Evidence

Mark M. Dobson∗
Evidence

Mark M. Dobson

Abstract

This article discusses major Florida evidentiary case law developments occurring primarily during 1986.

KEYWORDS: proof, crimes, relevancy
Evidence

Mark M. Dobson

I. INTRODUCTION

II. CONTEMPORANEOUS OBJECTION RULE

III. RELEVANCY

A. Exclusion on Grounds of Prejudice or Confusion

B. Subsequent Remedial Measures

C. Character Evidence in General

D. Prosecution Responses to Character Evidence

E. Other Crimes, Wrongs or Acts

1. To Prove a Matter Independent of Section 90.404(2)

2. To Prove Prior Illegal Sexual Relationships

3. To Prove Identity

F. Rape Shield Law

IV. PRIVILEGES

A. Privilege Against Self-Incrimination

1. Privilege Against Self-Incrimination and Documentary Evidence

2. Privilege Against Self-Incrimination and Professional Regulatory Proceedings

B. Attorney-Client Privilege

1. Scope of Attorney-Client Privilege

2. Waiver

C. Reporter’s Privilege

1. Scope of Privilege Generally

2. Physical Evidence

V. INTERPRETERS

VI. WITNESSES

A. Refreshing Recollection

B. Impeaching One’s Own Witness

336. Id. at 602. The officers saw the defendant arrive with one small suitcase and attempt to board the train forty to fifty minutes prior to its scheduled departure. Unable to board, the defendant sat in the station, during which time he appeared nervous.

337. Id.

338. Id. The defendant said he was a salesman from Boston, but had no identification. The ticket was issued in the name of “Leach,” which the defendant explained A check of the records showed that the defendant had claimed to have stayed with a friend of any guests by the name of Leech during the preceding week.

339. Id.

340. Id.

341. Id. at 603.

* Professor of Law, Nova University Center for the Study of Law, L.L.M., Temple University, 1977; J.D., Catholic University, 1973; B.A., American University, 1970.
mainly to the state's appellate courts for guidance on evidentiary issues. As with any survey, not every recent decision merits discussion. As in last year's article, cases have been selected for discussion for certain basic reasons: (1) the case represents a new evidentiary development, (2) the opinion settles an evidentiary dispute between Florida courts, (3) the case provides an excellent example of a fundamental principle in a particular area, or finally, (4) evidentiary issues in a particular area that arise so commonly that they are important ones for both practitioners and the courts. As a service to readers and for completeness, the author notes that the following evidentiary areas, not discussed in this article, generated opinions during the 1986 survey period: parole evidence rule, prohibition on judicial comment, judicial legislation provided for treble damages, attorneys fees and court costs for any person proving an injury from certain activity of a criminal nature. In so doing, 1986 Fla. Laws 277 expressly provides that any judgment in the state's favor in a "criminal proceeding concerning the conduct of the defendant which forms the basis for a civil cause of action under this chapter" will have estoppel effect against the defendant in a subsequent civil action. However, a not guilty verdict, while admissible, will not have a corresponding effect against the plaintiff. See Fla. Stat. §§ 772.14, 772.15 (1986).

While it may initially seem unfair to give the two verdicts in criminal cases different effect, these provisions are wisely drawn. Since the burden of proof differs in civil and criminal litigation, a guilty verdict is strong indication the defendant committed the alleged underlying facts. A not guilty verdict does not mean the jury believes the defendant did not probably engage in the prohibited conduct—just that the jurors have not been satisfied of such beyond a reasonable doubt. For a guilty verdict, the jury must have found the defendant committed the acts charged. Thus, having only a guilty verdict act as an estoppel in subsequent civil actions is sensible.

There were 160 reported cases dealing with evidentiary issues during the survey period. Eleven of these were reported in Florida Supplement Second, while the remaining 149 appeared in the Southern Reporter. Statistically this is closely comparable to the 1985 survey period which had 154 cases dealing with evidentiary issues, only one of which appeared in Florida Supplement Second.

Most, but not all, of the reported cases discussed issues involving various sections of the Florida Evidence Code.

1. See Fla. Stat. § 90.103(3) (1985), declaring the Florida Evidence Code's passage does not effect the parole evidence rule; Billera v. Custom Laminating Window, 11 Fla. Supp. 2d 120 (Palm Beach County Court 1985) (A lawsuit for return of money paid for purchase and installation of drapery in a townhouse involved a transaction in goods and thus was governed by the parole evidence provision of Florida's Uniform Commercial Code.).

2. See Fla. Stat. § 90.106 (1985); Huff v. State, 495 So. 2d 145 (Fla. 1986) (A trial judge's remark that a question objected to during the defendant's cross-examination was proper because Huff's previous answer had been "vague" did not constitute improper judicial comment on his veracity since the statement was merely a neutral
This article discusses major Florida evidentiary case law developments occurring primarily during 1986. As with most years since the Florida Evidence Code's passage in 1976, little statutory development took place last year. Thus, Florida attorneys must continue looking mainly to the state's appellate courts for guidance on evidentiary issues.

As with any survey, not every recent decision merits discussion. As in last year's article, cases have been selected for discussion for certain basic reasons: (1) the case represents a new evidentiary development, (2) the opinion settles an evidentiary dispute between Florida courts, (3) the case provides an excellent example of a fundamental principle in a particular area, or finally, (4) evidentiary issues in a particular area that arise so commonly that they are important ones for both practitioners and the courts. As a service to readers and for completeness, the author notes that the following evidentiary areas, not discussed in this article, generated opinions during the 1986 survey period: parole evidence rule, prohibition on judicial comment, judicial legislation provided for treble damages, attorneys fees and court costs for any person proving an injury from certain activity of a criminal nature. In so doing, 1986 Fla. Laws 277 expressly provides that any judgment in the state's favor in a "criminal proceeding concerning the conduct of the defendant which forms the basis for a civil cause of action under this chapter" will have estoppel effect against the defendant in a subsequent civil action. However, a not guilty verdict, while admissible, will not have a corresponding effect against the plaintiff. See Fla. Stat. §§ 772.14, 772.15 (1986).

While it may initially seem unfair to give the two verdicts in criminal cases different effect, these provisions are wisely drawn. Since the burden of proof differs in civil and criminal litigation, a guilty verdict is strong indication the defendant committed the alleged underlying facts. A not guilty verdict does not mean the jury believes the defendant did not probably engage in the prohibited conduct—just that the jurors have not been satisfied of such beyond a reasonable doubt. For a guilty verdict, the jury must have found the defendant committed the acts charged. Thus, having only a guilty verdict act as an estoppel in subsequent civil actions is sensible.

3. There were 160 reported cases dealing with evidentiary issues during the survey period. Eleven of these were reported in Florida Supplement Second, while the remaining 149 appeared in the Southern Reporter. Statistically this is closely comparable to the 1985 survey period which had 154 cases dealing with evidentiary issues, only one of which appeared in Florida Supplement Second.

Most, but not all, of the reported cases discussed issues involving various sections of the Florida Evidence Code.

4. See Fla. Stat. § 90.103(3) (1985), declaring the Florida Evidence Code's passage does not affect the parole evidence rule; Billera v. Custom Laminating Window; 11 Fla. Supp. 2d 120 (Palm Beach County Court 1985) (A lawsuit for return of money paid for purchase and installation of drapery in a townhouse involved a transaction in goods and thus was governed by the parole evidence provision of Florida's Uniform Commercial Code.)

5. See Fla. Stat. § 90.106 (1985); Huff v. State, 495 So. 2d 145 (Fla. 1986) (A trial judge's remark that a question objected to during the defendant's cross-examination was proper because Huff's previous answer had been "vague" did not constitute improper judicial comment on his veracity since the statement was merely a neutral
notice, civil presumptions, relevancy in general, similar happenings.

6. See Fla. Stat. §§ 90.201-90.207 (1985). Judicial notice cases decided during the survey presented rather standard issues. See Anderson v. Department of Health & Rehabilitative Serv., 482 So. 2d 491, 498 (Fla. 1st Dist. Ct. App. 1986) (The court could not judicially notice under Fla. Stat. §90.202 an HRS manual in a proceeding to revoke a child care facility's license since the manual is not a rule in the Florida Administrative Code.); Livingston v. Spero, 481 So. 2d 87 (Fla. 1st Dist. Ct. App. 1986) (In order to determine legislative intent, courts may properly take judicial notice of the Journals of the House and Senate and official actions of state legislative departments, including recorded Senate committee discussions.); Department of Admin. v. City of St. Petersburg, 12 Fl. Supp. 2d 112 (6th Cir. 1985) (Judicial notice was taken pursuant to FLA. STAT. §90.202(b) of court records in two cases; a motion was granted for judicial notice of two Florida appellate cases, two federal administrative regulations and statewide policy of Internal Improvement Trust Fund.; Diversicorp v. Department of Health & Rehabilitative Serv., 28 Fl. Supp. 2d 100 (Div. of Admin. Hearings 1985) (A hearing officer ruled to take judicial notice of agency action on a certificate of need application for paving home construction in another country since the fact was neither generally known while hearing officer's jurisdiction under FLA. STAT. §90.202(1) (1985) nor capable of "repeal and ready determination" by reference to reliable source under §90.203(2); the request was also untimely under § 90.203(1) since the hearing had concluded.)

Huff v. State, 495 So. 2d 145 (Fla. 1986) presented an unusual situation concerning the propriety of taking judicial notice at a defendant's sentencing hearing. Following a first degree murder conviction, the trial court took judicial notice of all pleadings from Huff's first trial and sentencing. Since the first trial had been reversed, see Huff v. State, 437 So. 2d 1087 (Fla. 1983), the result then was a nullity, and the trial had to proceed against Huff as if he had never been tried at all. Taking judicial notice of the first trial's events was error, because any facts found against Huff in the prior trial may have been unsupported by evidence in the second one. This was especially likely to happen when the state tried the case a second time on a different theory as happened here. Thus, judicial notice of a previous trial's evidence or proceedings would never be taken to support a death sentence following a defendant's retrial and second conviction. However, the court found the error harmless since ample evidence of Huff's second trial still existed to support a death sentence.

See Gutierrez v. Levy, 482 So. 2d 1236, 1239 (Fla. 3d Dist. Ct. App. 1980) (a jury instruction on the presumption of receipt of mail was improper since it "simply restated[d] the rule that a letter properly addressed, stamped and placed in the mail creates a presumption of receipt and the proof of general office practice satisfies the requirement of showing due mailing." Id. )

See FLA. STAT. §90.401 (1985) generally defining relevant evidence as "evidence tending to prove or disprove a material fact." What will be material of substance is necessarily more a function of the underlying claims and defenses in a particular trial than of substantive evidence law itself. This was recently demonstrated in Ironman v. Rhoads, 493 So. 2d 1097 (Fla. 4th Dist. Ct. App. 1986). Plaintiffs sued the defendant for injuries stemming from a rear end collision. Although the defendant drove filed various affirmative defenses, no pleading specifically raised sudden brake failure as a defense. At trial, plaintiffs motion in limine to present introduction of any evidence as to brake failure was denied, and the defendant was permitted to claim such. After a defense no liability verdict, the Fourth District Court of Appeal reversed and remanded for a new trial. The court found that although sudden brake failure was not one of the defenses specifically mentioned in Fla. R. Civ. P. 1.110(b), Affirmative Defense, general language in the rule requiring the specific pleading of "any other matter constituting an avoidance or affirmative defense," meant that Rule 1.110(b) covered such. Plaintiff's motion should have been granted, and the brake failure evidence excluded as irrelevant to any of the defenses specifically alleged.

Whether certain information proves to be a material fact depends upon the strength of the logical connection between the information and the matter it is being offered for. If there is no connection, trial courts will seldom be reversed on relevancy grounds for deciding to admit the evidence. However, when no connection exists, there is no foundational requisite by which the information can be at all relevant. Gulf Power Co. v. Kay, 493 So. 2d 1067 (Fla. 1st Dist. Ct. App. 1986) recently demonstrated that second point. A passenger rendered a quadruple plea of Gulf Power and other defendants for injuries caused when the car she was riding in collided with a company power pole. After the pole had been first installed, the Florida Department of Transportation realigned the roadway on which it stood from a two lane to a four lane highway. This officially placed the pole only thirty-three inches from the outside lane of travel on a curve. Plaintiff alleged the pole's location was a violation of standards and constituted negligence by Gulf Power. To support this allegation, four experts in highway and engineering design read from different manuals and guides concerning minimum standards of street design and utility device installation. After a substantial plaintiff verdict, the First District Court of Appeal reversed based upon improper use of the manuals. Id. at 1073. While the court found evidence to support the proposition that the pole's location violated all the manual standards involved, there was no evidence offered to show that the standards should have been applicable to the pole. The pole had been installed long before any of the manuals and standards were written, thus Gulf Power could not be negligent for failure to comply with non-existent standards. Id. Likewise the court found that whether Gulf Power should have relocated the pole after the highway change was a discretionary matter for the Transportation Department and not for the jury. Id. at 1072. Abstaining any evidence the Department could have made to such a relocation, the manuals were irrelevant. Id. 9.

9. See Rivera v. Jevres & Webb Co., 488 So. 2d 547 (Fla. 3d Dist. Ct. App. 1986) (Exclusion of evidence offered to prove notice of prior incidents when metal heads on packages snapped was harmless error since other testimony showed a company representative had been informed of prior similar incidents.)

Admissibility of similar happenings in civil cases is a relevancy question. Thus there is no specific evidence rule dealing exclusively with such. For more extended discussion and examples of when excluding similar happenings evidence is reversible see
notice,7 relevancy in general,8 similar happenings,

ruling on defense counsel's objection.)

survey presented rather standard issues. See Anderson v. Department of Health &
Rehabilitation Serv., 482 So. 2d 491, 498 (Fla. 1st Dist. Ct. App. 1986) (The
court could not judicially notice under Fla. Stat. §90.202 an HRS manual in a proceeding
revising a child care facility's license since the manual is not in a rule in the Florida
administration Code); Livingstone v. Speris, 481 So. 2d 87 (Fla. 1st Dist. Ct. App 1986)
(The defendant's failure to request judicial notice of a prior dismissal proceeding
mentioned in plaintiff's complaint meant that trial court erred in dismissing the com-
plaint because of res judicata.); Jacksonville Elec. Auth. v. Department of Revenue;
464 So. 2d 1559 (Fla. 1st Dist. Ct. App. 1986) (In order to determine legislative
acts, courts may properly take judicial notice of the Journals of the House and Senate and
official actions of state legislative departments, including recorded Senate committee
discussions.); Department of Admins. v. City of St. Petersburg, 127 So. Supp. 2d 115
(6th Cir. 1985) (Judicial notice was taken pursuant to Fla. Stat. §90.202(6) of court
records in two counts; a motion was granted for judicial notice of the Florida statute
cases, two federal administrative regulations and statewide policy of Internal Transport-
ment Trust Fund.); Diversicare Corp. v. Department of Health and Rehabilitation
a hearing officer's request to take judicial notice of agency action on a certificate of need application for new home construction in another county since the fact was neither generally known
nor available to the hearing officer's jurisdiction under Fla. Stat. §90.202(11) (1985) nor capable of "ac-
curately and readily determination" by reference to reliable source under §90.203(2). the
request was also denied under §90.203(1) since the hearing had concluded).

Huff v. State, 495 So. 2d 145 (Fla. 1986) presented an unusual situation concern-
ing the propriety of taking judicial notice at a defendant's sentencing hearing. Violat-
ing a first degree murder conviction, the trial court took judicial notice of all proceed-
ings from Huff's first trial and sentencing. Since the first trial had been reversed, see
Huff v. State, 437 So. 2d 1087 (Fla. 1983), the result then was not a surprise, and the
jury had to proceed against Huff as if he had never been tried at all. Taking judicial
notice of the first trial's events was error, because any facts found against Huff in the
first trial may have been unsupported by evidence in the second one. This was especially
likely to happen when the state tried the case a second time on a different theory
than the first, as in this case. Thus, taking judicial notice of a previous trial's evidence or proceedings
would be improper. The court then found that Huff should be retried and not
sentenced. However, the court found that the error harmless since ample evidence of
the defendant's guilt existed at the second trial and existed to support a death sen-
tence.

7. See O'Keefe v. Lewis, 481 So. 2d 1236, 1239 (Fla. 3d Dist. Ct. App. 1986)
(A jury instruction on the presumption of receipt of mail is incorrect when the
courts cannot properly address the issue of mailing; see Fed. R. Evid. 901(b)(2).)

presented to prove a fact material fact." For more extended discussion and examples of
cluding similar happenings evidence is irrelevan

trial than of substantive evidence law itself. This was recently demonstrated in Brown v. Rhodes, 493 So. 2d 977 (Fla. 4th Dist. Ct. App. 1986). Plaintiffs sued the defend-

notice,7 relevancy in general,8 similar happenings,

ruling on defense counsel's objection.)

survey presented rather standard issues. See Anderson v. Department of Health &
Rehabilitation Serv., 482 So. 2d 491, 498 (Fla. 1st Dist. Ct. App. 1986) (The
court could not judicially notice under Fla. Stat. §90.202 an HRS manual in a proceeding
revising a child care facility's license since the manual is not in a rule in the Florida
administration Code); Livingstone v. Speris, 481 So. 2d 87 (Fla. 1st Dist. Ct. App 1986)
(The defendant's failure to request judicial notice of a prior dismissal proceeding
mentioned in plaintiff's complaint meant that trial court erred in dismissing the com-
plaint because of res judicata.); Jacksonville Elec. Auth. v. Department of Revenue;
464 So. 2d 1559 (Fla. 1st Dist. Ct. App. 1986) (In order to determine legislative
acts, courts may properly take judicial notice of the Journals of the House and Senate and
official actions of state legislative departments, including recorded Senate committee
discussions.); Department of Admins. v. City of St. Petersburg, 127 So. Supp. 2d 115
(6th Cir. 1985) (Judicial notice was taken pursuant to Fla. Stat. §90.202(6) of court
records in two counts; a motion was granted for judicial notice of the Florida statute
cases, two federal administrative regulations and statewide policy of Internal Transport-
ment Trust Fund.); Diversicare Corp. v. Department of Health and Rehabilitation
a hearing officer's request to take judicial notice of agency action on a certificate of need application for new home construction in another county since the fact was neither generally known
nor available to the hearing officer's jurisdiction under Fla. Stat. §90.202(11) (1985) nor capable of "ac-
curately and readily determination" by reference to reliable source under §90.203(2). the
request was also denied under §90.203(1) since the hearing had concluded).

Huff v. State, 495 So. 2d 145 (Fla. 1986) presented an unusual situation concern-
ing the propriety of taking judicial notice at a defendant's sentencing hearing. Violat-
ing a first degree murder conviction, the trial court took judicial notice of all proceed-
ings from Huff's first trial and sentencing. Since the first trial had been reversed, see
Huff v. State, 437 So. 2d 1087 (Fla. 1983), the result then was not a surprise, and the
jury had to proceed against Huff as if he had never been tried at all. Taking judicial
notice of the first trial's events was error, because any facts found against Huff in the
first trial may have been unsupported by evidence in the second one. This was especially
likely to happen when the state tried the case a second time on a different theory
than the first, as in this case. Thus, taking judicial notice of a previous trial's evidence or proceedings
would be improper. The court then found that Huff should be retried and not
sentenced. However, the court found that the error harmless since ample evidence of
the defendant's guilt existed at the second trial and existed to support a death sen-
tence.

7. See O'Keefe v. Lewis, 481 So. 2d 1236, 1239 (Fla. 3d Dist. Ct. App. 1986)
(A jury instruction on the presumption of receipt of mail is incorrect when the
courts cannot properly address the issue of mailing; see Fed. R. Evid. 901(b)(2).)

presented to prove a fact material fact." For more extended discussion and examples of
including similar happenings evidence is irrelevan

in civil cases,6 habit evidence,10 offers to compromise,14 offers to plead
guilty,16 husband-wife privilege,19 medical review committee privilege,26 psychotherapist-patient privilege,17 general competency of witnesses,26

1985 Survey, supra note 1, at 1035-38.
10. See Fla. Stat. § 90.406 (1985); G. M. Acceptance Corp. v. Utal, 4 Fla. Supp. 2d 131 (Palm Beach County Ct. 1985) (A collection manager’s testimony about office’s routine mailing practice was admissible to show a specific letter had been mailed in a deficiency judgment lawsuit.).
11. See Fla. Stat. § 90.408 (1985); Sea Cabin, Inc. v. Scott, Berk, Roje & Harris, 496 So. 2d 163 (Fla. 4th Dist. Ct. App. 1986) (It was reversible error in a lawsuit against a law firm for negligence to admit a letter from counsel to a third party suggesting the third party was responsible for appellant’s injuries and offering a settlement since § 90.408 “applies to settlement offers made to third parties as well as parties to the litigation.” Id. at 164; Stamm v. Stamm, 489 So. 2d 851 (Fla. 5th Dist. Ct. App. 1986) (The trial court committed reversible error in a custody proceeding awarding primary residential responsibility by considering a settlement proposal and testimony on negotiations about custody conducted under mediation.).
12. See Fla. Stat. § 90.410 (1985); Telayor v. State, 498 So. 2d 1297 (Fla. 1st Dist. Ct. App. 1986) (Letters written by the defendant to two judges confessing to two murders and requesting death were not inadmissible offers to plead guilty).
13. See Fla. Stat. § 90.504 (1985); State v. Firtell, 13 Fla. Supp. 2d 65 (Broward County Ct. 1985) (The husband and wife privilege was merely mentioned in discussion of auditory transmitted information filed against married couples.).
14. See Fla. Stat. § 768.40(5) (1985); Feldman v. Gliccort, 488 So. 2d 574 (Fla. 3d Dist. Ct. App. 1986) (An action against doctors who allegedly defamed plaintiff in course of hospital medical review committee proceeding was dismissed because statute bar introduction of alleged defamatory damage subject matter. This in effect creates at absolute privilege against this type of defamation action.).
16. See Fla. Stat. § 90.503 (1985); Kadet v. Daytona Times, Inc., 12 Fla. Supp. 2d 106 (7th Cir. Ct. 1985) (A plaintiff in libel action could not claim psychotherapist-patient privilege to prevent the deposition of his psychiatrist concerning the cause of Kadet’s mental anguish since § 90.503(4)(c) abolishes the privilege as to “communications relevant to an issue of the mental or emotional condition of the patient in any proceeding [relating] upon the condition as an element of his claim...”).
17. See Fla. Stat. § 90.601 (1985); Zabranski v. Riveron, 495 So. 2d 1195 (Fla. 3d Dist. Ct. App. 1986) (The appellant’s claim that once someone is found insane they are presumed incompetent to testify as a witness was rejected since § 90.601 presumes competency and “a finding of insanity affects credibility rather than admissibility.” Id. at 1198; Begley v. State, 483 So. 2d 70, 72 (Fla. 4th Dist. Ct. App. 1986) (affirming trial court decision that five year old victim in sexual battery case had "sufficient mental capacity and sense of moral obligation to be competent as a witness,“ quoting Rutledge v. State, 374 So. 2d 975, 979 (Fla. 1979), cert. denied, 446 U.S. 913 (1980).

1987] Evidence

1297

dead man’s statute,27 competency of judges as witnesses,28 juror misconduct and incompetency,29 definition of an adverse party,30 impeach-

17. See Fla. Stat. § 90.602 (1985); Fabian v. Ryan, 486 So. 2d 10 (Fla. 3d Dist. Ct. App. 1986) (Reasonable person about discussion with deceased concerning an option to buy was inadmissible under Deadman’s Statute); In re Estate of Pearce, 481 So. 2d 69 (Fla. 4th Dist. Ct. App. 1986) (There was no error in allowing testimony of deceased’s attorney who had no claims against her estate concerning certain verbal instructions since the attorney was not “an interested party.”).
18. See Fla. Stat. § 90.6071 (1985); Kadet v. Daytona Times, Inc. 12 Fla. Supp. 2d 106 (7th Cir. Ct. 1985) (A judge who temporarily presided over plaintiff’s criminal prosecution may be deposed in civil defamation case concerning the basis for opinions stated to plaintiff in connection with the prosecution since “[t]here is no privilege which permits a judge to refuse to give testimony and it is now generally recognized that judges are competent to testify in cases over which they are not presiding.” Id. at 107).
19. See Fla. Stat. § 90.6072 (1985); Amazon v. State, 487 So. 2d 810 (Fla. 1986) (The jurors’ disobedience of court’s sequestration order in a murder trial and jurors’ watching of a silent news account of portions of the trial testimony was misconduct. However, “while potentially harmful misconduct is presumptively prejudicial... the defendant has the burden of establishing a prima facie case that the conduct is potentially prejudicial” and burden not met under the facts. Id. at 811; State Dept. of Transp. v. Fortune Fed. Sav. and Loan Assoc., 496 So. 2d 960 (Fla. 5th Dist. Ct. App. 1986) (A juror’s testimony that jury relied on facts presented at trial in reaching its verdict precluded interview of other jurors since “inquiry into each juror’s thought processes and motives” is not permitted. Id. at 961; Preast v. Amica Mut. Ins. Co., 483 So. 2d 83 (Fla. 2d Dist. Ct. App. 1986) (A jury’s admission that damages award was arrived at by lot and that jurors agreed to circumvent court’s instructions on damages in order to award something despite jurors’ belief plaintiff had no permanent injuries was misconduct and required reversal); Snook v. Firestone Tire & Rubber Co., 485 So. 2d 496 (Fla. 5th Dist. Ct. App. 1986) (A juror’s private investigations into ways plaintiff claimed an accident occurred and juror’s report of investigation’s results to rest of the jury was misconduct meriting reversal); Snook v. State, 478 So. 2d 403 (Fla. 3d Dist. Ct. App. 1985) (The failure to raise issue of known juror misconduct before verdict’s return constitutes a waiver).
20. See Botte v. Pomeroy, 497 So. 2d 1275, 1277 (Fla. 4th Dist. Ct. App. 1986) declaring that “a party need not be named in the pleadings to be called as an adverse party, so long as the party occupies an adverse position at trial to the calling party and could have been named as a party.” Id. The district court found the trial court erred by forbidding a plaintiff from calling as an adverse witness the defendant’s employee who allegedly caused the plaintiff’s personal injuries. In so doing, the court stated that “[a] non-party employee of a named party may be called as an adverse party witness.” Id. Here, since the employee allegedly caused the injuries, he could have been sued directly. One wonders if the Fourth District would have made such a broad declaration if the employee could not have been named as a party. Botte’s broad language may need further clarification, and the district court’s broad statement should be read with caution.
Dobson: Evidence

[1978]

Evidence

1297

dead man’s statute,77 competency of judges as witnesses,88 juror misconduct and incompetency,89 definition of an adverse party,90 impeach-

17. See Fla. Stat. § 90.602 (1985); Fabian v. Ryan, 486 So. 2d 10 (Fla. 3d Dist. Ct. App. 1986) (Testimony about discussion with deceased concerning an option to buy was inadmissible under Deadman’s Statute); In re Estate of Pearce, 481 So. 2d 69 (Fla. 4th Dist. Ct. App. 1985) (There was no error in allowing testimony of deceased’s attorney who had no claims against her estate concerning certain verbal instructions since the attorney was not “an interested party.”).

18. See Fla. Stat. § 90.607(1) (1985); Kades v. Daytona Times, Inc. 12 Fla. Supp. 2d 106 (7th Cir. Ct. 1985) (A judge who temporarily presides over plaintiff’s criminal prosecution may be deposed in civil defamation case concerning the basis for opinions stated to plaintiff in connection with the prosecution since “[t]here is no privilege which permits a judge to refuse to give testimony and it is now generally recognized that judges are competent to testify in cases over which they are not presiding.” Id. at 107).

19. See Fla. Stat. § 90.607(2) (1985); Amazon v. State, 487 So. 2d 810 (Fla. 1986) (The jurors’ disobedience of court’s sequestration order in a murder trial and jurors’ watching of a silent news account of portions of the trial testimony was misconduct. However, “while potentially harmful misconduct is presumptively prejudicial . . . the defendant has the burden of establishing a prima facie case that the conduct is potentially prejudicial” and burden not met under the facts. Id. at 811.); State Dept. of Transp. v. Fortune Fed. Sav. and Loan Assoc., 496 So. 2d 960 (Fla. 2d Dist. Ct. App. 1986) (A juror’s testimony that jury relied on facts presented at trial in reaching its verdict precluded interview of other jurors since “inquiry into each juror’s thought process and motives” is not permitted. Id. at 961.); Prast v. Amica Mut. Ins. Co., 483 So. 2d 83 (Fla. 2d Dist. Ct. App. 1986) (A jury’s admission that damages award was arrived at by lot and that jurors agreed to circumvent court’s instructions on damages in order to award something despite jurors’ belief plaintiff had no permanent injuries was misconduct and required reversal.); Snook v. Firestone Tire & Rubber Co., 483 So. 2d 496 (Fla. 5th Dist. Ct. App. 1986) (A juror’s private investigations into way plaintiff claimed an accident occurred and juror’s report of investigation’s results to rest of the jury was misconduct requiring reversal); Snook v. State, 487 So. 2d 403 (Fla. 3d Dist. Ct. App. 1985) (The failure to raise issue of known juror misconduct before verdict’s return constitutes a waiver).

20. See Botte v. Pomroy, 497 So. 2d 1275, 1277 (Fla. 4th Dist. Ct. App. 1986) declaring that “a party need not be named in the pleadings to be called as an adverse party, so long as the party occupies an adverse position at trial to the calling party and could have been named as a party.” Id. The district court found the trial court erred by forbidding a plaintiff from calling as an adverse witness the defendant’s employee who allegedly caused the plaintiff’s personal injuries. In so doing, the court stated that “[a] non-party employee of a named party may be called as an adverse party witness.” Id. Here, since the employee allegedly caused the injuries, he could have been sued directly. One wonders if the Fourth District would have made such a broad clarification if the employee could not have been named as a party. Botte’s broad language may need further clarification, and the district court’s broad statement should be read with caution.


10. See Fla. Stat. § 90.406 (1985); G. M. Acceptance Corp. v. Uatal, 4 Fla. Supp. 2d 131 (Palm Beach County Ct. 1985) (A collection manager’s testimony about office’s routine mailing practice was admissible to show a specific letter had been mailed in a deficiency judgment lawsuit.).

11. See Fla. Stat. § 90.408 (1985); Sea Cabin, Inc. v. Scott, Burk, Royce & Harris, 496 So. 2d 163 (Fla. 4th Dist. Ct. App. 1986) (It was reversible error in a lawsuit against a law firm for negligence to admit a letter from counsel to a third party suggesting the third party was responsible for appellant’s injuries and offering a settlement since § 90.408 “applies to settlement offers made to third parties as well as parties to the litigation.” Id. at 164); Stamm v. Stamrn, 489 So. 2d 851 (Fla. 5th Dist. Ct. App. 1986) (The trial court committed reversible error in a custody proceeding Avoiding primary residential responsibility by considering a settlement proposal and testimony on negotiations about custody conducted under mediation.).

12. See Fla. Stat. § 90.410 (1985); Traylor v. State, 498 So. 2d 1297 (Fla. 1st Dist. Ct. App. 1986) (Letters written by the defendant to two judges confessing to two murders and requesting death were not inadmissible offers to plead guilty.).

13. See Fla. Stat. § 90.504 (1985); State v. Firtell, 13 Fla. Supp. 2d 65 (Broward County Ct. 1985) (The husband and wife privilege was merely mentioned in discussion dismissing joint information filed against married couples.).

14. See Fla. Stat. § 768.40(3) (1985); Feldman v. Gucrofi, 488 So. 2d 574 (Fla. 3d Dist. Ct. App. 1986) (An action against doctors who allegedly defamed plaintiff in course of hospital medical review committee proceeding was dismissed because statute bars introduction of alleged defamatory subject matter. This in effect creates an absolute privilege against this type of defamation action.), Figuerola v. Allison, 13 Fla. Supp. 2d 133 (11th Cir. Ct. 1985) (This case dealt with an order quashing a subpoena duces tecum for certain privileged documents.); Former Fla. Stat. § 768.40(4), now Fla. Stat. § 768.40(5) (1985) protects both the testimony of witnesses before a hospital credentials committee and the committee records themselves.).

15. See Fla. Stat. § 90.503 (1985); Kadet v. Daytona Times, Inc., 12 Fla. Supp. 2d 106 (7th Cir. Ct. 1985) (A plaintiff in libel action could not claim psychiatrist-patient privilege to prevent the deposition of his psychiatrist concerning the cause of his mental anguish since § 90.503(4)(a) abolishes the privilege as to “communications relevant to an issue of the mental or emotional condition of the patient in any proceeding [relating] upon the condition of the patient.”). Id. at 106.

16. See Fla. Stat. § 90.601 (1985); Zahran v. Riveron, 495 So. 2d 1195 (Fla. 3d Dist. Ct. App. 1986) (The appellant’s claim that once someone is found insane they are presumed incompetent to testify as a witness was rejected since § 90.601 presumes competency and “a finding of insanity affects credibility rather than admissibility.” Id. at 1198); Begley v. State, 483 So. 2d 70, 72 (Fla. 4th Dist. Ct. App. 1986) (a frivolous trial court decision that five year old victim in sexual battery case had “insufficient mental capacity and sense of moral obligation to be competent as a witness,” citing Rutledge v. State, 374 So. 2d 975, 979 (Fla. 1979), cert. denied, 446 U.S. 913 (1980).)
ment by evidence of bad character for truthfulness,21 impeachment by prior conviction,28 lay witness opinions,26

21. See Fla. Stat. § 90.609 (1985); Carter v. State, 485 So. 2d 292 (Fla. Dist. Ct. App. 1986) (it was error to exclude entirely any evidence about a witness's bad reputation for truth "merely because it concerns his reputation in a different issue than that of his residence at the time of trial."); Id. at 1294. However, here a trial judge did not abuse his discretion in excluding such testimony, due to witnesses's time since testifying, when no witness had been in any contact with all for four years before trial with the witness whose character was being attacked and were only sporadically in contact for some years before that.); Gamble v. State, 492 So. 2d 113 (Fla. Dist. Ct. App. 1986) (A conviction was reversed because a defense witness's testimony of an alleged sexual battery against a bad reputation for truthfulness in community was improperly excluded. The witness's failure to remember specific dates and some of her burned court times caused the witness's bad reputation to go to the witness's weight instead of admissibility.);

22. See Fla. Stat. § 90.610 (1985); Broakings v. State, 495 So. 2d 135 (Fla. 1986) (There was no error in precluding impeachment with a pending charge but did not "turn out of the same episode for which the defendant is charged."); Id.); Johnson v. State, 494 So. 2d 906, 909 (Fla. 1986) (It was reversible error for prosecutor to impeach a defense witness with questioning about a prior conviction which "highlighted the details of the witness's crimes."); Id.) Castellon v. State, 490 So. 2d 106 (1986) (Fla. Dist. Ct. App. 1986) (After state impeached defendant by only asking for to show any felony convictions, defendant should have been allowed to "explain and limit the impact of the cross-examination by clarifying on redirect examination that he had only one single prior conviction."); Id. However, the error was harmless); Bate v. Popover, 362 So. 2d 1275 (Fla. Dist. Ct. App. 1986) (Fla. Stat. § 90.610 (1986) limits questioning to whether witness has been convicted of a felony or a crime involving dishonesty or false statement; it was reversible error to read deposition amounts while dictated speech of witness's past crimes); Gamble v. State, 492 So. 2d 1112 (Fla. Dist. Ct. App. 1986) (A prosecutor's frivolous objection that defense questions to lay witness about his prior conviction "has nothing to do with the issue of whether defendant is a suspect or not" reversed. Id. at 1135); Brown v. State, 607 So. 13 (Fla. 1986); The state's inquiry into the nature of defendant's prior offenses was improper but found harmless); Jones v. State, 480 So. 2d 705 (Fla. Dist. Ct. App. 1985) (Defendant's failure to testify after trial court held certain questions were available for impeachment waived issue for appeal).

23. For a general discussion of this topic, see Ehrhardt, Living Consequences of Impeachment under the Florida Evidence Code, 10 Fla. St. U. L. Rev. 235 (1982). Readers should note that subsequent developments have slightly dated this article. See, e.g., Stat. § 90.610 (1984) holding that any offense under Fla. Stat. ch. 341 (1983) (which was error to exclude defense counsel from cross-examining a state witness about his involvement in a pretrial intervention program run by the state attorney's office prosecuting the case.)

https://novaedu.java/reader/1298

1298 Nova Law Review, Vol. 11, Iss. 4 (1987), Art. 6

Evidence

[Vol. 11]

1299

20. See infra notes 454-463.
ment by evidence of bad character for truthfulness, impeachment by prior conviction, lay witness opinions.

21. See Fla. Stat. 90.609 (1985); Studer v. State, 492 So. 2d 1132 (Fla. 1st Dist. Ct. App. 1986) (It was error to exclude automatically testimony about witness’ bad reputation for truth “merely because it concerns his reputation in a different bar than that of his residence at the time of trial.” Id. at 1134. However, here the trial court did order the defense to introduce 8 witnesses, but they were only prospectively in the field of the covering case witness.)

22. See Fla. Stat. § 90.610 (1985); Brooks v. State, 492 So. 2d 13 (Fla. 1986); (There was no error in precluding impeachment with a pending charge for the defense to introduce 8 witnesses, but they were only prospectively in the field of the covering case witness.)

23. See Fla. Stat. § 90.610 (1985); Knoke v. Lifter, Inc., 492 So. 2d 502 (Fla. 4th Dist. Ct. App. 1986) (It was not error in parental lawsuit over accidental drowning of minor child to refuse to strike an investigating officer’s recollections of his conversations with the parents. Although the officer could not recall the conversations, their contents were admitted in evidence.)
a marked similarity to last year's result. Criminal cases continued to present the majority of evidentiary issues. A surprising number of both civil and criminal cases continued to be reversed for evidentiary errors. Like last year, the percentage of reversals for erroneous trial court evidence rulings could have been higher except for trial counsel's failure to make timely objections, or adequate offers of proof. Finally, the harmless error rule prevented some trial court evidence from causing reversals.

29. Of the 149 total cases discussing evidentiary issues in the Southern Reporter Second, 50 or 33% were civil. Ironically, of the eleven cases discussing evidentiary question in the Florida Supplement Second, the large majority, eight, were civil.
30. The appellate courts found reversible evidentiary error in 60 out of 149 cases or 40%. Civil cases produced a higher percentage of reversals: 22 out of 50 or 44%. Thirty-eight percent, 38 out of 99, of the criminal cases contained reversible evidentiary error. This last figure contains three cases where the State obtained reversals of interlocutory appeals, so the percentage of cases where criminal defendants prevailed on appeal is actually 35%.
31. See infra text accompanying notes 34-56.
32. See Fla. Stat. § 90.104(1)(b)(1985) allowing reversal for evidentiary error resulting in the exclusion of evidence only if "the evidence was made known to the court by offer of proof . . . ."

During this survey period, Florida appellate courts refused to consider at least three claimed evidentiary errors because of trial counsel failure to comply with § 90.104(1)(b). Ironically, each case demonstrates a different defective method of making offers of proof. In Silveira-Hernandez v. State, 493 So. 2d 914 (Fla. 3d Dist. Ct. App. 1986), counsel did not make any attempt to proffer what the restricted cross-examination of a crime victim would have shown. In Woodson v. State, 483 So. 2d 858 (Fla. 5th Dist. Ct. App. 1986), defense counsel, in a resisting arrest with violence case, attempted to introduce evidence about the arresting officer's character for violence to bolster a self-defense case. However, when the state successfully objected to this, the defense never proffered exactly what the witness would have said about the officer's reputation. On appeal, the court was willing to "assume it would have been adverse to the officer and favorable to Woodson," but still found this too vague to merit reversal at 859. Finally, in Johnson v. State, 494 So. 2d 311 (Fla. 1st Dist. Ct. App. 1986), the trial court excluded evidence of prior fights between Johnson and the alleged victim. Defense counsel had asked his questioning was relevant to show self-defense, but in so doing never specified the testimony he wished to introduce. But when both sides rested, defense counsel attempted to cure this error and proffer the testimony but the trial court interrupted the explanation. On appeal, the court affirmed finding that an attempted offer of proof made after sides have rested is untimely. Id. at 313. These three cases are reminders of the need to be timely, specific and complete in making offers of proof.
33. See Fla. Stat. § 90.104(1)(b)(1985) allowing reversal for evidentiary error only

II. Contemporaneous Objection Rule

Already rather unforgiving of the failure to make contemporaneous objections, Florida courts showed signs of becoming even stricter with this requirement. Failure to comply with the rule can take several forms, the most obvious being when trial counsel makes no objection to admission of certain evidence. A more subtle failure occurs when trial counsel timely objects but does not state the same grounds for exclusions as are later raised on appeal. Even motions in limine are not usually considered sufficient substitutes for a proper contemporaneous objection.

Florida courts also continued to apply the contemporaneous objection rule to all formal trial level proceedings, not just when proof is

if "a substantial right of the party is adversely affected . . . ." Fifteen cases, ten percent of the total, during this survey period, were affirmed based on the harmless error rule.
34. See Fla. Stat. § 90.104(1985) providing in part: "(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 . . . ."

