclusive possession of the marital home. These must be heard exclusively by judges. Hearing examiners not only make orders of support, they can order an undertaking to assure payments are made, commit the respondent to jail upon confirmation by a judge, and order any relief a judge can to enforce the order. If the respondent defaults in appearing and it can be proven he was personally served with process, there are no second chances, no second requests: An order of support must be entered.

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incentive to the states was for services provided to AFDC families. In practice, therefore, non-AFDC families often found it difficult, if not impossible, to get child-support assistance. Carter v. Morrow illustrates that in 1983 non-welfare families in North Carolina were refused child-support services which were readily available to welfare families. North Carolina had been providing in-court legal representation to AFDC families, but not to non-recipients of AFDC. The United States District Court for the Western District of North Carolina held that Congress' clear intent was that welfare and non-welfare families are to receive the same IV-D services. The Morrow court enjoined the North Carolina Department of Human Services from continued discrimination against persons on the basis of their welfare status. Congress intended the 1984 Amendments to resolve any lingering doubts regarding who is eligible to receive services under the IV-D program. The purpose of the 1984 Amendments is to assure "that the assistance in obtaining support will be available . . . to all children . . . for whom such assistance is requested." Clearly, Congress intended to make child-support services available equally to AFDC and non-AFDC families. Families not on welfare may now be more aware of child-support services because states must publicize the availability of enforcement services through public service announcements made on a frequent basis.

1. Incentive Programs

Under the IV-D program prior to the 1984 Amendments, the federal government, in order to stimulate collections, provided a fixed incentive which allowed the states and political subdivisions to retain twelve percent of all support monies collected for AFDC families.

142. Id. § 658(a)(amended 1984).
143. See FLORIDA REPORT, supra note 123 at 23.
145. Id. at 314.
146. Id.
147. Id. at 315.
148. Id. at 318.
The states, however, received no incentive for monies collected on behalf of non-AFDC families. Furthermore, AFDC collections are used to reimburse the state and federal government for their pro rata share of public assistance payments.\textsuperscript{153} As a result, many states and political subdivisions focused on the financial reward provided for AFDC collections and neglected their services to non-AFDC families.\textsuperscript{154} Additionally, the fixed incentive under the prior law provided little impetus for states to improve the efficiency and effectiveness of their child-support programs.

In order to encourage the states to equalize their provision of services to all families and to increase the efficiency and effectiveness of their programs, the 1984 Amendments provide a new incentive system\textsuperscript{155} for both AFDC and non-AFDC collections.\textsuperscript{156} A sliding scale has replaced the fixed percentage in computing the incentive to be paid each state.\textsuperscript{157} The federal government pays the states a minimum incentive of six percent for all collections; however, if a state's performance meets federal criteria for efficiency and effectiveness, the incentive payment to that state could reach as high as ten percent.\textsuperscript{158} The new incentives program is a great improvement over the old program. The new incentives encourage the states to make their child-support services more effective and efficient and to make them available to all families. Furthermore, the new incentives provide a great opportunity for states to increase their percentage of federal financial assistance because federal incentives for non-AFDC collections should be even higher than for AFDC collections because non-AFDC fathers have a greater ability to pay than welfare fathers.\textsuperscript{159}

2. \textit{Federal Income Tax Refund Program}

The 1984 Amendments permit non-welfare and foster-care cases to utilize the federal income tax refund program previously limited to AFDC clients.\textsuperscript{160} Non-AFDC clients may collect past-due child-support that exceeds five hundred dollars from the federal income tax re-
fund due to the absent parent. Notice must be sent to the absent parent, and he must have an opportunity to contest the order. If the absent parent has remarried and has filed a joint return with his new spouse, the procedure protects the share of the refund due to the new spouse.