Although appellate courts may excuse the failure to make a contemporaneous objection on the grounds that admission of the complained about matter was fundamental error, see Fla. Stat. § 90.104(3) (1985), they appear extremely reluctant to do so. During this survey period, Florida appellate courts rejected all fundamental error arguments made to them. See Dougan v. State, 470 So. 2d 697, 700 (Fla. 1985); Kinya v. Litter, Inc, 489 So. 2d 92, 94 (Fla. 3d Dist. Ct. App. 1986).
35. See Southeastern Fire Ins. Co. v. King's Way Mortgage Co., 481 So. 2d 530 (Fla. 3d Dist. Ct. App. 1985) (The trial court is obligated to weigh credibility of testimony that has not been objected to.); Dougan, 470 So. 2d at 697 (Although a homicide victim's family member should ordinarily not give testimony identifying the victim's body at trial, failure to object to such prevented review.); Sikes v. Seaboard Coast Line Railroad Co., 487 So. 2d 1118 (Fla. 1st Dist. Ct. App. 1986) (The failure to promptly object to expert testimony waived issue for review.).
36. See Allen v. State, 492 So. 2d 802 (Fla. 1st Dist. Ct. App. 1986) (A trial counsel's objection to admission of a tape-recorded confession's transcript, because the state did not prove a diligent search for the lost tape itself, was insufficient to preserve for appeal a lack of authentication issue.).
37. See Fredericonis v. Levinson, 495 So. 2d 842 (Fla. 3d Dist. Ct. App. 1986) (A motion in limine to exclude discussions between defendant and deceased partnership member did not dispense with need for contemporaneous objection); Rindhein v. Carnival Cruise Lines, Inc., 498 So. 2d 488 (Fla. 3d Dist. Ct. App. 1986) (The failure to object to certain damages testimony was not excused by a previously unsuccessful oral motion in limine covering the same matter.)
a marked similarity to last year’s result. 88 Criminal cases continued to present the majority of evidentiary issues. 89 A surprising number of both civil and criminal cases continued to be reversed for evidentiary errors. 90 Like last year, the percentage of reversals for erroneous trial court evidence rulings could have been higher except for trial counsel’s failure to make timely objections , 91 or adequate offers of proof . 92 Finally, the harmless error rule prevented some trial court evidence from causing reversals. 93

29. Of the 149 total cases discussing evidentiary issues in the Southern Report Second, 99 or 67% were criminal, while 50 or 33% were civil. Ironically, of the eleven cases discussing evidentiary question in the Florida Supplement Second, the large majority, eight, were civil.
30. The appellate courts found reversible evidentiary error in 60 out of 149 cases or 40%. Civil cases produced a higher percentage of reversals: 22 out of 50 or 44%. Thirty-eight percent, 38 out of 99, of the criminal cases contained reversible evidentiary error. This last figure contains three cases where the State obtained reversals or interlocutory appeals, so the percentage of cases where criminal defendants prevailed on appeal is actually 35%.
31. See infra text accompanying notes 34-56.
32. See Fla. Stat.  90.104(1)(b) (1985) allowing reversal for evidentiary error resulting in the exclusion of evidence only if “the evidence was made known to the court by offer of proof . . . .”
33. During this survey period, Florida appellate courts refused to consider at least three claimed evidentiary errors because of trial counsel failure to comply with § 90.104(1)(b). Ironically, each case demonstrates a different defective method of making offers of proof. In Silveira-Hernandez v. State, 495 So. 2d 914 (Fla. 3d Dist. Ct. App. 1986), counsel did not make any attempt to proffer what the restricted cross-examination of a crime victim would have shown. In Woodson v. State, 483 So. 2d 858 (Fla. 5th Dist. Ct. App. 1986), defense counsel, in a resisting arrest with violence case attempted to introduce evidence about the arresting officer’s character for viciousness to bolster a self-defense case. However, when the state successfully objected to this, the defense never proffered exactly what the witness would have said about the officer’s reputation. On appeal, the court was willing to “assume it would have been adverse to the officer and favorable to Woodson,” but still found this too vague to merit reversal. Id. at 859. Finally, in Johnson v. State, 494 So. 2d 311 (Fla. 1st Dist. Ct. App. 1986), the trial court excluded evidence of prior fights between Johnson and the alleged victim. Defense counsel had argued his questioning was relevant to show self-defense, but in so doing never specified the testimony he wished to introduce. When both sides rested, defense counsel attempted to cure this error and proffer the testimony but the trial court interrupted the explanation. On appeal, the court affirmed finding that an attempted offer of proof made after sides have rested is untimely. Id. at 313. These three cases are reminders of the need to be timely, specific and complete in making offers of proof.
34. See Fla. Stat.  90.104(1)(b) (1985) allowing reversal for evidentiary error only if “a substantial right of the party is adversely affected . . . .” Fifteen cases, ten percent of the total, during this survey period, were affirmed based on the harmless error rule.
35. See Fla. Stat.  90.104(3) (1985) providing in part: “(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 . . . .”
36. Although appellate courts may excuse the failure to make a contemporaneous objection on the grounds that admission of the complained about matter was fundamental error, see Fla. Stat.  90.104(3) (1985), they appear extremely reluctant to do so.
37. See Northwestern Fire Ins. Co. v. King’s Way Mortgage Co., 481 So. 2d 530 (Fla. 3d Dist. Ct. App. 1985) (The trial court is obligated to weigh credibility of testimony that has not been objected to . . . . ); Dougan, 470 So. 2d at 697 (Although a homicide victim’s family member should ordinarily not give testimony identifying the victim’s body at trial, failure to object to such prevented review . . . . ); Sikes v. Seaboard Coast Line Railroad Co., 487 So. 2d 1118 (Fla. 1st Dist. Ct. App. 1986) (The failure to promptly object to expert testimony waived issue for review . . . . )
38. See Allen v. State, 492 So. 2d 802 (Fla. 1st Dist. Ct. App. 1986) (A trial counsel’s objection to admission of a tape-recorded confession’s transcript, because the state did not prove a diligent search for the lost tape itself, was insufficient to preserve for appeal a lack of authentication issue . . . . )
39. See Fredericson v. Levinson, 495 So. 2d 842 (Fla. 3d Dist. Ct. App. 1986) (A motion in limine to exclude discussions between defendant and deceased partnership member did not dispense with need for contemporaneous objection . . . . ); Rendlesh  v. Carnival Cruise Lines, Inc., 498 So. 2d 488 (Fla. 3d Dist. Ct. App. 1986) (The failure to object to certain damages testimony was not excused by a previously unsuccessful oral motion in limine covering the same matter . . . . )
being offered concerning civil liability or guilt. However, previous Florida Supreme Court decisions strongly suggested that the rule should never be applicable at the sentencing stage. State v. Rhoden, the most prominent of these earlier cases, expressed the belief that "[t]he contemporaneous objection rule... was fashioned primarily for use in trial proceedings" and further claimed "[t]he purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge." There the supreme court approved a Second District Court of Appeal decision finding that trial counsel's failure to object to a juvenile being sentenced as an adult without the trial court providing any statutorily required written explanation did not prevent raising the issue on appeal. Until recently, Rhoden's broad language was utilized to excuse lack of contemporaneous objections to other types of sentencing errors. However, in one of these subsequent cases, Justice Shaw suggested Rhoden's description of the contemporaneous objection rule's purpose and application was faulty and that Rhoden should be limited to "sentencing procedures involving fundamental errors." In two recent important decisions, the Florida Supreme Court further clarified when the failure to make specific, contemporaneous objections at sentencing will result in a procedural default, adopting Justice Shaw's position as the appropriate standard. In State v. Whiteside, the defendant was charged with aggravated battery, stemming from an incident where the victim received a six-inch cut permanently causing functional loss of an arm and hand. Despite testimony about this, the jury only convicted Whiteside of aggravated assault. In preparing the sentencing guidelines scoresheet, the state mistakenly added thirty-six points for a victim injury although this was not an element of aggravated assault. Neither the state nor the defense or the trial court realized this error until after the defendant was sentenced. The First District Court of Appeal reversed for resentencing despite the lack of a contemporaneous objection, and the Florida Supreme Court affirmed. However, in so doing, the court retreated from its previously broad language concerning the contemporaneous objection rule's operation. The court first noted that all its previous reversals for sentencing errors despite lack of contemporaneous objections concerned cases where a statute required mandatory factual findings and none were made. As these sentences were illegal per se and supported by no authority, no contemporaneous objections to them were needed. Whiteside's situation was considered analogous since his sentence was based on an erroneous calculation, thus meaning he was sentenced without authority outside the guidelines. However, the court cautioned that "sentencing errors which do not produce an illegal sentence or an unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal."

Dailly v. State subsequently emphasized the Florida Supreme Court's "new" position toward the contemporaneous objection rule. Dailly originally pleaded guilty to aggravated battery and was sentenced to a period of incarceration followed by probation. While still on probation, he pleaded guilty to several subsequent offenses and had his probation successfully revoked, after which the trial court sentenced him to twelve years in prison, three years less than the original maximum for aggravated battery. In so doing, the court used a sentencing

38. See Kilaya, 498 So. 2d at 93-94; Estarrry v. State, 496 So. 2d 822, 825 (Fla. 1986) (failure to make contemporaneous objection to improper closing argument), Telfer v. State, 495 So. 2d 744, 747 (Fla. 1986) (The failure to object to improper psychiatric expert testimony concerning a defendant's previously recovered death sentence waived any error.).
39. Id. at 1013 (Fla. 1984).
40. Id. at 1016.
41. Id.
42. Id. at 1017.
43. See Walker v. State, 462 So. 2d 652, 454 (Fla. 1985) (The lack of objections to trial court's failure to make required factual findings before imposing an extended sentence under the habitual offender act did not bar review.), State v. Snow, 462 So. 2d 455, 457 (Fla. 1985) (The failure to object to trial court's partial exclusion of jail time as a defendant without making needed statutory findings did not waive this issue.).
44. See Walker, 462 So. 2d at 454-55 (Shaw, J., concurring).
45. Dailly v. State, 488 So. 2d 532 (Fla. 1986); State v. Whiteside, 467 So. 2d 1043 (Fla. 1986).
46. 467 So. 2d 1045 (Fla. 1986).
48. Whiteside, 487 So. 2d at 1046-47.
49. Id.
50. Id. at 1046.
51. Id. The court also noted for future reference in similar situations that after the appellant's erroneous preparation was discovered, the matter could have been expedited by asking the appellate court to surrender its jurisdiction and then requesting the trial court to correct the sentence.
52. 471 So. 2d 1349 (Fla. 1st Dist. Ct. App. 1985), aff'd, 488 So. 2d 532 (Fla. 1986).
being offered concerning civil liability or guilt.** However, previous Florida Supreme Court decisions strongly suggested that the rule should never be applicable at the sentencing stage. State v Rhodes,** the most prominent of these earlier cases, expressed the belief that

"[t]he contemporaneous objection rule . . . was fashioned primarily for use in trial proceedings"** and further claimed "[t]he purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge."**

There the supreme court approved a Second District Court of Appeal decision finding that trial counsel's failure to object to a juvenile being sentenced as an adult without the trial court providing any statutorily required written explanation did not prevent raising this issue on appeal.** Until recently, Rhoden's broad language was utilized to excuse lack of contemporaneous objections to other types of sentencing errors.** However, in one of these subsequent cases, Justice Shaw suggested Rhoden's description of the contemporaneous objection rule's purpose and application was faulty and that Rhoden should be limited to "sentencing procedures involving fundamental errors."** In two recent important decisions, the Florida Supreme Court further clarified when the failure to make specific, contemporaneous objections at sentencing will result in a procedural default, adopting Justice Shaw's position as the appropriate standard.**

In State v Whitfield,** the defendant was charged with aggravated battery, stemming from an incident where the victim received a six-inch cut permanently causing functional loss of an arm and hand. Despite testimony about this, the jury only convicted Whitfield of aggravated assault. In preparing the sentencing guidelines scoresheet, the state mistakenly added thirty-six points for a victim injury although this was not an element of aggravated assault. Neither the state nor the defense or the trial court realized this error until after the defendant was sentenced. The First District Court of Appeal reversed for resentencing despite the lack of a contemporaneous objection,** and the Florida Supreme Court affirmed.** However, in so doing, the court retreated from its previously broad language concerning the contemporaneous objection rule's operation. The court first noted that all its previous reversals for sentencing errors despite lack of contemporaneous objections concerned cases where a statute required mandatory factual findings and none were made.** As these sentences were illegal per se and supported by no authority, no contemporaneous objections to them were needed.** Whitfield's situation was considered analogous since his sentence was based on an erroneous calculation, thus meaning he was sentenced without authority outside the guidelines. However, the court cautioned that "[s]entencing errors which do not produce an illegal sentence or an unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal."**

Dailey v State,** subsequently emphasized the Florida Supreme Court's "new" position toward the contemporaneous objection rule. Dailey originally pleaded guilty to aggravated battery and was sentenced to a period of incarceration followed by probation. While still on probation, he pled guilty to several subsequent offenses and had his probation successfully revoked, after which the trial court sentenced him to twelve years in prison, three years less than the original maximum for aggravated battery. In so doing, the court used a sentencing

38. See Kinya, 489 So. 2d at 93-94; Irizarry v. State, 496 So. 2d 822, 825 (Fla. 1986) (failure to object to improper closing argument); Trefetler v. State, 495 So. 2d 744, 747 (Fla. 1986) (The failure to object to improper psychiatric expert testimony concerning a defendant's previously reversed death sentence waived any error.).

39. Id. at 1013 (Fla. 1984).

40. Id. at 1016.

41. Id.

42. Id. at 1017.

43. See Walker v. State, 462 So. 2d 452, 454 (Fla. 1985) (The failure of objection to trial court's failure to make required factual findings before imposing sentence under the habitual offender act did not bar review.). State v. Snow, 465 So. 2d 455, 457 (Fla. 1985) (The failure to object to trial court's partial retention of jurisdiction over a defendant without making needed statutory findings did not waive this issue.).

44. See Walker, 462 So. 2d at 454-55 (Shaw, J., concurring).

45. Dailey v. State, 488 So. 2d 532 (Fla. 1986); State v. Whitfield, 487 So. 3d 1045 (Fla. 1986).

46. 487 So. 2d 1045 (Fla. 1986).


48. Whitfield, 487 So. 2d at 1046-47.

49. Id.

50. Id. at 1046.

51. Id. The court also noted for future reference in similar situations that after the scoresheet's erroneous preparation was discovered, the matter could have been expedited by asking the appellate court to surrender its jurisdiction and then requesting the trial court to correct the sentence.

52. 471 So. 2d 1349 (Fla. 1st Dist. Ct. App. 1985), aff'd, 488 So. 2d 532 (Fla. 1986).
scoresheet which included points for his being under legal constraint at the time of the original offense and for victim injury. On review of this sentence, the district court of appeal distinguished the sentencing error from that in Rhoden and found that the failure to object to any underlying matters supporting the scoresheet was a waiver. The Florida Supreme Court affirmed, finding it "incumbent upon defense counsel to raise, at the trial level, any objections to underlying factual matter supporting the factors on the scoresheet." In so doing, the court indicated that the lack of prompt objections to sentencing errors will be excused only when "the errors are apparent from the four corners of the record." This situation existed in Whitfield because aggravated assault does not involve victim injury as an element. However, Bailey's aggravated battery conviction necessarily suggested such, thus his sentence was not per se illegal. Whitfield's and Bailey's language should send a clear message to all criminal defense attorneys. Every sentencing scoresheet must be examined and dissected with care to ensure that it contains no potential factual error, since failure to object to these will usually constitute a waiver.

III. Relevancy

A. Exclusion on Grounds of Prejudice or Confusion

The Florida Evidence Code considers an item relevant evidence if it has a tendency "to prove or disprove a material fact." As a category of information will ever be inherently relevant in all cases the Code is unable to go beyond this brief statement. Materiality will always be a function of the underlying claims and defenses involved in a particular lawsuit. Similarly, whether something tends to prove or disprove a material fact will depend upon the strength or weakness of the logical connection between the information and the matter it is being offered to prove or disprove. As relevancy is a function of logical deduc-

53. Bailey, 471 So. 2d at 155.
54. Bailey, 488 So. 2d at 533.
55. Id.
56. For another example during the survey period of such a waiver see Thomas v. State, 478 So. 2d 462 (Fla. 1st Dist. Ct. App. 1985) (Counsel's failure to specifically object to conclusory hearsay statements in a presentense investigation report constituted a waiver.).
scoresheet which included points for his being under legal constraint at the time of the original offense and for victim injury. On review of this sentence, the district court of appeal distinguished the sentencing error from that in Rhoden and found that the failure to object to any underly-

ing matters supporting the scoresheet was a waiver.83 The Florida Su-

preme Court affirmed, finding it "incumbent upon defense counsel to

raise, at the trial level, any objections to underlying factual matters

supporting the factors on the scoresheet."84 In so doing, the court indi-

cated that the lack of prompt objections to sentencing errors will be

excused only when "the errors are apparent from the four corners of

the record."85 This situation existed in Whitfield because aggravated

assault does not involve victim injury as an element. However, Dailey's

aggravated battery conviction necessarily suggested such, thus his sen-
tence was not per se illegal. Whitfield's and Dailey's language should

send a clear message to all criminal defense attorneys. Every sentenc-
ing scoresheet must be examined and dissected with care to ensure that

it contains no potential factual error, since failure to object to these will

usually constitute a waiver.86

III. Relevancy

A. Exclusion on Grounds of Prejudice or Confusion

The Florida Evidence Code considers an item relevant evidence if

it has a tendency "to prove or disprove a material fact."87 As no cate-

gory of information will ever be inherently relevant in all cases the

Code is unable to go beyond this brief statement. Materiality will al-

ways be a function of the underlying claims and defenses involved in a

particular lawsuit. Similarly, whether something tends to prove or dis-

prove a material fact will depend upon the strength or weakness of the

logical connection between the information and the matter it is being

offered to prove or disprove. As relevancy is a function of logical deduc-

tion and substantive law, altering a few facts can produce major

changes. Thus, cases discussing the general subject of relevancy seldom

have much precedential value since they are so inherently fact specific.

This situation existed during the 1986 survey period, with no general

relevancy case being unusual enough to merit extended discussion.88

Once logical relevancy requirements have been satisfied, the Evo-

dence Code expresses the general preference that all relevant evidence

should be admitted "except as provided by law."89 This broad language

can encompass any number of reasons extending from evidence being

excluded because of its substantive nature, such as hearsay, to evidence

being excluded because of more procedural problems, such as a ques-
tion being asked outside the scope of cross-examination. The substan-
tive reason for excluding logically relevant evidence may also stem

from the information's inherently prejudicial nature or the potential the

information has for being confusing.90 In certain specific situations, the

Florida Evidence Code expressly provides for exclusion.91 However, no

statutory scheme could possibly cover every instance where evidence

should be excluded because of its prejudicial or confusing nature. Flori-
da's Evidence Code tracks the Federal Rules by providing for the ex-

clusion of logically relevant evidence when "its probative value is sub-

stantially outweighed by the danger of unfair prejudice, confusion of

issues, misleading the jury, or needless presentation of cumulative
evidence."92

There are two important points to remember about this language.

First, only "unfairly" prejudicial types of evidence merit exclusion.93

Evidence which "fairly" hurts or damages the other side's case by the

mere force of its logical weight should not be excluded. Second, even

unfairly prejudicial evidence which will not be excluded unless the un-

fair prejudice "substantially" outweighs any probative value the infor-

83. See supra, note 8, for a brief discussion of the one logical relevancy case

meriting any mention at all.

84. See supra, note 13, for a practical discussion of this area see


59. See supra, note 8, for a brief discussion of the one logical relevancy case

meriting any mention at all.

60. See supra, note 8, for a brief discussion of the one logical relevancy case

meriting any mention at all.

61. See supra, note 8, for a brief discussion of the one logical relevancy case

meriting any mention at all.

62. See supra, note 8, for a brief discussion of the one logical relevancy case

meriting any mention at all.

63. See supra, note 8, for a brief discussion of the one logical relevancy case

meriting any mention at all.
mation has. Thus there is a preference for admissibility when the balance between probativeness and prejudice is close or even. Only a gross disproportion of unfair prejudice merits excluding evidence of any probative value. As with logical relevancy matters, cases discussing this provision are so likely to be "fact bound" that their precedential value is questionable. However, there were several recent, important decisions reversing verdicts for admission of prejudicial evidence. Indeed, both involved admission of evidence concerning damages.

Unfair prejudice usually exists when certain evidence is likely to arouse the jurors' emotions in a way which would lead them to decide a case on an improper basis. Roby By and Through Roby v. Kingsley recently provided an example of how this might occur. There is a sixteen year old boy sworn to recover for brain injuries received when a car in which he had hitchhiked a ride at night crashed into the rear of a tractor-trailer rig parked in a highway emergency lane. Roby sued the car's driver and the rig's driver, Kingsley, claiming the rig had been parked in the emergency lane without proper reflective warning devices. After the car's driver defaulted, the case went to trial against Kingsley. The jury returned a damage award against the defaulting driver but found no liability on Kingsley's part. However, the First District Court of Appeal reversed and remanded for a new trial because of several errors. One error involved the improper admission of evidence showing that the plaintiff had been involved in a prior homosexual relationship.

64. Id. at 2d 789.
65. Roby By and Through Roby v. Kingsley, 492 So. 2d 789 (Fla. 1st Dist. Ct. App. 1986). For other cases during the survey period, discussing the probativeness of evidence versus any unfair prejudice, see the information may here, see Whydham v. State, 479 So. 2d 208 (Fla. 4th Dist. Ct. App. 1985) (There was no error in editing the nondefendant's statement to eliminate all reference to the defendant's
66. Evidence versus any unfair prejudice. The effect of the information may here, see the
67. Whydham v. State, 479 So. 2d 208 (Fla. 4th Dist. Ct. App. 1985) (There was no error in editing the nondefendant's statement to eliminate all reference to the defendant's
68. Evidence versus any unfair prejudice. The effect of the information may here, see the
70. Id. at 793.
71. Id. at 793. Besides the § 90.403 issue, the other trial court errors involved the failure to give a jury instruction on concurrent cause, improper limitation of expert testimony and an inadequate damage award. Id. at 792.
72. Evidence
73. Roby v. Henderson, 166 S. Ct. 2841 (1986) upholding Georgia's sodomy statute against a claim that there is a fundamental right to engage in consensual private homosexual relationships.
74. Roby v. Henderson, 166 S. Ct. 2841 (1986) upholding Georgia's sodomy statute against a claim that there is a fundamental right to engage in consensual private homosexual relationships.
mation has. Thus there is a preference for admissibility when the balance between probativeness and prejudice is close or even. Only a gross disproportion of unfair prejudice merits excluding evidence of any probative value. As with logical relevancy matters, cases discussing the provision are so likely to be “fact bound” that their precedential value is questionable. However, there were several recent, important decisions reversing verdicts for admission of prejudicial evidence. Conversely, both involved admission of evidence concerning damages.

Unfair prejudice usually exists when certain evidence is likely to arouse the jurors’ emotions in a way which would lead them to decide a case on an improper basis. Roby By and Through Roby v. Kingsley recently provided an example of how this might occur. There a ten-year-old boy sued to recover for brain injuries received when a car in which he had hitchhiked a ride at night crashed into the rear of a trailer-trailer rig parked in a highway emergency lane. Roby sued the car’s driver and the rig’s driver, Kingsley, claiming the rig had been parked in the emergency lane without proper reflective warning devices. After the car’s driver defaulted, the case went to trial against Kingsley. The jury returned a damage award against the defaulting driver but found no liability on Kingsley’s part. However, the First District Court of Appeal reversed and remanded for a new trial because of several errors. One error involved the improper admission of evidence showing that the plaintiff had been involved in a prior homosexual relationship.

66. Id.
65. Roby By and Through Roby v. Kingsley, 492 So. 2d 789 (Fla. 1st Dist. Ct. App. 1986); Acton Casualty & Trust Co. v. Cooper, 485 So. 2d 1364 (Fla. 3d Dist. Ct. App. 1986). For other cases during the survey period, discussing the probative value of evidence versus any unfairly prejudicial effect the information may have, see Whitfield v. State, 479 So. 2d 208 (Fla. 4th Dist. Ct. App. 1985) (There was no error in admitting nonadmitting defendant’s statement to eliminate all reference to the co-defendant’s probationary status since the statement was not admitted against Whitfield and no co-defendant). State v. Abreu, 16 Fla. Supp. 2d 128 (Dural County Ct. 1986) (Evidence of unplanned amount of cocaine found in defendant’s ear sample after his arrest for impaired driving was excluded since its prejudicial effect would outweigh its probative value). See also State v. Desanto, 479 So. 2d 784 (Fla. 1st Dist. Ct. App. 1986). Id. at 792.
64. Id. at 793. Besides the § 90.401 issue, the other trial court errors involved failure to give a jury instruction on concurrent cause, improper limitation of expert testimony and an inadequate damage award. Id. at 792.

The district court found this irrelevant to any damages issue. Additionally, the court felt that any relevancy the evidence might have had would have been far outweighed by the danger of unfair prejudice. This decision is undoubtedly correct. Someone’s general sexual preference is usually not relevant to liability and should not be considered, absent extraordinary circumstances, relevant to damages. Damages were claimed here for brain injuries; so evidence of the plaintiff’s sexual preference would not assist the jury in determining the extent or permanency of such. Furthermore, homosexuality is still a highly controversial and emotionally laden issue in our society. Thus, jurors’ hearing of the prior homosexual relationship could have unfair prejudiced them against Roby. Indeed, another reason for reversal was the inadequate damage award against the defaulting car driver. Even though uncontested evidence showed $170,000 had already been spent for Roby’s medical care, the jury only awarded $50,000. One plausible explanation for this could be the jurors’ reaction to the improperly admitted evidence. Roby should be considered as establishing the general rule that evidence of homosexuality, or sexual practices in general, should not usually be admitted because of its prejudicial nature in any ordinary negligence case.

Roby illustrates how evidence may create an unfair bias against a party. However, evidence may also have the opposite effect by urging the jury to find for a party on an improper basis. In Aetna Casualty & Title Company v. Cooper, this type of evidence caused reversal of a plaintiff’s jury award. Cooper, a neurosurgeon, had been injured when his car was hit from behind. The doctor and his wife sued Aetna for payment under an uninsured motorist policy for damages exceeding the other driver’s insurance coverage. Plaintiff’s claimed the doctor’s eye had been injured in the accident so that he could no longer perform surgery. This factual question and how much, if any, damage existed extending the other driver’s insurance was the main trial issues. As part of his proof, Cooper had successfully offered a taped replay of a previously aired television program hosted by Dan Rather, concerning

69. Id. at 792.
70. Id.
71. Anyone doubting this need only consider the mixed public reaction to Bowers v. Hardwick, 106 S. Ct. 2841 (1986) upholding Georgia’s sodomy statute against a claim that there is a fundamental right to engage in consensual private homosexual relationships.
72. Roby, 492 So. 2d at 793.
73. 485 So. 2d 1364 (Fla. 2d Dist. Ct. App. 1988).
the doctor's practice and supposed miracle cures. The program included interviews with children who had been Dr. Cooper's patients and their parents, plus demonstrations of the children's disabilities and conditions before treatment. Over Actna's objections, the trial court allowed the tape to be considered "for whatever the jury later deemed relevant." On appeal, the Second District Court reversed for several reasons. Beside the tape's hearsay nature, the district court found it irrelevant to any issue. The only possible relevancy would have come from one small segment which included statements about the doctor's reputation, since he had claimed damages for loss of enjoyment of life. However, the tape's remaining parts, especially the parent and children interviews, were clearly irrelevant. The court reversed as the jury "could not reasonably be expected ... to disregard the provocative, emotional nature of the inadmissible statements." Furthermore, any evidence pertaining to Cooper's reputation was cumulative to other testimony about this from the doctor himself and a colleague.

B. Subsequent Remedial Measures

Florida Statutes 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. One currently debated issue is whether evidence of subsequent remedial measures should be admitted when a claim is based upon strict liability as opposed to negligence. Last year's survey noted that the Fourth District Court of Appeal decided in Francis v. Butler Manufacturing Co. to take a pro-defense viewpoint and exclude subsequent remedial measures evidence in strict liability claims. This conservative trend continued in 1989 with another district court adopting the same stance.

Alderman v. Wysong & Miles Co. involved a negligence and strict liability lawsuit filed by the widow of a worker who died from injuries received when the defendant's machine press brake crushed him. Alderman worked as a "rigger," removing and installing heavy industrial equipment. He and two other riggers had been ordered to install a Wysong press brake at a Jacksonville company. The press brake itself was extremely large and weighed 26,000 pounds. Since it was top heavy, it had to be kept level during installation. Alderman's accident occurred when the riggers had moved the brake to its final location. They then raised it up with two industrial jacks and began to remove several dollars underneath it, so that the press brake could be lowered onto a metal plate and welded to the floor. To do this the riggers used two sets of "leveling bolts" located on the press brake's foot pads. Ideally after the press brake had been lowered to the floor by use of the leveling bolts, the industrial jacks would then be removed from underneath it. One worker lowered the front onto the floor and removed the industrial jack there. However, when the second worker tried to do the same for the rear, the press brake fell on Alderman causing his fatal injuries.

At trial the plaintiff sought to prove that the press brake was defectively designed, claiming its weight distribution made it unreasonably dangerous due to a tendency to tip over even when kept level. The defense claimed that the machine was not defective and that all three riggers knew from experience about its top heavy nature but failed to exercise due care, causing the accident. The plaintiff attempted unsuccessfully to introduce evidence of remedial measures taken by Wysong after Alderman's accident. Specifically, Wysong had strengthened the footpads by four inches and had relabeled its parts list, denoting it as a "parts list and instructions manual." The plaintiff claimed this evidence was relevant to show the brake suffered from an intolerable degree of instability and also to impeach testimony of two defense experts who claimed that no safety changes were needed in either the press brake itself or the instructions manual.

The First District Court of Appeal noted that in Hartman v.

74. Id. at 1355.
75. Id.
76. Id. at 1366.
77. Id.
78. Id.
79. Id.
80. Id.
82. 463 So. 2d 408 (Fla. 4th Dist. Ct. App.), reverse denied, 475 So. 2d 696 (Fla. 1985).
85. Id.
86. Id. at 679.
the doctor’s practice and supposed miracle cures. The program included interviews with children who had been Dr. Cooper’s patients and their parents, plus demonstrations of the children’s disabilities and conditions before treatment. Over Aetna’s objections, the trial court allowed the tape to be considered “for whatever the jury later deemed relevant.” On appeal, the Second District Court reversed for several reasons. Besides the tape’s hearsay nature, the district court found it irrelevant to any issue. The only possible relevancy would have come from one small segment which included statements about the doctor’s reputation, since he had claimed damages for loss of enjoyment of life. However, the tape’s remaining parts, especially the parent and children interviews, were clearly irrelevant. The court reversed as the jury “could not reasonably be expected . . . to disregard the provocative, emotional nature of the inadmissible statements.” Furthermore, any evidence pertaining to Cooper’s reputation was cumulative to other testimony about this from the doctor himself and a colleague.

B. Subsequent Remedial Measures

Florida Statutes 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. One currently debated issue is whether evidence of subsequent remedial measures should be admitted when a claim is based upon strict liability as opposed to negligence. Last year’s survey noted that the Fourth District Court of Appeal decided in Vynn v. Butler Manufacturing Co. to take a pro-defense viewpoint and exclude subsequent remedial measures evidence even in strict liability claims. This conservative trend continued in 1986 with another district court adopting the same stance.

**Alderman v. Wysong & Miles Co.** involved a negligence and strict liability lawsuit filed by the widow of a worker who died from injuries received when the defendant’s machine press brake crushed him. Alderman worked as a “rigger,” removing and installing heavy industrial equipment. He and two other riggers had been ordered to install a Wysong press brake at a Jacksonville company. The press brake itself was extremely large and weighed 26,000 pounds. Since it was top heavy, it had to be kept level during installation. Alderman’s accident occurred when the riggers had moved the brake to its final location. They then raised it up with two industrial jacks and began to remove several dollars underneath it, so that the press brake could be lowered onto a metal plate and welded to the floor. To do this the riggers used two sets of “leveling bolts” located on the press brake’s footpads. Ideally after the press brake had been lowered to the floor by use of the leveling bolts, the industrial jacks would then be removed from underneath it. One worker lowered the front onto the floor and removed the industrial jack there. However, when the second worker tried to do the same for the rear, the press brake fell on Alderman causing his fatal injuries.

At trial the plaintiff sought to prove that the press brake was defectively designed, claiming its weight distribution made it unreasonably dangerous due to a tendency to tip over even when kept level. The defense claimed that the machine was not defective and that all three riggers knew from experience about its top heavy nature but failed to exercise due care, causing the accident. The plaintiff attempted unsuccessfully to introduce evidence of remedial measures taken by Wysong after Alderman’s accident. Specifically, Wysong had lengthened the footpads by four inches and had relabeled its parts list, denoting it as a “parts list and instruction manual.” The plaintiff claimed this evidence was relevant to show the brake suffered from an intolerable degree of instability and also to impeach testimony of two defense experts who claimed that no safety changes were needed in either the press brake itself or the instructions manual.

The First District Court of Appeal noted that in *Hartman v.*
Opekila Machine & Welding Co. had reserved the specific question whether subsequent remedial measures evidence should be generally admitted in product liability cases but agreed with the Fourth District Court of Appeal's decision to generally exclude such in strict product liability cases. Unfortunately, the First District Court's reasoning for its decision is not explicitly given. The court merely stated that Alderman herself admitted that she wanted the evidence introduced to prove that the press brake was defectively designed and, therefore, unsafe at the time of the accident and that this reason alone merited exclusion. Evidently, the court must have equated the notion of a manufacturer's defective design with that of negligence or culpable conduct under section 90.407's language. The court did note that plaintiff's own expert had testified that the measures would not have made the accident less likely and that the two riggers admitted they had not read and did not pay attention to the instruction manual. However, this testimony would have made the evidence merely logically irrelevant and excludable on that basis, not because it violated any specific provisions of section 90.407. The Alderman opinion also does not unfortunately explicitly address plaintiff's argument that the evidence of subsequent changes should have been admissible to impeach testimony of two defense experts. Even Vynor recognized that evidence of subsequent remedial measures should be admissible when issues such as feasibility of design changes are contested or when the evidence would be admissible to impeach an imposing witness. Since both defense experts had testified that no safety changes were necessary, the actions of Wysong in making such changes seem to conflict directly with that of their own experts and to impeach the experts' testimony. The First District's summary rejection of this argument is unfortunate. Although evidence of subsequent remedial repairs is theoretically admissible to impeach opposing witnesses, Florida lawyers are still largely forced to guess what would be appropriate situations for such impeachments. Last year's survey suggested the Florida Supreme Court should consider definitively resolving when evidence of subsequent remedial measures may be admissible in strict liability claims. Given the brief discussion this received in Alderman, along with the First District Court of Appeal's ignoring of the impeachment issue, the Florida Supreme Court should consider even more seriously the need to address this question. Leaving this area up in the air is likely to only produce more summary resolutions where one appellate court merely cites an earlier decision without explicitly giving any reasoning for its ultimate findings. Florida lawyers, whether they represent plaintiffs or defendants, are entitled to better guidance.

C. Character Evidence in General

Cases involving character evidence and its permissible or impermissible use often cause problems. This is undoubtedly because of the complex rules surrounding the subject. Besides, this character and habit evidence are often confused, forcing the courts to distinguish between the two as well.

87. 414 So. 2d 1105 (Fla. 1st Dist. Ct. App. 1982). Harman perempted to adopt the general rule that where a non-party to a lawsuit makes the subsequent remedial work, evidence of that should be admissible. However, the First District Court of Co., 446 So. 2d 243 (Fla. 1st Dist. Ct. App. 1984). The only real difference between Harman and Thompson is the identity of the party seeking to introduce the subsequent remedial measures. In Harman, the defense was allowed to do so but not the plaintiff supra note 1, at 1041-1043. Alderman, 446 So. 2d at 678.

88. For the author's previous extended criticism of Thompson, supra 1985 Survey.

89. Ferretti, 463 So. 2d at 413. Unlike Fla. R. Evid. 407, FLA. STAT. § 90.407 (1985) contains no second sentence prohibiting examples of issues that subsequent remedial measures evidence would be admissible to prove, providing the issues are controverted. However, Vynor noted the Florida courts have consistently adopted the Federal Rules approach in this area. See id. at 411. Fla. R. Evid. 407 specifically recognizes impeachment as an exception to the general exclusion of subsequent remedial measures evidence. 92. Alderman's failure to address the impeachment issue is even more puzzling when one considers that the first district itself expressly recognized the legitimacy of using subsequent remedial measures evidence to impeach in at least one decision following the enactment of the Florida Evidence Code. See John-McNairle Sales Corp. v. Tamina, 463 So. 2d 242 (Fla. 1st Dist. Ct. App. 1984) ("Evidence of such measures is admissible to impeach a witness's testimony or to prove the defendant's claimed lack of knowledge." Id. at 256).

90. In 1985,Survey, supra note 1, at 1105.

91. For an excellent summary of the basic character evidence rules see Mulligan, Character Evidence and Impeachment: An Introduction, 4 Litigation 45 (1977).
Opekta Machine & Welding Co.\textsuperscript{77} it had reserved the specific question whether subsequent remedial measures evidence should be generally admitted in product liability cases but agreed with the Fourth District Court of Appeal's decision to generally exclude such in strict product liability cases.\textsuperscript{80} Unfortunately, the First District Court's reasoning in its decision is not explicitly given. The court merely stated that Alderman herself admitted that she wanted the evidence introduced to prove that the press brake was defectively designed and, therefore, unsafe at the time of the accident and that this reason alone merited exclusion.\textsuperscript{81} Evidently, the court must have been equated the notion of a manufacturer's defective design with that of "negligence or culpable conduct" under section 90.407's language. The court did note that plaintiff's own expert had testified that the measures would not have made the incident less likely and that the two riggers admitted they had not read and did not pay attention to the instruction manual.\textsuperscript{82} However, this testimony would have made the evidence merely logically irrelevant and excludible on that basis, not because it violated any specific provisions of section 90.407. The Alderman opinion also does not unambiguously explicitly address plaintiff's argument that the evidence of subsequent changes should be admissible to impeach testimony if two defense experts. Even Voyer recognized that evidence of subsequent remedial measures should be admissible when issues such as feasibility of design changes are contested or when the evidence would be admissible to impeach an imposing witness.\textsuperscript{83} Since both defense experts had testified that no safety changes were necessary, the actions of Wysong in making such changes seem to conflict directly with that of their own experts and to impeach the experts' testimony. The First District's summarily rejection of this argument is unfortunate. Although evidence of subsequent remedial repairs is theoretically admissible to impeach opposing witnesses, Florida lawyers are still largely forced to guess what would be appropriate situations for such impeachments.\textsuperscript{84} Given the brief discussion this received in Alderman, along with the First District Court of Appeal's ignoring of the impeachment issue, the Florida Supreme Court should consider definitively resolving when evidence of subsequent remedial measures may be admissible in strict liability claims.\textsuperscript{85} Last year's survey suggested the Florida Supreme Court should consider definitively resolving when evidence of subsequent remedial measures may be admissible in strict liability claims.\textsuperscript{86} Given the brief discussion this received in Alderman, along with the First District Court of Appeal's ignoring of the impeachment issue, the Florida Supreme Court should consider even more seriously the need to address this question. Leaving this area up in the air is likely to only produce more summary resolutions where one appellate court merely cites an earlier decision without explicitly giving any reasoning for its ultimate findings. Florida lawyers, whether they represent plaintiffs or defendants, are entitled to better guidance.

C. Character Evidence in General

Cases involving character evidence and its permissible or impermissible use often cause problems. This is undoubtedly because of the complex rules surrounding the subject.\textsuperscript{87} Besides this, character and habit evidence are often confused, forcing the courts to distinguish between dual measures evidence.

92. Alderman's failure to address the impeachment issue is even more puzzling when one considers that the first district itself expressly recognized the legitimacy of using subsequent remedial measures evidence to impeach in at least one decision following the enactment of the Florida Evidence Code. See John-MaHustie Sales Corp. v. Tamms, 463 So. 2d 242 (Fla. 1st Dist. Ct. App. 1984) ("Evidence of such measures is admissible to impeach a witness's testimony or to prove the defendant's claimed lack of knowledge.") Id. at 256.

Later in this article, the author criticizes the First District's opinions in a number of other evidentiary areas. At first, I believed the First District was just writing poor opinions in the Williams Rule area. However, after reviewing the cases discussed in the 1986 Survey, I am forced to conclude that the First District's evidence decisions overall, with some exceptions, are not good.

93. 1982 Survey, supra note 1, at 1105.

94. For an excellent summary of the basic character evidence rules see Mollhauser, Character Evidence and Impeachment: An Introduction, 4 Litigation 45 (1977).
between the two.\textsuperscript{95} In criminal cases, the Evidence Code gives the accused the power to initially decide when circumstantial proof of his own or a victim's character will be admissible to prove action in conformity therewith.\textsuperscript{96} However, proof of someone's character may be directly relevant if it is an element of a charge or defense.

In Burks v. State,\textsuperscript{97} the trial court's failure to appreciate this fact eventually caused reversal of a first degree murder conviction. Burks admitted shooting a homicide victim, but claimed he did so in self-defense after the victim approached him and reached threateningly into his pocket, causing Burks to believe the victim had a gun. To bolster this case, Burks attempted unsuccessfully, because of a sustained prosecution objection, to introduce evidence of the deceased's reputation for violence.\textsuperscript{98} Reversing the conviction, the Second District Court of Appeal found the testimony given presented a jury question as to the reasonableness of Burks's belief that he was in imminent danger.\textsuperscript{99} Evidence of the victim's character would have been relevant in assessing this, so excluding it was error.\textsuperscript{100} Unfortunately, Burks is not clear on the crucial point. Would evidence of the victim's mere reputation alone have been admissible without any proof that Burks knew of it? Since Burks's state of mind when he shot the victim was the crucial contested fact, the answer should be "no."\textsuperscript{101} Reputation of a victim in a self-defense case should be considered relevant when: (1) the defendant knew of it, (2) the defendant believed it and (3) believing it, the defendant acted reasonably based on this belief. Absent this complete foundation, a victim's bad reputation for violence should not be admissible to prove reasonable self-defense.\textsuperscript{102} Burks should not be considered precedent for the proposition that a victim's reputation for violence is automatically admissible when the defendant claims self-defense.

D. Prosecution Responses to Character Evidence

As mentioned, under the language of section 90.404 of the Florida Statutes, the defendant in a criminal case initially decides whether circumstantial character evidence will be admissible.\textsuperscript{103} However, when the defendant does so, the prosecution may "rebut the trial"\textsuperscript{104} whether it concerns the defendant or the alleged victim. The proper form for rebuttal was a major topic of two pro-defense reversals during this survey period.\textsuperscript{105}

Section 90.404(1) of the Florida Statutes tells when circumstantial proof of character evidence is admissible, but it does not address the proper mode for such.\textsuperscript{106} Section 90.405 tells how character evidence may be presented, depending upon whether character is only being used circumstantially or whether someone's character is actually an issue in the case.\textsuperscript{107} This section specifically provides that when circumstantial proof of character evidence is admissible, but it does not address the proper mode for such.\textsuperscript{106} Section 90.405 tells how character evidence may be presented, depending upon whether character is only being used circumstantially or whether someone's character is actually an issue in the case.\textsuperscript{107} This section specifically provides that when circumstantial proof of character evidence is admissible, but it does not address the proper mode for such.\textsuperscript{106} Section 90.405 tells how character evidence may be presented, depending upon whether character is only being used circumstantially or whether someone's character is actually an issue in the case.\textsuperscript{107}

95. Habit evidence has been defined as "time's regular response to a repeated situation." See C. CORMACK, EVIDENCE § 195 at 575 (3d ed. 1984).

96. This kind of evidence is considered admissible in Florida despite the Florida Evidence Code's lack of a specific section providing for such. See 1983 Survey, supra note 1, at 1308-1401 for a general discussion of this subject and the author's arguments that Florida courts may be improperly interpreting the Code in this respect.

97. For a recent case admitting evidence of a defendant's driving habits, see an objection was inadmissible character evidence, to show how the habits could have caused the defendant to operate the vehicle in a particular manner. See Chambers v. White Motor Corp., 461 So. 2d 6 (Fla. 1984).

98. See Fla. Stat. § 90.404(b) (1) (c) (1983).

99. See id. at 732. Even the prosecution quickly admitted its mistake in objecting to this. After the defense rested, the state confessed error and offered to let the defense reopen subject to cross-examining the defendant on his actual knowledge of that evidence. The defense declined the offer, because if Burks testified and was cross-examined on this point, rebuttal witnesses who had been dismissed based on the trial court's previous ruling would need to be called. Since these witnesses were not unavailable, the defense claimed it could not effectively rebut the state's cross-examination.

100. The district court rejected the state's contention that any error had been caused by the state's error would have resulted in unfair prejudice to the defendant, the rebuttal witnesses were no longer available. Id. at 734.

101. Both the trial court and state would undoubtedly have argued "no" since the state wanted to examine Burks on this, and the trial court gave a jury instruction that the victim's reputation, if known to Burks, could be considered in determining if Burks acted reasonably.

102. However, it still would be admissible under Fla. Stat. § 90.404(3)(b) (1983) to circumstantially prove the victim was the first aggressor. See Woodson v. State, 483 So. 2d 858 (Fla. 1985) (Defendant in a resisting arrest without violence charge should have been allowed to elicit evidence concerning "the prior officer's reputation under § 90.404(1)(b)).


104. See Fla. Stat. § 90.404(3)(b) and (c) both containing this language.

105. Dragovich v. State, 492 So. 2d 308 (Fla. 1986); Kraus v. State, 483 So. 2d 1382 (Fla. 1986); App. 1986).


107. Id. § 90.404.
between the two.** In criminal cases, the Evidence Code gives the accused the power to initially decide when circumstantial proof of his own or a victim's character will be admissible to prove action in conformity therewith.** However, proof of someone's character may be directly relevant if it is an element of a charge or defense.

In *Burk v. State,* the trial court's failure to appreciate this fact eventually caused reversal of a first degree murder conviction. Burk admitted shooting a homicide victim, but claimed he did so in self-defense after the victim approached him and reached threateningly into his pocket, causing Burk to believe the victim had a gun. To bolster his case, Burk attempted unsuccessfully, because of a sustained protest objection, to introduce evidence of the deceased's reputation for violence.** Reversing his conviction, the Second District Court of Appeal found the testimony given presented a jury question as to the reasonableness of Burk's belief that he was in imminent danger.** Evidence of the victim's character would have been relevant in assessing this, so excluding it was error.** Unfortunately, Burk is not clear in

95. Habit evidence has been defined as "one's regular response to a repeated situation." See C. McCORMICK, EVIDENCE § 195 at 577 (3d ed. 1984).

This kind of evidence is considered admissible in Florida despite the Florida Evidence Code's lack of a specific section providing for such. See 1985 Survey, supra note 4, at 1308-1041 for a general discussion of this subject and the author's argument that Florida courts may be improperly interpreting the Code in this respect.

For a recent case admitting evidence of a decedent's driving habits, one at objection this was immaterial character evidence, to show how the driver could have caused a traffic accident and failure see Chambers v. White Motor Corp., 481 So. 2d 6 (Fla. 1st Dist. Ct. App. 1985).


97. Id. at 732. Even from the prosecution's quick admission of its mistake in objecting to this, after the defense rested, the state confessed error and offered to let the defense reopen the subject to cross-examine the defendant on his actual knowledge of this omitted evidence. The defense declined the offer, because it seemed to Burk and was trial court's previous ruling would not be called. Since two witnesses were present, the defense claimed it could not effectively rebut the state's cross-examination.

The court rejected the state's contention that any error had been caused by its offer since *""being the appellant to reopen his case and present evidence that the state's error would have resulted in such prejudice to the rebuttal witnesses were no longer available. Id. at 734.

99. Id. at 733.

100. Id.
stantial character evidence is being introduced, "proof may be made by
testimony about [the person's] reputation." Thus, unlike the Federal
Rules of Evidence, circumstantial character evidence may be presented
in a Florida state court on direct examination only by reputation ev-
dence and not by opinion.108 Kruse v. State109 recently illustrated
another important distinction between the federal and Florida approaches
to how character evidence can be elicited. Kruse was charged with
various child sexual assault offenses. As part of his defense, he called
several witnesses to testify to his good moral character. However, on
questioning of Kruse's previous arrests for the same type of offense. The
Fourth District Court of Appeal reversed, declaring that "the state
may only rebut testimony on reputation for good moral character by
reputation testimony as to bad moral character, not by cross-examina-
tion about prior arrests or specific bad acts." Since the prior acts
were similar to the ones on trial, harmful error existed. From a
purely logical viewpoint, Kruse is an incorrect decision. Reputation
evidence is based upon what one has heard said about another in a partic-
ular community. If the witnesses did not hear about these arrests and
accusations, assuming they happened in the same community, it is
questionable how much they really knew Kruse's reputation. Yet, in
comparing the language of the federal and Florida provisions governing
how character evidence can be introduced, Kruse is scrupulously cor-
correct. The Federal Rules provide that when circumstantial character
evidence has been given, "[o]n cross-examination, inquiry is allowed
into relevant specific instances of conduct." However, the Florida
Code does not contain comparable language. Thus, as a matter of strict
statutory interpretation, circumstantial character evidence in a Florida
state court can only be inquired about through proof of reputation.
As a practical matter this limitation is potentially very unfair to the

108. Id.
109. See Fed. R. Evid. 405. Methods of Proving Character, partially providing
that: "(a) in all cases in which evidence of character or a trait of character of a person
is admissible, proof may be made by testimony as to reputation or by testimony in the
form of an opinion.
110. 483 So. 2d 1385 (Fla. 4th Dist. Ct. App. 1986).
111. Unfortunately, the opinion is unclear whether the character evidence
presented was general or concerned a more specific character trait.
112. Kruse, 483 So. 2d at 1388.
113. Id. at 1388.
114. See Fed. R. Evid. 405(a).

115. 492 So. 2d 1350 (Fla. 1986).
116. Id. at 1354.
117. Id. at 351.
118. Id. at 355.
119. Id. at 354.

state. Not only is it an inquiry into specific acts logically the best way to
test the true knowledge of defense character witnesses but it may also be
the only practical way. Unless trial courts force defendants to dis-
close pretrial that they contemplate offering good character evidence,
the prosecution may not be able to secure, within a very short time, the
needed character rebuttal witness. Thus, the defendant's good charac-
ter reputation evidence may go effectively unchallenged when it could
be otherwise. Both simple logic and practical concerns based on the
feasibility of trials demonstrate that the legislature should concern
amending the Florida Code to conform to Federal Rules in this respect.
The Florida Supreme Court's opinion in Dragovich v. State119 es-
tablished an even more important limitation on the state's use of repu-
tation character evidence. Dragovich had been convicted of the con-
tract murder of his brother-in-law. At his sentencing hearing, he tried
to avoid the death penalty by proving that he had no significant history
of prior criminal activities. To bolster this claim, Dragovich intro-
duced a rap sheet showing he had no prior arrests or convictions, and
called several witnesses, including the victim's wife to testify that he
had a good character as a "father, husband and provider."120 On cross
examination, the state asked each of these witnesses about the defend-
ant's involvement in several fires in his previous Indiana hometown.
When the state presented its rebuttal evidence, even more "information
about the fires was elicited. Two of the victim's children testified
that Dragovich had a reputation in Indiana as an arsonist. Addition-
ally, the state called a detective from an Indiana Fire Department who
tested that he had records showing that Dragovich was suspected as
an arsonist in six previous fires. The jury recommended the death pen-
alty, and the trial court agreed.121 However, the Florida Supreme
Court found that improper use of reputation evidence mandated a new
sentencing hearing.122

In so doing, the court noted that reputation character evidence is
generally not admissible in a criminal proceeding to show that the ac-
cused acted in conformity therewith.123 Furthermore, the court recog-
nized what it termed a "vital distinction between character and reputa-

https://nsuworks.nova.edu/nlr/vol11/iss4/6
stantial character evidence is being introduced, "proof may be made by testimony about [the person's] reputation." 108 This, unlike the Federal Rules of Evidence, circumstantial character evidence may be presented in a Florida state court on direct examination only by reputation evidence and not by opinion. 109 Kruse v. State 110 recently illustrated another important distinction between the federal and Florida approaches as to how character evidence can be elicited. Kruse was charged with various child sexual assault offenses. As part of his defense, he called several witnesses to testify to his good moral character. 111 However, on cross-examination of these witnesses, the state inquired about their knowledge of Kruse's previous arrests for the same type of offense. The Fourth District Court of Appeal reversed, declaring that "the state may only rebut testimony on reputation for good moral character, by reputation testimony as to bad moral character, not by cross-examination about prior arrests or specific bad acts." 112 Since the prior acts were similar to the ones on trial, harmful error existed. 113 From a purely logical viewpoint, Kruse is an incorrect decision. Reputation evidence is based upon what one has heard said about another in a particular community. If the witnesses did not hear about these arrests and accusations, assuming they happened in the same community, it is questionable how much they really knew Kruse's reputation. Yet, in comparing the language of the federal and Florida provisions governing how character evidence can be introduced, Kruse is scrupulously correct. The Federal Rules provides that when circumstantial character evidence has been given, "[i]n cross-examination, inquiry is allowable into relevant specific instances of conduct." 114 However, the Florida Code does not contain comparable language. Thus, as a matter of strict statutory interpretation, circumstantial character evidence in a Florida state court can be only be inquired about through proof of reputation. As a practical matter this limitation is potentially very unfair to the state. Not only is an inquiry into specific acts logically the best way to test the true knowledge of defense character witnesses but it may also be the only practical way. Unless trial courts force defendants to disclose pretrial that they contemplate offering good character evidence, the prosecution may not be able to secure, within a very short time, the needed character rebuttal witness. Thus, the defendant's good character reputation evidence may go effectively unchallenged when it could be otherwise. Both simple logic and practical concerns based on the exigencies of trials demonstrate that the legislature should concern amending the Florida Code to conform to Federal Rules in this respect.

The Florida Supreme Court's opinion in Dragovich v. State 115 established an even more important limitation on the state's use of reputation character evidence. Dragovich had been convicted of the contract murder of his brother-in-law. At his sentencing hearing, he tried to avoid the death penalty by proving that he had no significant history of any prior criminal activities. To bolster this claim, Dragovich introduced a rap sheet showing he had no prior arrests or convictions, and called several witnesses, including the victim's wife to testify that he had a good character as a "father, husband and provider." 116 On cross-examination, the state asked each of these witnesses about the defendant's involvement in several fires in his previous Indiana hometown. When the state presented its rebuttal evidence, even "information" about the fires was elicited. Two of the victim's children testified that Dragovich had a reputation in Indiana as an arsonist. Additionally, the state called a detective from an Indiana Fire Department who testified that he had records showing that Dragovich was suspected as an arsonist in six previous fires. The jury recommended the death penalty, and the trial court agreed. 117 However, the Florida Supreme Court found that improper use of reputation evidence mandated a new sentencing hearing. 118

In so doing, the court noted that reputation character evidence is generally not admissible in a criminal proceeding to show that the accused acted in conformity therewith. 119 Furthermore, the court recognized what it termed a "vital distinction between character and reputa

---

108. Id.
109. See FED. R. EVID. 405, Methods of Proving Character, partially providing that: "(a) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion . . . ."
110. 483 So. 2d 1383 (Fla. 4th Dist. Ct. App. 1986).
111. Unfortunately, the opinion is unclear whether the character evidence presented was general or concerned a more specific character trait.
112. Kruse, 483 So. 2d at 1388.
113. Id. at 1388.
114. See FED. R. EVID. 405(a).
tional evidence. Reputation evidence is merely a method of trying to discern one's character, thus while it often reflects the type of individual someone is, it may not. In the court's own words, "character is what a man actually is, while reputation is what his neighbors say he is." In this case, the state was certainly entitled to rebut Davich's claim that he was not involved in any prior criminal activity. However, the rebuttal evidence would only have been proper if it actually showed that he had been involved in some of these alleged illegal acts. Davich had never been arrested, let alone convicted of any crime! Nor had any of the witnesses testified that they had any first-hand knowledge concerning his involvement in the crime. Given the unique nature of capital sentencing proceedings and the unfair innuendo that could be placed upon the defendant by this former reputation evidence, the supreme court decided this form of evidence should never be admissible to prove that a defendant was involved in certain prior criminal activity. At best it proved he had a reputation for such an involvement, not that he was actually so involved. Davich's result is clearly called for. When someone is charged with the death penalty, the state should not be allowed to ask a jury to recommend this based upon what has been said about a person. If no other evidence existed, the propriety of recommending such a severe consequence is highly questionable indeed. Where there is actual evidence that a person has been involved in prior criminal activity, the state should produce it through witnesses who have first-hand knowledge about the illegal participation. Otherwise extreme unfairness to the defendant will result.

E. Other Crimes, Wrongs, or Acts

Section 90.404(2) of the Florida Statutes codifies the procedure "Williams Rule," prohibiting the introduction of evidence concerning the defendant's other crimes, wrongs, or acts for the sole purpose of proving propensity. However, when there is another legitimate use, evidence of bad acts may be admissible. As with last year's survey,

120. Id.
121. Id. (quoting State v. Peterson, 199 Iowa 1073, 1074, 205 N.W. 257, 258 (1926)).
122. Id. at 355.
125. 1982 Survey, supra note 1, at 1023.

Section 90.404(2) of the Florida Statutes is not all inclusive on the subject of other crimes. If other crimes evidence is offered to show propensity, this section automatically excludes it. If offered for any other purpose, it may be admitted. Indeed, under the section's language, other crimes evidence will be automatically excluded only when offered for propensity and not when offered to prove another issue relevant to the litigation. However, in at least two instances, Florida courts have found that the Williams Rule does not govern admissions of other crimes evidence. One example occurs when the other crimes evidence is so "intrinsically intertwined" with the present offense that separating the two is impossible. In this situation, there is a factual necessity to

126. Five of eighteen cases found reversible error in admission of other crimes evidence. These cases found admission of Williams Rule evidence erroneous but considered it harmless error, because the evidence was usually inadmissibly admitted, and played only a small part. See, e.g., Johnson v. State, 497 So. 2d 863 (Fla. 1986); Nickelson v. State, 486 So. 2d 688 (Fla. 3d Dist. Ct. App. 1986); Hickox v. State, 492 So. 2d 744 (Fla. 1st Dist. Ct. App. 1986), all finding admission of Williams Rule evidence harmless.
127. See Purv v. State, 490 So. 2d 1327 (Fla. 3d Dist. Ct. App. 1986) (A police officer's testimony in a grand theft motor vehicle case that he had been to the defendant's bar days prior at other times to recover stolen vehicles constituted reversible error.).
128. Williams v. State, 492 So. 2d 1031 (Fla. 1986).
129. This had been called the "inculpatory" approach. Under it, if the propone nt can convince the court that the other crimes evidence will show anything but propensity, the evidence should be admitted or "included." Under the "exclusionary" approach, other crimes evidence is inadmissible when offered to prove propensity or any purpose not specifically enumerated in the rule's language. See Inwinkstine, The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes, 50 No. 1, REV. 14-15 (1985) for further discussion of the two approaches.
130. For recent survey cases illustrating this see Jackson v. State, 498 So. 2d 406 (Fla. 1986) (Evidence concerning attempted murder of a cab driver was admissible in a trial accusing the first-degree murder of a police officer since the evidence showed...
tional evidence. Reputation evidence is merely a method of trying to discern one's character, thus while it often reflects the type of individual someone is, it may not. In the court's own words, "character is what a man actually is, while reputation is what his neighbors say he is."

In this case, the state was certainly entitled to rebut Drago's claim that he was not involved in any prior criminal activity. However, the rebuttal evidence would only have been proper if it actually showed that he had been involved in some of these alleged illegal fires. Drago's character had never been arrested, let alone convicted of any arson! Nor had any of the witnesses testified that they had any first hand knowledge concerning his involvement in the fires. Given the unique nature of capital sentencing proceedings and the unfair iniquities that could be placed upon the defendant by this former reputation evidence, the supreme court decided this form of evidence should never be admitted to prove that a defendant was involved in certain prior criminal activity. At best it proved he had a reputation for such an involvement, not that he was actually so involved. Drago's result is clearly called for. When someone is faced with the death penalty, the state should not be allowed to ask a jury to recommend this based upon what has been said about a person. If no better evidence existed, the propriety of recommending such a severe consequence is highly questionable indeed. Where there is actual evidence that a person has been involved in prior criminal activity, the state should produce it through witnesses who have first hand knowledge about the illegal participation. Otherwise extreme unfairness to the defendant will result.

E. Other Crimes, Wrongs, or Acts

Section 90.404(2) of the Florida Statutes codifies the precede "Williams Rule" prohibiting the introduction of evidence concerning the defendant's other crimes, wrongs or acts for the sole purpose of proving propensity. However, when there is another legitimate use, evidence of bad acts may be admissible. As with last year's survey, a five of eighteen cases found reversible error in admission of other crimes evidence. These cases found admission of Williams Rule evidence erroneous but considered it harmless error, because the evidence was usually inadvertently admitted, and played only a small part. See, e.g., Johnston v. State, 497 So. 2d 863 (Fla. 1986); Nicholson v. State, 486 So. 2d 688 (Fla. 3d Dist. Ct. App. 1986); Hickox v. State, 492 So. 2d 744 (Fla. 1st Dist. Ct. App. 1986), all finding admissions of Williams Rule evidence harmless.

But see Peris v. State, 490 So. 2d 1327 (Fla. 3d Dist. Ct. App. 1986) (a police officer's testimony in a grand theft motor vehicle case that he had been to the defendant's body shop at other times to recover stolen vehicles constituted reversible error.).

127. Williams v. State, 492 So. 2d 1051 (Fla. 1986).

128. This has been called the "inclusory" approach. Under it, if the proponent can convince the court that the other crimes evidence will show anything but propensity, the evidence should be admitted or "included." Under the "exclusory" approach, other crimes evidence is inadmissible when offered to prove propensity or any purpose not specifically enumerated in the rule's language. See Imwinkelried, The Plain Theory of Admitting Evidence of the Defendant's Uncharged Crimes, 50 Mo. L. Rev. L. 14-15 (1985) for further discussion of the two approaches.

129. For recent survey cases illustrating this see Jackson v. State, 498 So. 2d 406 (Fla. 1986) (Evidence concerning attempted murder of a cab driver was admissible in a trial concerning the first-degree murder of a police officer since the evidence showed

126. Five of eighteen cases found reversible error in admission of other crimes evidence. These cases found admission of Williams Rule evidence erroneous but considered it harmless error, because the evidence was usually inadvertently admitted, and played only a small part. See, e.g., Johnston v. State, 497 So. 2d 863 (Fla. 1986); Nicholson v. State, 486 So. 2d 688 (Fla. 3d Dist. Ct. App. 1986); Hickox v. State, 492 So. 2d 744 (Fla. 1st Dist. Ct. App. 1986), all finding admissions of Williams Rule evidence harmless.

But see Peris v. State, 490 So. 2d 1327 (Fla. 3d Dist. Ct. App. 1986) (a police officer's testimony in a grand theft motor vehicle case that he had been to the defendant's body shop at other times to recover stolen vehicles constituted reversible error.).

127. Williams v. State, 492 So. 2d 1051 (Fla. 1986).

128. This has been called the "inclusory" approach. Under it, if the proponent can convince the court that the other crimes evidence will show anything but propensity, the evidence should be admitted or "included." Under the "exclusory" approach, other crimes evidence is inadmissible when offered to prove propensity or any purpose not specifically enumerated in the rule's language. See Imwinkelried, The Plain Theory of Admitting Evidence of the Defendant's Uncharged Crimes, 50 Mo. L. Rev. L. 14-15 (1985) for further discussion of the two approaches.

129. For recent survey cases illustrating this see Jackson v. State, 498 So. 2d 406 (Fla. 1986) (Evidence concerning attempted murder of a cab driver was admissible in a trial concerning the first-degree murder of a police officer since the evidence showed
present evidence of both crimes in order to give the jury a coherent picture of all events. However, there is a legal necessity to prove other crimes evidence when proof of one earlier conviction is an essential statutory element of a later offense. In this second situation, the exact scope of the other crimes evidence should be determined by the offense charged. However, the Florida Supreme Court recently gave notice that this may not be the case.

Williams v. State,138 concerned an appeal by a convicted felon from a conviction of possessing a firearm. At trial, the defendant claimed he was prohibited from repeating the nature of his prior felony conviction because this would be prejudicial. This objection was overruled, and the prosecution was allowed to introduce a certified copy of Williams’s prior armed robbery conviction. The trial judge reasoned that “such evidence is relevant to the prosecution of the defendant charged with possession of a firearm by a convicted felon.”139 Williams contended the particulars of his previous felony were irrelevant as the crime charged did not seem to distinguish between prior felons. After Williams was convicted, the First District Court of Appeal affirmed his conviction,140 but certified the issue to the Florida Supreme Court as one of great public importance.141 The Florida Supreme Court noted

"consciousness of guilt concerning [victim’s] murder, flight, and possession of the murder weapon" and "was in fact not evidence of a collateral crime at all." 130

Tumby v. State, 489 So. 2d 150 (Fla. 4th Dist. Ct. App. 1986). Evidence of the defendant’s and the homicide victim’s involvement in an unchallenged drug importation schemes was admissible "to show the context of the victim’s murder since it ‘usually throw light upon the crime being prosecuted.’ Id. at 153.

130. 492 So. 2d 1051 (Fla. 1986).

131. Id at 1052.


133. The First District Court of Appeal certified the question as being: Whether, in a prosecution for unlawful possession of a firearm by a convicted felon under section 790.23, Florida Statutes, the admission into evidence of more than one prior felony and the particulars of each such crime (note being related to the offense charged), for the purpose of proving that the defendant was a convicted felon, is so prejudicial to the defendant’s right to a fair trial as to constitute reversible error?

Williams, 492 So. 2d at 1052.

However, the Florida Supreme Court rephrased it as follows: Whether, in a prosecution for unlawful possession of a firearm by a convicted felon under section 790.23, Florida Statutes, prejudicial error results when the type of the prior conviction as well as the fact of such conviction is admitted into evidence in order to establish defendant’s status as a convicted felon.

that it had previously held “the state may introduce . . . the particulars of a prior conviction when the prior conviction is an essential element of the crime charged unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.” 134 Williams argued that mentioning the particulars of his prior conviction, together with the state’s informing the jury he was arrested in a high crime area where robberies had occurred, would cause the jury to speculate whether he had been planning to commit an armed robbery when arrested. However, the supreme court summarily rejected this argument stating “[i]t appears to be an uncontrovertible, inherent factor of every jury trial” 135 and found the combination of the prior conviction’s particulars and the nature of the neighborhood would not cause substantial prejudice to Williams. 140 Additionally, although not confronted with that issue, the supreme court noted that the same principle would allow the state to introduce the particulars of more than one prior felony conviction in a prosecution for possession of a firearm by a convicted felon. 140 Thus, apparently, Williams gives the prosecution carte blanche to introduce at least the name of any prior felony conviction in a subsequent possession of a firearm charge. From a logical standpoint, it is difficult to defend the supreme court’s decision. As the court itself noted, Williams “was on trial for possession of a firearm, not armed robbery.” 141 Thus, the only thing about his prior conviction which should have been considered relevant to the possession charge was not the type of crime itself but rather the degree of offense involved. Williams was willing to stipulate that he had been convicted of a prior felony but just did not want the jury informed of its particular nature. Why the previous felony’s particulars were logically relevant is difficult to determine. Williams is an ill-founded decision that the Florida Supreme Court should consider quickly reversing.142

130. Id at 1053 (citing Parker v. State, 489 So. 2d 1037 (Fla. 1982), in which the particulars of a defendant’s breaking and entering with intent to commit grand theft conviction were admissible in prosecution of a criminal theft for possession of a firearm).

134. Id at 1053 (citing Harper v. State, 494 So. 2d 530 (Fla. 1st Dist. Ct. App. 1986)).
present evidence of both crimes in order to give the jury a cohesive picture of all events. However, there is a legal necessity to present other crimes evidence when the evidence of one earlier conviction is an essential statutory element of a later offense. In this second situation, the exact scope of the other crimes evidence should be determined by its offense charged. However, the Florida Supreme Court recently gave notice that this may not be the case.

Williams v. State, 160 concerned an appeal by a convicted felo from a conviction of possessing a firearm. At trial, the defense claimed the state should be prohibited from revealing the nature of his prior felony conviction because this would be prejudicial. This defense was overruled, and the prosecution was allowed to introduce a certified copy of Williams' prior armed robbery conviction. The trial judge reasoned that "such evidence is relevant to the prosecution of a defendant charged with possession of a firearm by a convicted felon." 161 Williams contended the particulars of his previous felony were irrelevant as the crime charged did not seem to distinguish between prior felonies. After Williams was convicted, the First District Court of Appeal affirmed his conviction, 162 but certified the issue to the Florida Supreme Court as one of great public importance. 163 The Florida Supreme Court noted that it had previously held "the state may introduce ... the particulars of a prior conviction when the prior conviction is an essential element of the crime charged unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence." 164 Williams argued that mentioning the particulars of his prior conviction, together with the state's informing the jury he was arrested in a high crime area where robberies had occurred, would cause the jury to speculate whether he had been planning to commit an armed robbery when arrested. However, the supreme court summarily rejected this argument stating "[j]ury speculation is an uncontrollable, inherent factor of every jury trial" 165 and found the combination of the prior conviction's particulars and the nature of the neighborhood would not cause substantial prejudice to Williams. 166 Additionally, although not confronted with that issue, the supreme court noted that the same principle would allow the state to introduce the particulars of more than one prior felony conviction in a prosecution for possession of a firearm by a convicted felon. 167 Thus, apparently, Williams gives the prosecution carte blanche to introduce at least the name of any prior felony conviction in a subsequent possession of a firearm charge. From a logical standpoint, it is difficult to defend the supreme court's decision. As the court itself noted, Williams "was on trial for possession of a firearm, not armed robbery." 168 Thus, the only thing about his prior conviction which should have been considered relevant to the possession charge was not the type of crime itself but rather the degree of offense involved. Williams was willing to stipulate that he had been convicted of a prior felony but just did not want the jury informed of its particular nature. Why the previous felony's particulars were logically relevant is difficult to determine. Williams is an ill founded decision that the Florida Supreme Court should consider quickly reversing. 169

160. Dobson: Evidence Published by NSUWorks, 1987

161. Id. at 53.
162. Id. at 50.
163. Id. at 50.
164. Id. at 50.
165. Id. at 50.
166. Id. at 50.
167. Id. at 50.
168. Id. at 50.
169. Id. at 50.

1318 Nova Law Review [Vol. 11

1987]

1319
2. To Prove Prior Illegal Sexual Relationships

Illicit sexual relations between adults and children have recently become a major concern of the criminal law. To prove these incidents, evidence law often admits proof of other crimes which is only relevant to show the defendant's propensity. Courts have often strained their reasoning to promote what they undoubtedly feel is a worthwhile goal: the protection of the innocent child victims. Several Florida courts during the survey period showed their willingness to extend Williams Rule evidence to such cases, even though this conflicts with the general ban on propensity evidence. Two recent First District Court of Appeal decisions illustrate the unsatisfactory attempts of Florida courts to deal with evidence showing a propensity to engage in child sex abuse crimes. Coleman v. State, was an appeal from a verdict finding the defendant guilty of sexual battery upon a child eleven years or younger. The state charged Coleman with forcing a nine year old child to engage in several acts of sexual battery during a three month period in 1983. After the charge was filed, the state served notice it intended to introduce proof of other similar sexual battery by Coleman against the victim and three other children. These additional three child victims were allegedly Coleman's son and his two step daughters, who claimed that they had been forced to performed oral sex while living with Coleman during the same three month period. Coleman objected to admission of this evidence claiming that it was inadmissible because the other alleged offenses were not relevant to the one charged and were not sufficiently similar in nature. However, the trial court denied his motion in limine finding specifically that the other crime's evidence "may demonstrate or tend to demonstrate the capacity of the defendant to obtain gratification from oral sex with young children;" "may tend to support motive in that defendant finds oral sex with children to be gratifying, which supports an inference that he had a motive to have such a relationship with a child "; "may support inferences dealing with a common plan or method of operation "; and to refute "the issue of absence of a mistake or accident or intent." After Coleman's conviction, he appealed claiming that the collateral crimes were not sufficiently similar to the instant charge to be admissible. The First District Court of Appeal admitted that evidence of a collateral crime is relevant to another crime charged if both crimes "share a uniqueness about the perpetrator of the offense or the manner in which the offenses are committed." However, the court still affirmed Coleman's conviction finding that the collateral crime evidence was sufficiently similar factually to be admissible in Coleman's prosecution. Unfortunately, the First District Court of Appeal did not specify what the similarities were. After reading the case, the only similarities that seem to be present are that all children were of a young age, the alleged acts of child abuse all involved oral sex, and that they all supposedly occurred when the four children lived in the same house with Coleman. While the failure of the First District to sufficiently explain its reasoning is troubling, even more disturbing is that it ignored the trial court's reasons for admitting evidence of the prior alleged sexual offenses. The trial court's reasons concerning "gratification from oral sex with young children" and "to support motive in that the defendant finds oral sex with children to be

App. 1986) (Evidence of defendant's child abuse arrest properly admitted in an obstructing an investigation charge stemming from the defendant's attempt to take several photographs showing abuse from a police interview room.).

See generally Gregg, Other Acts of Sexual Misconduct and Persuasion as Evidence in Prosecutions for Sexual Offenses, 6 ARIZ. L. REV. 212 (1965). This article claims most jurisdictions allow such evidence only "where a defendant is charged with a sexual offense and the prosecution offers evidence that the defendant either prior to or subsequent to the offense charged engaged in similar acts with the victim." id. at 214. As the following discussion shows, recent Florida cases even go beyond this much criticized position.

141. Hearing v. State, 495 So. 2d 893 (Fla. 1st Dist. Ct. App. 1986); Coleman v. State, 484 So. 2d 624 (Fla. 1st Dist. Ct. App. 1986). Florida courts are not unique in this respect. For several cases from other jurisdictions, see State v. Schlak, 253 Iowa 115, 111 N.W.2d 289 (1961) (Evidence of similar offenses with persons other than the victim were admissible to show "the motive, the desire to gratify his lustful desire by grabbing or fondling young girls . . . ." id. at 116, 111 N.W.2d at 291); State v. Crossman, 229 Kan. 384, 624 P.2d 461 (1981) (The child victim's testimony concerning other acts with defendant was admissible to show "relationship of the parties, the existence of a continuing course of conduct between the parties, or corroborate the testimony of the complaining witness as to the act charged." id. at 387, 624 P.2d at 464.).

142. Hearing, 495 So. 2d at 893; Coleman, 484 So. 2d at 624.

143. 484 So. 2d at 624.

144. id. at 625.

145. Id. at 625-26.

146. Id. at 626.

147. Id.

148. Id. at 627 (quoting Joseph v. State, 447 So. 2d 243 (Fla. 3d Dist. Ct. App. 1983)).

149. Id.
Dobson Evidence

Evidence

children. These additional three child victims were allegedly Coleman's son and his two stepdaughters, who claimed that they had been forced to perform oral sex while living with Coleman during the same three month period. Coleman objected to admission of this evidence claiming that it was inadmissible because the other alleged offenses were not relevant to the one charged and were not sufficiently similar in nature. However, the trial court denied his motion in limine finding specifically that the other crime's evidence "may demonstrate or tend to demonstrate the capacity of the defendant to obtain gratification from oral sex with young children," and "may tend to support motive in that defendant finds oral sex with children to be gratifying, which supports an inference that he had a motive to have such a relationship with a child . . . ." and to refute "the issue of absence of a mistake or accident or intent." After Coleman's conviction, he appealed claiming that the collateral crimes were not sufficiently similar to the instant charge to be admissible. The First District Court of Appeal admitted that evidence of a collateral crime is relevant to another crime charged if both crimes "share a uniqueness about the perpetrator of the offense or the manner in which the offenses are committed." However, the court still affirmed Coleman's conviction finding that the collateral crime evidence was sufficiently similar factually to be admissible in Coleman's prosecution. Unfortunately, the First District Court of Appeal did not specify what the similarities were. After reading the case, the only similarities that seem to be present are that all children were of a young age, the alleged acts of child abuse all involved oral sex, and that they all supposedly occurred when the four children lived in the same house with Coleman. While the failure of the First District to sufficiently explain its reasoning is troubling, even more disturbing is that it ignored the trial court's reasons for admitting evidence of the prior alleged sexual offenses. The trial court's reasons concerning "gratification from oral sex with young children" and "to support motive in that the defendant finds oral sex with children to be

144. Id. at 631.
145. Id. at 635-26.
146. Id. at 626.
147. Id.
148. Id. at 627 (quoting Joseph v. State, 447 So. 2d 243 (Fla. 3d Dist. Ct. App. 1984)).
gratifying” are nothing more than propensity evidence. Yet propensity evidence is what section 90.404(2) supposedly forbids. The trial court's finding that this evidence would be admissible to show a “common plan” is likewise really disguised propensity evidence. This is not a situation where one crime is committed as a necessary prelude to another, nor is it the situation where another crime occurs subsequent to the first crime charged but is necessary for the successful escape from detection. If there is anything involving a “common plan” about Coleman, it is the defendant’s alleged attempts to have this particular type of oral sex with young children. Clearly, this is propensity evidence. 146

In the second case, Hearing v. State, 147 the defendant appealed from a conviction involving charges of sexual battery against his step daughter. To bolster its case, the state offered testimony of Hearing's adult daughter who claimed she had sexually battered her when she was between seven and fifteen years old. Hearing objected to this evidence pointing out that it was some twenty years before the alleged offense against his step daughter and that the other crimes evidence had no unique characteristic. The First District Court of Appeal noted that “[r]emoteness may relate to passage of time or to present relationship with an issue.” 148 The court felt that it was not the mere passage of

143. One recent article criticizing courts use of the “common plan” rationale for the admission of other crimes evidence would not recognize this as enough to present evidence of a “common scheme or plan,” stating that although the defendant's other similar, approximate offenses are logically relevant to prove the existence of a plan, standing alone they are insufficient to show a plan. A plan requires an overall objective tying the crimes together. . . . [E]ven if the defendant commits several similar crimes, each individual crime could be the result of an impulsive burst of the moment. When the prosecutor's only foundational evidence is proof of the commission of several crimes, the only plea proven is a spurious plea to commit a series of acts at the same time.

144. Without, supra note 128, at 129 (footnotes omitted).

151. During this survey period, the district court affirmed a second child sex abuse conviction for Coleman in Coleman v. State, 485 So. 2d 1342 (Fla. 1st Dist. O. App. 1986), which also summarily rejected the defendant’s Williams Rule argument. This time the court found the other crimes evidence relevant to show a “continuing pattern of abuse by appellate of familial, custodial or parental authority in the household,” id. at 1344. In virtually summary affirming Coleman’s two child sex abuse conviction and rejecting his Williams Rule arguments, could the First District Court of Appeal have possibly been concerned about the effect of opposite rulings would have had i.e., reversal for new trials with increased prospects for acquittal? 152. 485 So. 2d at 893.

153. Id. at 894.

time which was important but “the effect of the passage of time on the evidence.” 154 Remoteness would require exclusion if the evidence had “become unverifiable through loss of memory, unavailability of witnesses and the like.” 155 Here the first district felt that was not a problem since the adult daughter’s memory supposedly had not faded. 156 As to Hearing’s second point regarding the lack of uniqueness between the alleged instances, the first district admitted that “absence of similar conduct for an extensive period of time indicates that such conduct is no longer characteristic of the accused.” 157 However, after admitting this, the district court made the disclaimer that it is “not the propensity toward such conduct that is relevant. It is the manner of perpetrating the crime which is relevant.” 158 In Hearing, the first district found uniqueness by concluding this was the type of crime which could occur “only generationally.” 159 Thus, since Hearing “twice had the opportunity to sexually batter young females under his familial authority and did so in like manner in each occasion,” 160 the element of uniqueness was satisfied. While the first district court’s opinion in Coleman can be criticized for its lack of reasoning, Hearing must be criticized for its faulty reasoning. The courts “generation argument” is nothing more than disguised propensity evidence. Essentially what the court said was that every time Hearing had a chance to batter a young female under his control, he did so; and since he only had a chance to do this with his adult daughter when she was young and with his step daughter when she was young, there was a unique aspect present. Not one single detail of where, how, and exactly when during all these years the alleged sexual batteries took place is mentioned in the court’s opinion. Without knowing these, it is difficult to believe that the court is not making a propensity ruling. Admittedly, trial testimony may have filled in these facts, but if so, the First District Court of Appeal should have mentioned them in its opinion. Hearing’s conclusion regarding remoteness is likewise faulty. Based upon this reasoning, a court should admit evidence of an event any time a witness is willing to testify that she remembers it clearly, no matter how long ago that event occurred.
time which was important but "the effect of the passage of time on the
evidence." 1546 Remoteness would require exclusion if the evidence had
"become unverifiable through loss of memory, unavailability of wit-
nesses and the like." 1547 Here the first district felt that was not a prob-
lem since the adult daughter's memory supposedly had not faded. 1548 As
to Heuring's second point regarding the lack of uniqueness between the
alleged instances, the first district admitted that "absence of similar
conduct for an extensive period of time indicates that such conduct is
no longer characteristic of the accused." 1549 However, after admitting
this, the district court made the disclaimer that it is "not the propensity
toward such conduct that is relevant. It is the manner of perpetrating
the crime which is relevant." 1550 In Heuring, the first district found uni-
queess by concluding this was the type of crime which could occur
"only generationally." 1551 Thus, since Heuring "twice had the oppor-
tunity to sexually batter young females under his familial authority and
did so in like manner in each occasion," 1552 the element of uniqueness
was satisfied. While the first district court's opinion in Coleman can be
criticized for its lack of reasoning, Heuring must be criticized for its
faulty reasoning. The courts "generation argument" is nothing more
than disguised propensity evidence. Essentially what the court said was
that every time Heuring had a chance to batter a young female under
his control, he did so; and since he only had a chance to do this with his
adult daughter when she was young and with his step daughter when
she was young, there was a unique aspect present. Not one single detail
of where, how, and exactly when during all these years the alleged sexual
batteries took place is mentioned in the court's opinion. Without
knowing these, it is difficult to believe that the court is not making a
propensity ruling. Admittedly, trial testimony may have filled in these
facts, but if so, the First District Court of Appeal should have men-
tioned them in its opinion. Heuring's conclusion regarding remoteness
is likewise faulty. Based upon this reasoning, a court should admit evi-
dence of an event any time a witness is willing to testify that she
remembers it clearly, no matter how long ago that event occurred.

1546. Id.
1547. Id.
1548. Id.
1549. Id.
1550. Id.
1551. Id.
1552. Id.
1553. Id.
1554. Id.
1555. Id.
1556. Id.
1557. Id.
1558. Id.
1559. Id.
1560. Id.
After reading both Coleman and Heuring, the only logical conclusion is that Williams Rule evidence will almost always be admissible in child sex abuse prosecution charges. The Florida appellate courts have removed much of the protection the Williams Rule meant to give a defendant in child sex abuse cases. Furthermore, the courts seem to have been doing this on the pretension that they are not admitting propensity evidence. Coleman and Heuring show this is not true. The Florida Supreme Court should review the positions taken towards Williams Rule evidence in recent child sex abuse cases. In so doing, the court should adopt one of two positions. One, it could frankly admit that Williams Rule evidence is being allowed in as propensity evidence in these cases and find sufficient justification for this. Alternatively, if it is not prepared to admit the propensity use of Williams Rule evidence, the Florida Supreme Court should severely limit when this type of evidence can be used in child sex abuse cases. Section 90.404(2) is a legislative determination that other crimes, wrongs, or acts evidence can only be used in certain circumstances. For the Florida appellate courts to ignore this section’s limitations is improper. Any change in the language of section 90.404(2) should come from the legislature, not through a rationalized judicial lawmaking procedure.

3. To Prove Identity

The remaining Williams Rule opinions presented standard questions. Of these, those cases discussing the use of other crimes evidence to prove identity were the most important. Unlike the two previously

161. See also Hickox v. State, 492 So. 2d 744 (Fla. 1st Dist. Cir. App. 1986) (The court found summarily that a child sex abuse victim’s unexpected testimony concerning alleged other sexual abuse from the defendant in violation of a pre-trial stipulation was harmless error.)

The Third District Court of Appeal likewise recently found harmless error with inadvertent mention of Williams Rule evidence in child sex abuse cases. See Nicholas v. State, 486 So. 2d 688 (Fla. 3d Dist. Cir. App. 1986).

162. Thompson v. State, 494 So. 2d 203 (Fla. 1986); Peek v. State, 489 So. 2d 52 (Fla. 1986). For the other Williams Rule cases decided during the survey period, see Mitchell v. State, 491 So. 2d 596 (Fla. 1st Dist. Cir. App. 1986) (In the prosecution for the death of two nursing home residents, evidence of neglect shown to other residents was relevant to show defendant’s knowledge of home’s condition and absence of mistake); Traylor v. State, 498 So. 2d 1297 (Fla. 1st Dist. Cir. App 1986) (Evidence concerning an Alabama murder was admissible to prove intent in Florida prosecution for second-degree murder.).