3. Imposition of Fees

Although states must now provide child-support services equally to non-welfare and welfare families, one area of minor inequality remains. Congress amended 42 U.S.C. § 654(6)(8) to require states to charge "an application fee for furnishing . . . services . . . ." Under the prior provision, a fee was not mandatory. The fee cannot exceed twenty-five dollars unless the Secretary of Health and Human Services determines that administrative costs require a higher fee. Furthermore, although the upper limit must be uniform nationwide, each state may vary the amount an individual must pay based on that individual's ability to pay. Under the OCSE rules, states may either charge a flat fee or establish a schedule, but the schedule must be tied to the applicant's ability to pay. AFDC families, on the other hand, are not charged a fee for any services. Arguably, this inequality is de minimus because the fee charged to IV-D families is low and unlikely to discourage them from applying for services.

The 1984 Amendments permit states to charge an additional twenty-five dollar fee to non-AFDC clients who request the federal income tax refund offset program. States may impose still another twenty-five dollar fee for payments made through the Child Support Clearinghouse. States may continue to charge for the actual costs of the collection services and impose charges against either the custo-
dial or absent parent.¹⁷³

C. Improved Enforcement of Interstate Collections

Another problem area encountered by many parents is the enforcement of child-support awards across state lines.¹⁷⁴ Under the 1984 Amendments, states must use their wage withholding systems to enforce out-of-state support orders.¹⁷⁵ There is new incentive for states to cooperate because the 1984 Amendments provide that both the state where the custodial parent resides and the state where the absent parent works will receive federal incentive payments.¹⁷⁶ Expedited legal procedures also apply to interstate cases.¹⁷⁷ States must cooperate with each other to obtain and enforce orders for child support.¹⁷⁸ Therefore, mandatory state procedures, such as the imposition of liens and the posting of bonds, apply to interstate cases.¹⁷⁹ Additionally, the 1984 Amendments set aside grants of money to encourage states to use new or innovative methods to improve interstate collection.¹⁸⁰

Congress has mandated a nationwide uniform child-support enforcement act. Not only has Congress required each state to meet certain standards in order to receive federal funds, but Congress has also established enforcement standards which will receive full faith and credit among the sister states. Because many absent parents live in different states than custodial parents, the cooperation requirement of the 1984 Amendments may be one of the most valuable child-support enforcement provisions.

D. Federal Financial Participation and Penalties

1. Reduction of Federal Share of Costs

Another method of congressional pressure on each state to increase the effectiveness of its program is the reduction of the federal share of administrative costs of the state enforcement program. Currently the

¹⁷³. Id. § 654(6)(C)(i), (ii).
¹⁷⁴. See FLORIDA REPORT, supra note 123, at app. C.A.
¹⁷⁸. Id. § 654(9).
¹⁷⁹. Id.
¹⁸⁰. Id. § 655(e).
federal government pays seventy percent of each state's administrative costs for providing child-support services to both welfare and non-welfare families. However, in 1988 and 1989 the federal rate will drop to sixty-eight percent, and in 1990 it will drop again and remain thereafter at sixty-five percent. The legislative history states that "by increasing the state matching share, the Committee expects that State responsibility for and interest in the effectiveness of child support enforcement and paternity establishment services will also be increased." In other words, Congress believes that by gradually increasing the percentage of costs payable by the states, the states will have greater incentive to make their child-support programs more cost efficient.

While decreasing the amount of federal financial participation in many areas, the 1984 Amendments increased federal funding for computerized enforcement systems in order to encourage states to develop more efficient child-support services. Federal matching funds of up to ninety percent are available for the "planning, design, development, installation or enhancement of an automatic data-processing and information system." These automated systems will record child-support payments made and report any delinquencies.

2. **Audits and Penalties**

Auditing is another procedure included in the 1984 Amendments designed to make state programs more effective. One of the duties of the OCSE is to audit state child-support programs at least once every three years. The auditor must make a report to the Secretary of Health and Human Services, who determines if the state child-support enforcement programs conforms to the requirements of the IV-D statute. Two types of sanctions exist for noncompliance. The first sanction is a reduction in federal AFDC benefits to any state not in substantial compliance with Title IV-D. The second type of sanction

181. *Id.* § 655(a)(2).
182. *Id.*
183. S. REP. No. 387, supra note 150, at 2,419.
187. *Id.*
188. *Id.* § 603(h)(2).