Evidence

1987] 1325

discussed categories, Florida courts were extremely strict with prosecution use of Williams Rule evidence for this purpose. Since the opinions in this area were overall of good quality, only the two Florida Supreme Court decisions will be discussed. Peck v. State involved an appeal from a first degree murder, sexual battery, and unauthorized use of a motor vehicle conviction. Peck was accused of raping and murdering an elderly woman. Her body was found tied to a bedpost, and her clothing contained numerous blood and semen stains. No fingerprints were found in the victim’s house; however, the police found two fingerprints, later identified as Peck’s, on her missing car located approximately one mile from her home. Besides the fingerprints, the state attempted to show that Peck was the murderer by using circumstantial evidence concerning his blood type, his hair features and finally that after the victim’s assault and death, that Peck had raped a young woman in the same area. Peck explained the presence of his fingerprints on the victim’s car by claiming he had seen the car abandoned and attempted to burglarize it. He

163. Four out of the five Williams Rule identity cases resulted in reversals of criminal convictions. See Dix v. State, 485 So. 2d 38 (Fla. 2Dist. Cir. App. 1986); Wilson v. State, 490 So. 2d 1062 (Fla. 5th Dist. Cir. App. 1986); Peek v. State, 488 So. 2d 52 (Fla. 1986); Thompson v. State, 494 So. 2d 203 (Fla. 1986).

In Smith v. State, 479 So. 2d 804 (Fla. 1st Dist. Cir. App. 1985), the district court found partial error in the admission of other crimes evidence in a burglary and sexual battery case but found the error harmless. The state had introduced evidence of two collateral crimes allegedly similar to the one charged. The district court admitted the two offenses were similar in “method of entry, time of night, age and sex of the victim, and geographic location.” Id. at 807. However, the court found that since no sexual battery actually occurred in one collateral crime, speculation necessarily existed as to what the intruder intended. The court therefore, felt “[b]oth the qualitative and quantitative elements of similarity appear to fall short of that required for admissibility.” Id.

From any rational standpoint, this conclusion is as bad as those in the first district’s Williams Rule and child sex abuse cases. No sexual battery occurred in the one collateral crime episode because the victim happened to have kept a knife under her pillow which she used to stab the intruder who fell Smith’s fingerprints were found on a window screen in this home. How could the district court have ignored this fact? Smith should have been affirmed, not because of harmless error in admission of Williams Rule evidence, but because there was no error at all.

164. For another well-reasoned case, see Wilson v. State, 490 So. 2d 1062 (Fla. 5th Dist. Cir. App. 1986) (Evidence showing defendant’s involvement in other drug sales to show identity in delivery and possession of cocaine charge was not similar enough to merit admission, thus causing reversible error.).

165. 488 So. 2d 52 (Fla. 1986).
After reading both Coleman and Heuring, the only logical conclusion is that Williams Rule evidence will almost always be admissible in child sex abuse prosecution charges. The Florida appellate courts have removed much of the protection the Williams Rule meant to give a defendant in child sex abuse cases. Furthermore, the courts seem to have been doing this on the pretention that they are not admitting propensity evidence. Coleman and Heuring show this is not true. The Florida Supreme Court should review the positions taken towards Williams Rule evidence in recent child sex abuse cases. In so doing, the court should adopt one of two positions. One, it could frankly admit that Williams Rule evidence is being allowed in as propensity evidence in these cases and find sufficient justification for this. Alternatively, if it is not prepared to admit the propensity use of Williams Rule evidence, the Florida Supreme Court should severely limit when this type of evidence can be used in child sex abuse cases. Section 90.404(2) is a legislative determination that other crimes, wrongs, or acts evidence can only be used in certain circumstances. For the Florida appellate courts to ignore this section’s limitations is improper. Any change in the language of section 90.404(2) should come from the legislature, not through a rationalized judicial lawmaking procedure.

3. To Prove Identity

The remaining Williams Rule opinions presented standard questions. Of these, those cases discussing the use of other crimes evidence to prove identity were the most important. Unlike the two previously discussed categories, Florida courts were extremely strict with prosecution use of Williams Rule evidence for this purpose. Since the opinions in this area were overall of good quality, only the two Florida Supreme Court decisions will be discussed.

Peek v. State involved an appeal from a first degree murder, sexual battery, and unauthorized use of a motor vehicle conviction. Peek was accused of raping and murdering an elderly woman. Her body was found tied to a bedpost, and her clothing contained numerous blood and semen stains. No fingerprints were found in the victim’s house; however, the police found two fingerprints, later identified as Peek’s, on her missing car located approximately one mile from her home. Besides the fingerprints, the state attempted to show that Peek was the murderer by using circumstantial evidence concerning his blood type, his hair features and finally that after the victim’s assault and death, that Peek had raped a young woman in the same area. Peek explained the presence of his fingerprints on the victim’s car by claiming he had seen the car abandoned and attempted to burglarize it.

163. Four out of the five Williams Rule identity cases resulted in reversals of criminal convictions. See Dix v. State, 485 So. 2d 38 (Fla. 2d Dist. Ct. App. 1986); Wilson v. State, 490 So. 2d 1062 (Fla. 5th Dist. Ct. App. 1986); Peek v. State, 488 So. 2d 52 (Fla. 1986); Thompson v. State, 494 So. 2d 203 (Fla. 1986).

In Smith v. State, 490 So. 2d 804 (Fla. 1st Dist. Ct. App. 1985), the district court found partial error in the admission of other crimes evidence in a burglary and sexual battery case but found the error harmless. The state had introduced evidence of two collateral crimes allegedly similar to the one charged. The district court admitted the two offenses were similar in “method of entry, time of night, age and sex of the victim, and geographic location.” Id. at 807. However, the court found that since no sexual battery actually occurred in one collateral crime, speculation necessarily existed as to what the intruder intended. The court therefore, felt “[b]oth the qualitative and quantitative elements of similarity appear to fall short of that required for admissibility.” Id.

From any rational standpoint, this conclusion is as bad as those in the first district’s Williams Rule and child sex abuse cases. No sexual battery occurred in the one collateral crime episode because the victim happened to have kept a knife under her pillow which she used to stab the intruder who fled! Smith’s fingerprints were found on a window screen in this home. How could the district court have ignored this fact? Smith should have been affirmed, not because of harmless error in admission of Williams Rule evidence, but because there was no error at all.

164. For another well-reasoned case, see Wilson v. State, 490 So. 2d 1062 (Fla. 5th Dist. Ct. App. 1986) (Evidence showing defendant’s involvement in other drug sales to show identity in delivery and possession of cocaine charge was not similar enough to merit admission, thus causing reversible error.).

165. 488 So. 2d 52 (Fla. 1986).
claimed that when the murder had been committed he was on supervised restriction in a half-way house near where the car was found. Two house counselors testified that they made periodic checks on the night of the murder and that there were no unauthorized absences or signs of entry from the half-way house. After the collateral crime evidence was admitted and Peck convicted, he appealed. The Florida Supreme Court first discussed the original rational for the Williams Rule, noting that in Williams v. State, the collateral crime evidence was likewise used to show identity. There the victim had returned to her parked car in a city parking lot and was grabbed and sexually assaulted by the defendant who had hidden in the back seat. At Williams' trial, the state offered evidence of another incident occurring in the same lot, about the same hour of the evening, six weeks before the instant attack. Given the similar circumstances, the court found evidence of the prior attack admissible to prove Williams' identity as the perpetrator of the later crime. In Peek, the supreme court noted that not all evidence concerning collateral crimes of the same type is automatically admissible, stating, "there must be identifiable points of similarity which persuade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant, the points of similarity must have some special character or be so unusual as to point to the defendant." Using this stringent test, the supreme court had no difficulty in finding reversible error in Peek's case. The only similarities were that both crimes occurred in the Winter Park area, within two months of each other, and both victims were White. In contrast, the court noted five major dissimilarities between the two crimes. The court found that if Williams Rule evidence was admissible in this case given this

---

166. 110 So. 2d 654 (Fla.), rev. denied, 361 U.S. 847 (1959).
167. See Peek, 488 So. 2d at 54; n.3 for a listing of cases in which the Florida Supreme Court has upheld admission of other evidence.
168. Id. at 55.
169. Id. at 53.
170. Id. at 55.

In this rape and murder case, the victim was elderly, and the assailant (1) strangled and severely beat the victim; (2) tied the victim to a bopstick; (3) gained entry by cutting a screen door; (4) cut the telephone wires outside the victim's home; and (5) committed the crime during daylight. In the collateral crime, the victim was a young woman, and Peck (1) did not strangle or beat the victim; (2) failed to bind the victim; (3) did not force entry into the victim's home; (4) left telephone lines outside the house intact; and (5) committed his crime during daylight.

---

degree of dissimilarity, "any collateral crime evidence would be admissible as long as the crimes were of the same type and were committed within the same vicinity."

The second Florida Supreme Court case, Thompson v. State, also evolved from a first degree murder conviction. Thompson was charged with the strangulation death of a young woman whose body was discovered in a dumpster behind a Fort Lauderdale bar. An examination of the body revealed bruises indicating she had resisted her attacker and also the presence of sperm. The victim's boyfriend testified that he and the victim had had sexual relations two days before her murder and that he last saw the victim the evening before. According to the boyfriend, the woman left his house around 6:00 P.M. but never returned. Among other things she was supposed to do that evening was to see a former boyfriend and tell him that she no longer wanted to see him. The next day her body was discovered and her car found near a Catholic church parking lot. No evidence was introduced to show Thompson was this boyfriend or even knew the victim. Indeed, Thompson was not arrested for the murder until one year afterwards. The arrest was apparently made because his fingerprints matched a print taken from the box containing the victim's body and because Thompson lived two blocks from the church where the victim's car was found. Thompson explained his fingerprint on the box by admitting that he had thrown two boxes into the same dumpster during the month of the victim's murder. Several prosecution witnesses gave conflicting testimony concerning the defendant's presence at the scene. One claimed to have seen Thompson and the victim standing near her car. Another testified that he helped a man put a large box into the dumpster, but testified that Thompson was definitely not that person. Over defendant's objection, the state introduced evidence of a collateral crime two years before the incident offense. Thompson had allegedly abducted a young woman and driven her to the church parking lot where they had sexual relations. According to this victim, Thompson afterwards apologized, returned her to the spot where she had been abducted and even kissed her goodnight. Thompson had been arrested and convicted for the sexual battery and kidnapping. On appeal, the Florida Supreme Court reversed finding that its recent decisions, including Peek, required such. The court used the same standard for admissibility of
claimed that when the murder had been committed he was on supervised restriction in a half-way house near where the car was found. Two house counselors testified that they made periodic checks on the night of the murder and that there were no unauthorized absences or signs of entry from the half-way house. After the collateral crimes evidence was admitted and Peek convicted, he appealed. The Florida Supreme Court first discussed the original rational for the Williams Rule, noting that in Williams v. State, collateral crime evidence was likewise used to show identity. There the victim had returned to her parked car in a city parking lot and was grabbed and sexually assaulted by the defendant who had hidden in the back seat. At Williams' trial, the state offered evidence of another incident occurring in the same lot, about the same hour of the evening, six weeks before the instant attack. Given the similar circumstances, the court found evidence of the prior attack admissible to prove Williams' identity as the perpetrator of the later crime.

In Peek, the supreme court noted that not all evidence concerning collateral crimes of the same type is automatically admissible, stating, "there must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant, the points of similarity must have some special character or be so unusual as to point to the defendant." Using this stringent test, the supreme court had no difficulty in finding reversible error in Peek's case. The only similarities were that both crimes occurred in the Winter Park area, within two months of each other, and both victims were white. In contrast, the court noted five major dissimilarities between the two crimes. The court found that if Williams Rule evidence was admissible in this case given this

166. 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).
167. See Peek, 488 So. 2d at 54, n.3 for a listing of cases in which the Florida Supreme Court has upheld admission of other crimes evidence.
168. Id. at 55.
169. Id. at 53.
170. Id. at 55.

In this rape and murder case, the victim was elderly, and the assailant (1) strangled and severely beat the victim; (2) tied the victim to a bedpost; (3) gained entry by cutting a screen door; (4) cut the telephone wires outside the victim's home; and (5) committed the crime during darkness. In the collateral crime, the victim was a young woman, and Peek (1) did not strangle or beat the victim; (2) failed to bind the victim; (3) did not force entry into the victim's home; (4) left telephone lines outside the house intact; and (5) committed his crime during daylight.

171. Id.
172. 494 So. 2d 203 (Fla. 1986).
173. Id. at 205.
collateral crimes evidence rule as in Peek.174 Here there were similarities between the victims' ages, both crimes occurring near the same Catholic church, and Thompson having been involved in domestic difficulties on both occasions. However, the dissimilarities between the two events were more substantial. In the crime charged, the victim had been badly beaten, while in the collateral one no physical force was used. Moreover, in the collateral crime, a sexual assault had definitely taken place, but while there was sperm found on the homicide victim's body, there was no other evidence of sexual trauma. Indeed, the evidence was overall so weak in the murder case that Justice Boyd dissented from the majority opinion, arguing a new trial should not be permitted as the evidence would be insufficient to support a conviction.175

Both Peek and Thompson indicate the Florida Supreme Court will look closely at any collateral crimes evidence used to prove identity. For prosecutors and trial judges, the most important lesson is how the proffered collateral crimes evidence should be evaluated in determining admissibility. These two cases suggest a several step approach. First, similarities between the collateral crime and the one on trial should be identified and counted. Secondly, the dissimilarities should likewise be identified and counted. After these two steps, if the dissimilarities outweigh the similarities, unless there is some explanation present from the facts for such, the collateral crimes evidence should usually be excluded. Even if the similarities outweigh the differences, Williams Rule evidence should not automatically be admissible to prove identity. The facts still must possess some unique characteristics or be so incredibly numerous and similar they inherently point to the defendant. Absent this, it is likely that there will continue to be many reversals for improper use of Williams Rule evidence to prove identity.

F. Rape Shield Law

As a relatively new occurrence in modern evidence law, rape shield statutes have been heavily criticized. Some authors question whether these statutes provide so much victim protection a defendant is unfairly denied the ability to present favorable evidence.176 Section 90.404(b) of the Florida statutes permits a criminal defendant to introduce pertinent evidence of a character trait of a victim.177 However, this general subsection is expressly subordinated to the provisions of section 794.022, commonly known as the Florida Rape Shield Statute.178 The rape shield law establishes a somewhat elaborate procedure for deciding the admissibility of a victim's previous sexual conduct and severely restricts the subjects for which this will be considered relevant. The statute presumes evidence of previous sexual conduct ordinarily should be inadmissible.179 When a defendant wishes to present evidence of a victim's previous sexual conduct, he must notify the state and establish at a pre-trial in camera hearing why the evidence is relevant.180 If a defendant is not presenting a consent defense, section 794.022 limits evidence of previous sexual conduct to prove "the defendant was not the source of the semen, pregnancy, injury, or disease,"181 of the victim. Recently, the Florida appellate courts decided two important cases constraining the rape shield law and discussing the limitations which it places upon defense presentation of evidence.182

The first case, Marr v. State,183 permitted the Florida Supreme Court to address arguments that the limitations set by section 794.022 violate a defendant's confrontation clause rights.184 Marr had been convicted of sexual battery by oral penetration. At trial the only evidence presented by the state was the victim's testimony. Marr denied any sex-

174. See supra text accompanying note 168.
175. Thompson, 494 So. 2d at 205 (Boyd, J., dissenting).
collateral crimes evidence rule as in Peek. Here there were similarities between the victims’ ages, both crimes occurring near the same Catholic church, and Thompson having been involved in domestic difficulties on both occasions. However, the dissimilitudes between the two events were more substantial. In the crime charged, the victim had been badly beaten, while in the collateral one no physical force was used. Moreover, in the collateral, a sexual assault had definitely taken place, while there was semen found on the homicide victim’s body, there was no other evidence of sexual trauma. Indeed, the evidence was overall so weak in the murder case that Justice Boyd dis-sented from the majority opinion, arguing a new trial should not be permitted as the evidence would be insufficient to support a conviction.

Both Peek and Thompson indicate the Florida Supreme Court will look closely at any collateral crimes evidence used to prove identity. For prosecutors and trial judges, the most important lesson is how the proffered collateral crimes evidence should be evaluated in determining admissibility. These two cases suggest a several step approach. First, similarities between the collateral crime and the one on trial should be identified and counted. Secondly, the dissimilarities should likewise be identified and counted. After these two steps, if the dissimilarities outweigh the similarities, Williams Rule evidence should not automatically be admissible to prove identity. The facts still must possess some unique characteristics or be so incredibly numerous and similar they inherently point to the defendant. About this, it is likely that there will continue to be many reversals for improper use of Williams Rule evidence to prove identity.

F. Rape Shield Law

As a relatively new occurrence in modern evidence law, rape shield statutes have been heavily criticized. Some authors question whether these statutes provide so much victim protection a defendant is unfairly denied the ability to present favorable evidence. Section 90.404(5) of the Florida statutes permits a criminal defendant to introduce pertinent evidence of a character trait of a victim. However, this general subsection is expressly subordinated to the provisions of section 794.022, commonly known as the Florida Rape Shield Statute. The rape shield law establishes a somewhat elaborate procedure for deciding the admissibility of a victim’s previous sexual conduct and severely constrains the subjects for which this will be considered relevant. The statute presumes evidence of previous sexual conduct ordinarily should be inadmissible. When a defendant wishes to present evidence of a victim’s previous sexual conduct, he must notify the state and establish at a pre-trial hearing why the evidence is relevant. If a defendant is not presenting a consent defense, section 794.022 limits evidence of previous sexual conduct to prove “the defendant was not the source of the semen, pregnancy, injury, or disease” of the victim. Recently, the Florida appellate courts decided two important cases construing the rape shield law and discussing the limitations which it places upon defense presentation of evidence.

The first case, Marr v. State, permitted the Florida Supreme Court to address arguments that the limitations set by section 794.022 violate a defendant’s confrontation clause rights. Marr had been convicted of sexual battery by oral penetration. At trial the only evidence presented by the state was the victim’s testimony. Marr denied any sex-
nal battery and as part of his defense, attempted to introduce evidence relating to the sexual intimacy between the victim and her boyfriend. The purpose of this evidence was to show bias on the victim's part against Marr. This bias supposedly arose from the fact that Marr had told the state attorney about the victim's boyfriend's alleged criminal activity. Although the trial court excluded the evidence relating to the sexual relations between the victim and her boyfriend, the defendant was allowed to cross-examine the victim who admitted she had a close relationship with her boyfriend and that the two of them were in love. Moreover, the boyfriend admitted that he knew that Marr had contacted the state attorney to report the alleged criminal offense. The First District Court of Appeal found there was no denial of Marr's sixth amendment right to confrontation by precluding evidence of the sexual relations between the victim and her boyfriend since Marr had been able to show their close relationship by the evidence presented.186 The Florida Supreme Court in an important decision affirmed.188

The supreme court noted that the rape shield statute rested on two premises. First, that usually "a victim's prior sexual activity with one other than the accused is simply irrelevant for determining the guilt of the accused;"189 and second, that a victim's sexual activity with a third person is only relevant when "such evidence may show the accused was not the perpetrator of the crime or the defense is consent."190 Neither of these situations actually existed in Marr. Thus the evidence of sexual relations between the victim and her boyfriend was presumptively inadmissible under the statute. However, the Florida Supreme Court also addressed Marr's arguments that application of the rape shield statute denied him his constitutional right to confrontation.191 In Davis v. Alaska,192 the United States Supreme Court noted that where constitutional principles are involved, state evidence rules must give way to basic defense rights. In Davis, an Alaska evidence rule forbids use of juvenile convictions for impeachment. The rule's rational was that exposing a witness's juvenile record would stigmatize the witness and conflict with the juvenile correction system's rehabilitative goals. The Court acknowledged Alaska's right to adopt this rule but found evidence of the witness's juvenile conviction had been improperly excluded as it demonstrated the witness's potential bias.193 Since the witness at the time of trial was still on probation for a juvenile offense, he might have been hoping for favorable state treatment or been trying to cast blame for the present crime on Davis, rather than himself. The Court also found the juvenile's probationary status could have made the witness more susceptible to police suggestions.194 Since use of the protected juvenile records was the only way to demonstrate the witness's motivation to testify, the denial of cross-examination caused constitutional error.195 Acknowledging Davis, the Florida Supreme Court admitted that "if in a particular case there is a complete foreclosure of cross-examination seeking to disclose the bias of the key witness serious constitutional problems may be presented."196 However, the supreme court found that this did not exist in Marr. Marr had been able to show how strong the relationship was between the alleged victim and her boyfriend. Thus, he had been afforded a fair opportunity to show the victim's potential bias against him without the necessity to delve into the explicit sexual nature of her relationship with her boyfriend. This compromise allowed Marr's confrontation rights to be protected while at the same time furthering section 794.022's policy.

Deel v. State,197 involved an interpretation of what constitutes an "injury" for purposes of section 794.022(2). Deel was accused of child sexual battery and wanted to prevent evidence of the victim's prior sexual activity with other people. At trial, a pediatrician testified that the victim's vagina was slightly more open than normal and that her hymen had been broken. Other than these findings, the pediatrician felt there were no abnormalities in the victim's female sex organs. The state argued these abnormalities could not be considered injuries for purposes of section 794.022(2), because they merely suggested the victim had had sexual relations at some time before the examination but not necessarily when. According to the state, this physical evidence did not necessarily link Deel to the crime. Therefore he should not be able to offer the defendant's other sexual activities as proof that he was not the source of these physical changes. The Fifth District Court of Appeal found

186. Marr, 494 So. 2d at 1143.
187. Id. at 1142.
188. Id.
189. Id. at 1140.
191. Id. at 315-18.
192. Id. at 316, 318.
193. Id. at 319, 320.
194. Marr, 494 So. 2d at 1143 (Emphasis added).
195. 481 So. 2d 15 (Fla. 5th Dist. Ct. App. 1985).
usual battery and as part of his defense, attempted to introduce evidence relating to the sexual intimacy between the victim and her boyfriend. The purpose of this evidence was to show bias on the victim's part against Marr. This bias supposedly arose from the fact that Marr had told the state attorney about the victim's boyfriend's alleged criminal activity. Although the trial court excluded the evidence relating to the sexual relations between the victim and her boyfriend, the defendant was allowed to cross-examine the victim who admitted that she had a close relationship with her boyfriend and that the two of them were in love. Moreover, the boyfriend admitted that he knew that Marr had contacted the state attorney to report the alleged criminal offense. The First District Court of Appeal found there was no denial of Marr's sixth amendment right to confrontation by precluding evidence of the sexual relations between the victim and her boyfriend since Marr had been able to show their close relationship by the evidence presented.

The Florida Supreme Court in an important decision affirmed.

The supreme court noted that the rape shield statute rested on two premises. First, that usually "a victim's prior sexual activity with one other than the accused is simply irrelevant for determining the guilt of the accused," and second, that a victim's sexual activity with a third person is only relevant "when such evidence may show the accused was not the perpetrator of the crime or the defense is consent." Neither of these situations factually existed in Marr. Thus the evidence of sexual relations between the victim and her boyfriend was presumptively inadmissible under the statute. However, the Florida Supreme Court also addressed Marr's arguments that application of the rape shield statute denied him his constitutional right to confrontation. In Davis v. Alaska, the United States Supreme Court noted that where constitutional principles are involved, state evidence rules must give way to basic defense rights. In Davis, an Alaska evidence rule forbids use of juvenile convictions for impeachment. The rule's rationale was that exposing a witness's juvenile record would stigmatize the witness and conflict with the juvenile correction system's rehabilitative goals. The Court acknowledged Alaska's right to adopt this rule but found evidence of the witness's juvenile conviction had been improperly excluded as it demonstrated the witness's potential bias. Since the witness at the time of trial was still on probation for a juvenile offense, he might have been hoping for favorable state treatment or been trying to cast blame for the present crime on Davis, rather than himself. The Court also found the juvenile's probationary status could have made the witness more susceptible to police suggestions. Since use of the protected juvenile records was the only way to demonstrate the witness's motivation to testify, the denial of cross-examination caused constitutional error. Acknowledging Davis, the Florida Supreme Court admitted that "if in a particular case there is a complete foreclosure of cross-examination seeking to disclose the bias of the key witness serious constitutional problems may be presented." However, the supreme court found that this did not exist in Marr. Marr had been able to show how strong the relationship was between the alleged victim and her boyfriend. Thus, he had been afforded a fair opportunity to show the victim's potential bias against him without the necessity to delve into the explicit sexual nature of their relationship with her boyfriend. This compromise allowed Marr's confrontation rights to be protected while at the same time furthering section 794.022's policy.

Deel v. State involved an interpretation of what constitutes an "injury" for purposes of section 794.022(2). Deel was accused of child sexual battery and wanted to prevent evidence of the victim's prior sexual activity with other people. At trial, a pediatrician testified that the victim's vagina was slightly more open than normal and that her hymen had been broken. Other than these findings, the pediatrician felt there were no abnormalities in the victim's female sex organs. The state argued these abnormalities could not be considered injuries for purposes of section 794.022(2), because they merely suggested the victim had had sexual relations at some time before the examination but not necessarily when. According to the state, this physical evidence did not necessarily link Deel to the crime. Therefore he should not be able to offer the defendant's other sexual activities as proof that he was not the source of these physical changes. The Fifth District Court of Appeal

186. Marr, 494 So. 2d at 1143.
187. Id. at 1142.
188. Id.
189. Id. at 1140.
191. Id. at 315-18.
192. Id. at 316, 318.
193. Id. at 319, 320.
194. Marr, 494 So. 2d at 1143 (Emphasis added).
195. 481 So. 2d 15 (Fla. 5th Dist. Ct. App. 1985).
reversed in a short but important opinion.198 The state interpreted the word "injury" only to mean some type of wound which would not in-clude the kind of abnormality present in this case. The fifth district found this interpretation "overly restrictive."199 More importantly, the court felt that the defendant was prevented from introducing ev-idence of the victim's sexual activity with others, the jury necessarily must have concluded that her physical changes would have resulted from the alleged sexual contact with Deel.200 Since the state first intro-duced the testimony about the abnormalities, Deel should have been entitled to rebut this by showing that there was another cause other than himself. How much the Deel opinion will allow defendants to in-troduce evidence of a victim's sexual relations with others is not cer-tain. Certainly, when the state attempts to argue that any physical changes on the victim's body were caused by sexual abuse from the defendant, it appears that defendants will always be able to introduce evidence of the victim's sexual activity with others. In this respect, the word "injury" in section 794.022(2) should be equated with the word "physical abnormalities". However, this should not open the door to widespread use of defense evidence concerning a victim's prior sexual activity. Consider for example, the hypothetical situation where the state contends that the defendant has sexually attacked a child or young woman and wishes to introduce evidence of the victim's physical condition to prove such. If the state presents medical evidence of the presence of an "abnormality" not usually found in a person of that age, then the door will be open to other sexual activity evidence. However, if the state's medical experts merely testify there is evidence of recent sexual relations, the door should not be open, since mere evidence of recent sexual relations should not necessarily be equated with the notion of "injury." To do so would effectively read any protection of the rape shield law out of existence. Deel thus cautions the state to care-fully plan and limit the medical testimony relating to the sexual condi-tions of alleged victims, or else the door will be opened to defense rebuttal evidence concerning a victim's prior sexual activity.201

196. Id. at 16.
197. Id.
198. Id.
199. For a second case involving this same issue during the survey period see Haze v. State, 489 So. 2d 36 (Fla. 4th Dist. Ct. App. 1986) (There was a partial reversal of several convictions for sexual battery since defendant was not allowed to present evidence that victim's vaginal changes could have come from someone else.)

200. 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." See, e.g., Stewart v. Masseline, 487 So. 2d 96 (Fla. 3d Dist. Ct. App. 1986) (The invasion of privilege at a civil deposition is proper since "[i]n any type of proceeding, a person is exempt from answering questions which may constitute a link in a chain of evidence tending to his conviction." Id. at 97, quoting Fisher v. E.F. Hutton & Co., 463 So. 2d 269, 290-91 (Fla. 2d Dist. Ct. App. 1984).)

201. See Zabrans v. Riveron, 495 So. 2d 1195 (Fla. 3d Dist. Ct. App. 1986).
203. See Suarez v. State, 481 So. 2d 1005 (Fla. 1983). However, no such hearing will be necessary whenever the privilege's assertion is obviously valid, e.g., when the witnessing individual is a co-defendant whose case has been severed for trial, as it would be merely an idle exercise of judicial labor to indulge in such inquiry." Id. at 481 (quoting Lupin v. State, 349 So. 2d 1188, 1189 (Fla. 2d Dist. Ct. App. 1977), cert. denied, 359 So. 2d 1216 (Fla. 1980)).

reversed in a short but important opinion. The state interpreted the word "injury" only to mean some type of wound which would not include the kind of abnormality present in this case. The fifth district found this interpretation "overly restrictive." More importantly, the court felt that since the defendant was prevented from introducing evidence of the victim's sexual activity with others, the jury necessarily must have concluded that her physical changes would have resulted from the alleged sexual contact with Deel. Since the state first introduced the testimony about the abnormalities, Deel should have been entitled to rebut this by showing that there was another cause other than himself. How much the Deel opinion will allow defendants to introduce evidence of a victim's sexual relations with others is not certain. Certainly, when the state attempts to argue that any physical changes on the victim's body were caused by sexual abuse from the defendant, it appears that defendants will always be able to introduce evidence of the victim's sexual activity with others. In this respect, the word injury in section 794.022(2) should be equated with the words "physical abnormalities". However, this should not open the door to widespread use of defense evidence concerning a victim's prior sexual activity. Consider for example, the hypothetical situation where the state contends that the defendant has sexually attacked a child or young woman and wishes to introduce evidence of the victim's physical condition to prove such. If the state presents medical evidence of the presence of an "abnormality" not usually found in a person of that age, then the door will be open to other sexual activity evidence. However, if the state's medical experts merely testify there is evidence of recent sexual relations, the door should not be open, since mere evidence of recent sexual relations should not necessarily be equated with the notion of "injury." To do so would effectively read any protection of the rape shield law out of existence. Deel thus cautions the state to carefully plan and limit the medical testimony relating to the sexual conditions of alleged victims, or else the door will be opened to defense rebuttal evidence concerning a victim's prior sexual activity.

IV. Privileges

A. Privilege Against Self-Incrimination

Both the United States and Florida constitutions recognize that all individuals have a privilege against self-incrimination. Most discussion of this privilege involves the admissibility of confessions or incriminating statements in criminal cases and is beyond this article's scope. However, the courts have recognized that the privilege exists whenever speaking may force an individual to reveal information which could be incriminating. It is the nature of the information asked for, and not the setting in which the privilege is invoked, that determines whether a privilege against self-incrimination claim will be recognized. During the survey period, Florida courts continued to accept traditional versions of the privilege. Thus, assertion of the privilege did not prevent granting a motion for summary judgement against a party in a civil case. Florida courts also adhered to the position that a party has no right to call a witness who will assert the privilege before a jury, although the determination as to whether a valid Fifth Amendment claim exists generally should rest with the trial court after an on the record voir dire of the witness at a hearing. However, there were two recent decisions involving cases of first impression.

200. 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."


202. See, e.g., Stewart v. Mussonine, 487 So. 2d 96 (Fla. 3d Dist. Ct. App. 1986) (The invocation of privilege at a civil deposition is proper since "[i]n any type of proceeding, a person is exempt from answering questions which may constitute a link in a chain of evidence leading to his conviction." " Id. at 91, quoting Fisher v. E.F. Hutton & Co., 463 So. 2d 289, 290-91 (Fla. 2d Dist. Ct. App. 1984).


205. See Suarez v. State, 481 So. 2d 1201 (Fla. 1985). However, no such hearing will be necessary when the privilege's assertion is obviously valid, e.g. when the asserting individual is a co-defendant whose case has been severed for trial, as it would be merely "an idle exercise of judicial labor to indulge in such inquiry."" Id. at 481 (quoting Lopez v. State, 349 So. 2d 1198, 1199 (Fla. 2d Dist. Ct. App. 1977), cert. denied, 359 So. 2d 1216 (Fla. 1978)).

1. Privilege against Self-Incrimination and Documentary Evidence

As criminal investigations attempt to delve into more complicated types of crime, the need for documentary evidence will increase. This is especially so with respect to investigations of "white collar" crimes and regulatory offenses. Besides a traditional search warrant, the state may attempt to use other means of producing documents. In Hawaiian Pineapple Co. v. State, the state court determined that a custodian of corporate records should have a right to assert the privilege against self-incrimination where compelling production of these records would be self-incriminating, and therefore quashed the subpoena. On appeal, the parties agreed that a corporation does not have a personal privilege against self-incrimination and that a custodian of corporate records generally has no privilege to refuse producing them even though their contents may be self-incriminating. However, they disagreed as to how these principles should be applied in the present context. The United States Supreme Court in United States v. Doe, has previously recognized two important aspects with respect to the privilege against self-incrimination and the production of documentary evidence. The privilege only protects a person from compelled self-incrimination. Doe found that "where the preparation of business records is voluntary, no compulsion is present."

The Court held that the

207. For an excellent article dealing generally with this subject and discussing the United States Supreme Court decisions in this area, see Altino, Documents and the Privilege Against Self-Incrimination, 48 U. Pitt. L. REV. 27 (1986). The author concludes that "the problem of regulating subpoenas for documents is not inherently insurmountable but is amenable to solution that is consistent with the Fifth Amendment." Indeed the author claims the area is more appropriately handled on a non-constitutional basis, through legislation balancing the needs of individual privacy versus the requirements of law enforcement. Id. at 81.


209. Id. at 327.


212. United States v. Wilson, 223 U.S. 361 (1911). Wilson is based on the theory that a custodian by refusing to assume responsibility for corporate records waives his personal Fifth Amendment privilege. For further discussion see Altino, supra note 207, at 66.


214. Id. at 612.

215. Id.

216. Id. The Court noted that producing documents in response to a subpoena admits their existence and that control by the person to whom the subpoena is directed, along with that person's "belief that the papers are those described in the subpoena," Id. at 612.

217. Id. at 612. The Court found that a grant of use immunity for the act of producing the documents would have satisfied any privilege concerns. However, it declined to recognize a "constructed immunity" doctrine under which the automatic production of any self-incriminatory documents in response to a subpoena would be preauthorized and could not be used against the producer. Id. at 616.

For a recent, more in-depth discussion of Doe, see Weith & Ferguson, United States v. Doe: The Supreme Court and the Fifth Amendment, 16 LOYOLA L. REV. 729 (1980). The authors note that "the main theories supporting the privilege: (1) the truth-seeking rationale; (2) the individual dignity rationale; and (3) the privacy rationale." Id. at 743. They conclude that the Court's determination that any voluntarily created documents are within the privilege's protection is entirely consistent with the truth-seeking rationale "if the records are created voluntarily - if they are not the product of governmental compulsion - their reliability is not open to question, and there is no reason to exclude them from evidence." Id. at 751. Unfortunately the authors do not try to find any justification for the second part of Doe's holding regarding the act of production's testimonial aspect but merely admitting this to "consistent with truth-seeking rationale," Id. at 752, n. 126.

218. The Third District phrased the exact issue as: "Whether the owner of a

tests of voluntarily prepared business records are not privileged." However, Doe additionally found that while the contents of a document might not be privileged, the production of it might be. Indeed, the Court recognized that a "subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." In Doe, the government sought to subpoena records of five different sole proprietorships. Since the act of producing these would have been tantamount to authenticating them for purposes of trial, the Court found the act of production was privileged, although the contents of the documents themselves were not. Unlike Doe, Wellington involved an attempt to subpoena records of a one-man corporation versus those of a sole proprietorship. The state argued that Doe should be distinguished from the instant case, because it is applied only to sole-proprietorships and not to collective entities. However, the corporate owner argued that the critical fact in Doe was not the precise nature of the entity itself, but the self-incriminatory aspects of the compelled production. The Third District Court of Appeal found this issue had never been directly addressed either in Florida or by the United States Supreme Court. Acknowledging there was a split of

https://nsuworks.nova.edu/nlr/vol11/iss4/6

[^5]: Wilson, 223 U.S. 361 (1911). Wilson is based on the theory that a custodian by refusing to assume responsibility for corporate records waives his personal Fifth Amendment privilege. For further discussion see Altino, supra note 207, at 66.
1. Privilege against Self-Incrimination and Documentary Evidence

As criminal investigations attempt to delve into more complicated types of crime, the need for documentary evidence will increase. This is especially so with respect to investigations of "white collar" crimes and regulatory offenses. Besides a traditional search warrant, the state may attempt to use other means of producing documents. 207 State v. Wellington Precious Metals, Inc. 208 involved an investigative subpoena duces tecum, subpoenaing the records of the defendant corporation relating to its acquisition of certain precious metals. The trial court found that a custodian of corporate records should have a right to assert the fifth amendment privilege where compelling production of these records would be self-incriminating, and therefore quashed the subpoena. 209 On appeal, the parties agreed that a corporation does not have a personal privilege against self-incrimination 210 and that a custodian of corporate records generally has no privilege to refuse producing them out though their contents may be self-incriminating. 211 However, they disagreed as to how these principles should be applied in the present context. The United States Supreme Court in United States v. Doe 212 has previously recognized two important aspects with respect to the privilege against self-incrimination and the production of documentary evidence. The privilege only protects a person from compelled self-incrimination. Doe found that "[w]here the preparation of business records is voluntary, no compulsion is present. 213 The Court held that the contents of voluntarily prepared business records are not privileged. 214 However, Doe additionally found that while the contents of a document might not be privileged, the production of it might be. 215 Indeed, the Court recognized that a "subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect. 216 In Doe, the government sought to subpoena records of five different sole proprietorships. Since the act of producing these would have been tantamount to authenticating them for purposes of trial, the Court found the act of production was privileged, although the contents of the documents themselves were not. 217 Unlike Doe, Wellington involved an attempt to subpoena records of a one-man corporation versus those of a sole proprietorship. The state argued that Doe should be distinguished from the instant case, because it is applied only to sole-proprietorships and not to collective entities. However, the corporate owner argued that the critical fact in Doe was not the precise nature of the entity itself, but the self-incriminatory aspects of the compelled production. The Third District Court of Appeal found this issue had never been directly addressed either in Florida or by the United States Supreme Court. 218 Acknowledging there was a split of

207. For an excellent article dealing generally with this subject and discussing the United States Supreme Court decisions in this area, see Altos, Documents and the Privilege Against Self-Incrimination, 48 U. Pitt. L. Rev. 27 (1986). The author concludes that "the problem of regulating subpoenas for documents is not inherently intractable [b]ut is not amenable to easy solution using the Self-Incrimination Clause of the Fifth Amendment." Indeed the author claims this area is more appropriate handled on a non-constitutional basis through legislation balancing the need of individual privacy versus the requirements of law enforcement. Id. at 81.

208. 487 So. 2d 326 (Fla. 3d Dist. Ct. App. 1986).

209. Id. at 327.

210. Id. See Hare v. Henkel, 201 U.S. 43 (1906).

211. Wellington Precious Metals, 487 So. 2d at 327. See Wilson v. United States, 221 U.S. 361 (1911). Wilson is based on the theory that a custodian by agreeing to assume responsibility for corporate records waives his personal fifth amendment privilege. For further discussion see Altos, supra note 207, at 46.


213. Id. at 610.

214. Id. at 612. The Court noted that producing documents in response to a subpoena admits their existence and their control by the person to whom the subpoena is directed, along with that person's "belief that the papers are those described in the subpoena." Id. at 613.

215. Id. at 612. The Court found that a grant of use immunity for the act of producing the documents would have satisfied any privilege concerns. However, it declined to recognize a "constructive immunity" doctrine under which the automatic production of any self-incriminatory documents in response to a subpoena would be privileged and could not be used against the producer. Id. at 616.

216. Id. The Court noted that producing documents in response to a subpoena admits their existence and their control by the person to whom the subpoena is directed, along with that person's "belief that the papers are those described in the subpoena." Id. at 613.

217. Id. at 612. The Court found that a grant of use immunity for the act of producing the documents would have satisfied any privilege concerns. However, it declined to recognize a "constructive immunity" doctrine under which the automatic production of any self-incriminatory documents in response to a subpoena would be privileged and could not be used against the producer. Id. at 616.

218. The Third District phosphory the exact issue as: "Whether the owner of a
authority on this point, the court adopted the position of the United States Court of Appeals for the Third Circuit in In re Grand Jury Matter (Appeal of James Gilbert Brown) and held that "a sole owner-corporate custodian of records ... may not be compelled to produce corporate records pursuant to a subpoena duces tecum ... if the act of producing will be communicative and incriminatory, in the absence of a grant of use immunity." Thus, the district court of appeal affirmed the order quashing the subpoena, although doing so on slightly different grounds from that of the trial court.

Wollington may not give as much protection to corporate records as the decision would first suggest. Since it was the act of production which was privileged and not the contents themselves, if the state can obtain the documents other than through the corporate owner-custodian's hands, Wollington will not apply. Furthermore, the state still has the option of granting use immunity for the act of production of the documents themselves. The Third District Court of Appeal specifically noted that the Florida and federal use immunity statutes are similar in this respect, thus the large body of federal case law developed under the act of production and use immunity doctrines will be relevant to any Florida cases on this subject. If documents are produced under a grant of use immunity, the state merely has to authenticate them by independent means. Wollington will not totally prevent the acquisition of records from a solely owned corporation for use in a criminal investigation, but will only make it slightly harder.

one-man corporation can be compelled to produce records of the corporation without a grant of use immunity where the act of producing may be both incriminating and communicative." Wollington, 487 So. 2d at 327. (emphasis in original). 219. 784 F.2d 525 (3d Cir. 1986). 220. Wollington, 487 So. 2d at 327-328.

21. Id. at 328.

222. For example, if a search warrant could be obtained describing documents with sufficient particularity, there should be no fifth amendment problem with the police seizing the documents. See Andresen v. Maryland, 427 U.S. 463 (1976), upholding a search warrant allowing the seizure of an attorney's personal business papers.

223. Wollington, 487 So. 2d at 328, n.4.

224. Readers should note that the Supreme Court in its 1986 term decided to revisit the issue whether the fifth amendment privilege protects against the production of corporate records when the act of producing would allegedly incriminate the owner-custodian. See In re Grand Jury Subpoena, 784 F.2d 857 (8th Cir.), cert. granted sub nom. See v. United States, 107 S. Ct. 59 (1986), cert. dismissed, 107 S. Ct. 378 (1986). This case would probably have required the Court to revisit Wollington.
authority on this point, the court adopted the position of the United States Court of Appeal for the Third Circuit in In re Grand Jury Matter (Apell of James Gilbert Brown) and held that "a sole owner-corporate custodian of records . . . may not be compelled to produce corporate records pursuant to a subpoena duces tecum . . . if the act of producing will be communicative and inquisitorial, in the absence of a grant of use immunity." Thus, the district court of appeal affirmed the order quashing the subpoena, although doing so on slightly different grounds from that of the trial court.

Wellington may not give as much protection to corporate records as the decision would first suggest. Since it was the act of production which was privileged and not the contents themselves, if the state can obtain the documents other than through the corporate owner custodian's hands, Wellington will not apply. Furthermore, the state also has the option of granting use immunity for the act of production of the documents themselves. The Third District Court of Appeal specifically noted that the Florida and federal use immunity statutes are similar in this respect, thus the large body of federal case law developed under the act of production and use immunity doctrines will be relevant to any Florida cases on this subject. If documents are produced under a grant of use immunity, the state merely has to authenticate them by independent means. Wellington will not totally prevent the acquisition of records from a solely owned corporation for use in a criminal investigation, but will only make it slightly harder.

one-man corporation can be compelled to produce records of the corporation without a grant of use immunity where the act of producing may be both testimonial and inquisitorial." Wellington, 487 So. 2d at 327. (emphasis in original).

219. 768 F.2d 525 (3d Cir. 1985).
220. Wellington, 487 So. 2d at 327-328.
221. Id. at 328.
222. For example, if a search warrant could be obtained describing documents with sufficient particularity, there should be no fifth amendment problems with the police searching for and seizing the documents. See Andrensen v. Maryland, 427 U.S. 463 (1976), upholding a search warrant allowing the seizure of an attorney's personal business papers.
223. Wellington, 487 So. 2d at 328, n.4.
224. Readers should note that the Supreme Court in its 1986 term declined to revisit the issue whether the fifth amendment privilege protects against the production of corporate records when the act of production would allegedly incriminate the producing person. See In re Grand Jury Subpoena, 784 F.2d 857 (8th Cir.), cert. granted sub nom. See v. United States, 107 S.Ct. 59 (1986), cert. dismissed, 107 S.Ct. 93 (1986). This case would probably have required the Court to revisit Wilson v. United

2. Privilege against Self-Incrimination and Professional Regulatory Proceedings

The privilege against self-incrimination is considered applicable to Florida Real Estate Commission proceedings investigating allegations of misconduct and to State Board of Medical Examiners' investigation of unprofessional conduct claims. However, last year the Florida Supreme Court in Boedy v. Department of Public Regulation found that the privilege did not apply to prevent psychiatric examinations of a physician ordered by the Department of Professional Regulation pursuant to the Medical Practice Act. In a case important to all Florida attorneys, DeBock v. State, the Florida Supreme Court considered the relationship between the Fifth Amendment privilege against self

States, 221 U.S. 361 (1911), relied on in Wellington to find that a corporate custodian cannot invoke his personal fifth amendment privilege to decline production of corporate records.

225. See State ex rel. Vining v. Florida Real Estate Comm'n, 281 So. 2d 487 (Fla. 1973).
227. 463 So. 2d 215 (Fla. 1985). The department had filed an administrative complaint alleging Boedy suffered from a mental or physical condition making him "unable to practice medicine with reasonable skill and safety" under the Medical Practice Act, Fla. Stat. § 458.331(1)(c)(1981). Id. at 216. The department ordered Boedy to submit to the psychiatric examinations, the results of which would be used to determine his fitness to continue practicing. Boedy unsuccessfully contested this order before a department hearing examiner and the First District Court of Appeal, Boedy v. Department of Professional Regulation, 444 So. 2d 503 (Fla. 1st Dist. Ct. App. 1984), and finally the Florida Supreme Court. The First District noted that the privilege against self-incrimination had not been considered implicated when a proceeding is held to assess a civil penalty rather than a criminal one, and summarily concluded that the department's proceeding was civil rather than criminal in nature. The Florida Supreme Court affirmed, concluding that the specific section of the Medical Practice Act involved "does not deal with an issue of guilt or innocence." Boedy, 463 So. 2d at 217. Rather the issue was Boedy's fitness to practice medicine "with reasonable skill and safety" as required by law. As long as the state did not attempt to use anything Boedy might say during the psychiatric evaluations in later criminal proceedings, there would be no valid privilege claim. Since a specific section in the Medical Practice Act, § 458.331(1)(c) proscribed such, this was not a realistic issue. The Florida Supreme Court concluded by finding 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." Id. at 218.

incrimination and potential Florida Bar disciplinary proceedings. This case grew out of a criminal proceeding against another attorney who had offered unlawful compensation to DeBock, to induce him to effect the disposition of a pending criminal case. At the time, DeBock was an Assistant Attorney. The state subpoenaed DeBock for deposition, but he claimed his fifth amendment privilege not to answer any questions on the grounds that the answers could be used against him in Florida Bar disciplinary proceedings. DeBock's position was that the use immunity granted under Florida statutes would not immunize him from bar disciplinary proceedings and that the Florida Supreme Court had yet to grant him such protection. He further contended that the state had the burden to seek an order immunizing him before it could compel his testimony. The trial court agreed with DeBock and entered an order accordingly. However, the Fourth District Court of Appeal quashed this order on two grounds. The district court agreed that any use immunity granted to DeBock by his having been subpoenaed for deposition would not protect him from bar disciplinary proceedings. Despite this, the court found DeBock, not the state, should have to bear the burden of seeking any immunity from the Florida Supreme Court. The basis for this holding was that DeBock had no valid claim under the fifth amendment, because bar disciplinary proceedings were Remedial and not punitive. The court found that the purpose of the privilege against self-incrimination is to protect an attorney against possible criminal prosecution by words uttered outside of his mouth. Defining a criminal case as "one which may result in sanctions being imposed upon a person as a result of his conduct being adjudged violative of the criminal law," the district court found the real purpose of a Bar disciplinary proceeding is not to judge a person's criminality but rather to determine an attorney's moral fitness to practice law. While it admitted that some conduct which would form a basis for criminal prosecution would justify disciplinary proceedings, the district court claimed that the main focal point was upon looking

232. Id. at 737.
233. Id. at 736.
234. Id.
235. Id.
236. Id. (quoting In re Daley, 549 F.2d 469, 474 (7th Cir. 1977)).
237. Id.

1987] Evidence 1339

into a person's character and fitness to practice law and not making judgments as to whether or not he had engaged in any criminal acts. The Florida Supreme Court granted review and in turn quashed the District Court of Appeal's decision. The supreme court found that a disciplinary proceeding "which could result in revocation of [an attorney's] privilege to practice law" is tantamount to the disciplinary action "as contemplated" by the immunity statutes. The rationale behind this finding was that someone's "right to earn a living... is protected by the immunity statute." Since DeBock could lose his right to practice law, and therefore his livelihood, by the disciplinary proceedings, the privilege against self-incrimination was found applicable to them. The Florida Supreme Court noted that

238. Id.
240. Id. at 551. The court considered a disciplinary proceeding to revoke an attorney's privilege to practice with an earlier disciplinary action involving revocation of an architect's certificate. In Florida State Bd. of Architecture v. Seyoum, 62 So. 2d 1 (Fla. 1952), the State Board of Architecture had brought charges of bribery and conspiracy to commit bribery against an architect. The supreme court found that a proceeding to revoke the architect's certificate was equivalent to a proceeding to affect a penalty or forfeiture as contemplated by an earlier immunity statute, and the architect was entitled to notice. Id. at 3.
241. 11 Fla. L. Weekly at 551, quoting Seyoum, 62 So. 2d at 3. See also Lurie v. Florida State Bd. of Dentistry, 288 So. 2d 223 (Fla. 1973). In Lurie the question was whether a grant of immunity immunizing the dentist from criminal prosecution also immunized him from administrative proceedings to revoke his license to practice dentistry based upon the same acts. Lurie had allegedly been involved in a stolen tart ring and was compelled to testify about this when immunized. The Florida Supreme Court felt that revocation of his dentistry license would constitute a penalty or forfeiture within the meaning of the then existing immunity statute. In finding for the dentist, the supreme court apparently recognized the public perception which its decision would arouse, stating in language particularly ironic in light of DeBock, that [i]f there are those who would hypothetically parade the horridness of felonious disposal as physicians or lawyers preying on unsuspecting patients or clients under a cloak of governmental immunity. Such found abuses and evils ordinarly never transpire because practicing officers exercise reasonable discretion in granting statutory immunity. A certain degree of confidence must be placed in state attorneys and other officials by assuming that they will not recklessly grant immunity to the extent of opening food-gates for great numbers of the unsusceptible to professionally victimize the public.

Id. at 221.
incrimination and potential Florida Bar disciplinary proceedings. This case grew out of a criminal proceeding against another attorney who had offered unlawful compensation to DeBock, to induce him to effect the disposition of a pending criminal case. At the time, DeBock was an Assistant Attorney. The state subpoenaed DeBock for deposition, but he claimed his fifth amendment privilege not to answer any questions on the ground that the answers could be used against him in Florida Bar disciplinary proceedings. DeBock's position was that the use immunity granted under Florida statute would not immunize him from bar disciplinary proceedings and that the Florida Supreme Court had yet to grant him such protection. He further contended that the state had the burden to seek an order immunizing him before it could compel his testimony. The trial court agreed with DeBock and entered an order accordingly. However, the Fourth District Court of Appeal quashed this order on two grounds. The district court agreed that any use immunity granted to DeBock by his having been subpoenaed for deposition would not protect him from bar disciplinary proceedings. Despite this, the court found DeBock, not the state, should have to bear the burden of seeking any immunity from the Florida Supreme Court. The basis for this holding was that DeBock had no valid claim under the fifth amendment, because Bar disciplinary proceedings were remedial not punitive. The court found that the purpose of the privilege against self-incrimination is to protect one against possible criminal prosecution by words uttered out of his own mouth. Defining a criminal case as "one which may result in sanctions being imposed upon a person as a result of his conduct being adjudged violative of the criminal law," the district court found the real purpose of a Bar disciplinary proceeding is not to judge a person's criminality but rather to determine an attorney's moral fitness to practice law.

While it admitted that some conduct which would form a basis for criminal prosecution would justify disciplinary proceedings, the district court claimed that the main focal point was upon looking into a person's character and fitness to practice law and not making judgments as to whether or not he had engaged in any criminal acts. The Florida Supreme Court granted review and in turn quashed the District Court of Appeal's decision. The supreme court found that a disciplinary proceeding "which could result in revocation of [an attorney's] privilege to practice law" is tantamount to the disciplinary action [earlier determined to be] a prosecution to affect the penalty or forfeiture as contemplated by the immunity statutes. The rationale behind this finding was the conclusion that someone's "right to earn a living . . . is protected by the immunity statute." Since DeBock could lose his right to practice law, and therefore his livelihood, by the disciplinary proceedings, the privilege against self-incrimination was found applicable to them.

238. Id.
239. Dobson v. The Fla. Bar, 361 So. 2d 121 (Fla. 1978).
240. Id. at 551. The court compared a disciplinary proceeding to revoke an attorney's privilege to practice with an earlier disciplinary action involving revocation of an architect's certificate. In Florida State Bd. of Architecture v. Seymen, 62 So. 2d 1 (Fla. 1952), the State Board of Architecture had brought charges of bribery and conspiracy to commit bribery against an architect. The supreme court found that a proceeding to revoke the architect's certificate was equivalent to a prosecution to affect a penalty or forfeiture as contemplated by an earlier immunity statute, and thus was criminal in nature. Id. at 3.
241. Id. at 551. (quoting Seymen, 62 So. 2d at 3).
242. Id. at 551. (quoting Seymen, 62 So. 2d at 3).
243. Id.
244. Id. at 551.
245. Id. at 551.
246. Id. at 551.
247. Id. at 551.
248. Id. at 551.
United States Supreme Court itself had recognized that the fifth amendment privilege should be extended to protect attorneys from certain disciplinary proceeding and had given a broad definition of the term "penalty" for purposes of asserting the privilege.\textsuperscript{243}

Once the privilege against self-incrimination was found applicable to bar disciplinary proceedings, the rest of the opinion was relatively simple. The court noted Grievani v. The Florida Bar,\textsuperscript{244} had found that the separation of powers doctrine contained in the Florida constitution required that any immunity from disciplinary proceedings be granted by the Florida Supreme Court and not by an individual state's attorney office. Furthermore, the supreme court found that the burden was upon the agency desiring the immunity to apply for such and not the person who claimed the privilege of self-incrimination.\textsuperscript{245} Since the state attorney's office did not apply for immunity here and the court had so granted such, DeBock's assertion of the privilege at the deposition was correct.

Whatever the outcome in the Florida Supreme Court, DeBock would have been controversial. However, the brevity of the opinion may make it even more so. This case raises serious questions as to whether the Florida Supreme Court has adopted a consistent rationale for dealing with the question of whether the fifth amendment privilege applies to professional regulatory proceedings. Based on the notion that DeBock had a right to earn a living and therefore should have been able to claim the privilege at the deposition, earlier Florida Supreme Court decisions must be questioned.\textsuperscript{246} Certainly, the doctrine in the supreme court's decision holding that certain proceedings under the Medical Practice Act were regulatory and not penal also had a right to earn a living.\textsuperscript{247} Why should his case be considered any different from DeBock's? Based upon the court's "right to earn a living" rationale, why should any witness who is appearing before any regulatory agency

\textsuperscript{243} Id. in Spevacek v. Kleine, 385 U.S. 511 (1967) the Court found that a New York State practitioner who refused to honor a subpoena requiring him to produce certain financial records and also refused to testify at a judicial inquiry based upon his assertion of a privilege against self-incrimination, could not subsequently be disciplined for doing so. So doing, the Court defined the word "penalty" for purposes of the 5th amendment as "the imposition of any sanction which makes assertion of the 5th Amendment privilege "vain".\textsuperscript{244} Id. at 515.

\textsuperscript{244} 361 So. 2d 121 (Fla. 1978).

\textsuperscript{245} DeBock, 11 Fla. L. Weekly at 551.

\textsuperscript{246} Boody v. Department of Pub. Regulation, 463 So. 2d 215 (Fla. 1985)

\textsuperscript{247} See id. and supra discussion at note 227.
United States Supreme Court itself had recognized that the fifth amendment privilege should be extended to protect attorneys from certain disciplinary proceedings and had given a broad definition to the term “penalty” for purposes of asserting the privilege.\textsuperscript{248}

Once the privilege against self-incrimination was found applicable to bar disciplinary proceedings, the rest of the opinion was relatively simple. The court noted Ciravolo \textit{v. The Florida Bar},\textsuperscript{249} had found that the separation of powers doctrine contained in the Florida constitution required that any immunity from disciplinary proceedings be granted by the Florida Supreme Court and not by an individual state’s attorney office. Furthermore the supreme court found that the burden was upon the agency desiring the immunity to apply for such and not the person who claimed the privilege of self-incrimination.\textsuperscript{250} Since the state attorney’s office did not apply for immunity here and the court had not granted such, DeBock’s assertion of the privilege at the deposition was correct.

Whatever the outcome in the Florida Supreme Court, DeBock would have been controversial. However, the brevity of the opinion may make it even more so. This case raises serious questions as to whether the Florida Supreme Court has adopted a consistent rationale for dealing with the question of when the fifth amendment privilege applies in professional regulatory proceedings. Based on the notion that DeBock had a right to earn a living and therefore should have been able to claim the privilege at the deposition, earlier Florida Supreme Court decisions must be questioned.\textsuperscript{251} Certainly the doctor in the supreme court’s decision holding that certain proceedings under the Medical Practice Act were regulatory and not penal also had a right to earn a living.\textsuperscript{252} Why should his case be considered any different from DeBock’s? Based upon the court’s “right to earn a living” rationale, why should any witness who is appearing before any regulatory agency not be able to claim the fifth amendment privilege against self-incrimination and refuse to answer any questions which could be used to strip him of a license to continue in a particular profession? The Florida Supreme Court may not have intended DeBock to extend this far. Yet its opinion ignores past decisions which found the privilege inapplicable to certain regulatory proceedings.\textsuperscript{253} Justice Ehrlich, in his dissent, argued that Bar disciplinary proceedings should not be considered penal in nature.\textsuperscript{254} In his view, an inquiry into someone’s fitness to practice law is undertaken for the purpose of protecting the public, not necessarily punishing the lawyer.\textsuperscript{255} This viewpoint would certainly be consistent with the 1983 decision governing certain investigations under the Medical Practice Act.\textsuperscript{256} However, this rationale, like the “right to earn a living” reasoning, could also be applied to all professional regulatory proceedings. Thus, Justice Ehrlich’s reasoning is substantively as flawed as that of the majority. Only if he would be willing to likewise reverse some of the earlier Florida decisions holding the privilege applicable\textsuperscript{257} to certain regulatory proceedings would his dissent have any consistent rationale. Justice Ehrlich’s dissent cites one United States Supreme Court case, \textit{Ullmann} \textit{v. United States},\textsuperscript{258} which arguably supports his conclusion that the fifth amendment privilege against self-incrimination should not apply to proceedings before disciplinary groups once a witness has been immunized from criminal prosecution. In \textit{Ullmann}, the Court rejected Justice Douglas’s argument that a witness had a fifth amendment privilege to refuse answering certain questions about his communist background, even after being granted immunity from criminal prosecution, because his answers would disqualify him from holding certain jobs, such as certain government positions, or from being an officer of a labor organization.\textsuperscript{259} Justice Frankfurter’s majority opinion found that once a grant of immunity protected the witness’s answers from being used against him in a criminal prosecution, this was as much protection as the scope of the privilege had in-

\textsuperscript{248} Specfically, the court ignored the example of \textit{Boedy}, 463 So. 2d at 215.

\textsuperscript{249} DeBock, 11 Fla. L. Weekly 551-52 (Ehrlich, J., dissenting).

\textsuperscript{250} Id.

\textsuperscript{251} Boedy, 463 So. 2d at 215.


\textsuperscript{253} 350 U.S. 422 (1936).

\textsuperscript{254} Id. at 430-31.
torneys and clients.\textsuperscript{880} In the cases discussing the attorney-client privilege during this survey period, the issues seem to fall within two main subdivisions. They involved either questions concerning the privilege's scope\textsuperscript{263} or questions about the privilege's waiver.\textsuperscript{264} Each of these areas contain major cases worth noting.

1. Scope of the Attorney-Client Privilege

In general, the attorney-client privilege protects confidential communications made between a client and an attorney for the purpose of possibly obtaining legal services. Many recent cases involved rather standard constructions of this general proposition.\textsuperscript{265} However, Corey v.

---

\textsuperscript{260} FLA. STAT. § 90.502 (1985). This provision is modeled after Proposed Fla. R. or Ev. 502.

\textsuperscript{261} Corey v. Meigs, 498 So. 2d 508 (Fla. 1st Dist. Ct. App. 1986).

\textsuperscript{262} Brookings v. State, 495 So. 2d 135 (Fla. 1986); Tucker v. State, 444 So. 2d 1299 (Fla. 4th Dist. Ct. App. 1984). A third area of major discussion during the survey period involved the protection afforded by the work product doctrine. Admittedly this is a separate issue from the attorney-client privilege. However, questions involving the two areas seem to frequently arise together. Readers may wish to note the following recent work product cases. See City of Orlando v. Dejanosis, 493 So. 2d 1027 (Fla. 1986) (the new provision, FLA. STAT. § 119.072(1)(a) (Supp. 1986), under the Florida Public Records Act, protecting access to work product material, should be applied retrospectively to actions occurring before provision's effective date); Rahland v. Gibbs, 495 So. 2d 1243 (Fla. 5th Dist. Ct. App. 1986) (This case noted that work product protection still exists even after litigation has ended and that the "burden is on the party who seeks to overcome a work product objection to show a need for the documents sought and demonstrate that they are useful, without undue hardship, to obtain the information by any means.") Id. at 1244; State v. Rabh, 495 So. 2d 257 (Fla. 3d Dist. Ct. App. 1986) (This case identified two types of work product, fact work product and opinion work product. The first type is discoverable after a case's termination but record is not since it represents an attorney's mental processes which need complete protection from disclosure.).

\textsuperscript{263} See Johnson v. State, 497 So. 2d 863 (Fla. 1986) (Letters allegedly sent to a murder defendant from someone confessing to the murder and subsequently given to defendant's attorney were not protected as confidential communications "not intended to be disclosed to third persons" since the defendant had told a state investigator and his new girlfriend about them. Id. at 867); State v. Rabh, 495 So. 2d 257 (Fla. 3d Dist. Ct. App. 1986) (Communications in an interview between criminal defense counsel and a potential witness were not protected since there was no attorney-client relationship between the two nor were the communications made with an eye toward potentially forming one); Brevard Community College v. Barber, 488 So. 2d 93 (Fla. 1st Dist. Ct. App. 1986) (Letters from an attorney to defendant's representatives should not have been disclosed since they were protected communications, however, any disclosure was harmless. The court rejected the argument that the exception to the privilege

---
torneys and clients. In the cases discussing the attorney-client privilege during this survey period, the issues seem to fall within two main subdivisions. They involved either questions concerning the privilege's scope or questions about the privilege's waiver. Each of these areas contain major cases worth noting.

1. Scope of the Attorney-Client Privilege

In general, the attorney-client privilege protects confidential communications made between a client and an attorney for the purpose of possibly attaining legal services. Many recent cases involved rather standard constructions of this general proposition. However, Corry v.  


262. Brookings v. State, 495 So. 2d 135 (Fla. 1986); Tucker v. State, 484 So. 2d 1299 (Fla. 4th Dist. Ct. App. 1986). A third area of major discussion during the survey period involved the protection afforded by the work product doctrine. Admittedly this is a separate issue from the attorney-client privilege. However, questions involving the two areas seem to frequently arise together. Readers may wish to note the following recent work product cases. See City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986) (The new provision, Fla. Stat. § 119.07(3)(a) (Supp. 1986), under the Florida Public Records Act, protecting access to work product material, should be applied retrospectively to actions accruing before provision's effective date.); Rhuhl v. Gibeault, 495 So. 2d 1243 (Fla. 5th Dist. Ct. App. 1986) (This case noted that work product protection still exists even after litigation has ended and that the "burden is on the party who seeks to overcome a work product objection to show a need for the documents sought and demonstrate that they are usable, without undue hardship, to obtain the equivalent by any means." Id. at 1244.); State v. Rabin, 495 So. 2d 257 (Fla. 3d Dist. Ct. App. 1986) (This case identified two types of work product, fact work product and opinion work product. The first type is discoverable after a case's termination but second is not since it represents an attorney's mental processes which need complete protection from disclosure.).

263. See Johnston v. State, 497 So. 2d 863 (Fla. 1986) (Letters allegedly sent to a murder defendant from someone confessing to the murder and subsequently given to defendant's attorney were not protected as confidential communications "not intended to be disclosed to third persons" since the defendant had told a state investigator and his own girlfriend about them). Id. at 867.); State v. Rabin, 495 So. 2d 257 (Fla. 3d Dist. Ct. App. 1986) (Communications in an interview between criminal defense counsel and a potential witness were not protected since there was no attorney-client relationship between the two nor were the communications made with an eye towards potentially forming one.); Brevard Community College v. Barber, 488 So. 2d 93 (Fla. 1st Dist. Ct. App. 1986) (Letters from an attorney to defendant's representatives should not have been disclosed since they were protected communications, however, any disclosure was harmless. The court rejected the argument that the exception to the privilege...
Mega, recently demonstrated how difficult it may be to apply the privilege's general definition to certain particular circumstances. Corry, a Florida attorney, originally represented a material witness during a homicide investigation. After the witness, Davis, testified before a grand jury, perjury charges were brought against him. Davis had testified that he did not know any of the three men who left the homicide scene with one of the homicide suspects. Contrary to this, four or five other witnesses testified that Davis did have a close relationship with these three men. Corry was served with a subpoena ducem tecum commanding him to appear before the grand jury and bring all records pertaining to legal fees paid on behalf of Davis during two years. Corry filed a motion for a protective order asserting the attorney-client privilege on behalf of Davis. He appeared before the grand jury but declined to answer any questions about payment of Davis's fees or produce the requested records. At the protective order hearing, Corry claimed the person who paid Davis's attorney fees was also one of Corry's clients and was not one of the three persons under investigation for the homicide. The trial court denied the protective order motion finding that there were no confidential communications involved and that disclosure of the requested fee information would not provide a last evidentiary link incriminating Davis in the homicide. However, the First District Court of Appeal reversed. The district court found that the trial court should have granted the motion because the requested information concerned confidential attorney-client communications, because it would provide the last link in a criminal investigation, and because the state did not show a compelling need to obtain this information by proving that it had exhausted other available sources.

rules recognized in bad faith insurance-excess liability cases should be extended to bad faith proceedings under Workers' Compensation Act; Merlin v. Boca Raton Community Hospital, Inc., 479 So. 2d 236 (Fla. 4th Dist. Ct. App. 1985) (The privilege protected a client's notes "prepared for and transmitted to the attorney either in contemplation of or during the litigation and kept confidential throughout." Id. at 239; Fugate v. Allinson, 13 Fla. Supp. 2d 133 (11th Cir. 1985) (The attorney-client privilege was applied to protect reports prepared by a client for the attorney's use.

264. 498 So. 2d at 508.
265. Corry also claimed the subpoena violated his right of privacy to the records under Fla. Const. art. I, § 23. The appellate court found it unnecessary to address this issue because of its favorable finding for Corry on other grounds. Id. at 509.
266. Corry, 498 So. 2d at 509.
267. Id. at 514.
268. Id. at 509.

In this author's opinion, Corry was certainly wrongly decided as to the first point, and most likely as to the second one. The First District Court of Appeal's decision erroneously construed the statutory attorney-client privilege and failed to take into account other important factors.

In finding the identity of the person who paid Davis's legal bills and the fee itself a confidential communication, the court began by noting that section 90.502(1) of the Florida Statutes defines a communication between lawyer and client as confidential if "it is not intended to be disclosed to third persons." The court then noted there were five specific statutory exceptions to the attorney-client privilege but that a client's identity or the payment of a fee was not one of them. The first district admitted that the general rule "at common law and in the federal courts has been that the identity of a client and the payment of attorney fees are merely underlying facts of an attorney-client relationship, not confidential communications contemplated as privileged." Despite this proposition, the court found that the Florida Evidence Code's definition of attorney-client privilege and the enumeration of specific exceptions thereto was "a definitive statement or codification of the law of attorney-client privilege." Thus, since revelation of a client's identity or fee arrangements were not one of the specific statutory exceptions, these two matters should be considered confidential communications.

The main error with the first district's reasoning is where the court chose to begin. Instead of beginning with the definition of what is considered a confidential communication under the Florida Evidence Code, the court should have looked to the definition of who is considered a client. Section 90.502 of the Florida Statutes defines a client as someone "who consults a lawyer for the purpose of obtaining legal services or who was rendered legal services by a lawyer." If this language is read broadly, perhaps the alleged undisclosed fee payer in Corry fell within it. However, construed in the proper light, it is easy to see that this should not be so. The unknown client who supposedly paid the fee was not rendered legal services by Corry because of the fee's payment.

269. Id. at 510 (quoting Fla. Stat. § 90.502(1)(e) (1985)).
271. Corry, 498 So. 2d at 511.
272. Id.
273. Id.
Mega, recently demonstrated how difficult it may be to apply to privilege's general definition to certain particular circumstances. Corry, a Florida attorney, originally represented a material witness during a homicide investigation. After the witness, Davis, testified before a grand jury, perjury charges were brought against him. Davis had testified he did not know any of the three men who left the homicide scene with one of the homicide suspects. Contrary to this, four of the other witnesses testified that Davis did have a close relationship to at least these three men. Corry was served with a subpoena duces tecum commanding him to appear before the grand jury and bring all papers pertaining to legal fees paid on behalf of Davis during two years. Corry filed a motion for a protective order asserting the attorney-client privilege on behalf of Davis. He appeared before the grand jury but declined to answer any questions about payment of Davis's fees or produce the requested records. At the protective order hearing, Corry claimed the person who paid Davis's attorney fees was also one of Corry's clients and was not one of the three persons under investigation for the homicide. The trial court denied the protective order noting that there were no confidential communications involved, that disclosure of the requested fee information would not provide any last evidentiary link incriminating Davis in the homicide. However, the First District Court of Appeal reversed. The district court found that the trial court should have granted the motion because the requested information concerned confidential attorney-client communications, because it would provide the last link in a criminal investigation, and because the state did and not show a compelling need to obtain this information by proving that it had exhausted other available sources.

rules recognized in bad faith insurance-excess liability cases should be extended to bad faith proceedings under Workers' Compensation Act.); Merlin v. Boca Raton Community Hospital, Inc., 479 So. 2d 236 (Fla. 4th Dist. Ct. App. 1985). The problem presented here is whether a client's notes "prepared for and transmitted to the attorney either in connection with or during the litigation and kept confidential throughout." Id. at 133 (Allison v. Allison, 13 Fla. Supp. 2d 133 (11th Cir. 1985) (The attorney-client privilege was applied to protect reports prepared by a client for the attorney's use.).

264. 498 So. 2d at 508.
265. Corry also claimed the subpoena violated his right of privacy to his notes under Fla. Court. R. 7, § 23. The appellate court found it unnecessary to entertain the issue because of its favorable findings for Corry on other grounds. Id. at 509.
266. Corry, 498 So. 2d at 509.
267. Id. at 514.
268. Id. at 509.

In this author's opinion, Corry was certainly wrongly decided as to the first point, and most likely as to the second one. The First District Court of Appeal's decision erroneously construed the statutory attorney-client privilege and failed to take into account other important factors. In finding the identity of the person who paid Davis's legal bills and the fee itself a confidential communication, the court began by noting that section 90.502(1) of the Florida Statutes defines a communication between lawyer and client as confidential if "it is not intended to be disclosed to third persons." The court then noted there were five specific statutory exceptions to the attorney-client privilege but that a client's identity or the payment of a fee was not one of them. The first district admitted that the general rule "at common law and in the federal courts has been that the identity of a client and the payment of attorney fees are merely underlying facts of an attorney-client relationship, not confidential communications contemplated as privileged." Despite this proposition, the court found that the Florida Evidence Code's definition of attorney-client privilege and the enumeration of specific exceptions thereto was "a definitive statement or codification of the law of attorney-client privilege." Thus, since revelation of a client's identity or fee arrangements were not one of the specific statutory exceptions, these two matters should be considered confidential communications.

The main error with the first district's reasoning is where the court chose to begin. Instead of beginning with the definition of what is considered a confidential communication under the Florida Evidence Code, the court should have looked to the definition of what is considered a client. Section 90.502 of the Florida Statutes defines a client as someone "who consults a lawyer for the purpose of obtaining legal services or who was rendered legal services by a lawyer." If this language is read broadly, perhaps the alleged undisclosed fee payer in Corry fell within it. However, construed in the proper light, it is easy to see that this should not be so. The unknown client who supposedly paid the fee was not rendered legal services by Corry because of the fee's payment.

269. Id. at 510 (quoting Fla. Stat. § 90.502(1)(c) (1985)).
271. Corry, 498 So. 2d at 511.
272. Id.
273. Id.
If anyone was rendered legal services it was Davis. Likewise, this unknown client did not consult Corry for the purpose of obtaining legal services for himself/herself, rather the services were for Davis. Evidence recognizes that there is nothing improper per se about one person paying for legal services on behalf of another. However, this is not a communication which should be protected as confidential. It is difficult to understand how Corry could be seen as having rendered this unknown person either legal services as having consulted Corry for the purpose of obtaining legal services for himself. This still does not necessarily mean that the person who paid Davis’s fee was not one of Corry’s clients in other matters. But with respect to any potential charges against Davis concerning his part in the homicide under the investigation, the unknown fee payer should not be considered a client under section 90.502 for purposes of determining whether any communications between this unknown individual and Corry came within the attorney-client privilege.

This argument is completely consistent with the purposes behind the attorney-client privilege. As one recent writer has stated:

the privilege is established so that clients with concerns about legal matters can communicate about their problems without feeling that their communications might subsequently be used as evidence by legal fees. Thus, the privilege insures that clients do not suffer as a result of consulting lawyers and confiding in them.

Under this rationale, if Corry had been asked what this unknown person had originally said about the possibility of paying Davis’s fees, Corry probably would have been justified in refusing to answer on the grounds of an attorney-client privilege. This is so because the fee payer would have unwittingly made these communications believing that they were confidential but not realizing they would not fall within the ambit of the attorney-client privilege. Under these circumstances, what should have transpired is for the attorney to explain that the identity of a person who pays the legal fees for another is not privileged and that even if legal fees were paid by someone else on Davis’s behalf, Davis would have to be considered the client and not the payor. This again is completely consistent with the attorney-client privilege’s rationale. The privilege exists to promote full disclosure between a client and attorney concerning the matter on which legal advice is sought. Generally, to promote this disclosure, new communications are generated which may not otherwise be made. The privilege should protect these new communications and nothing more. However, “facts concerning the professional relationship of attorney and client do not amount to the kind of information generally provided for the purpose of attaining legal services.” Thus, the First District’s finding that the identity of the fee payor and the amount of fees were confidential communications was wrong.

The First District Court of Appeal also found that the “last link” exception justified the refusal to disclose the fee payer’s identity. This exception exists with respect to a client’s identity if disclosure “would supply the last link of incriminating evidence in an existing chain and would likely lead to the filing of criminal charges.” While the district court was correct in stating this as the general rule, its subsequent reasoning was flawed. Ironically, the court was not willing to exempt the identity of a client or the payment of the fee from what it felt was a confidential communication since these two matters do not fall within one of the statutory exceptions under section 90.502(1)(c) of the Florida Statutes. However, the court failed to recognize that this notion of a client’s identity filling a last link in a chain of incriminating

277. Id. at 826. Saltzburg also notes that the privilege was never designed to allow attorneys to become agents for clients and do something which the client should not necessarily be allowed to do in the first place. Applied to questions of whether information about a client’s identity and fee should be privileged, Saltzburg asserts that [p]reviously, if the lawyer can refuse to reveal the identity of the client, the client could refuse to reveal that he retained the lawyer. To permit this is to permit clients not only to communicate in private with lawyers, but also to allow them to use their lawyers to prevent the gathering of information about acts which may be very public. Once the privilege is extended beyond communications to bar an inquiry about actions taken by a lawyer for the benefit of the client . . . there is a danger that clients will use the attorney-client relationship to immunize public activities from public scrutiny and to prevent investigative bodies . . . from inquiring into actions for which a client may be legally responsible . . . . To avoid this loss of information, courts are justified in restricting the privilege. The privilege is intended to foster communications, not to make the attorney an agent whose agency is not subject to judicial inquiry.

278. Corry, 498 So. 2d at 511.
279. Id.
280. Id.
If anyone was rendered legal services it was Davis. Likewise, this unknown client did not consult Corry for the purpose of obtaining legal services for himself/herself, rather the services were for Davis. Evidence recognizes that there is nothing improper per se about one person paying for legal services on behalf of another. However, this is not a communication which should be protected as confidential. It is difficult to understand how Curry could be seen as having rendered this unknown person either legal services as having consulted Corry for the purpose of obtaining legal services for himself. This still does not necessarily mean that the person who paid Davis's fee was not one of Corry's clients in other matters. But with respect to any potential charges against Davis concerning his part in the homicide under the investigation, the unknown fee payer should not be considered a client under section 90.502 for purposes of determining whether any communications between this unknown individual and Corry came within the attorney-client privilege.

This argument is completely consistent with the purposes behind the attorney-client privilege. As one recent writer has stated:

the privilege is established so that clients with concerns about legal matters can communicate about their problems without feeling that their communications might subsequently be used as evidence by legal foes. Thus, the privilege insures that clients do not suffer as a result of consulting lawyers and confiding in them. 275

Under this rationale, if Corry had been asked what this unknown person had originally said about the possibility of paying Davis's fee, Corry probably would have been justified in refusing to answer on the grounds of an attorney-client privilege. This is so because the fee payer would have unwittingly made these communications believing that they were confidential but not realizing they would not fall within the ambit of the attorney-client privilege. Under these circumstances, what should have transpired is for the attorney to explain that the identity of a person who pays the legal fees for another is not privileged and that even if legal fees were paid by someone else on Davis's behalf, Davis would have to be considered the client and not the payer. This is completely consistent with the attorney-client privilege's rationale. The privilege exists to promote full disclosure between a client and attorney concerning the matter on which legal advice is sought. Generally, to promote this disclosure, new communications are generated which may not otherwise be made. The privilege should protect these new communications and nothing more. However, "facts concerning the professional relationship of attorney and client do not amount to the kind of information generally provided for the purpose of attaining legal services." 277 Thus, the First District's finding that the identity of the fee payer and the amount of fees were confidential communications was wrong.

The First District Court of Appeal also found that the "last link" exception justified the refusal to disclose the fee payer's identity. 278 This exception exists with respect to a client's identity if disclosure "would supply the last link of incriminating evidence in an existing chain and would likely lead to the filing of criminal charges." 279 While the district court was correct in stating this as the general rule, its subsequent reasoning was flawed. Ironically, the court was not willing to exempt the identity of a client or the payment of the fee from what it felt was a confidential communication since these two matters do not fall within one of the statutory exceptions under section 90.502(1)(c) of the Florida Statutes. 280 However, the court failed to recognize that this notion of a client's identity filling a last link in a chain of incriminating

277. Id. at 826. Saltzburg also notes that the privilege was never designed to allow attorneys to become agents for clients and do something which the client should not necessarily be allowed to do in the first place. Applied to questions of whether information about a client's identity and fee should be privileged, Saltzburg asserts that [p]resumably, if the lawyer can refuse to reveal the identity of the client, the client could refuse to reveal that he retained the lawyer. To permit this is to permit clients not only to communicate in private with lawyers, but also to allow them to use their lawyers to prevent the gathering of information about acts which may be very public. Once the privilege is extended beyond communications to bar an inquiry about actions taken by a lawyer for the benefit of the client . . . there is a danger that clients will use the attorney-client relationship to immunize public activities from public scrutiny and to prevent investigative bodies . . . from inquiring into actions for which a client may be legally responsible . . . To avoid this loss of information, courts are justified in restricting the privilege. The privilege is intended to foster communications, not to make the attorney an agent whose agency is not subject to judicial inquiry.
278. Corry, 498 So. 2d at 511.
279. Id.
280. Id.
Evidence is likewise not a creature of statute but of case law. Furthermore, the court even misapplied this "last link" case law to Corry's particular facts. The trial court had ruled that the disclosure of the unnamed payor's identity would not provide a last link incriminating Davis in the homicide; therefore, the exception would not apply. The First District admitted this conclusion was "substantiated by the record, which evidences no indication of an existing chain of incriminating evidence against Davis relating to the homicide." However, the district court refused to give the "last link" exception a limited reading. The court found it applies not only where the incriminating evidence would be "relevant to the crime for which the advice was initially sought," in these circumstances the homicide, but also where "the incriminating evidence is likely to incriminate, notwithstanding the nature of the attorney's initial services." Under this interpretation, the last link exception would allow one party to arrange for the payment of legal services on behalf of another party in order to protect having the unknown payor's involvement in a criminal act revealed. Clearly, the attorney-payor privilege was never designed to protect such a situation. While some courts have admitted extended it this far, usually the

281. Corry, 498 So. 2d at 512.
282. Id.
283. Id.
284. Id.
285. See, e.g., Sepler v. State, 191 So. 2d 588 (Fla. 3d Dist. Ct. App. 1966) which the First District cited as support for its "last link" exception ruling. In Sepler, an attorney was allowed to refuse to disclose the identity of two other attorneys who sought his legal advice about certain information, relating to a missing girl, which had been relayed to them by one of their own clients and the client's friend. The court ruled that disclosure of the two attorneys' names could possibly lead to prosecution of the unnamed friend. Id. at 591. Although superficially Sepler and Corry appear analogous, close examination of each case's circumstances shows this is not so. Unlike Corry, Sepler focuses the policies behind the attorney-client privilege. When the client's friend talked to the two attorneys and sought their advice, this person in turn also became a "client." Obviously this person contacted these attorneys for the purposes of seeking legal advice as to what he should do. The two attorneys were not able to advise him and in turn sought Sepler's advice concerning the whole matter. Keeping in mind that the purpose of the attorney-client privilege is to encourage people to seek legal advice and to encourage them to be frank in their discussions with counsel, any ruling requiring Sepler to reveal the identity of the two attorneys would be contrary to the privilege's policy. When the two attorneys contacted Sepler, they in turn became his clients for the purposes of seeking legal advice. This legal advice was both on behalf of themselves and on behalf of their own client. The original clients who called the two attorneys would most likely never

have done so if they suspected that the two attorneys would have been forced to reveal their identities or if someone whom the attorneys in turn consulted would have been forced to reveal their identities. Thus Sepler's ruling that he did not have to disclose the two attorneys' identities actually would encourage people in future situations to seek legal advice, rather than to not seek it because of fear their identities would be disclosed.

In contrast to Sepler, there is no indication that in Corry that the unknown "client" sought Corry for the purposes of acquiring any legal advice for himself. Thus, once again it is difficult to see how requiring disclosure of his identity would discourage people from seeking attorneys for purposes of legal advice or discourage them from being frank and open with their attorneys during consultation.

286. See, e.g., Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) which the First District called the "leading case from which this exception emanated." Corry, 498 So. 2d at 591. In Baird, an attorney made an anonymous tax payment on behalf of the undisclosed client of several accountants. Once again this case is completely distinguishable from Corry because Baird actually fosters the policy between the attorney-client privilege. In contacting the attorney to make a payment on behalf of their client, the accountants were actually representatives of their unnamed client for the purpose of seeking legal advice. Thus any communications between the accountants to the attorney about the unnamed client should fall within the attorney-client privilege. Here the identity of the client was one of the things which the court found there was a strong desire to keep confidential. Obviously in Corry the person paying Davis's fees also wanted to keep his identity confidential. Yet the two cases are distinguishable on a very important point. In Baird the named client had sought the attorney's advice through the accountants for the purposes of getting legal advice for himself, not another person. As has already been mentioned, there is no evidence that the unnamed fee payor in Corry, sought the attorney for the purposes of attaining any legal advice or assistance for himself.