The 1984 amendments require that OCSE conduct audits of State enforce-
occurs when the Secretary of Health and Human Services refuses to approve a state plan. The secretary will disapprove any state plan that the audit shows does not comply with IV-D requirements.189 The secretary's refusal to approve a state plan results in termination of all federal financial participation in that state's child-support program.190 If, for example, a state refuses to cooperate with another state, or fails to conform to any other requirement of Title IV-D, that state loses its seventy percent federal matching funds and incentives for its child-support program. Therefore, as a result of an audit, any state found not in substantial compliance with Title IV-D will incur two penalties: reduction of state AFDC funds and termination of federal financial participation in the state's child-support program.

E. Other Miscellaneous Provisions of the 1984 Amendments

The Secretary of Health and Human Services may exempt a state from a particular requirement if that state can demonstrate that the required procedures would not increase the effectiveness and efficiency of that state's current program.191 In other words, the burden is on the state to prove that an existing procedure is so effective that the state child-support program would not be improved by implementing the new procedure mandated by the 1984 Amendments.192 This is a refreshing approach by Congress since legislators, in an attempt to improve an

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area of law, often enact legislation which actually retards the progress already made in some jurisdictions. The exemption enables states that are one or more steps ahead of the 1984 Amendments to continue progress as usual.193

Custodial parents who are IV-D clients and have spousal support orders as well as orders for child support and who live in the same household as the child may have their spousal support order enforced along with the order for child support.194 In addition, the state IV-D agency may petition the court to include medical support in a child-support order if health insurance is available to the absent parent at a reasonable cost.195

V. Florida's Compliance with Congress' Mandate: Major Problems & Recommendations

Florida must resolve serious deficiencies before it will receive the Secretary's approval of its state plan. Unless the Florida legislature enacts new laws in the 1986 legislative session, Florida will lose all federal financial participation in the state child-support program and will incur a reduction in federal AFDC funds. Areas requiring legislation include provisions for expedited procedures, establishment of guidelines for child support, liens on personal property, and wage withholding. Of course, in addition to enacting necessary legislation, Florida must improve its operations for the delivery of child-support services by expanding service to non-AFDC families. Florida must also expand its child-support program to provide services to a greater number of families because federal criteria require that seventy-five percent of the cases must be served at any given time.196

The 1984 Amendments require the governor of each state to appoint a commission to study the child-support program in that state197 and make a report on its findings and recommendations.198 Governor Graham appointed a state commission composed of attorneys, judges, public officials, divorced parents and various experts in the field of child

195. Id. § 652(f).
198. Id. § 654 note(d).
On October 1, 1985 the Florida Governor's Commission on Child Support presented its report to Governor Graham. In addition to the report of the state commission, the Florida Office of the Auditor General conducted a performance audit of the state child-support enforcement program and issued its recommendations in a report dated December 18, 1985. This section of the note discusses the major areas of current Florida noncompliance.

A. The Need for Enactment of Specific Legislation

The 1984 Amendments require states to use expedited procedures in all IV-D cases. Under the OCSE rules Florida must use administrative or quasi-judicial proceedings to establish and enforce child-support orders if the custodial parent has applied to the state IV-D agency or is on AFDC. Justice Boyd of the Florida Supreme Court believes there are better ways to speed up the judicial process than the use of administrative or quasi-judicial officials. Justice Boyd has already taken steps to make child-support determinations more timely. He recommended to the Florida Legislature the addition of twelve circuit court judges in fiscal year 1985-1986. He also issued an administrative order on April 12, 1985 that requires judges to hear child-support cases within fifteen days of a request and to make determinations within ten days. Expressing his views on quasi-judicial officials he writes:

The Court has some concern about requiring the use of masters. Masters are limited in their authority to making recommendations which must be reviewed by a judge. Experience has shown that the use of masters adds on another layer of bureaucracy contributing to delay. I strongly believe that with adequate prepara-