Furthermore, the ruling in Baird also promotes public policy in the sense that it encourages individuals to recognize, although belatedly, their public responsibility as far as income tax payments, while at the same time not risking incrimination. If the client had mailed a letter to the Internal Revenue Service with a check stating that he had not paid income taxes for certain years in the specified amount, this could be directly used against the client in possible criminal prosecutions. In essence then, such a statement would be equivalent to an admission that the unnamed client had broken some of the criminal tax laws. Given this situation, if the court had ruled differently in Baird, attorneys in future situations would have to tell their clients or their clients' accountants that they could not make anonymous payments on their behalf without being forced to reveal the client's identity if subpoenaed to do so. In such a situation what the likely result would be is that the clients would not seek to make any payments and hope that their failure to comply with the tax laws would somehow go unnoticed.
exception has been applied when disclosure of the client’s identity may lead to that person’s harassment and where it is clear an attorney-client privilege exists between the payor and the attorney with respect to the matter on which legal services were paid. This situation did not exist have done so if they suspected that the two attorneys would have been forced to reveal their identities or if someone whom the attorneys in turn consulted would have been forced to reveal their identities. Thus Sepler’s ruling that he did not have to disclose the two attorneys’ identities actually would encourage people in future situations to seek legal advice, rather than to not seek it because of fear their identities would be disclosed.

In contrast to Sepler, there is no indication that in Corry that the unknown “client” sought Corry for the purposes of acquiring any legal advice for himself. Thus, once again it is difficult to see how requiring disclosure of his identity would discourage people from seeking attorneys for purposes of legal advice or discourage them from being frank and open with their attorneys during consultation.

286. See, e.g., Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) which the First District called the “leading case from which this exception emerged.” Corry, 498 So. 2d at 51. In Baird, an attorney made an anonymous tax payment on behalf of the undisclosed client of several accountants. Once again the case is completely distinguishable from Corry because Baird actually fosters the policy behind the attorney-client privilege. In contacting the attorney to make a payment on behalf of their client, the accountants were actually representatives of their unnamed client for the purpose of seeking legal advice. Thus any communications between the accountants and the attorney about the unnamed client should fall within the attorney-client privilege. Here the identity of the client was one of the things which the court found there was a strong desire to keep confidential. Obviously in Corry the person paying Davis’s fees also wanted to keep his identity confidential. Yet the two cases are distinguishable on a very important point. In Baird the unnamed client had sought the attorney’s advice through the accountants for the purposes of getting legal advice for himself, not another person. As has already been mentioned, there is no evidence that the unnamed fee payer in Corry sought the attorney for the purposes of attaining any legal advice or assistance for himself.

Furthermore, the ruling in Baird also promotes public policy in the sense that it encourages individuals to receive, although belatedly, their public responsibility as far as income tax payments, while at the same time not risking incrimination. If the client had mailed a letter to the Internal Revenue Service with a check stating that he had not paid income taxes for certain years in the specified amount, this could be illegally used against the client in possible criminal prosecutions. In essence then, such a statement would be equivalent to an admission that the unnamed client had broken some of the criminal tax laws. Given this situation, if the court had ruled differently in Baird, attorneys in future situations would have to tell their clients or their clients’ accountants that they could not make anonymous payments on their behalf without being forced to reveal the client’s identity if subpoenaed to do so. In such a situation the likely result would be that the clients would not seek to make any payments and hope that their failure to comply with the tax laws would somehow go unnoticed.

281. Corry, 498 So. 2d at 512.
282. Id.
283. Id.
284. Id.
285. See, e.g., Sepler v. State, 191 So. 2d 588 (Fla. 3d DCA..Fl. 1966) which the First District cited as support for its “last link” exception ruling. It held that an attorney was allowed to refuse to disclose the identity of two other attorneys who sought his legal advice about certain information, relating to a mininggif, he had learned and had been relayed to him by one of his own clients and the client’s friend. The court held that disclosure of the two attorneys’ names could possibly lead to promotion of the unnamed friend. Id. at 59.

Although superficially Sepler and Corry appear analogous, close examination of each case’s circumstances shows this is not so. Unlike Corry, Sepler lends no support behind the attorney-client privilege. When the client’s friend talked to the two attorneys and sought their advice, this person in turn also became a “Client.” Obviously the person consulted these attorneys for the purposes of seeking legal advice as to what should be done. The two attorneys were not able to advise him and in turn spoke Sepler’s advice concerning the whole matter. Keeping in mind that the purpose of the attorney client privilege is to encourage people to seek legal advice and to encourage their clients to be frank in their discussions with counsel, any ruling requiring Sepler to reveal the identity of the two attorneys would be contrary to the privilege’s policy. When the two attorneys contacted Sepler, they in turn became his clients for the purposes of seeking legal advice. This legal advice was both on behalf of themselves and on behalf of the client’s friend. The original clients who called the two attorneys would most likely not have done so if they suspected that the two attorneys would have been forced to reveal their identities or if someone whom the attorneys in turn consulted would have been forced to reveal their identities.
in Corry thus the Court of Appeal’s decision was erroneous.\textsuperscript{887}

2. \textbf{Waiver}

While each privilege in the Florida Evidence Code contains specific exceptions to that particular privilege’s application, section 90.507 of the Florida Statutes governs when voluntary disclosure will constitute a waiver of a privilege.\textsuperscript{888} This section provides that the holder of any alleged confidential communication “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.”\textsuperscript{889} Although this section was not specifically mentioned in any case during the survey period discussing the attorney-client privilege, its principles provided the rationale for two recent, noteworthy Florida cases.\textsuperscript{890}

\textbf{Tucker v. State.}\textsuperscript{891} involved an appeal from convictions for attempted murder, kidnapping and grand theft. One evening Tucker took his brother, who both shared an apartment with the victim, beat and stabbed the victim and took him to an isolated spot where they stabbed him several more times before leaving. Tucker was apprehended after confessing his crime to a neighbor. Prior to trial, Tucker’s attorney moved the appointment of a psychiatric expert to evaluate the defendant. After an initial evaluation declaring Tucker competent to stand trial, he was subsequently found competent to do so. The defense filed a notice of intent to rely on the insanity defense

287. Hopefully the Florida Supreme Court will overrule the First District Court of Appeal’s decision. The state filed a jurisdictional brief with the Florida Supreme Court on January 23, 1987 asking the court to review Corry. As of February 6, 1987 no respondent’s brief had been received. Telephone interview with Andrea Smith Hillier, Assistant Attorney General, Tallahassee, (Feb. 6, 1987).


289. \textit{Id.} However, the last sentence of this section also specifically provides it “is not applicable when the disclosure is itself a privileged communication,” e.g., when a client reveals to his attorney, in the scope of their professional relationship, communications which would be privileged under the husband-wife privilege provision.

290. Brooks v. State, 497 So. 2d 125 (Fla. 1986). Tucker v. State, 484 So. 2d 1299 (Fla. 4th Dist. Cl. App. 1986). In addition to these two cases, see Portnoy v. State, 497 So. 2d 969 (Fla. 3d Dist. Cl. App. 1986). (A client’s malpractice suit against an attorney relating to a particular real estate transaction did not constitute a waiver to any confidential communications between the two which were not related to this transaction.)

291. 484 So. 2d at 1299.

292. Id. at 1300. Fla. R. C.RIM. PRO 3.216 Insanity at Time of Offensive Notice and appointment of Experts specifically provides that with respect to any court appointed expert, “(a) expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the attorney-client privilege.”


294. 428 So. 2d 713 (Fla. 4th Dist. Cl. App.), review denied, 438 So. 2d 834 (Fla. 1983).

295. Tucker, 484 So. 2d at 1300.

296. Id. at 1300, 1301.

297. Id. at 1301. The Fourth District found it made no difference that it was the attorney and not the client who had permitted the discovery. While the privilege is the client’s, the court found an attorney has implied authority to waive it. Once the doctor was deposited without the privilege was lost, despite the client’s lack of participation in the waiver.
in Corry thus the Court of Appeal's decision was erroneous.\textsuperscript{287}

2. \textit{Waiver}

While each privilege in the Florida Evidence Code contains specific exceptions to that particular privilege's application, section 90.507 of the Florida Statutes governs when voluntary disclosure will constitute a waiver of a privilege.\textsuperscript{288} This section provides that the holder of any alleged confidential communication "waives the privilege if he voluntarily discloses or makes the communication when he does so have a reasonable expectation of privacy, or consents to disclose or any significant part of the matter or communication."\textsuperscript{289} Although the section was not specifically mentioned in any case during the seven period discussing the attorney-client privilege, its principles provide the rationale for two recent, noteworthy Florida cases.\textsuperscript{290}

\textit{Tucker v. State},\textsuperscript{291} involved an appeal from convictions for attempted murder, kidnapping and grand theft. One evening Tucker and his brother, both of whom shared an apartment with the victim, entered the apartment and stabbed him several times before leaving. Tucker was apprehended after confessing his crime to a neighbor. Prior to trial, Tucker's court-appointed attorney moved for the appointment of a psychiatric expert to evaluate the defendant. After an initial evaluation declaring Tucker incompetent to stand trial, he was subsequently found competent to do so. The defense filed a notice of intent to rely on the insanity defense

\textsuperscript{287} See id. at 1300. FLA. R. CRIM. PRO. 1.216 Insanity At Time of Offense. Notice and Appointment of Expert. Specifically provides that with respect to any court-appointed expert, "[a]ny expert shall report only to the attorney for the defendant and matters related to the expert shall not be deemed to fall under the lawyer-client privilege." See Prosser v. State, 331 So.2d 640 (Fla. 3d Dist. Ct. App. 1976).

\textsuperscript{288} See Tucker v. State, 499 So. 2d 135 (Fla. 1986). Tucker v. State, 499 So. 2d 696 (Fla. 3d Dist. Ct. App. 1986). (A client must allege a waiver to any confidential communications between the two which were not related to this transaction.)

\textsuperscript{290} See Prosser v. State, 331 So.2d 640 (Fla. 3d Dist. Ct. App. 1976) (a client must allege a waiver to any confidential communications between the two which were not related to this transaction.)

\textsuperscript{291} See Tucker v. State, 499 So. 2d 135 (Fla. 1986). Tucker v. State, 499 So. 2d 696 (Fla. 3d Dist. Ct. App. 1986) (A client must allege a waiver to any confidential communications between the two which were not related to this transaction.)

\textsuperscript{292} See Tucker v. State, 499 So. 2d 135 (Fla. 1986). Tucker v. State, 499 So. 2d 696 (Fla. 3d Dist. Ct. App. 1986) (A client must allege a waiver to any confidential communications between the two which were not related to this transaction.)

\textsuperscript{293} See Tucker v. State, 499 So. 2d 135 (Fla. 1986). Tucker v. State, 499 So. 2d 696 (Fla. 3d Dist. Ct. App. 1986) (A client must allege a waiver to any confidential communications between the two which were not related to this transaction.)

\textsuperscript{294} See Prosser v. State, 331 So.2d 640 (Fla. 3d Dist. Ct. App. 1976).

\textsuperscript{295} See Tucker v. State, 499 So. 2d 135 (Fla. 1986).

\textsuperscript{296} See Tucker v. State, 499 So. 2d 135 (Fla. 1986).

\textsuperscript{297} See Tucker v. State, 499 So. 2d 135 (Fla. 1986). Tucker v. State, 499 So. 2d 696 (Fla. 3d Dist. Ct. App. 1986) (A client must allege a waiver to any confidential communications between the two which were not related to this transaction.)

\textsuperscript{298} See Tucker v. State, 499 So. 2d 135 (Fla. 1986).

\textsuperscript{299} See Tucker v. State, 499 So. 2d 135 (Fla. 1986). Tucker v. State, 499 So. 2d 696 (Fla. 3d Dist. Ct. App. 1986) (A client must allege a waiver to any confidential communications between the two which were not related to this transaction.)
result should remind defense counsel to make specific and prompt contemporaneous objections to any objectionable matter or procedure attempted by the state attempts. The Fourth District noted that Tucker’s trial counsel had conceded that no earlier objection was made, because he believed that it was not necessary to do so until trial. This unfortunately mistaken judgment by resulted in a loss of Tucker’s privilege.

In the second case, *Brookings v. State*, the Florida Supreme Court addressed a case of first impression concerning waiver of the attorney-client privilege. This first degree murder case actually grew out of an earlier murder. In November, 1978, a man named Earl Sadler witnessed a stabbing death during a bar room fight. One year and four months later in March 1980, the mother of the man whom Sadler had seen commit the earlier killing, hired Brookings to kill Sadler and prevent him from testifying about the earlier crime. In April 1980, Brookings and his girlfriend went to Sadler’s home and tricked him to come out, whereupon Brookings shot and killed Sadler. Over a year later in June 1981, Brookings’ girlfriend, Judith Lowery, found herself incarcerated for an unrelated crime. During her incarceration she sent her attorney to the state to obtain immunity in exchange for her testimony against Brookings. After completing the immunity agreement, Lowery told the state all she knew about Brookings and his mother who were both subsequently charged with Sadler’s homicide. At Brookings’ trial, his defense counsel attempted to question Lowery about whether she had told a different version of the Sadler murder to her attorney before he approached the state with the plea bargain offer. The state objected to this and the trial court sustained the objection, finding that by sending her attorney to the state, Lowery had not waived the attorney-client privilege as to the communications between the two. The Florida Supreme Court agreed with this ruling.

The supreme court first noted that one of the traditional reasons supporting the attorney-client privilege is the necessity to promote full disclosure of factual information between an attorney and client. With this idea in mind, the court focused on what exactly should be considered privileged during an attorney-client consultation. In so doing, it noted that what is privileged are the actual communications between an attorney and client and not the underlying facts concerning this information itself. The supreme court held the “the mere fact that a witness-client testifies to facts which were the subject of consultation with counsel is no waiver of the privilege.” In *Brookings*, the pre-negotiation communications between Lowery and her attorney had been made with the expectation they would be kept private. Although Lowery may have entered into an immunity agreement with the state, merely sending her attorney to arrange such a “deal” did not waive the privilege. Furthermore, under the circumstances of the case, respecting the privilege would certainly not have caused Brookings any harm. Brookings was able to cross-examine both Lowery and the chief detective investigating the case concerning Lowery’s original statements to that detective. Likewise, the fact Lowery had negotiated with the state for immunity was clearly brought out. The only restriction concerned the actual confidential communications between Lowery and the attorney himself. Thus, respecting the privilege certainly worked no hardship on Brookings.

C. Reporter’s Privilege

1. Scope of the Privilege Generally

Section 90.501 of the Florida Statutes expressly recognizes that privileges other than those named in the Florida Evidence Code can exist. As can be expected, the recognition of a non-statutory privilege is an exceedingly rare event. One area where the Florida courts have recognized a non-statutory, constitutional privilege relates to the privilege of a reporter to protect sources of confidential communication. *Tribune Co. v. Huffsteter*, provided the Florida Supreme Court an opportunity to discuss the exact scope of this constitutional privilege. In *Huffsteter*, a reporter co-authored an article claiming that a complaint

298. *Id.*
299. 495 So. 2d 135 (Fla. 1986).
300. *Id.* at 139.
301. *Id.* at 140.
302. *Id.* at 139.

303. *Id.*
304. *Id.*
305. Although this was a case of first impression in Florida, the Florida Supreme Court correctly noted that ample case law from other jurisdictions confronting the same issue supported the court’s holding. See, e.g., *Chicola v. State*, 253 Ga. 773, 325 S.E.2d 339 (1985); State v. Rankin, 465 So. 2d 679 (La. 1985); *Young v. State*, 425 So. 2d 1022 (Miss. 1983); *Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (W. Va. 1975).
308. 489 So. 2d 722 (Fla. 1986).
result should remind defense counsel to make specific and prompt contemporaneous objections to any objectionable matter or procedure attempted by the state attempts. The Fourth District noted that Tucker's trial counsel had conceded that no earlier objection was made, because he believed that it was not necessary to do so until trial.134 This unfortunately mistaken judgment resulted in a loss of Tucker's privilege.

In the second case, Borgonovo v. State,135 the Florida Supreme Court addressed a case of first impression concerning waiver of the attorney-client privilege. This first degree murder case actually grew out of a earlier murder. In November, 1978, a man named Earl Sadler witnessed a stabbing death during a bar room fight. One year and four months later in March 1980, the mother of the man whom Sadler had seen commit the earlier killing, hired Borgonovo to kill Sadler and prevent him from testifying about the earlier crime. In April 1980, Borgonovo and his girlfriend went to Sadler's home and tricked him into coming out, whereupon Borgonovo shot and killed Sadler. Over a year later in June 1981, Borgonovo's girlfriend, Judith Lowery, found herself incarcerated for an unrelated crime. During her incarceration she set her attorney to the state to obtain immunity in exchange for her testimony against Borgonovo. After completing the immunity agreement, Lowery told the state all she knew about Borgonovo and his mother who were both subsequently charged with Sadler's homicide. At Borgonovo's trial, his defense counsel attempted to question Lowery about whether she had told a different version of the Sadler murder to her attorney before she approached the state with the plea bargain offer. The state objected to this and the trial court sustained the objection, finding that by sending her attorney to the state, Lowery had not waived the attorney-client privilege as to the communications between the two. The Florida Supreme Court agreed with this ruling.

The supreme court first noted that one of the traditional reasons supporting the attorney-client privilege is the necessity to promote disclosure of factual information between an attorney and client. With this idea in mind, the court focused on what exactly should be considered privileged during an attorney-client consultation. To do so, it noted that what is privileged are the actual communications be-
had been filed with the local ethics commission against two county commissioners for misuse of their offices. The ethics commission did receive such a complaint, but it was ultimately dropped. After the dismissal, the two commissioners involved filed a complaint with the local state attorney’s office alleging a violation of Florida Statute §112.317(6). The reporter was subpoenaed for questioning about the source of his article. He refused to testify and was subsequently found guilty of civil contempt. After the Fifth District Court of Appeal upheld the contempt citation, the reporter appealed to the Florida Supreme Court.

The Florida Supreme Court began its discussion by examining the United States Supreme Court’s decision in Branzburg v. Hayes. In Branzburg, several reporters were subpoenaed to testify before a grand jury concerning their knowledge of several violent acts including an alleged presidential assassination attempt. The reporters claimed the first amendment privilege in support of their refusal to reveal their sources and refused to testify. Four justices rejected outright any claim of privilege believing it was frivolous when compared with the grave nature of the crimes involved. The crucial fifth vote was provided by Justice Powell who felt that any claim of a newspaper’s privilege “should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”

In Morgan v. State, the Florida Supreme Court specifically adopted Justice Powell’s balancing test, holding that a reporter has a limited and qualified privilege to protect sources of information against disclosure depending upon the public interest involved in the particular prosecution. To identify just what particular public interest is involved in a given case, the court in Hufstedler suggested that the particular statute involved in each individual prosecution must be examined. The supreme court found that although section 112.317(c) of the Florida Statutes provided that the disclosure of certain information was a first degree misdemeanor, the main interest behind the statute was in protecting a person’s private interest in his/her reputation. The Florida Supreme Court therefore concluded that “the societal interests underpinning most criminal statutes are not present in the instant statute.” Given these circumstances, the supreme court found that the reporter’s claim of privilege should have been recognized and reversed his civil contempt conviction.

2. Physical Evidence

Most questions concerning the reporter privilege involve attempts to have a reporter disclose the identity of a source and/or the actual conversations the reporter has had with that source. Satz v. News & Sun-Sentinel Co., demonstrates that the scope of the reporter privilege is not likely to be expanded beyond questions of identity and revelation of the actual communications themselves. The Sun-Sentinel newspaper had published a series of articles involving misuse of city equipment by city employees. After the articles’ publication, the state attorney initiated an investigation and subpoenaed two reporters and a custodian of the newspaper’s photographic records. The newspaper provided copies of all previously published photographs but claimed a conditional privilege with respect to any unpublished ones. The trial court agreed with the newspaper’s claims finding that “the newspaper enjoys a conditional privilege to withhold unpublished photographs depicting criminal activity.” In a short but important decision the Fourth District Court of Appeal reversed.

The district court phrased the issue before it as “whether one’s status as a newspaper confers a privilege to withhold physical evidence of crime.” Satz drew an important distinction between physical evidence of a crime and information concerning confidential sources which a newspaper has used in its reporting work. The Fourth District

309. Fla. Stat. § 112.317(6) (1985) states in part that “Any person who willfully discloses or permits to be disclosed . . . the existence or contents of a complaint which has been filed with the commission . . . before such complaint . . . becomes a public record as provided herein is guilty of a misdemeanor . . .”
312. Id. at 690-93.
313. Id. at 710.
314. 337 So. 2d at 951.
315. Hufstedler, 489 So. 2d at 724.
had been filed with the local ethics commission against two county commissioners for misuse of their offices. The ethics commission did receive such a complaint, but it was ultimately dropped. After the dismissal, the two commissioners involved filed a complaint with the local state attorney’s office alleging a violation of Florida Statute § 112.317(6). The reporter was subpoenaed for questioning about the source of his article. He refused to testify and was subsequently found guilty of civil contempt. After the Fifth District Court of Appeal upheld the contempt citation, the reporter appealed to the Florida Supreme Court.

The Florida Supreme Court began its discussion by examining the United States Supreme Court’s decision in Branzburg v. Hayes. In that case, several reporters were subpoenaed to testify before a grand jury concerning their knowledge of several violent acts including an alleged presidential assassination attempt. The reporters claimed the First Amendment privilege in support of their refusal to reveal their sources and refused to testify. Four justices rejected outright any claim of privilege believing it was frivolous when compared with the grave nature of the crimes involved. The crucial fifth vote was provided by Justice Powell who felt that any claim of a newspaper’s privilege “should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” In Morgan v. State, the Florida Supreme Court specifically adopted Justice Powell’s balancing test, holding that a reporter has a limited and qualified privilege in print to reveal confidential sources of information against disclosure depending upon the public interest involved in the particular prosecution. To identify just what particular public interest is involved in a given case, the court in Rinfret v. State suggested that the particular statute involved in each individual prosecution must be examined. The supreme court found that

630. Fla. Stat. § 112.317(6) (1985) states in part that “Any person who wilfully discloses or permits to be disclosed ... the existence or contents of a report or public record as provided herein is guilty of a misdemeanor ... .

632. Id. at 690-93.
633. Id. at 716.
634. 377 So. 2d at 951.
635. Huffsteter, 409 So. 2d at 724.

2. Physical Evidence

Most questions concerning the reporter privilege involve attempts to have a reporter disclose the identity of a source and/or the actual conversations the reporter has had with that source. Saxe v. News & Sun-Sentinel Co. demonstrates that the scope of the reporter privilege is not likely to be expanded beyond questions of identity and revelation of the actual communications themselves. The Sun-Sentinel newspaper had published a series of articles involving misuse of city equipment by city employees. After the articles’ publication, the state attorney initiated an investigation and subpoenaed two reporters and a custodian of the newspaper’s photographic records. The newspaper provided copies of all previously published photographs but claimed a conditional privilege with respect to any unpublished ones. The trial court agreed with the newspaper’s claim finding that “the newspaper enjoys a conditional privilege to withhold unpublished photographs depicting criminal activity.” In a short but important decision the Fourth District Court of Appeal reversed.

The district court based its decision on the “whether one’s status as a newspaper conveys a privilege to withhold physical evidence of crime.” Saxe drew an important distinction between physical evidence of a crime and information concerning confidential sources which a newspaper has used in its reporting work. The Fourth District

316. Id.
317. Id.
318. Id.
319. 484 So. 2d 590 (Fla. 4th Dist. Ct. App. 1985).
320. Id. at 591.
321. Id.
322. Id.
323. Id.
found that the United States Supreme Court decision in Zurcher v. Stanford Daily, had settled any questions regarding a newspaper’s privilege in physical evidence of a crime. In Zurcher, the Supreme Court upheld a search warrant executed on a campus newspaper office to locate and seize photographs showing potential criminal activity. The Supreme Court rejected claims that a different standard should be required for the search of a newspaper office because of first amendment concerns. As long as probable cause existed to believe the desired evidence was present and a proper warrant had been issued by a neutral, detached magistrate, the Court saw nothing improper in searching the newspaper. Zurcher admittedly involved the search of a newspaper’s office pursuant to a warrant, while Sats involved a subpoena for photographic evidence of criminal activity. The Fourth District Court of Appeal did not address this distinction. Rather, it merely concluded that the trial court had erroneously “applied a different standard for the press and thereby impermissibly inhibited the state’s right to obtain physical evidence of a crime.”

V. Interpreters

The Florida Evidence Code specifically provides for the use of interpreters where appropriate. Given the international nature of Florida’s population, the Evidence Code’s sections dealing with interpreters have not received as much judicial attention as might be expected. During this survey period, no case directly construed any provisions of the Florida Evidence Code relating to interpreters. However, in Suarez v. State, the Florida Supreme Court clarified the extent of a trial court’s duty to insure adequate interpreters for non-English speaking defendants. Suarez was accused of the first degree murder of a police officer shot in a chase following a convenience store robbery. Before trial, the trial court appointed an interpreter to assist Suarez’s attorney. During the trial itself the interpreter sat at the defense table. After Suarez’s first degree murder conviction, but before his sentencing, his attorney moved for a re-trial claiming the defendant had been denied his right to a fair trial, because the entire trial had allegedly not been translated to Suarez. The record did not show whether the interpreter provided any simultaneous translation. The trial court denied the motion finding that “the court had fulfilled its responsibility in appointing the interpreter, and that it was defense counsel’s responsibility to determine how that interpreter should be used.” On appeal, the Florida Supreme Court agreed that Suarez had a constitutional right to have the interpreter present with him at the trial. Without the interpreter, Suarez would not have been able to understand what was going on and would not have been able to assist his counsel. Thus, he would have been denied his right to confront the witnesses against him and to have been adjudicated by a trial process that was fundamentally fair. As the supreme court said “a defendant who has no way of understanding the trial at which he is being tried is, in effect, absent from that trial.”

However, in this case, the trial court had provided Suarez with an interpreter. Thus, the real issue was whether or not the trial court was under a duty to do anything more than this.

Suarez argued that a trial court verdict rendered in the absence of any simultaneous interpretation could not be upheld since this would violate his fundamental right which only he could waive. In essence, Suarez argued that the trial court had a duty to personally inform him of his rights to simultaneous translation and that only Suarez could waive such after being so informed. As support for this proposition, the defendant cited United States ex rel. Negron v. New York which had reversed a defendant’s conviction because of problems in the translation. However, the Florida Supreme Court found that factual differences between Negron and Suarez merited different results.

325. Sats, 484 So. 2d at 591.
326. Zurcher, 436 U.S. at 559-60.
327. Id. at 565.
328. Id.
329. Sats, 484 So. 2d at 592.
330. Fla. Stat. § 90.606(1)(a) (1985) requires an interpreter whenever the court finds “a witness cannot hear or understand the English language, or cannot express himself in English sufficiently to be understood.” Fla. Stat. § 90.606(3) further requires appointment of a qualified interpreter when a deaf person is “a complainant, defendant, witness, or otherwise a party” in any judicial proceeding, including grand jury investigations.
331. 481 So. 2d 1201 (Fla. 1985).
332. Id. at 1203.
333. Id.
334. Id. at 1203-04.
335. 434 F.2d 386 (2d Cir. 1970).
336. Suarez, 481 So. 2d at 1204-05.
found that the United States Supreme Court decision in *Zurcher v. Stanford Daily*, had settled any questions regarding a newspaper's privilege in physical evidence of a crime. In *Zurcher*, the Supreme Court upheld a search warrant executed on a campus newspaper due to locate and seize photographs showing potential criminal activity. The Supreme Court rejected claims that a different standard should be required for the search of a newspaper office because of first amendment concerns. As long as probable cause existed to believe the desired evidence was present and a proper warrant had been issued by a neutral, detached magistrate, the Court saw nothing improper in searching the newspaper. *Zurcher* admittedly involved the search of a newspaper's office pursuant to a warrant, while *Satz* involved a subpoena for photographic evidence of criminal activity. The Fourth District Court of Appeal did not address this distinction. Rather, it simply concluded that the trial court had erroneously "applied a different standard for the press and thereby impermissibly inhibited the state's right to obtain physical evidence of a crime . . . ."

V. Interpreters

The Florida Evidence Code specifically provides for the use of interpreters where appropriate. Given the international nature of Florida's population, the Evidence Code's sections dealing with interpreters have not received as much judicial attention as might be expected. During this survey period, no case directly construed any provisions of the Florida Evidence Code relating to interpreters. However, in *Suarez v. State*, the Florida Supreme Court clarified the extent of a trial court's duty to insure adequate interpreters for non-English speaking defendants. *Suarez* was accused of the first degree murder of a police officer shot in a chase following a convenience store robbery. Before trial, the trial court appointed an interpreter to assist Suarez's attorney. During the trial itself, the interpreter sat at the defense table. After Suarez's first degree murder conviction, but before his sentencing, his attorney moved for a re-trial claiming the defendant had been denied his right to a fair trial, because the entire trial had allegedly not been translated to Suarez. The record did not show whether the interpreter provided any simultaneous translation. The trial court denied the motion finding "the court had fulfilled its responsibility in appointing the interpreter, and that it was defense counsel's responsibility to determine how that interpreter should be used." On appeal, the Florida Supreme Court agreed that Suarez had a constitutional right to have the interpreter present with him at the trial. Without the interpreter, Suarez would not have been able to understand what was going on and would not have been able to assist his counsel. Thus, he would have been denied his right to confront the witnesses against him and to have been adjudicated by a trial process that was fundamentally fair. As the supreme court said "a defendant who has no way of understanding the trial at which he is being tried is, in effect, absent from that trial." However, in this case, the trial court had provided Suarez with an interpreter. Thus, the real issue was whether or not the trial court was under a duty to do anything more than this.

Suarez argued that a trial court's verdict rendered in the absence of any simultaneous interpretation could not be upheld since this would violate his fundamental right which only he could waive. In essence, Suarez argued that the trial court had a duty to personally inform him of his rights to simultaneous translation and that only Suarez could waive such after being so informed. As support for this proposition, the defendant cited United States ex rel. *Negron v. New York* which had reversed a defendant's conviction because of problems in the translation. However, the Florida Supreme Court found that factual differences between *Negron* and *Suarez* merited different results. In *Negron*, the interpreter had not been constantly available to assist the defendant and defense counsel during all pre-trial stages and at the

---

325. *Satz*, 484 So. 2d at 591.
326. *Zurcher*, 436 U.S. at 559-60.
327. *Id* at 565.
328. *Id*.
329. *Satz*, 484 So. 2d at 592.
330. FLA. STAT. § 90.606(1)(a) (1985) requires an interpreter whenever the court finds "a witness cannot hear or understand the English language, or cannot express himself in English sufficiently to be understood." FLA. STAT. § 90.606(1)(b) further requires appointment of a qualified interpreter when a deaf person is a complainant, defendant, witness, or otherwise a party in any judicial proceeding, including grand jury investigations.
331. 481 So. 2d 1201 (Fla. 1985).
trial itself. Likewise, the Florida Supreme Court found that other cases holding that the right to interpreter is waivable only by the defendant personally, were not applicable, since here the defendant had been given an interpreter, whereas in the other cases, no interpreter had been furnished at all. 338 Rather the Florida Supreme Court agreed with those courts that found once an interpreter had been appointed for all stages of the trial, there was no further affirmative trial court duty to see that everything was translated for the defendant. 339 Since Suarez was never deprived of access to the court appointed interpreter during the trial proceedings, the Florida Supreme Court refused to impose any additional duties upon trial courts in this situation. 340

The Suarez decision is correct from both a practical and constitutional basis. Constitutionally speaking, both the trial court and Florida Supreme Court recognize that fundamental fairness requires an interpreter be present to assist the needy defendant in criminal cases. Interpreters in these situations are present to provide as go-betweens between defense counsel and between defendants. Thus, any decision as to their usage or non-usage should be made by those parties and not by the trial court. Furthermore, from a practical standpoint, any other result could cause confusion. If defense counsel or the defendant were concerned about lack of simultaneous translation they should have called it to the trial court’s attention. If no such concern was raised, the trial court probably had no way of knowing that such simultaneous translation was not going on. No claim was made here that the interpreter was incompetent and that the translation was not being made because of this. Absent such a claim, as in so many other situations reviewed during this survey period, defense counsel should have promptly raised any questions concerning the interpreter’s proper performance during the trial itself. Absent such defense counsel action, the record could not possibly be preserved for effective review. 341

339.  Suarez, 481 So. 2d at 1204-05.
340.  Even if defense counsel had objected to the interpreter’s performance during the trial, there was the possibility of a harmless error finding, depending upon what the alleged error involved. For a recent case finding harmless error when the right to an interpreter has been violated, see People v. Rodriguez, 42 Cal. 3d 1005, 728 P.2d 202 (Cal. Sup. Ct. 1986).
341.  See Peoples Gas System, Inc. v. Hotel Ocean 71 Assoc., Ltd., 479 So. 2d 203 (Fla. 3d Dist Ct. App. 1985) (There was no error “in allowing a witness to refer to certain notes which the witness had prepared for trial for the stated purpose of his recollection.” Id. at 204.).
343.  Id.
345.  FED. R. EVID. 612.
347.  FED. R. EVID. 612.

VI. Witnesses

A. Refreshing Recollection

The law of evidence makes several concessions to the frailities of human nature. The most common is the procedure which allows for refreshing the recollection of a witness who has a temporary memory failure while testifying. 344 Anything may be used to refresh the witness’s memory. However, the most frequent device appears to be a statement which the witness or someone connected closely to the witness has prepared. 345 When a particular writing has been used to refresh recollection, fairness requires that it be produced for inspection by the opposing party. 346

Section 90.613 of the Florida Statutes and Federal Rule of Evidence 612, both governing refreshing recollection, are almost identical. However they differ in one particular respect. Section 90.613 specifically provides that “[w]hen a witness uses a writing . . . to refresh his memory while testifying, an adverse party is entitled to have such writing . . . produced at the hearing, to inspect it, cross-examine the witness thereon, and . . . to introduce those portions which relate to the testimony of the witness, in evidence.” 347 However, section 90.613 makes no mention of what should happen when the witness uses something to refresh recollection at a time other than while testifying. Federal Rule of Evidence 612 contains the exact same procedure for production of a writing used by the witness while testifying and additionally provides that writings used to refresh recollection before testifying are producible to the same extent “if the court in its discretion determines it is necessary in the interest of justice.” 348 The absence of similar language in section 90.613 would seem to insulate writings used to refresh memory before testifying from any production whatso-
trial itself. Likewise, the Florida Supreme Court found that other cases holding that the right to interpreter is waivable only by the defendant personally, were not applicable, since here the defendant had been given an interpreter, whereas in the other cases, no interpreter had been furnished at all. The Florida Supreme Court agreed with those courts that found once an interpreter had been appointed for all stages of the trial, there was no further affirmative trial court duty to see that everything was translated for the defendant. Since Swarts was never deprived of access to the court appointed interpreter during the trial proceedings, the Florida Supreme Court refused to impose any additional duties upon trial courts in this situation.

The Swarts decision is correct from both a practical and constitutional basis. Constitutionally speaking, both the trial court and Florida Supreme Court recognize that fundamental fairness requires an interpreter be present to assist the needy defendant in criminal cases. Interpreters in these situations are present to provide as go-between between defense counsel and between defendants. Thus, any decision as to their usage or non-usage should be made by those parties and not by the trial court. Furthermore, from a practical standpoint, any Court result could cause confusion. If defense counsel or the defendant were concerned about lack of simultaneous translation they should have called it to the trial court's attention. If no such concern was raised, the trial court probably had no way of knowing that such simultaneous translation was not going on. No claim was made here that the interpreter was incompetent and that the translation was not being made because of this. Absent such a claim, as in so many other situations reviewed during this survey period, defense counsel should have promptly raised any questions concerning the interpreter's proper performance during the trial itself. Absent such defense counsel action, the record could not possibly be preserved for effective review.

A. Refreshing Recollection

The law of evidence makes several concessions to the frailties of human nature. The most common is the procedure which allows for refreshing the recollection of a witness who has a temporary memory failure while testifying. Anything may be used to refresh the witness's memory. However, the most frequent device appears to be a statement which the witness or someone connected closely to the witness has prepared. When a particular writing has been used to refresh recollection, fairness requires that it be produced for inspection by the opposing party.

Section 90.613 of the Florida Statutes and Federal Rule of Evidence 612, both governing refreshing recollection, are almost identical. However they differ in one particular respect. Section 90.613 specifically provides that "[w]hen a witness uses a writing ... to refresh his memory while testifying, an adverse party is entitled to have such writing, ... produced at the hearing, to inspect it, cross-examine the witness thereon, and ... to introduce those portions which relate to the testimony of the witness, in evidence." However, section 90.613 makes no mention of what should happen when the witness uses something to refresh recollection at a time other than while testifying. Federal Rule of Evidence 612 contains the exact same procedure for production of a writing used by the witness while testifying and additionally provides that writings used to refresh recollection before testifying are producible to the same extent "if the court in its discretion determines it is necessary in the interest of justice." The absence of similar language in section 90.613 would seem to insulate writings used to refresh memory before testifying from any production whatever.

339. Swarts, 481 So. 2d at 1204-05.
340. Even if defense counsel had objected to the interpreter's performance during the trial, there was the possibility of a harmless error finding, depending upon what the alleged error involved. For a recent case finding harmless error when the right to interpreter has been violated, see People v. Rodriguez, 42 Cal. 3d 1005, 728 P.2d 20 (Cal. Sup. Ct. 1986).
ever. However, *Merlin v. Boca Raton Community Hospital, Inc.* shows that this may not be so.

*Merlin* originated as a married couple’s medical malpractice suit against the hospital and several doctors. During discovery, the defendants attempted to depose both the plaintiffs. While Mrs. Merlin was being deposed, her husband was in the same room reviewing some handwritten notes which he had allegedly prepared when he knew he and his wife were going to contact an attorney. At Mr. Merlin’s deposition, defense counsel asked what he had been reading while his wife was being deposed. The husband mentioned that these were written notes but claimed that the notes “did not refresh his memory, as he remembered everything that was in the notes before looking at the notes.” The plaintiffs refused to produce these notes, and the defendants moved to compel their production. The trial court found that the notes had indeed been used to refresh recollection and granted the defendants’ motion. On appeal, the Fourth District Court agreed that, under some circumstances, notes of this kind would be discoverable; however, it quashed the lower court’s order on the basis of attorney-client privilege.

The plaintiffs’ main argument against production of the notes relied on the principle that when the plain language of a statute is clear, that statute needs no real construction. The plaintiffs contended that the words “while testifying” within section 90.613 limited the production of any items used to refresh recollection strictly to something used during the giving of testimony itself. The Fourth District noted that the exact question before it was “what constitutes use of a writing to refresh one’s memory while testifying?” The court noted that Florida case law on this point was nonexistent. Florida courts have consistently found that when a witness actually consulted papers while testifying, these should be producible. However, if the witness stated that a writing was not used to refresh his recollection, the writing would not be automatically given to opposing counsel. However, the Fourth district noted that even the case law refusing to require the production of personal writings not actually had during testimony had held that they were producible at the discretion of the trial court. From this the Fourth District Court of Appeal concluded “that notes used to refresh a witness’ or a party’s memory other than while actually being deposed or testimony may or may not be disclosed to the adverse party, according to the trial court’s discretion.”

Although *Merlin* seems to violate a principle of strict statutory construction, its decision is probably warranted. Here the plaintiff may not have needed his notes to actually refresh his recollection prior to being deposed; however, he clearly used them to make sure that his memory of the critical events was correct. If his memory had not been correct, the notes definitely would have been useful in refreshing his memory. Thus the mere fact that he had consulted them and reviewed them before being deposed should have been enough to have considered them used to refresh his recollection. Admittedly he did not refer to the notes “while testifying” in the strict sense. However, as a practical matter this should not make a difference. The plaintiff had referred to these notes only moments before his deposition. The mere fact he was not under oath while doing so should not matter. A contrary decision would only establish an arbitrary time line which would not reflect the practical purpose for which the doctor had referred to his notes. Unfortunately *Merlin* is deficient in other respects. While the fourth district left this matter in the trial court’s discretion, the appellate court did not specify any factors which trial courts should use in deciding this issue in the future. Thus the trial courts now know that they have the discretion to require production of documents used to refresh recollection before testifying, but little or no guidance as to how to exercise this discretion. *Merlin* may also be deficient in another respect. The Fourth District Court of Appeal noted that “such notes are not discoverable, however, if they are otherwise privileged.” The court unfortunately gave no reasons for this decision. If the purpose of requiring disclosure is to ensure that a witness’s memory has been truly refreshed by referring to some item and that the witness is not reciting words written in a particular memorandum consulted moments before

348. 479 So. 2d 236 (Fla. 4th Dist. Ct. App. 1985).
349. Id. at 237.
350. Id. at 238.
351. Id. at 239, 240.
352. Id. at 238 (emphasis in original).
353. Id. at 238. See Soler v. Kukula, 297 So. 2d 600 (Fla. 3d Dist. Ct. App. 1974).
355. Merlin, 479 So. 2d at 239.
356. Id.
357. Id. Indeed the Fourth District ultimately quashed the trial court’s order based on its determination that the notes were privileged attorney-client communications.
ever. However, Merlin v. Boca Raton Community Hospital, Inc. shows that this may not be so.

Merlin originated as a married couple’s medical malpractice suit against the hospital and several doctors. During discovery, the defendants attempted to depose both the plaintiffs. While Mrs. Merlin was being deposed, her husband was in the same room reviewing some handwritten notes which he had allegedly prepared when he knew he and his wife were going to contact an attorney. At Mr. Merlin’s deposition, defense counsel asked what he had been reading while his wife was being deposed. The husband mentioned that these were written notes but claimed that the notes “did not refresh his memory, as he remembered everything that was in the notes before looking at the notes.” The plaintiffs refused to produce these notes, and the defendants moved to compel their production. The trial court found that the notes had indeed been used to refresh recollection and granted the defendants’ motion. On appeal, the Fourth District Court agreed that, under some circumstances, notes of this kind would be discoverable; however, it quashed the lower court’s order on the basis of attorney-client privilege.

The plaintiffs’ main argument against production of the notes relied on the principle that when the plain language of a statute is clear, that statute needs no real construction. The plaintiffs contended that the words “while testifying” within section 90.613 limited the production of any items used to refresh recollection strictly to something used during the giving of testimony itself. The Fourth District noted that the exact question before it was “what constitutes use of a writing to refresh one’s memory while testifying?” The court noted that Florida case law on this point was virtually nonexistent. Florida courts have consistently found that when a witness actually consulted papers while testifying, these should be producible. However, if the witness stated that a writing was not used to refresh his recollection, the writing would not be automatically given to opposing counsel. However, the fourth district noted that even the case law refusing to require the production of writings not actually had during testimony had held that they were producible at the discretion of the trial court. From this the Fourth District Court of Appeal concluded “that notes used to refresh a witness’ or a party’s memory other than while actually being deposed or testifying or may or may not be disclosed to the adverse party, according to the trial court’s discretion.”

Although Merlin seems to violate a principle of strict statutory construction, its decision is probably warranted. Here the plaintiff may not have needed his notes to actually refresh his recollection prior to being deposed; however, he clearly used them to make sure that his memory of the critical events was correct. If his memory had not been correct, the notes definitely would have been useful in refreshing his memory. Thus the mere fact that he had consulted them and reviewed them before being deposed should have been enough to have considered them used to refresh his recollection. Admittedly he did not refer to the notes “while testifying” in the strict sense. However, as a practical matter this should not make a difference. The plaintiff had referred to these notes only moments before his deposition. The mere fact he was not under oath while doing so should not matter. A contrary decision would only establish an arbitrary time line which would not reflect the practical purpose for which the doctor had referred to his notes. Unfortunately Merlin is deficient in other respects. While the fourth district left this matter in the trial court’s discretion, the appellate court did not specify any factors which trial courts should use in deciding this issue in the future. Thus the trial courts now know that they have the discretion to require production of documents used to refresh recollection before testifying, but little or no guidance as to how to exercise this discretion. Merlin may also be deficient in another respect. The Fourth District Court of Appeal noted that “such notes are not discoverable, however, if they are otherwise privileged.” The court unfortunately gave no reasons for this decision. If the purpose of requiring disclosure is to ensure that a witness’s memory has been truly refreshed by referring to some item and that the witness is not reciting words written in a particular memorandum consulted moments before

348. 479 So. 2d 236 (Fla. 4th Dist. Ct. App. 1985).
349. Id. at 237.
350. Id. at 238.
351. Id. at 239, 240.
352. Id. at 238 (emphasis in original).
353. Id. at 238. See Soder v. Kukula, 297 So. 2d 600 (Fla. 3d Dist. Ct. App. 1974).
355. Merlin, 479 So. 2d at 239.
356. Id.
357. Id. Indeed the Fourth District ultimately quashed the trial court’s order based on its determination that the notes were privileged attorney-client communications.
giving testimony, it should make no difference whether the document is privileged. Holders of privileged documents who wish to maintain their confidentiality can merely refrain from using any alleged written privileged communications between themselves and someone else to refresh. Hopefully if the Florida Supreme Court ever confronts the issue of whether the use of a privileged written communication to refresh memory waives the privilege, it should find that it does so.

358. For cases from other jurisdictions discussing this issue see e.g. James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982) (The review of certain materials by plaintiff's witnesses before their deposition constituted a waiver of any work product claim); Wheeling-Pittsburgh Steel v. Underwriter Labs., 81 F.R.D. 8 (N.D. Ill. 1978) (The use of documents once covered by the attorney-client privilege to refresh a witness's memory before his deposition "served as an effective waiver of any such privilege." Id. at 9).

See also Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D. N.Y. 1977) stating that:

it is disquieting to posit that a party's lawyer may "aid" a witness with items of work product and then prevent totally her access that might reveal and counteract the effects of such assistance. There is much to be said for a view that a party or its lawyer, meaning to invoke the privilege, ought to use other and different materials, available later to a cross-examiner in preparation of witness.

Id. at 614.

While Berkey found notebooks used to prepare a deposed witness not producible because they constituted work product material, the court did so because counsel was apparently unaware that such notebooks would constitute a privilege waiver. At least one subsequent case, Raytheon, has found Berkey specifically limited to its facts because there "counsel [were] unaware of the scope of the then recently adopted rule.

Indeed, the court was at pains to put the bar on notice that in the future a contrary result would obtain." Raytheon, 93 F.R.D. at 145.

One recent author has criticized the traditional approaches courts have taken towards the privilege waiver question and advocates a more flexible approach to the same:

_The Perils of Privilege: Waiver and the Litigator_, 84 Mich. L. Rev. 1605 (1986), claiming that use of the privilege approach is "the emerging trend in the courts" under which "[t]he prime concern is that a privilege-holder may affirmatively use privileged material to gets the truth while invoking the privilege to deny his opponent access to related privileged material that would put the proffered evidence in perspective." Id. at 1655-56. Professor Marcus, in discussing how his fairness approach would work, specifically addresses the witness preparation situation. Id. at 1642-48. However his discussion seems only to concern situations where an attorney has selected certain material for the witness to use in preparation for trial or a deposition. In _Merlin_, the client apparently selected the material used to refresh his recollection without any attorney involvement. Such selection clearly indicated the client believed the matter was important and may argue even stronger for disclosure.

359. See F. R. Evid. 607 stating that "[t]he credibility of a witness may be attacked by any party, including the party calling him.

360. See _Fla. Stat. §90.608 (2)_ which provides in part that "[a] party calling a witness shall not be allowed to impeach his character . . . unless the witness proves adverse . . . ."


362. The voucher rationale has almost died out in modern evidence law. The United States Supreme Court has recognized that utilizing this rationale to prevent a party from impeaching his/her own witness may deprive a defendant of Due Process. See _Chambers_, 410 U.S. at 302.


364. Id.

365. 498 So. 2d 906 (Fla. 1986).

B. Impeaching One's Own Witness

One modern evidentiary development which Florida has not adopted is the removal of any ban on impeachment of one's own witness. Unlike the federal rules the Florida Evidence Code still contains limitations on when a party calling a witness may attack that witness's credibility. The ban against impeaching one's own witness has been traditionally justified on three grounds. The first is a remnant of common law notion that a party who calls a witness vouches for that witness's trustworthiness. Under this rationale if a party cannot vouch for a witness' trustworthiness, the witness should not be called to the stand in the first place. The second rationale is the belief that allowing for free impeachment of one's own witness gives a party the ability to coerce a witness to testify as the party desires under threat of destroying the witness's character if he does not. The third ground is the fear that removal of the ban on impeachment of one's own witness would allow a party to call witnesses to the stand and freely impeach them with otherwise inadmissible prior inconsistent statements. Thus the impeaching party could present otherwise inadmissible hearsay to a jury under the guise of impeachment, in the hope that the jury would use the evidence for substantive rather than impeachment purposes. In _Jackson v. State_, this last rationale behind prohibiting free impeachment of one's own witness recently provided the basis for reversal of a first-degree murder conviction.

In _Jackson_, the defendant was charged with killing a hardware store owner during a robbery. At Jackson's trial, the state called his mother as a court witness. She testified in response to a state's question that Jackson had not admitted to her that he had robbed the store and...
giving testimony, it should make no difference whether the document is privileged. Holders of privileged documents who wish to maintain their confidentiality can merely refrain from using any alleged written privileged communications between themselves and someone else to refresh. Hopefully if the Florida Supreme Court ever confronts the issue of whether the use of a privileged written communication to refresh memory waives the privilege, it should find that it does so. See also Berkery Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D. N.Y. 1977) stating that:

it is disquieting to posit that a party’s lawyer may ‘aid’ a witness with items of work product and then prevent totally the access that might reveal and counteract the effects of such assistance. There is much to be said for a view that a party or its lawyer, meaning to invoke the privilege, ought to use other and different materials, available later to a cross-examiner in preparation of witness.

Id. at 614.

While Berkery found notebooks used to prepare a depositor witness not probative because they constituted work product material, the court did so because counsel was apparently unaware that so using the notebooks would constitute a privilege waiver. At least one subsequent case, Raytheon, has found Berkery specifically limited to its facts because there “counsel [were] unaware of the scope of the then recently adopted rule. Indeed, the court was at pains to put the bar on notice that in the future a contrary result would obtain.” Raytheon, 93 F.R.D. at 145.

One recent author has criticized the traditional approaches courts have taken toward the privilege waiver question and advocates a more flexible case-by-case approach based upon a “fairness” analysis. See Marcus, The Perils of Privilege, Water and the Litigator, 84 Mich. L. Rev. 1605 (1986), claiming that use of the fairness approach “is the emerging trend in the courts” under which “[t]he primary concern is that a privilege-holder may affirmatively use privileged material to garble the truth while invoking the privilege to deny his opponent access to related privileged material that would put the proffered evidence in perspective.” Id. at 1655-56. Professor Marcus, in discussing how his fairness approach would work, specifically addresses the witness preparation situation. Id. at 1642-48. However his discussion seems only to concern situations where an attorney has selected certain material for the witness to use if preparation for trial or a deposition. In  Merlino, the client apparently selected the material used to refresh his recollection without any attorney involvement. Such selection clearly indicated the client believed the matter was important and may argue one stronger for disclosure.

358. For cases from other jurisdictions discussing this issue see e.g. James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982) (The review of certain materials by plaintiff’s witnesses before their deposition constituted a waiver of any work product claim); Wheeling-Pittsburgh Steel v. Underwriter Labs., 81 F.R.D. 8 (N.D. Ill. 1978) (The use of documents once covered by the attorney-client privilege to refresh a witness’s memory before his deposition “served as an effective waiver of any such privilege.” Id. at 9).

359. See also Berkery Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D. N.Y. 1977) stating that:

it is disquieting to posit that a party’s lawyer may ‘aid’ a witness with items of work product and then prevent totally the access that might reveal and counteract the effects of such assistance. There is much to be said for a view that a party or its lawyer, meaning to invoke the privilege, ought to use other and different materials, available later to a cross-examiner in preparation of witness.

Id. at 614.

While Berkery found notebooks used to prepare a depositor witness not probative because they constituted work product material, the court did so because counsel was apparently unaware that so using the notebooks would constitute a privilege waiver. At least one subsequent case, Raytheon, has found Berkery specifically limited to its facts because there “counsel [were] unaware of the scope of the then recently adopted rule. Indeed, the court was at pains to put the bar on notice that in the future a contrary result would obtain.” Raytheon, 93 F.R.D. at 145.

One recent author has criticized the traditional approaches courts have taken toward the privilege waiver question and advocates a more flexible case-by-case approach based upon a “fairness” analysis. See Marcus, The Perils of Privilege, Water and the Litigator, 84 Mich. L. Rev. 1605 (1986), claiming that use of the fairness approach “is the emerging trend in the courts” under which “[t]he primary concern is that a privilege-holder may affirmatively use privileged material to garble the truth while invoking the privilege to deny his opponent access to related privileged material that would put the proffered evidence in perspective.” Id. at 1655-56. Professor Marcus, in discussing how his fairness approach would work, specifically addresses the witness preparation situation. Id. at 1642-48. However his discussion seems only to concern situations where an attorney has selected certain material for the witness to use if preparation for trial or a deposition. In Merlino, the client apparently selected the material used to refresh his recollection without any attorney involvement. Such selection clearly indicated the client believed the matter was important and may argue one stronger for disclosure.

360. See F. R. EVII. 607 stating that “[t]he credibility of a witness may be attacked by any party, including the party calling him.”


362. The voucher rationale has almost died out in modern evidence law. The United States Supreme Court has recognized that utilizing this rationale to prevent a party from impeaching his/her own witness can deprive a defendant of Due Process. See Chambers, 410 U.S. at 302.


364. Id.

365. 498 So. 2d 906 (Fla. 1986).
killed its owner. The state knew this testimony was consistent with her earlier sworn deposition but was inconsistent with a statement that she allegedly made to a police officer in which she claimed her son admitted his guilt. After the mother denied making the statement, the state called the police officer to prove the inconsistency. The Florida Supreme Court recognized that section 90.615 of the Florida Statutes especially provides that the trial “court may call witnesses whom all parties may cross-examine,” and that whether this should be done is usually left to the trial court’s discretion. One instance where trial courts have frequently exercised such discretion is where a witness’s expected in-court testimony will conflict with prior statements he/she has made. The Florida Supreme Court had previously noted that the “purpose of allowing evidence of prior inconsistent statements is to counteract the effect of testimony harmful to the interest of the impeaching party.” Examining Jackson, the Florida Supreme Court noted that in virtually every case where someone had been called as a court witness, the person had “been an eye-witness and therefore able to provide direct, first hand knowledge of the facts pertaining to the transaction in question.” This was not the situation in Jackson. Jackson’s mother did not have any first hand knowledge concerning the commission of the robbery. She was not present and was not involved. Thus the court noted that “[t]he sum and substance of her testimony at trial was simply that her son had not told her that he had committed the crime.” The supreme court found that this testimony would not be relevant let alone adverse to the state and that neither party should be “permitted to place a witness on the stand merely to say that they knew nothing of the event in question.” Therefore, no matter who called her, Jackson’s mother’s testimony should have been considered inadmissible. The sole effect of making her a court’s witness was to allow the state, under the claim of impeachment, to admit the police officer’s testimony concerning Jackson’s mother’s alleged out-of-court statement. As the supreme court noted “[c]ounsel’s introduction of that testimony under the guise of impeachment was little more than a thinly veiled artifice placed before the jury that would otherwise be inadmissible.”

The Florida Supreme Court noted that what really caused error was that the trial court allowed the state to call Jackson’s mother as a court witness, therefore permitting free cross-examination and impeachment. The court pointed out that the purpose behind section 90.615 of the Florida Statutes was “to prevent the manifest injustice which might occur if the testimony of an eye-witness to a crime was not placed before the jury because of the inability of either party to vouch for that witness.” The supreme court felt that the occasions when a trial court should allow someone to be called as a court witness “should be severely limited to those situations where there is an eye-witness to the crime whose veracity or integrity is in reasonable doubt.” The veracity of Jackson’s mother may have been in doubt, but she certainly was not an eye-witness to the crime. Therefore, allowing her to be called as a state’s witness was reversible error.

C. Anticipatory Rehabilitation v. Impeaching One’s Own Witness

Last year’s survey highlighted the conflict between the various district courts of appeal over what constituted impeaching one’s own witness. The Florida Supreme Court recently settled this issue in Bell v. State. Bell and a co-defendant were charged with cocaine trafficking. The co-defendant plead guilty and then stated under oath that Bell had nothing to do with the alleged crime. However, during Bell’s trial, the co-defendant ended up testifying for the state. The co-defendant implicated Bell and also admitted making his prior inconsistent statement. He explained his initial statement as a lie to protect Bell. The defense objected to eliciting this testimony claiming that it amounted to the state impeaching its own witness. However, the trial court overruled the objection “characterizing the testimony as ‘anticipatory rehabilitation’.”

367. Jackson, 499 So. 2d at 908.
368. Id.
370. Jackson, 499 So. 2d at 908.
371. Id.
372. Id.
373. Id. at 909.
374. Id.
375. Id.
376. Id.
377. Id. For another recent case where calling a witness as the court’s witness to allow impeachment by the state caused reversible error see Parral v. State, 500 So. 2d 258 (Fla. 4th Dist. Ct. App. 1987).
379. 499 So. 2d 537 (Fla. 1986).
killed its owner. The state knew this testimony was consistent with her earlier sworn deposition but was inconsistent with a statement that she allegedly made to a police officer in which she claimed her son admitted his guilt. After the mother denied making the statement, the state called the police officer to prove the inconsistency. The Florida Supreme Court recognized that section 90.615 of the Florida Statutes especially provides that the trial “court may call witnesses whom all parties may cross-examine” and that whether this should be done is usually left to the trial court’s discretion. One instance where trial courts have frequently exercised such discretion is where a witness’s expected in-court testimony will conflict with prior statements he/she has made. The Florida Supreme Court had previously noted that the “purpose of allowing evidence of prior inconsistent statements is to counteract the effect of testimony harmful to the interest of the impeaching party.” Examining Jackson, the Florida Supreme Court noted that in virtually every case where someone had been called as a court witness, the person had “been an eye-witness and therefore able to provide direct, first hand knowledge of the facts pertaining to the transaction in question.” This was not the situation in Jackson. Jackson’s mother did not have any first hand knowledge concerning the commission of the robbery. She was not present and was not involved. Thus the court noted that “[t]he sum and substance of her testimony in trial was simply that her son had not told her that he had committed the crime.” The supreme court found that this testimony would be relevant and adverse to the state and that neither party should be “permitted to place a witness on the stand merely to say that they knew nothing of the event in question.” Therefore, no matter who called her, Jackson’s mother’s testimony should have been considered inadmissible. The sole effect of making her a court’s witness was to allow the state, under the claim of impeachment, to admit the police officer’s testimony concerning Jackson’s mother’s alleged out-of-court statement. As the supreme court noted “[c]ounsel’s introduction of this testimony under the guise of impeachment was little more than a flight

367. Jackson, 498 So. 2d at 908.
368. Id.
370. Jackson, 498 So. 2d at 908.
371. Id.
372. Id.

1987] Evidence 1365

veiled artifice placed before the jury that which would otherwise be insubstantial.”

The Florida Supreme Court noted that what really caused error was that the trial court allowed the state to call Jackson’s mother as a court witness, therefore permitting free cross-examination and impeachment. The court pointed out that the purpose behind section 90.615 of the Florida Statutes was “to prevent the manifest injustice which might occur if the testimony of an eye-witness to a crime was not placed before the jury because of the inability of either party to vouch for that witness.” The supreme court felt that the occasions when a trial court should allow someone to be called as a court witness “should be severely limited to those situations where there is an eye-witness to the crime whose veracity or integrity is reasonably doubted.” The veracity of Jackson’s mother may have been in doubt, but she certainly was not an eye-witness to the crime. Therefore, allowing her to be called as a state’s witness was reversible error.

C. Anticipatory Rehabilitation v. Impeaching One’s Own Witness

Last year’s survey highlighted the conflict between the various district courts of appeal over what constituted impeaching one’s own witness. The Florida Supreme Court recently settled this issue in Bell v. State. Bell and a co-defendant were charged with cocaine trafficking. The co-defendant plead guilty and then stated under oath that Bell had nothing to do with the alleged crime. However, during Bell’s trial, the co-defendant ended up testifying for the state. The co-defendant implicated Bell and also admitted making his prior inconsistent statement. He explained his initial statement as a lie to protect Bell. The defense objected to eliciting this testimony claiming that it amounted to the state impeaching its own witness. However, the trial court overruled the objection “characterizing the testimony as ‘anticipatory rehabilita-

373. Id. at 909.
374. Id.
375. Id.
376. Id.
377. Id. For another recent case where calling a witness as the court’s witness to allow impeachment by the state caused reversible error see Parrish v. State, 500 So. 2d 508 (Fla. 4th Dist. Ct. App. 1986).
379. 491 So. 2d 537 (Fla. 1986).
tion.' 380 The district court affirmed Belle's conviction, 381 and the Florida Supreme Court did likewise. 382 The supreme court found that the testimony to which the defense had objected "was not impeachment because it was not for the purpose of attacking the witness's credibility." 383 Instead the supreme court recognized that the testimony concerning the initial lie was actually offered to steal the defense's thunder or in the court's words "to take the wind out of the sails of a defense attack on the witness's credibility." 384 The court found nothing in the evidence code that forbids a party from mitigating the impact of inconsistent statements likely to be introduced. 385 Nor was there anything unfair about anticipatorily thwarting the thrust of opposing counsel's cross-examination. All decisions to the contrary were expressly disapproved. 386

One question possibly unresolved by Bell is the extent to which a party can engage in anticipatory rehabilitation without violating the rule against impeaching one's own witness or the rule that generally the character of a witness cannot be bolstered before it is attacked. 387 In Bell, Justice Barkett concurred specially arguing that the majority's decision should be limited "to admitting only the prior inconsistent statement." 388 Justice Barkett was concerned that once the prior inconsistent statement was admitted, the state would automatically wish to introduce an explanation of why such an inconsistency was made fearing that such a procedure "may take the trial far afield from the issues to be decided." 389 As an alternative procedure she suggested that rather than regularly admitting evidence of prior inconsistent statements during direct examination, the opposing party should be given the opportunity of waiving use of the inconsistency. 390 If the opponent agrees to waive any use of the prior inconsistent statement, then there would be no need for bringing out either the inconsistency or the explanation for it. 391

D. Procedure for Impeachment with Prior Inconsistent Statement

Since impeachment with prior inconsistent statements is often attempted during trial, the proper procedure for doing so must be understood. Although the Florida Evidence Code does not specifically require it, there must be a material inconsistency before impeachment by this method is attempted. 392 This requirement is really a relevancy concern, since if the alleged inconsistency is not material the trial court should not spend time on it. Section 90.614 of the Florida Statutes otherwise sets forth the procedural requirements for impeaching with prior inconsistent statements. 393 When there is a written prior inconsistent statement, section 90.614(1) adopts a compromise position between the minor Federal Rules of Evidence 394 approach and the common law requirement of Queen Caroline's Case. 395 Under Queen Caroline's Case, the witness had to be shown any prior inconsistent statement which the adverse party desired to use for impeachment. 396 Under the Federal Rules, the witness to be impeached does not need to be shown the statement before the impeachment. 397 Section 90.614(1) of the Florida Statutes requires that a witness who is being impeached with a prior written inconsistent statement need only be shown the statement when the adverse party so moves. Under any of the three procedures, if

380. Id. at 538.
381. Bell v. State, 473 So. 2d 734 (Fla. 2d Dist. Ct. App. 1985)
382. Bell, 491 So. 2d at 538.
383. Id.
384. Id.
385. Id.
386. Id.
387. Id. For other cases during this survey period reaching the same conclusion as Bell, see Sloan v. State, 491 So. 2d 276 (Fla. 1986); State v. Price, 491 So. 2d 536 (Fla. 1986); Tobe v. State, 486 So. 2d 54 (Fla. 2d Dist. Ct. App. 1986).
388. At least one kind of rehabilitation, use of prior consistent statements, still can not be used to anticipate and thwart expected impeachment. See Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986).
389. Bell, 491 So. 2d at 538 (Barkett, J., concurring).
390. Id.
391. Id. at 538-39. Despite Justice Barkett's concurrence, Bell's holding has been applied to allow anticipatory rehabilitation in situations other than prior inconsistent statements. See Lawhorne v. State, 500 So. 2d 519 (Fla. 1986) (Defendant should have been allowed not only to testify on direct examination that he had been convicted previously and how many times, but also testify whether he had gone to trial in these cases.)
392. See Gamble v. State, 492 So. 2d 1132 (Fla. 5th Dist. Ct. App. 1986) ("One requisite is that the proffered inconsistent statement must relate to a material matter or issue involved in the trial."); Id. at 1133; Perry v. State, 17 Fla. Supp. 2d 92 (2d Cir. 1986) (A party is "not entitled during either cross or direct examination to attempt an impeachment" by introducing statements not inconsistent with trial testimony. Id. at 93).
394. FED. R. EVID. 613(a).
396. Id.
397. See FED. R. EVID. 613(a).
The district court affirmed Belle's conviction, and the Florida Supreme Court did likewise. The supreme court found that the testimony to which the defense had objected "was not impeach- ing because it was not for the purpose of attacking the witness's credibility." Instead the supreme court recognized that the witness con- cerning the initial lie was actually offered to steal the defense's thunder or in the court's words "to take the wind out of the sails of a defense attack on the witness's credibility." The court found nothing in the evidence code that forbids a party from mitigating the impact of inconsistent statements likely to be introduced. Nor was there anything unfair about anticipating thwarting the thrust of opposing counsel's cross-examination. All decisions to the contrary were expressly disapproved.

One question possibly unresolved by Bell is the extent to which a party can engage in anticipatory rehabilitation without violating the rule against impeaching one's own witness or the rule that generally character of a witness cannot be bolstered before it is attacked. In Bell, Justice Barkett concurred specially arguing that the majority's decision should be limited "to admitting only the prior inconsistent statement." Justice Barkett was concerned that once the prior inconsistent statement was admitted, the state would automatically wish to introduce an explanation of why such an inconsistency was made fort- ing that such a procedure "may take the trial far afield from the issues to be decided." As an alternative procedure she suggested that rather than regularly admitting evidence of prior inconsistent statements dur- ing direct examination, the opposing party should be given the opportu- nity of waiving use of the inconsistency. If the opponent agrees in

D. Procedure for Impeachment with Prior Inconsistent
Statement

Since impeachment with prior inconsistent statements is often at- tempted during trial, the proper procedure for doing so must be under- stood. Although the Florida Evidence Code does not specifically require it, there must be a material inconsistency before impeachment by this method is attempted. This requirement is really a relevancy concern, since if the alleged inconsistency is not material the trial court should not spend time on it. Section 90.614 of the Florida Statutes otherwise sets forth the procedural requirements for impeaching with prior inconsistent statements. When there is a written prior inconsistent statement, section 90.614(1) adopts a compromise position between the minor Federal Rules of Evidence approach and the common law requirement of Queen Caroline's Case. Under Queen Caroline's Case, the witness had to be shown any prior inconsistent statements which the adverse party desired to use for impeachment. Under the Federal Rules, the witness to be impeached does not need to be shown the statement before the impeachment. Section 90.614(1) of the Florida Statutes requires that a witness who is being impeached with a prior written inconsistent statement need only be shown the statement when the adverse party so moves. Under any of the three procedures, if

380. Id. at 538.
382. Bell, 491 So. 2d at 538.
383. Id.
384. Id.
385. Id.
386. Id. For other cases during this survey period reaching the same conclusion as Bell, see Sloan v. State, 491 So. 2d 276 (Fla. 1986); State v. Price, 491 So. 2d 38 (Fla. 1986); Tobey v. State, 406 So. 2d 54 (Fla. 2d Dist. Ct. App. 1983).
387. At least one kind of rehabilitation, use of prior consistent statements, still cannot be used to anticipate and thwart expected impeachment. See Jackson v. State, 499 So. 2d 906, 909 (Fla. 1986).
388. Bell, 491 So. 2d at 538 (Barkett, J., concurring).
389. Id.
390. Id.
391. Id. at 538-39. Despite Justice Barkett's concern, Bell's holding has been applied to allow anticipatory rehabilitation in situations other than prior inconsistent statements. See Lawhorse v. State, 500 So. 2d 319 (Fla. 1986) (Defendant should have been allowed not only to testify on direct examination that he had been convicted previ- ously and how many times, but also testify whether he had gone to trial in those cases.)
392. See Gamble v. State, 492 So. 2d 1332 (Fla. 5th Dist. Ct. App. 1986) ("One requisite is that the proffered inconsistent statement must relate to a material matter or issue involved in the trial.") Id. at 1333.1. Perry v. State, 17 Fl. Supp. 2d 92 (2d Cir. 1986) (A party is "not entitled during either cross or direct examination to attempt an impeachment by introducing statements not inconsistent with trial testimony."") Id. at 93.
394. Finn R. Evn. 613(a).
396. Id.
397. See Finn R. Evn. 613(a).
the witness admits making the prior inconsistent statement, whether written or oral, the impeachment is completed and the opposing party is not permitted to introduce extrinsic evidence. Under section 90.614(2) "[i]f a witness denies making or does not distinctly admit making the prior inconsistent statement," extrinsic evidence will only be admissible if the "witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it, or the interest of justice otherwise requires." 489

In Thorns v State, 490 justices of the First District Court of Appeal disagreed on the proper procedure to be used for laying the predicate to introduce a witness's prior inconsistent statement. In this case, the defendant was charged with the second degree murder of his girlfriend. The victim's eight year old son testified that he saw the defendant approach his mother with a pistol and say, "I ought to kill you" before shooting her. On cross-examination, defense counsel attempted to impeach the child by an alleged prior oral inconsistent statement the boy had made to his grandmother who entered the victim's apartment moments after the shooting. Supposedly the boy had told his grandmother he was not even in the same room at the time of the shooting. On cross-examination, the boy agreed that he had seen his grandmother but claimed that he did not talk to her. However, defense counsel did not directly confront the child with the exact words of the alleged prior oral inconsistent statement. During the defense case, the grandmother was called and testified that she went into the victim's apartment immediately after the shooting and that her grandson was there and talked to her. The prosecution objected to the grandmother testifying to what the grandchild had allegedly said on the grounds of hearsay. Defense counsel argued he was attempting to impeach with the prior inconsistent statement and that therefore, the testimony would not be hearsay. On appeal, the First District correctly recognized that inconsistent statements do not constitute hearsay, because they are not being offered for their truth but rather for the mere fact they were made. 491 However, the state argued alternatively that section 90.614(2) barred admission of the grandmother's testimony, because the boy had not been given the requisite opportunity to explain or deny his prior inconsistent statement. Although the First District admitted that the "predicate for impeaching ... was not laid as artfully as some might prefer" 492 the occasion where the alleged prior inconsistent statement was made was sufficiently established to have allowed the grandchild to explain at trial if the state had so asked. 493 Therefore, defense counsel's failure to confront the boy with the exact impeaching statement itself did not require exclusion of the grandmother's testimony. In a short but strong dissent, Judge Nimmons argued that the necessary predicate had not been laid for introduction of the grandmother's testimony, since the grandson had never been confronted with his exact prior inconsistent statement. 494 In Judge Nimmons mind, proper predicate for impeachment with prior inconsistent statement requires not only calling the witness's attention to the time and occasion when the alleged inconsistent statement was made, but also "calling the attention of the witness to be impeached to the alleged contradictory statement" itself. 495 He argued that since the grandson was never confronted with the statement itself, there was no way of knowing what he would have said if he had been. 496 The grandson allegedly may have admitted or explained the prior statement; and if so, there may have been no need to call the grandmother in order to testify about it. Thorns represents probably the most liberal view of what is the proper predicate required for introduction of extrinsic evidence to prove the making of a prior inconsistent statement. If the witness had been confronted with the exact words of the alleged inconsistent statement, as well as his attention called to the time and place when they were made, there would be no doubt there was a proper predicate. Rather than possibly stop short as defense counsel did in Thorns, attorneys would do much better eliciting the information suggested in Judge Nimmons's dissent.

The requirements of section 90.614(2) of the Florida Statutes do not apply when counsel attempts to impeach an opposing party with his/her prior inconsistent statements since these are admissible not only for impeachment but also for substantive purposes as admissions under section 90.803(18). 497 Thus these statements could be admitted against

401. Id. at 1359.
402. Id.
403. Id. at 1360 (Nimmons, J., dissenting).
404. Id. (quoting Hancock v. McDonald, 148 So. 2d 56, 58 (Fla. 1st Dist. Ct. App. 1963)).
405. Id. at 1361.
the witness admits making the prior inconsistent statement, whether written or oral, the impeachment is completed and the opposing party is not permitted to introduce extrinsic evidence. Under section 90.614(2) "[i]f a witness denies making or does not distinctly admit making the prior inconsistent statement," extrinsic evidence will only be admissible if the "witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it, or the interest of justice otherwise requires." 398

In Thorne v State, 399 justices of the First District Court of Appeal disagreed on the proper procedure to be used for laying the predicate to introduce a witness's prior inconsistent statement. In this case, the defendant was charged with the second degree murder of his girlfriend. The victim's eight year old son testified that he saw the defendant approach his mother with a pistol and say, "I ought to kill you" before shooting her. On cross-examination, defense counsel attempted to impeach the child by an alleged prior oral inconsistent statement the boy had made to his grandmother who entered the victim's apartment moments after the shooting. Supposedly the boy had told his grandmother he was not even in the same room at the time of the shooting. On cross-examination, the boy agreed that he had seen his grandmother but claimed that he did not talk to her. However, defense counsel did not directly confront the child with the exact words of the alleged prior oral inconsistent statement. During the defense case, the grandmother was called and testified that she went into the victim's apartment immediately after the shooting and that her grandson was there and talked to her. The prosecution objected to the grandmother testifying to what the grandson had allegedly said on the grounds of hearsay. Defense counsel argued he was attempting to impeach with the prior inconsistent statement and that therefore, the testimony would not be hearsay. On appeal, the First District correctly recognized that inconsistent statements do not constitute hearsay, because they are not being offered for their truth but rather for the mere fact they were made. 400 However, the state argued alternatively that section 90.614(2) barred admission of the grandmother's testimony, because the boy had not been given the requisite opportunity to explain or deny his prior inconsistent statement. Although the First District admitted that the "predicate for impeaching ... was not laid as artfully as some might prefer" 401 the occasion where the alleged prior inconsistent statement was made was sufficiently established to have allowed the grandson to explain at trial if the state had so asked. 402 Therefore, defense counsel's failure to confront the boy with the exact impeaching statement itself did not require exclusion of the grandmother's testimony. In short but strong dissent, Judge Nimmons argued that the necessary predicate had not been laid for introduction of the grandmother's testimony, since the grandson had never been confronted with his exact prior inconsistent statement. 403 In Judge Nimmons mind, proper predicate for impeachment with prior inconsistent statement requires not only calling the witness's attention to the time and occasion when the alleged inconsistent statement was made, but also "calling the attention of the witness to be impeached to the alleged contradictory statement itself." 404 He argued that since the grandson was never confronted with the statement itself, there was no way of knowing what he would have said if he had been. 405 The grandson allegedly may have admitted or explained the prior statement; and if so, there may have been no need to call the grandmother in order to testify about it. Thorne represents probably the most liberal view of what is the proper predicate required for introduction of extrinsic evidence to prove the making of a prior inconsistent statement. If the witness had been confronted with the exact words of the alleged inconsistent statement, as well as his attention called to the time and place when they were made, there would be no doubt there was a proper predicate. Rather than possibly stop short as defense counsel did in Thorne, attorneys would do much better eliciting the information suggested in Judge Nimmons's dissent.

The requirements of section 90.614(2) of the Florida Statutes do not apply when counsel attempts to impeach an opposing party with his/her prior inconsistent statements since these are admissible not only for impeachment but also for substantive purposes as admissions under section 90.803(18). 406

399. 485 So. 2d 1357 (Fla. 1st Dist. Ct. App. 1986).
400. Id. at 1358.
401. Id. at 1359.
402. Id.
403. Id. at 1360 (Nimmons, J., dissenting).
404. Id. (quoting Hancock v. McDonald, 148 So. 2d 56, 58 (Fla. 1st Dist. Ct. App. 1963)).
405. Id. at 1361.
an opposing party even without their being allegedly inconsistent with trial testimony. Saucier v. State\(^{407}\) recently demonstrated that even with this liberal treatment of party admissions, prosecutors must sometimes still lay the predicate required by section 90.614(2). After Saucier's convictions for aggravated battery with a firearm and shooting into a building, he appealed claiming the trial court erred in permitting the testimony of a deputy sheriff during state's rebuttal about certain incriminating statements Saucier had allegedly made when in custody but before being given his Miranda warnings. Under Harris v. New York\(^{408}\) voluntary statements of a defendant given without the proper Miranda warnings may still be used for impeachment although they are not usable for substantive purposes. Indeed in Saucier, the state had waited to offer the defendant's statements during rebuttal, because it recognized they could not be used during the state's case in chief. However, during the defendant's testimony the prosecutor never inquired about any conversation that Saucier had with the deputy, nor was the defendant offered an opportunity to explain or deny the prior statement. Given this lack of foundation, the First District Court of Appeal found it improper to use the deputy's testimony for impeachment purposes.\(^{409}\) The state unsuccessfully argued that section 90.614(2) specifically excluded the usual predicate for impeachment when the impeaching statement was also an admission of a party opponent. The First District found this argument was "based upon a misconstruction of the statute."\(^{410}\) Statements admissible pursuant to section 90.603(18) are admissible for substantive purposes as exceptions to the hearsay rule. However, here, because the defendant's prior statement to the deputy had occurred before he had been given his Miranda warnings, it was not, as a matter of constitutional criminal procedure, admissible for substantive purposes. Therefore, the First District concluded that the defendant's statement is "not properly treated as falling within the exception for admission."\(^{411}\) The state's failure to lay the usual predicate required by section 90.614(2) meant that admission of the deputy's testimony on rebuttal was reversible error.\(^{412}\)

\(^{407}\) 491 So. 2d 1232 (Fla. 1st Dist. Ct. App. 1986).
\(^{408}\) 491 U.S. 222 (1990).
\(^{409}\) Saucier, 491 So. 2d at 1232.
\(^{410}\) Id.
\(^{411}\) Id. at 1233-34.
\(^{412}\) Id. at 1233.
an opposing party even without their being allegedly inconsistent with trial testimony. Saucier v. State recently demonstrated that even with this liberal treatment of party admissions, prosecutors must sometimes still lay the predicate required by section 90.614(2). After Saucier's convictions for aggravated battery with a firearm and shooting into a building, he appealed claiming the trial court erred in permitting the testimony of a deputy sheriff during state's rebuttal about certain incriminating statements Saucier had allegedly made when in custody but before being given his Miranda warnings. Under Harris v. New York voluntary statements of a defendant given without the proper Miranda warnings may still be used for impeachment although they are not usable for substantive purposes. Indeed in Saucier, the state had waited to offer the defendant's statements during rebuttal, because it recognized they could not be used during the state's case in chief. However, during the defendant's testimony the prosecutor never inquired about any conversation that Saucier had with the deputy, nor was the defendant offered an opportunity to explain or deny the prior statement. Given this lack of foundation, the First District Court of Appeal found it was improper to use the deputy's testimony for impeachment purposes. The state unsuccessfully argued that section 90.614(2) specifically excused the usual predicate for impeachment when the impeaching statement also was an admission of a party opponent. The First District found this argument was "based upon a misconstruction of the statute."

Statements admissible pursuant to section 90.803(18) are admissible for substantive purposes as exceptions to the hearsay rule. However, here, because the defendant's prior statement to the deputy had occurred before he had been given his Miranda warnings, it was not, as a matter of constitutional criminal procedure, admissible for substantive purposes. Therefore, the First District concluded that the defendant's statement "is not properly treated as falling within the exception for admission." The state's failure to lay the usual predicate required by section 90.614(2) meant that admission of the deputy's testimony on rebuttal was reversible error. 407

Recent opinions concerning expert witness testimony overall did not break any significant ground. Several cases were reversed, because the expert's testimony concerned facts within the jury's common understanding. However, Florida appellate courts seldom reversed a trial court's determination whether a particular expert possessed the requisite expertise to offer testimony in an area. Likewise the appellate courts continued leaving the question whether a witness has an adequate factual basis for an opinion to the trial court's discretion.

The final case discussing prior inconsistent statements criticized prosecutors who lay a predicate for impeachment with a prior inconsistent statement and then do not call witnesses to prove such statements were made. See Tobey v. State, 486 So. 2d 54, 55 (Fla. 2d Dist. Ct. App. 1986).

413. See Fla. Stat. § 90.702 (1985); Botte v. Pomeroy, 497 So. 2d 1275 (Fla. 4th Dist. Ct. App. 1986) (It was error to exclude an expert's testimony that someone's actions in moving an injured individual were reasonable for a layperson); Roby v. Connors, 492 So. 2d 789 (Fla. 1st Dist. Ct. App. 1986) (Plaintiff's expert improperly excluded from testifying about highway design and construction in general and about purpose of having an emergency lane on a highway); Florida Power Corp. v. Barron, 481 So. 2d 1309 (Fla. 2d Dist. Ct. App. 1986) (Expert testimony that a person's concentration and awareness decreases as the working day goes on was improperly admitted. "[E]xpert testimony must concern a subject which is beyond the common understanding of the average layman and is such as will probably aid the triers of fact in their search for truth." Id. at 1310.)

415. Westinghouse Elec. Corp. v. Lawrence 488 So. 2d 623 (Fla. 1st Dist. Ct. App. 1986) (While the expert was admittedly only a clinical psychologist and not a medical doctor, it was error not to allow him to testify that plaintiff's mental disorder was causally related to injuries received in an industrial accident); Machado v. Foreign Trade, Inc. 478 So. 2d 405 (Fla. 3d Dist. Ct. App. 1985) (The trial court correctly refused to let a document analyst testify as to whether the defendant admitted he was not an expert in the style of typing or letter construction for the contested document involved; but see Botte, 497 So. 2d at 1275 (The trial court erred by excluding expert medical testimony concerning cause of plaintiff's spinal injury since the proffered expert had experience in treating similar injuries. The doctor's lack of specialization in this area went "to the weight of his testimony and not its admissibility." Id. at 1279.)

416. See Fla. Stat. § 90.702(3)(1985); Huff v. State, 495 So. 2d 145 (Fla. 1986) (Defense counsel's attempt to call retired police officer to testify that the state improperly processed a crime scene, causing the destruction of favorable defense evidence, was properly denied since voir dire established the witness had not visited the scene nor had he read any reports or testimony of the investigating officers. Although a qualified expert "normally decides for himself whether he has sufficient facts on which

409. Saucier, 491 So. 2d at 1283.
410. Id.
411. Id. at 1283-84.
412. Id. at 1283. For another example during the survey period of failure to lay properly the foundation for impeachment with a prior inconsistent statement see infra v. State, 498 So. 2d 958, 959-960 (Fla. 2d Dist. Ct. App. 1986).
Florida courts also maintained the position that experts' opinion can be based upon information reasonably relied upon in their field, even though the information would not itself be separately admissible. However, Florida courts still prohibited opinion on the ultimate "legal" as opposed to "factual" issue. Finally, Florida courts approved the admission of one new type of scientific evidence, Post Traumatic Stress Syndrome evidence, disapproved admission of dog scent-discrimination line-up evidence because of an insufficient reliability showing, and continued discussing the admission of polygraph evidence pursuant to counsel's stipulation. Those few major cases involving expert testimony to base an opinion . . . when the factual predicate submitted to the expert omits facts which are obviously necessary to the formation of an opinion . . . ." should be excluded. Id. at 148.

417. See Fla. Stat. § 90.704 (1985); Burnham v. State, 497 So. 2d 904 (Fla. 3d Dist. Ct. App. 1986) (When the defendant proposed calling two medical doctors to support his voluntary intoxication defense to first degree murder and aggravated battery charges, a hearsay objection concerning tests done by others should not have precluded the doctors' testimony "where such information is of a type reasonably relied upon by experts in the field."); id. at 906.)

For other cases merely citing § 90.704 in deciding whether there was a sufficient basis for expert testimony see Baker v. Niess, 496 So. 2d 215 (Fla. 1st Dist. Ct. App. 1986); Johnson v. State, 474 So. 2d 885 (Fla. 3d Dist. Ct. App. 1985).