199. Florida Report, supra note 123, at iv-vi.
201. Performance Audit, supra note 123.
202. A complete list of specific legislation which must be enacted by Florida in order to comply with the 1984 amendments can be found in Office of Child Support Enforcement, U.S. Department of Health and Human Services, State Child Support Legislation and the 1984 Federal Amendments: A 54 Jurisdictional Analysis 21 (December 1985).
205. Performance Audit, supra note 123, at 18.
206. Letter from Chief Justice Boyd to Auditor General Ernest Ellison, found in Performance Audit, supra note 123, at 51-52.
tory services and a few additional judges, Florida can alleviate any delay now existing in hearing child support cases and prevent the necessity of creating another tier to the court system.207

Other alternatives have been suggested by the state commission. They recommend the establishment of a family court division in the Office of the Courts Administrator.208 Under the current system child-support cases must compete with criminal and other civil cases for limited judicial time. Unfortunately, in jurisdictions with crowded court dockets, judges are forced to hear child-support motions on their morning motion calendars in order to comply with the administrative order requiring speedy support determinations. Frequently this means that each attorney is allowed only five minutes to present his case. While these hearings may technically comply with Justice Boyd's administrative order, five minutes is often not a sufficient amount of time to permit the judge to make an informed and equitable decision. The growing number of divorce cases and the distaste that some judges have for domestic issues makes the establishment of a family court division a good alternative to the present system.

The state commission also recommends Florida adopt new rules of civil procedure similar to the Florida Rules of Summary Procedure to expedite the judicial process.209 The Florida Rules of Summary Procedure shorten the time limit for service of pleadings and discovery, thus allowing cases to be disposed of in a more timely manner.210 Florida should request exemptions as provided for in the 1984 Amendments for political subdivisions already handling cases in a timely manner.211 However, the subdivisions must prove to the Secretary of Health and Human Services that their present handling of cases qualifies as timely.212 Unfortunately, many subdivisions which are presently operating child-support programs in a timely manner may not be able to prove this to the secretary because these subdivisions may not have the necessary statistics available.

Another problem frustrating many parents is the lack of consistency in the amount of support awarded.213 Even in the same judicial

207. Id. at 52.
208. Florida Report, supra note 123, at 42.
209. Florida Report, supra note 123, at 32.
210. Id.
212. Id. § 666(d).
circuit, children under similar circumstances are awarded widely disparate amounts for child support. 214 Custodial parents often compare the amount of their support orders to the amounts awarded to custodial parents in similar circumstances and conclude the amount of their support order is inadequate, while non-custodial parents compare amount of support awards and conclude the amount of their order is excessive. 218 "Such inequity is bound to lead to disrespect for the legal judicial system at best and, at worst, non-compliance with support orders by those who feel they were the victims of an unfair and arbitrary process." 216 To remedy this problem the 1984 Amendments require states to establish support guidelines by October 1, 1987. 217 Florida must develop guidelines which can be either aspirational or mandatory to be used by judges to establish the amount of the award for child support. 218 The guidelines must include specific numerical criteria to be used in computing the amount of the support order. 219

The provision requiring these support guidelines is one of the most controversial provisions of the 1984 Amendments. 220 The chairman of the Family Law section of the American Bar Association warns that "support guidelines may create more problems than they solve." 221 On the other hand, the state commission considers the guidelines "necessary to achieve equity and adequacy in child support awards." 222 One drawback to guidelines is that they offer a mechanical approach to setting amounts for support, generally based on the basic needs of the child and the parent's ability to pay. 223 Guidelines may fail to consider special needs of a child. A case-by-case approach, on the other hand, would be less likely to overlook those needs. Justice Boyd expressed his reservations about support guidelines by citing Rook v. Rook, 224 "in

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214. Id. at 31-32.
216. Id. at 5-6.
218. Id. § 667(b).
219. Id. § 667.
220. 45 C.F.R. § 302.56(c) (1985).
222. FLORIDA REPORT, supra note 123, at 32.
which the Fifth District Court of Appeal stated that a mechanized approach to establishing child support would contravene the Court's decision in Canakaris v. Canakaris. The Canakaris decision gives judges wide discretion in domestic matters, including child support. Another disadvantage to guidelines is that they are often based on minimum levels of support established for poor families. The use of such guidelines is inappropriate for families with middle level or high incomes. The state commission recognizes these problems and therefore recommends that Florida adopt guidelines which include considerations for children with special needs, parents with very low incomes or "other extraordinary circumstances." The state commission further urges that the low level of support provided in the AFDC program not be used in calculating a child's basic needs and it recommends that Florida adopt the Melson Formula, an approach that incorporates both cost and income sharing concepts.

Wage withholding is another controversial subject. Although Flor-

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225. Letter from Chief Justice Boyd to Auditor General Ernest Ellison, supra note 206, at 52 (referring to Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980)).
226. Canakaris v. Canakaris, 382 So. 2d 1197, 1204 (Fla. 1980).
228. FLORIDA REPORT, supra note 123, at 33.
229. Id. at 33-34.

[1] Parents are entitled to keep sufficient income to meet their most basic needs in order to encourage continued employment.
[2] Until the basic needs of children are met, parents should not be permitted to retain any more income than that required to provide the bare necessities for their own self-support.
[3] Where income is sufficient to cover the basic needs of the parents and all dependents, children are entitled to share in any additional income so that they can benefit from the absent parent's higher standard of living.

These principles were formulated into a guideline that serves as the method under which the Court presumes that a fair and equitable amount of child support will be derived. This presumption is rebuttable in that it will be applied unless and until a parent presents facts that persuade the Court that an application of the formula would be inequitable to either the absent parent, the custodial parent, or the child.

ida has had statutory provisions for wage withholding in effect since 1982, much disagreement exists over the procedures that should be used to initiate the withholding. Under current law, wages will be withheld in IV-D cases if the support is overdue by thirty days. Arguably, a shorter triggering period is required to provide adequate security to the child. The state commission recommends that all child-support orders have provisions for immediate wage withholding without waiting for a delinquency to occur. One advantage to the immediate withholding is that no stigma would accompany wage deductions since all parents, not just delinquent payers, would have support payments automatically deducted from their wages.

To comply with the 1984 Amendments, Florida must enact legislation to provide for the imposition of liens against real and personal property to insure child-support payments. Under the bill proposed by the Florida Senate, when an obligor’s support payment becomes overdue, the obligee or his agent may record a claim of lien in the amount of the overdue payment. “The lien shall attach to all non-exempt real and personal property currently owned or subsequently acquired by the obligor.” Notice must be sent to the obligor whose grounds for contesting the lien is limited solely to a mistake of fact.

B. The Need to Improve Delivery of Child-Support Services

Florida has a poor record for providing child-support services. It currently ranks last among the states in providing child-support services to families headed by women. In 1984 only twenty-four percent of Florida’s families headed by women were receiving child-support services. In fact Florida’s performance appears to have been getting worse in recent years. In 1984, there were not only fewer cases in

231. FLORIDA REPORT, supra note 123, at 72.
233. FLORIDA REPORT, supra note 123, at 73-74.
235. Id. at 28.
236. Id.
237. Id.
239. Id.
which payments were collected from absent fathers240 but fewer absent fathers were located than in 1983.241

These statistics are particularly distressing because the demand for child-support services is very high in Florida.242 This high demand for services is due in part to Florida’s high out-of-wedlock birth rate.243 Children born out-of-wedlock are likely to require state assistance in establishing paternity and enforcing support orders.244 Florida’s divorce rate for families with children, the eighth highest in the nation,245 is also a factor contributing to the high demand for child-support services.

According to the state commission there are two principal reasons for Florida’s poor record.246 First, Florida has concentrated on providing child-support services almost exclusively to AFDC families.247 Because most families are not on AFDC248 they have been unable to receive support services. Only seven percent of non-AFDC families receive child-support services.249 The 1984 Amendments have eliminated a major reason for this disparity — the old incentives program which encouraged the unequal treatment of welfare and non-welfare families. Furthermore, Florida Statutes section 409.24 requires that child-support services be provided equally to all families.250

According to the state commission the second reason Florida is ranked last in the nation in providing child-support services to families headed by women is that Florida has not maintained an adequate staff of child-support workers.251 Staff workers in Florida have caseloads more than twice as heavy as the national average.252 Only three states

240. Id. at 48.
241. Id. at 52.
242. FLORIDA REPORT, supra note 123, at 6. There is an estimated backlog of 250,000 cases of Florida families needing, but not receiving, child-support services. Id.
243. Id. at 7. Twenty-five percent of children born in Florida are born out-of-wedlock; however, the national average is less than twenty percent born out-of-wedlock. Id.
244. Id.
245. Id. at app. A-2.
246. Id. at 7.
247. Id. at x. Thirty-eight percent of Florida AFDC families receive child-support services. Id.
248. W. DIXON, supra note 238, at 10. For example, there are 370,000 families headed by women in Florida, and only 78,000 of those are on AFDC. Id. at 10.
249. FLORIDA REPORT, supra note 123, at x.
251. FLORIDA REPORT, supra note 123, at 7.
252. Id. at 8.
assign their support workers more cases than Florida assigns its workers. Florida stands to lose federal funding because of its poor service delivery system if Florida fails to meet the OCSE requirements which provide that "75 percent of cases must be currently served at any given time." The Florida legislature should allocate more money to the child-support enforcement program to hire, train and better compensate staff workers. Furthermore, Florida should improve the current automated child-support information systems to increase staff efficiency. Expanded federal funding for automated systems makes the acquisition and improvement of computer systems a particularly wise investment.

C. The Need to Allocate More Revenue to the Florida Child-Support Program

The child-support program is cost beneficial to Florida. Although Florida spent over four million dollars providing child-support services, it recouped nearly four times that amount from support payments recovered from absent parents, fees paid by non-AFDC families and federal incentive payments. If the legislature allocates more money to the child-support program, the program will recover more money from absent parents. As a result, federal incentive payments will increase and produce an even greater net gain for the state. The state commission calls the child-support program "a highly productive financial arrangement for the government and the citizens of Florida. It is most unusual for state government to provide a social service and, at the same time, earn or recover 377 percent of the state's program costs."

VI. Conclusion

The increasing number of divorces, desertions and out-of-wedlock

253. Id. at app. A-5.
255. Letter from William J. Page to Governor Robert Graham (September 30, 1985) (submitting FLORIDA GOVERNOR'S COMM'N ON CHILD SUPPORT, FINAL REPORT 2 (1985)).
256. See FLORIDA REPORT, supra note 123, at 45.
258. FLORIDA REPORT, supra note 123, at x.
259. Id. at 2.
260. Id. at 15.
births results in the increasing number of single-parent families. It is estimated that half the children born in the United States today will live in a single-parent family at some point in their lives. These children run a high risk of living lives of poverty because they often receive little or no support from their absent parent. Taxpayers have been forced to assume the responsibility of providing support for these children through the AFDC program. In order to reduce the taxpayers' burden and to force absent parents to assume their parental duty to support their children, the federal government invaded a traditional state domain — child-support enforcement. The most recent federal action, the Child Support Amendments of 1984, revised various provisions of Title IV-D of the Social Security Act and provides new federal incentives and penalties to force the states to use specific child-support enforcement procedures which other states have successfully utilized. Wage withholding is perhaps the most important new procedure for support enforcement. Other new provisions include the requirements for the imposition of liens and the posting of bonds to secure support payments, mandatory tax refund offset programs, and the use of expedited procedures to accelerate the establishment and enforcement of child-support orders. The 1984 Amendments clearly require that states provide child-support services equally to AFDC and non-AFDC families.

In order to continue receiving federal funds for the state child-support program and to avoid a reduction in federal AFDC funds, Florida must pass the required legislation and make significant improvements in its system for the delivery of child-support services. Since the child-support program is cost-beneficial, the Florida legislature has no excuse not to allocate more money to the child-support program. The Florida Governor's Commission on Child Support declared "[i]t is clear . . . that [the] establishment and enforcement of child support obligations is the most significant and useful public policy instrument for reducing poverty among children in the United States."262

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262. Florida Report, supra note 123, at 11.