418. See Fla. Stat. § 90.703 (1985); City of Cooper City v. PCH Corp., 496 So. 2d 843 (Fla. 4th Dist. Ct. App. 1986) (An expert's preferred testimony whether certain city charges were within "generally accepted regulatory principles and standards" would have been impermissibly ultimate "legal" as opposed to "factual" issue testimony in a utility fee dispute case. Id. at 847); cf. Huff v. State, 495 So. 2d 145, 149-50 (Fla. 1986) (Defense cross-examination of state's witness about alleged improper processing of crime scene opened door for redirect examination that witness's investigation uncovered nothing which led him to change his mind about Huff's guilt. This was so even though this testimony standing alone without the cross-examination would have impermissibly invaded the ultimate legal issue.).


420. See Ramos v. State, 496 So. 2d 121 (Fla. 1986).

421. See Anderson v. State, 11 Fla. L. Weekly 2509 (Fla. 1st Dist. Ct. App. Dec. 2, 1986) (While polygraph evidence is inadmissible absent stipulation of both counsel, a stipulation to admit polygraph evidence concerning "the question, answers and reactions, and the examiner's opinions" was sufficient to allow the examiner to conclude Anderson's answers were not untruthful. Id.). Davis v. State, 11 Fla. L. Weekly 2238 (Fla. 4th Dist. Ct. App. Oct. 22, 1986) ("[W]hen polygraph evidence is admitted by stipulation, and a party requests a proper instruction on the subject, it should be given."); id. at 2240. Thus "the jury should be apprised of the strengths and weaknesses of such evidence, what the results are calculated to determine, and that it is for them to determine what weight and effect should be attributed to such evidence.") Id. at 2239. This case resulted in the following question being certified to Florida Supreme Court as one of great public importance: "When polygraph evidence is admitted by stipulation and a party requests a proper instruction on the scientific reliability of polygraph results, is it reversible error for the trial court to fail to so instruct the jury?"

Id. at 2240.)

422. 498 So. 2d 488 (Fla. 3d Dist. Ct. App. 1986).

423. The trial court set aside the plaintiff's verdict, because the jury was erroneously instructed as to the standard of care required of a common carrier rather than the reasonable care standard of negligence. Id. at 490. Besides the expert testimony issue, the cruise line also argued plaintiffs should not have been allowed to introduce evidence about the husband's lost business opportunities, but the third district rejected this because no contemporaneous objection was made at trial. Id. at 492.

424. Id. at 2240 (quoting Heiser v. State, 52 Fla. 30, 38, 42 So. 692, 693 (1906)).

425. Id. at 492.
Florida courts also maintained the position that experts' opinion can be based upon information reasonably relied upon in their field, even though the information would not itself be separately admissible. However, Florida courts still prohibited opinion on the ultimate "legal" as opposed to "factual" issue. Finally, Florida courts approved the admission of one new type of scientific evidence, Post Traumatic Stress Syndrome evidence, which disapproved admission of dog scent-discrimination line-up evidence because of an insufficient reliability showing, and continued discussing the admission of polygraph evidence pursuant to counsel's stipulation. Those few major cases involving experi-

mony which deserve extended discussion are noted below.

A. Experts and Experiments

The question whether to admit the results of an out-of-court experiment's results mainly presents relevancy concerns. However, experts are so often used to perform these experiments that discussing their admissibility under the topic of expert testimony is appropriate. In *Rindfleisch v. Carnival Cruise Lines, Inc.* the plaintiffs sued the cruise line for injuries the husband allegedly received from a slip and fall on a ship's stairway. Plaintiffs claimed the accident occurred because of the stairway's negligently maintained condition, while the defendant claimed Mr. Rindfleisch's injuries stemmed from his own negligence. At trial, the plaintiff introduced the testimony of an expert who performed a coefficient of friction test on a step resembling the one on which the husband fell. After plaintiff's verdict was set aside on defendant's motion for a new trial, both sides appealed raising various issues. The cruise line contended the trial court erred in allowing testimony about the coefficient of friction test. According to the Third District Court of Appeal, the general rule in this area is that "evidence of an experiment whereby to test the truth of testimony that a certain thing occurred is not admissible, where the conditions attending the alleged occurrence in this experiment are not shown to be similar." The district court also acknowledged that the plaintiff has the burden to lay a proper foundation for admission such evidence and that this type of evidence should be received "with caution." Given these principles, one would expect that admitting the test results would have been error because the plaintiff's expert admitted that there were

Nova Law Review

[Vol. 1]

1372

83

Dobson: Evidence

Published by NSUWorks, 1987
many things about the step which he did not know. The expert admitted he did not know if the step tested was the exact step on which the husband allegedly slipped, nor whether the condition of the step tested was similar to the step's condition when the plaintiff slipped, nor when on the ship the particular step was located, and finally admitted he did not have any knowledge of the step's conditions in the several years between the accident and the expert's test. However, in a confusing opinion the Third District affirmed the admission of the results, allegedly receding from the general rule, while at the same time giving lip service to its principles.446

The Third District noted that "the rule of substantial similarity between test conditions and actual conditions... has been eroded as to other types of experimental evidence."447 From this the District Court found that "if enough of the obviously important factors are duplicated in the experiment, and if the failure to control other possibly relevant variables is justified, the court may conclude that the experiment is sufficiently enlightening that it should come into evidence."448 The court concluded the issue was one of weight to be given the evidence rather than its relevancy and that a trial court's decision should not be upset except for an abuse of discretion.449 Unfortunately the court did not explain why it found that enough of the "obviously important factors" were duplicated by the experiment in Rindfleisch. Indeed given the expert's lack of admitted knowledge concerning the step's condition, one could fairly argue that many of the important factors were not duplicated. Furthermore, readers could fairly argue that a requirement that an expert duplicate the obviously important factors is nothing more than the general rule of substantial similarity expressed another way. If out of court experiment's results should truly be received with caution, as the Third District claims,450 then the rule of similarity is appropriate and should be maintained. The less similarity there is between experimental conditions and those under which an accident allegedly occurred, the less helpful the experiment's results will be to a jury, and the more likely it will be to mislead them. Florida courts have stated Rindfleisch's unfortunate statement that the substantial similarity question has become an issue of weight rather than

426. Id. at 492-93.
427. Id. at 492.
428. Id. at 493.
429. Id.
430. Id. at 492.

B. Qualifying Experts

Section 90.702(8) of the Florida Statutes recognizes that a person may become qualified as an expert in a variety of ways. Thus a witness may possess sufficient expertise in a certain area "by knowledge, skill, experience, training, or education..."451 In Chambless v. White Motor Corp.,452 plaintiff, a former garbage collector, sued a garbage truck manufacturer, when the truck in which he was a passenger skidded and overturned, causing injuries paralyzing him from the neck down. The company claimed that the accident was caused by the truck's driver, not any defect in the truck's manufacture. After a jury verdict for the defendant, the plaintiffs appealed contending the trial court erred in allowing a city garbage fleet superintendent to testify as an expert without being qualified. The First District Court of Appeal rejected this claim, since the defendant had qualified the superintendent by showing his education, training, experience and background in automotive maintenance, repair and technology.453 Admittedly the trial court did not expressly declare the superintendent an expert before allowing him to give an opinion. However, the First District found this was not necessary and furthermore expressed the opinion that "it is questionable whether it is proper procedure for a court to expressly declare a witness an 'expert' because the jury may infer from such declaration that the court is placing its approval on the opinions of the witness."454

Hopefully the First District's belief about the impropriety of a court declaring someone an expert will be noted and followed elsewhere. Indeed, it seems that Florida trial courts routinely allow counsel, when attempting to qualify a witness as an expert, to ask the person how many times he/she has ever testified as an expert before. The author submits that this question is improper, because it is irrelevant and possibly misleading. First, the alleged expert may have been improperly allowed to testify before by another court even though there was not an adequate foundation for the person's expertise. Second, unless the person is offering testimony on exactly the exact same subject

432. Id.
433. 481 So. 2d 6 (Fla. 1st Dist. Ct. App. 1985).
434. Id. at 8.
435. Id.
many things about the step which he did not know. The expert admitted he did not know if the step tested was the exact step on which the husband allegedly slipped, nor whether the condition of the step tested was similar to the step's condition when the plaintiff slipped, nor where on the ship the particular step was located, and finally admitted he did not have any knowledge of the step's conditions in the several years between the accident and the expert's test. However, in a conflicting opinion the Third District affirmed admission of the results, allegedly recording from the general rule, while at the same time giving lip service to its principles.

The Third District noted that "the 'rule of substantial similarity' between test conditions and actual conditions ... has been eroded to other types of experimental evidence." From this the District Court found that "if enough of the obviously important factors are duplicated in the experiment, and if the failure to control other possibly relevant variables is justified, the court may conclude that the experiment is sufficiently enlightening that it should come into evidence." The court concluded the issue was one of weight to be given the evidence rather than its relevancy and that a trial court's decision should not be upset except for an abuse of discretion. Unfortunately the court did not explain why it found that enough of the "obviously important factors" were duplicated by the experiment in RimPF. Indeed given the expert's lack of admitted knowledge concerning the step's condition, one could fairly argue that many of the important factors were not duplicated. Furthermore, readers could fairly argue that a requirement that an experiment duplicate the obviously important factors is nothing more than the general rule of substantial similarity expressed another way. If out of court experiment's results should truly be received with caution, as the Third District claims, then the rule of similarity is appropriate and should be maintained. The less similarity there is between experimental conditions and those under which an incident allegedly occurred, the less helpful the experiment's result will be to a jury, and the more likely it will be to mislead them. Florida courts should ignore RimPF's unfortunate statement that the substantial similarity question has become an issue of weight rather than admissibility.

B. Qualifying Experts

Section 90.702(4) of the Florida Statutes recognizes that a person may become qualified as an expert in a variety of ways. Thus a witness may possess sufficient expertise in a certain area "by knowledge, skill, experience, training, or education ... In Kolb v. White Motor Corp., plaintiff, a former garbage collector, sued a garbage truck manufacturer, when the truck in which he was a passenger skidded and overturned, causing injuries paralyzing him from the neck down. The company claimed that the accident was caused by the truck's driver, not any defect in the truck's manufacture. After a jury verdict for the defendant, the plaintiffs appealed contending the trial court erred in allowing a city garage fleet superintendent to testify as an expert without being qualified. The First District Court of Appeal rejected this claim, since the defendant had qualified the superintendent by showing his education, training, experience and background in automotive maintenance, repair and technology. Admittedly the trial court did not expressly declare the superintendent as an expert before allowing him to give an opinion. However, the First District found this was not necessary and furthermore expressed the opinion that "it is questionable whether it is proper procedure for a court to expressly declare a witness an 'expert' because the jury may infer from such declaration that the court is placing its approval on the opinions of the witness." Hopefully the First District's belief about the impropriety of a court declaring someone an expert will be noted and followed elsewhere. Indeed, it seems that Florida trial courts routinely allow counsel, when attempting to qualify a witness as an expert, to ask the person how many times he/she has ever testified as an expert before. The author submits that this question is improper, because it is irrelevant and possibly misleading. First, the alleged expert may have been improperly allowed to testify before by another court even though there was not an adequate foundation for the person's expertise. Second, unless the person is offering testimony on exactly the same subject

426. Id. at 492-93.
427. Id. at 492.
428. Id. at 491.
429. Id.
430. Id. at 492.
431. See FLA. STAT. § 90.702 (1985).
432. Id.
433. 481 So. 2d 6 (Fla. 1st Dist. Ct. App. 1985).
434. Id. at 8.
435. Id.
as in the previous trial or trials, it is irrelevant whether the alleged expert has testified before. The author believes that this type of questioning should not be allowed and concurs with the First District's opinion that trial courts should not in the jury's presence put an impermanency on an alleged expert's testimony. 438

C. Permissible Limits of Expert Opinions

Although section 90.703 of the Florida Statutes permits testimony on the ultimate issue, Florida courts have distinguished between testimony on the ultimate "factual" issue as opposed to the ultimate "legal" issue. 439 Testimony on the ultimate legal issue can be objectionable for two reasons. First, it may amount to vouching for a witness's credibility, especially the victim in a criminal case. 440 Second, this testimony may invade the province of the jury. 441 However, the distinction between testimony on the ultimate "factual" as opposed to "legal" issue is sometimes difficult to draw. Two recent Fourth District Court of Appeal cases should give some guidance to practitioners in making some distinction. 442 In the first case, Kruse v. State, 443 the Fourth District allowed expert testimony that a child victim in an indecent assault case was suffering from Post-Traumatic Stress Syndrome. An expert in child and adolescent psychiatry described the Post-Traumatic Stress Syndrome and compared her observations of the victim's behavior with the syndrome's patterns. The expert also testified about the victim and her parents' statements to the expert and concluded that based upon her psychiatric examination and the child's behavior history, the victim had suffered a sexual trauma. The defendant claimed this testimony invaded the province of the jury. The Fourth District noted that past Florida cases had firmly established that while an expert may testify to something within his expertise, "it is not the function of an expert to draw legal conclusions." 444 This is partially based on the view that an expert should not give an opinion whether a criminal violation has actually occurred. However, the court noted the previous Florida cases had allowed experts to testify that certain facts were consistent with such things as strangulation 445 and forced sexual intercourse 446 when these were factual issues in a case. Kruse concluded that the expert's testimony "was more in the nature of a medical opinion that trauma was responsible for the child's behavioral problems, than a legal conclusion that a criminal act had occurred." 447 This was so because the expert had expressed an opinion that the behavioral changes "were consistent with [the victim's] report of sexual abuse." 448 The second recent Fourth District Court of Appeal case, Fridovich v. State, 449 relied on Kruse in concluding that a medical examiner should not have been prohibited from testifying about the manner, as opposed to the cause, of a victim's death. In Fridovich, the defendant admitted he fired the fatal shot killing his father. The only issue was whether this was an accident or purposeful. One factor pointing to an accidental shooting was the unusual angle of bullet entry on the victim's body. The defense twice proffered the county medical examiner's testimony that the shooting circumstances were consistent with an accident. This proffer was based upon the medical examiner's autopsy findings, his knowledge of the police investigation, and his consultation with two other medical examiners who were experts in gunshot wounds. Despite such an extensive proffer, the trial court refused to permit the medical examiner to give this opinion. 449 On appeal, the state relied on an earlier case, Spradley v. State, 450 holding it was error to admit a medical examiner's conclusion that the victim's death was homicide, since an expert cannot give an opinion as to the defendant's guilt or innocence. 451 The Fourth District noted that Kruse had clarified this exact issue and felt that the medical examiner's testimony that the circum-

436. For another case involving a similar issue see Johnston v. State, 497 So. 2d 863 (Fla. 1986) (There was no error in allowing a police officer with twelve years experience as an evidence technician but who was not formally qualified as an expert, to testify that testing revealed blood on the defendant's clothes.).
437. FLA. STAT. § 90.703 (1985).
438. See Fridovich v. State, 489 So. 2d 143 (Fla. Dist. Ct. App. 1986); City of Cooper City, 486 So. 2d at 843; Kruse, 483 So. 2d at 1383.
440. Id.
441. Fridovich, 489 So. 2d at 143; Kruse, 483 So. 2d at 1383.
442. 483 So. 2d at 1383.
443. Id. at 1387 (quoting Palm Beach County v. Town of Palm Beach, 426 So. 2d 1063, 1070 (Fla. 4th Dist. Ct. App. 1983)).
444. Id.; See North v. State, 65 So. 2d 77 (Fla. 1952).
445. See Kruse, 483 So. 2d at 1387; Ferradas v. State, 434 So. 2d 24 (Fla. 3d Dist. Ct. App. 1983).
446. Kruse, 483 So. 2d at 1387.
447. Id.
448. 489 So. 2d 143 (Fla. 4th Dist. Ct. App. 1986).
449. Id.
450. 443 So. 2d 1039 (Fla. 2d Dist. Ct. App. 1983).
451. Fridovich, 489 So. 2d at 145.
as in the previous trial or trials, it is irrelevant whether the alleged expert has testified before. The author believes that this type of questioning should not be allowed and concurs with the First District's opinion that trial courts should not in the jury's presence put an imputation on an alleged expert's testimony. 436

C. Permissible Limits of Expert Opinions

Although section 90.703 437 of the Florida Statutes permits testimony on the ultimate issue, Florida courts have distinguished between testimony on the ultimate "factual" issue as opposed to the ultimate "legal" issue. 438 Testimony on the ultimate legal issue can be objectionable for two reasons. First, it may amount to vouching for a witness's credibility, especially the victim in a criminal case. 439 Second, the testimony may invade the province of the jury. 440 However, the distinction between testimony on the ultimate "factual" issue as opposed to "legal" issue is sometimes difficult to draw. Two recent Fourth District Court of Appeal cases should give some guidance to practitioners in making some distinction. 441 In the first case, Kruse v. State, 442 the Fourth District allowed expert testimony that a child victim in an indecent assault case was suffering from Post-Traumatic Stress Syndrome. An expert child and adolescent psychiatry described the Post-Traumatic Stress Syndrome and compared her observations of the victim's behavior with the syndrome's patterns. The expert also testified about the victim and her parents' statements to the expert and concluded that he felt she was suffering from a sexual trauma. The defendant claimed this testimony invaded the province of the jury. The Fourth District noted that the Florida cases had firmly established that while an expert may testify to something within his expertise, "it is not the function of an expert to draw legal conclusions." 443 This is partially based on the view that an expert should not give an opinion whether a criminal violation has actually occurred. However, the court noted the previous Florida cases had allowed experts to testify that certain facts were consistent with such things as strangulation and forced sexual intercourse when these were factual issues in a case. Kruse concluded that the expert's testimony "was more in the nature of a medical opinion that trauma was responsible for the child's behavioral problems, than a legal conclusion that a criminal act had occurred." 444 This was so because the expert had expressed an opinion that the behavioral changes "were consistent with [the victim's] report of sexual abuse." 445 The second recent Fourth District Court of Appeal case, Friedovich v. State, 446 relied on Kruse in concluding that a medical examiner should not have been prohibited from testifying about the manner, as opposed to the cause, of a victim's death. In Friedovich, the defendant admitted he fired the fatal shot killing his father. The only issue was whether this was an accident or purposeful. One factor pointing to an accidental shooting was the unusual angle of bullet entry on the victim's body. The defense twice proffered the county medical examiner's testimony that the shooting circumstances were consistent with an accident. This proffer was based upon the medical examiner's autopsy findings, his knowledge of the police investigation, and his consultation with two other medical examiners who were experts in gunshot wounds. Despite such an extensive proffer, the trial court refused to permit the medical examiner to give this opinion. 447 On appeal, the state relied on an earlier case, Spradley v. State, 448 holding it was error to admit a medical examiner's conclusion that the victim's death was homicide, since an expert cannot give an opinion as to the defendant's guilt or innocence. 449 The Fourth District noted that Kruse had clarified this exact issue and felt that the medical examiner's testimony that the circum-

436. For another case involving a similar issue, see Johnston v. State, 497 So. 2d 863 (Fla. 1986) (there was no error in allowing a police officer with twenty-two years of experience as an evidence technician but who was not formally qualified as an expert, to testify that testing revealed blood on the defendant's clothes).


440. Id.

441. Friedovich, 489 So. 2d at 14d; Kruse, 483 So. 2d at 1383.

442. 483 So. 2d at 1383.
stances were consistent with an accidental shooting should have been admitted. 450 The court candidly acknowledged that "[s]uch opinions may support a conclusion that a defendant is not guilty, but the opinions themselves are directed to expert inferences to be drawn from a set of facts, not personal opinions of guilt or innocence." 451

The author submits both Kruse and Fridovich are correct and should be followed by Florida's courts. In both cases, especially Fridovich, the opinions offered are routinely given by experts. When Florida adopted its new evidence code, one purpose of liberalizing the rules on expert testimony was the belief that experts should not be constrained by artificial legal rules from offering conclusions in court which they clearly make in every day practice. Such an artificial barrier only keeps helpful information from a jury and could lead to incorrect results. Both these cases demonstrate that the distinction between ultimate "legal" and "factual" issues may be difficult to draw. Where an expert's opinion may present both a mixture of facts and law, Florida courts should admit the opinion and let cross-examination test its accuracy.

VIII. hearsay

A substantial number of cases discussed some aspect of the hearsay rule during the survey period. As with other areas of evidence law, not every case is important or interesting. For completeness and for service to readers, the author notes that the following hearsay topics received minor attention during this survey period: prior consistent statements, 452 spontaneous statements of a witness's lack of credibility. 453

452. Id. According to Fridovich, Kruse "distinguished legal conclusions which a medical expert may not offer, from expert opinions, which are admissible so long as the expert is qualified to render the opinion." Id.

453. Id.

454. See Fla. Stat. § 90.003(2)(b)(1983): DuFour v. State, 493 So. 2d 131 (Fla. 1986) (A witness's prior consistent statement was admissible since defense had suggested a motive to falsify by cross-examination about the witness's prior deposition with the state attorney's office); Jackson v. State, 488 So. 2d 906 (Fla. 1986) (A prior consistent statement may be admissible to corroborate a witness's trial testimony only if made before existence of fact indicating possible bias); Kelley v. State, 486 So. 2d 573 (Fla. 1986) (Cross-examination concerning the witness to a crime who had been incentivized in return for testifying against the defendant, suggested a motive to fabricate which allowed admission of the witness's prior inconsistent statements); Henricks v. State, 483 So. 2d 768 (Fla. 1st Dist. Ct. App. 1986) ("Prior consistent statements are generally inadmissible absent a showing of recent fabrication or other reason for the

1987

Evidence

1379
stances were consistent with an accidental shooting should have been admitted.\textsuperscript{4} The court candidly acknowledged that "[s]uch opinions may support a conclusion that a defendant is not guilty, but the opinions themselves are directed to expert inferences to be drawn from a set of facts, not personal opinions of guilt or innocence."\textsuperscript{44}

The author submits both Kruse and Fridovich are correct and should be followed by Florida's courts. In both cases, especially Fridovich, the opinions offered are routinely given by experts. When Florida adopted its new evidence code, one purpose of liberalizing the rules on expert testimony was the belief that experts should not be constrained by artificial legal rules from offering conclusions in court which they clearly make in everyday practice. Such an artificial barrier only keeps helpful information from a jury and could lead to incorrect results. Both these cases demonstrate that the distinction between ultimate "legal" and "factual" issues may be difficult to draw. Where an expert's opinion may present both a mixture of facts and law, Florida courts should admit the opinion and let cross-examination test its accuracy.

VIII. Hearsay

A substantial number of cases discussed some aspect of the hearsay rule during the survey period. As with other areas of evidence law, not every case is important or interesting. For completeness and for service to readers, the author notes that the following hearsay topic received minor attention during this survey period: prior consistent statements,\textsuperscript{44} prior statements of identification,\textsuperscript{44} spontaneous statements,\textsuperscript{44} excited utterances,\textsuperscript{47} statements for purposes of medical diagnosis or treatment,\textsuperscript{48} records of regularly conducted business activity,\textsuperscript{49} public records and reports,\textsuperscript{46} employee admissions,\textsuperscript{48} and the witness's lack of credibility.” Id. at 769.) Begley v. State, 483 So. 2d 70 (Fla. 4th Dist. Ct. App. 1986) (A victim's prior consistent statement was admitted to rebut claim she "was compelled to lie at the trial by both her mother and the state, due to [a] pending custody dispute.”) Id. at 73.)

In Carroll v. State, 497 So. 2d 253 (Fla. 3d Dist. Ct. App. 1986), two judges split over whether to determine if a prior consistent statement was actually made before any motive to fabricate arose. Judge Pearson argued this was for the jury's determination, while Judge Neshbitt claimed this was the judge's responsibility. The author agrees with Judge Neshbitt's viewpoint and believes the issue of when the statement was made is in relation to the event(s) giving rise to a motive to fabricate should be initially considered a preliminary question for the court under §§ 90.105(1) and (2).

455. See Fla. Stat. § 90.801(2)(c)(1985); Weinstein v. LPI-The Shoppes, Inc., 482 So. 2d 520 (Fla. 3d Dist. Ct. App. 1986) (A process server's testimony that a nonsatisfying witness previously identified himself as Weinstein's roommate was inadmissible under § 90.801(2)(c) since "[t]here was no statement of identification made by the process server at the time he served the process.”) Id. at 521.)

456. See Fla. Stat. § 90.803(1)(1985); Garcia v. State, 492 So. 2d 360 (Fla. 1986), cert. den. 107 S. Ct. 680 (1986) (The statements of the surviving of a multiple homicide made at the crime scene to a responding police officer were considered spontaneous and admissible as res gestae); Silveira v. Hernandez v. State, 495 So. 2d 914 (Fla. 3d Dist. Ct. App. 1986) (A crime victim's statements to a police officer investigating an offense were not spontaneous statements since the victim had time to reflect beforehand.)

457. See Fla. Stat. § 90.803(2)(1986); Begley v. State, 483 So. 2d 70 (Fla. 4th Dist. Ct. App. 1986) (The statements of a minor victim of an alleged sexual battery to her mother sometime during a two week period after the alleged event was inadmissible since it was not made "immediately after the event or at [the victim's] first opportunity to complain and [no predicate showed] that the statement was made under the stress of excitement caused by the event.”Id. at 72-73.)

458. See Fla. Stat. § 90.803(4)(1985), Begley v. State, 483 So. 2d 70, 73 (Fla. 4th Dist. Ct. App. 1986) (The statements of a minor victim of a sexual battery describing the alleged event to a sexual assault treatment counselor were inadmissible since no predicate showed they were (1) made for treatment or (2) the child knew the statements were made for a medical or diagnostic purpose.)

459. See Fla. Stat. § 90.803(6)(1985), Harris v. Game and Fresh Water Fish Commission, 495 So. 2d 806 (Fla. 1st Dist. Ct. App. 1986) (An agency's investigator's report may not be a business record when the "relevant information contained in the report is itself hearsay" unless both statements fall within a hearsay exception. Id at 808-09); Hudson v. State, 489 So. 2d 808 (Fla. 4th Dist. Ct. App. 1986) (Testimony to support a probation revocation based on information in a probation department's files cannot qualify under the business records exception if the records themselves are not introduced.)


Published by NSUWorks. 1987

89
cocomspirator statements, and former testimony. While some exceptions to the hearsay rule received significant attention, the recent cases discussing the definition of hearsay under the Florida Evidence Code were far more important.

A. Hearsay Defined

1. The Classical Definition

Section 90.801 of the Florida Statutes divides the definition of hearsay into two important subparts. The first subpart defines hearsay in general as 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." For convenience, this definition can be broken down into three discrete components. For any proposed item of evidence to be hearsay, there must be (1) a statement, (2) the statement's words must be offered as true, and (3) the statement must not have been made at the trial or hearing in question. Whether or not something constitutes a "statement" for purposes of the hearsay rule seems to give the Florida courts little trouble. However, both trial and appellate courts all too often misconstrue the last two components.

The second component requires that the out-of-court statement be offered for its literal truth and thus requires trial courts to analyze why the proponent of an out-of-court statement is urging its admission. The same out-of-court statement can be hearsay or non-hearsay, depending upon the purpose for which it is being offered. When an out-of-court statement is not offered for its truth, it is not hearsay; and the real question is whether the non-truth purpose urged to support admission is relevant. Beaun v. State, recently demonstrated how these two aspects sometimes are unfortunately confused. In Beaun an off-duty police officer witnessed an attempted shooting and unsuccessfully tried to stop the perpetrator before he could drive off. The next day the officer received an anonymous telephone call from a woman who claimed she witnessed the event and told the officer that Beaun had fired the gun. Based on this tip, the officer constructed a photographic lineup and used it to identify the defendant. When evidence of the phone call was introduced at trial, defense counsel objected claiming this was hearsay. However, the trial court overruled the objection claiming the statements were not being admitted for the truth but merely to show the officer received a phone call and someone gave him a name. After Beaun's conviction for possession of a firearm by a convicted felon, the Fourth District Court of Appeal reversed finding that "[a] reasonable interpretation of the testimony . . . would allow us to conclude that the State introduced this testimony for any other purpose than for the truth of the words spoken in order to identify appellant as the perpetrator of the crime." In so doing, the Fourth District relied upon past cases holding that where "the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence the court made a passable determination regarding the necessity of the challenged statement in this case.

cconspirator statements, and former testimony. While some exceptions to the hearsay rule received significant attention, the recent cases discussing the definition of hearsay under the Florida Evidence Code were far more important.

A. Hearsay Defined

1. The Classical Definition

Section 90.801 of the Florida Statutes divides the definition of hearsay into two important subparts. The first subpart defines hearsay in general as "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." For convenience, this definition can be broken down into three discrete components. For any proposed item of evidence to be hearsay, there must be (1) a statement, (2) the statement's words must be offered as true, and (3) the statement must not have been made at the trial or hearing in question. Whether or not something constitutes a "statement" for purposes of the hearsay rule seems to give the Florida courts little trouble. However, both trial and appellate courts all too often misconstrue the last two components.

The second component requires that the out-of-court statement be offered for its literal truth and thus requires trial courts to analyze why the proponent of an out-of-court statement is urging its admission. The same out-of-court statement can be hearsay or non-hearsay, depending upon the purpose for which it is being offered. When an out-of-court statement is not offered for its truth, it is not hearsay; and the real question is whether the non-truth purpose urged to support admission is relevant. Beatty v. State, recently demonstrated how these two aspects sometimes are unfortunately confused. In Beatty an off-duty police officer witnessed an attempted shooting and unsuccessfully tried to stop the perpetrator before he could drive off. The next day the officer received an anonymous telephone call from a woman who claimed she witnessed the event and told the officer that Beatty had fired the gun. Based on this tip, the officer constructed a photographic lineup and used it to identify the defendant. When evidence of the phone call was introduced at trial, defense counsel objected claiming this was hearsay. However, the trial court overruled the objection claiming the statements were not being admitted for the truth but merely to show the officer received a phone call and someone gave him a name. After Beatty's conviction for possession of a firearm by a convicted felon, the Fourth District Court of Appeal reversed finding that "[n]o reasonable interpretation of the testimony . . . would allow us to conclude that the State introduced this testimony for any other purpose than for the truth of the words spoken in order to identify appellant as the perpetrator of the crime." In so doing, the Fourth District relied upon past cases holding that "the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evi-
dence of the defendant's guilt, the testimony is hearsay. The Fourth District's conclusion is correct, but unfortunately the court's opinion uses incorrect terminology in discussing the legal issue presented. The Fourth District noted the trial court had admitted "this hearsay testimony based upon a much overworked exception to the hearsay rule which allows such hearsay when the inquiry is directed to the truth of the word spoken, but rather to whether the words were in fact spoken." This quoted language is a major mischaracterization of the hearsay rule. There is no statutory exception which allows the admission of out-of-court statements when they are not offered for their truth! Under the Florida evidence code's definition of hearsay, when an out-of-court statement is not being offered for its truth, it is not hearsay. Thus, for the Fourth District to begin its analysis by calling the testimony "hearsay" was legally incorrect. Beatty would have been much better opinion if the Fourth District would have confined itself to analyzing whether there was a legitimate purpose to offer these statements, other than for their truth. If there was, the statements should have been admitted because they were not hearsay. If there was not, the statement should have been excluded, because they came under no exceptions and thus were not admissible under the Florida Evidence Code. Hopefully, Beatty will not lead other Florida courts into a misunderstanding of the hearsay rule. The third hearsay component is that the statement must be "other than one made by the declarant while testifying at the trial or hearing." This is completely consistent with the purposes behind the hearsay rule. Hearsay statements are considered suspect, because what they are actually made are the crux of fact is not present and does not have an opportunity to judge the declarant's demeanor and because the statement are not usually subject to cross-examination.

From several years observation of Florida trial courts and from discussion with many Florida trial attorneys, the author is forced to conclude that this aspect of the hearsay rule is sadly misunderstood. The misunderstanding usually takes two forms. First, trial courts all too often incorrectly admit out-of-court statements of a now in-court testifying witness. Thus, witness X is often allowed to restate what that same witness said out-of-court at an earlier time. Some trial courts incorrectly consider this non-hearsay by failing to remember that it is when the statements were originally made which is important. Statements do not become non-hearsay when they are repeated in court.

Some trial courts also incorrectly admit hearsay when one witness, X, restates in court the out-of-court statement of a second witness, Y, who is present and subject to cross-examination at trial. The trial judges who make this mistake incorrectly believe that since the declarant-witness is present at the later hearing and subject to cross-examination there, the statement not hearsay. Again, this misunderstanding fails to focus on the critical time—when the statement was originally made—not when the statement is being repeated in court. Fortunately, no appellate courts made either of these two mistakes during the survey period. One case, Silva-Ramos v. State, correctly refused to characterize as non-hearsay a police officer's in-court testimony which repeated the out-of-court testimony of an alleged victim. The testimony could not have been admitted based upon the argument that the officer had first hand knowledge of the statement being made "as on the State's theory that the testimony is relevant to show the officer's course of action." As the third district correctly stated "if a testifying witness's presence upon hearing the declarant speak were justification to admit a narrative of the declarant's statement despite the rule precluding hearsay, there would be no rule precluding hearsay."

Florida trial courts should pay close attention to this case and to the components and reasons for distorting hearsay in general. While many out-of-court statements ultimately prove admissible because they are not offered for the truth or because they fall under a hearsay exception, no out-of-court statement is admissible merely because its declarant is present in court and is subject to cross examination.
dence of the defendant's guilt, the testimony is hearsay. The Fourth District's conclusion is correct, but unfortunately the court's opinion uses incorrect terminology in discussing the legal issue presented. The Fourth District noted the trial court had admitted "this hearsay testimony based upon a much overworked exception to the hearsay rule which allows such hearsay when the inquiry is directed to the truth of the word spoken, but rather to whether the words were in fact spoken." This quoted language is a major mischaracterization of the hearsay rule. There is no statutory exception which allows the admission of out-of-court statements when they are not offered for their truth! Under the Florida evidence code's definition of hearsay, when an out-of-court statement is not being offered for its truth, it is not hearsay. Thus, for the Fourth District to begin its analysis by calling the testimony "hearsay" was legally incorrect. Beatty would have been a much better opinion if the Fourth District would have confined itself to analyzing whether there was a legitimate purpose to offer these statements, other than for their truth. If there was, the statements should have been admitted because they were not hearsay. If there was not, the statement should have been excluded, because they came under no exceptions and thus were not admissible under the Florida Evidence Code. Hopefully, Beatty will not lead other Florida courts into a misunderstanding of the hearsay rule.

The third hearsay component is that the statement must be "other than one made by the declarant while testifying at the trial or hearing." This is completely consistent with the purposes behind the hearsay rule. Hearsay statements are considered suspect, because when they are originally made the ticer of fact is not present and does not have an opportunity to judge the declarant's demeanor and because the statement are not usually subject to cross-examination.

From several years observation of Florida trial courts and from

468. Id. at 60-61 (quoting Postell v. State, 398 So. 2d 851, 854 (Fla. 3d Dist. Ct. App. 1981), review denied, 441 So. 2d 384 (Fla. 1981)).

469. Id. at 60.

470. For other recent cases holding similar out-of-court statements inadmissible as hearsay see Davis v. State, 493 So. 2d 11 (Fla. 3d Dist. Ct. App. 1986); Wells v. State, 492 So. 2d 712 (Fla. 1st Dist. Ct. App. 1986); cf. Freeman v. State, 494 So. 2d 270 (Fla. 4th Dist. Ct. App. 1986) (Testimony about a police officer's conversation with an informant was properly admitted to show why the officers went to defendant's apartment.).


472. See MCCORMICK ON EVIDENCE § 245 (3d ed. 1984).

473. 495 So. 2d 914 (Fla. 3d Dist. Ct. App. 1986).

474. Id. at 915.

475. Id.

476. For an excellent article discussing the definition of hearsay see Kelley, Hear'say Today... Gone Tomorrow: The Changing Florida Evidence Code, 56 FLA. B.J. 520 (1982).
2. Statutorily Defined Non-hearsay

Section 90.801(2) specifies three distinct situations where out-of-court statements falling within the classical hearsay definition are statutorily declared to be non-hearsay.\textsuperscript{477} All three types of statements have two common elements. Under section 90.801(2) such statements will be non-hearsay only "if the declarant testifies at the trial or hearing"\textsuperscript{478} and if the declarant "is subject to cross-examination concerning the statement."\textsuperscript{479} When these two elements exist then subsections (a), (b), and (c) establish three situations where the out-of-court statements, although being offered for their truth, are statutorily made non-hearsay.\textsuperscript{480}

a. Prior Inconsistent Statements Under Oath

The first non-hearsay situation exists when a witness testifies at trial and is subject to cross-examination concerning a previous statement which is "[i]nconsistent 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."\textsuperscript{481} During the survey period, Florida courts decided several important cases dealing with two aspects of the use of prior inconsistent statements during oath.\textsuperscript{482}

b. Sufficiency for Conviction

The need at times to use the testimony of a defendant’s family members, close friends or former accomplices may create problems for the state when these witnesses become "turncoats" or "chameleonic" witnesses. A turncoat witness is one whose out-of-court statement is adverse to the defendant; but who when called at trial as a prosecution witness, feigns memory loss or tells an inconsistent story now favorable to the defense. When this occurs, the state usually attempts to impeach the witness with his earlier statement. When there is other evidence to establish the defendant’s guilt besides the prior inconsistent statement given under oath, most courts agree the evidence should be admitted substantively for corroboration purposes. However, if the earlier inconsistent statements are the only evidence available to prove guilt, a difficulty occurs. By impeaching a witness with the earlier statement under oath, the state is at the same time not only producing substantive evidence of the defendant’s guilt but simultaneously attacking the witness’s credibility. If a witness is untrustworthy at trial, why should jurors be allowed to find the person was worthy of belief on some prior occasion? State v. Moore\textsuperscript{483} definitively answered this question for Florida. Moore was originally indicted for first degree murder based upon the sworn grand jury testimony of two witnesses who implicated him in a robbery-murder. After the grand jury indicted Moore, both witnesses recanted their grand jury testimony in sworn depositions, claiming they lied to the grand jury because of police coercion. Factually both these witnesses provide classic examples of "turncoat witnesses." One was a good friend of Moore, and the second was his niece. After the recantation, Moore moved to dismiss the indictment. When the state admitted it had no other substantive evidence to prove a prima facia case, the trial court granted the motion.\textsuperscript{484}

However, the state appealed and the Fourth District Court of Appeal reversed,\textsuperscript{485} finding that since the witnesses’ prior grand jury testimony was admissible for substantive purposes under section 90.801(2)(a), the state had sufficient substantive evidence available.\textsuperscript{486} The Florida Supreme Court initially agreed that the witnesses’ recanted grand jury testimony could be introduced as substantive evidence but remanded without deciding whether this testimony alone was enough to sustain a criminal conviction.\textsuperscript{487} At Moore’s trial, the state relied solely on the witnesses’ recanted grand jury testimony. Both witnesses testified for Moore and claimed that they lied to the grand jury. However, the jury returned a second degree murder verdict. On appeal the Fourth District held “that in the absence of some competent corroborating evidence the admittedly perjured testimony of the witnesses did not constitute sufficient competent evidence” to support Moore’s

\textsuperscript{477} Fla. Stat. § 90.801(2)(1985).
\textsuperscript{478} Id.
\textsuperscript{479} Id.
\textsuperscript{480} For cases discussing § 90.801(2)(b) and (c) see supra discussion at notes 454 & 455.
\textsuperscript{481} Fla. Stat. § 90.801(2)(a)(1985).
\textsuperscript{482} Delgado-Santos v. State, 497 So. 2d 1199 (Fla. 1986); State v. Moore, 485 So. 2d 1279 (Fla. 1986); Kirkland v. State, 495 So. 2d 831 (Fla. 1st Dist. Ct. App. 1986), aff’d on reh’g, 497 So. 2d 741 (Fla. 1st Dist. Ct. App. 1986).
\textsuperscript{483} 485 So. 2d at 1279.
\textsuperscript{484} Id. at 1280.
\textsuperscript{486} Id. at 687-88.
\textsuperscript{487} Moore v. State, 452 So. 2d 559 (Fla. 1984).
2. Statutorily Defined Non-hearsay

Section 90.801(2) specifies three distinct situations where out-of-court statements falling within the classical hearsay definition are statutorily declared to be non-hearsay. All three types of statements have two common elements. Under section 90.801(2) such statements will be non-hearsay only "if the declarant testifies at the trial or hearing", and if the declarant "is subject to cross-examination concerning the statement." When these two elements exist then subsections (a), (b), and (c) establish three situations where the out-of-court statements, although being offered for their truth, are statutorily made non-hearsay.

a. Prior Inconsistent Statements Under Oath

The first non-hearsay situation exists when a witness testifies at trial and is subject to cross-examination concerning a previous statement which is "[i]nconsistent 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 ...." During the survey period, Florida courts decided several important cases dealing with two aspects of the use of prior inconsistent statements during oath.

b. Sufficiency for Conviction

The need at times to use the testimony of a defendant’s family members, close friends or former accomplices may create problems for the state when these witnesses become "turncoats" or "chameleon-like" witnesses. A turncoat witness is one whose out-of-court statement is adverse to the defendant; but who when called at trial as a prosecution witness, feigns memory loss or tells an inconsistent story now favorable to the defense. When this occurs, the state usually attempts to impeach

the witness with his earlier statement. When there is other evidence to establish the defendant’s guilt besides the prior inconsistent statement given under oath, most courts agree the evidence should be admitted substantively for corroborative purposes. However, if the earlier inconsistent statements are the only evidence available to prove guilt, a difficult question occurs. By impeaching a witness with the earlier statement under oath, the state is at the same time not only producing substantive evidence of the defendant’s guilt but simultaneously attacking the witness’s credibility. If a witness is untrustworthy at trial, why should jurors be allowed to find the person was worthy of belief on some prior occasion? State v. Moore definitively answered this question for Florida. Moore was originally indicted for first degree murder based upon the sworn grand jury testimony of two witnesses who implicated him in a robbery-murder. After the grand jury indicted Moore, both witnesses recanted their grand jury testimony in sworn depositions, claiming they lied to the grand jury because of police coercion. Factually both these witnesses provide classic examples of "turncoat witnesses." One was a good friend of Moore, and the second was his niece. After the recantation, Moore moved to dismiss the indictment. When the state admitted it had no other substantive evidence to prove a prima facia case, the trial court granted the motion.

However, the state appealed and the Fourth District Court of Appeal reversed, finding that since the witnesses’ prior grand jury testimony was admissible for substantive purposes under section 90.801(2)(a), the state had sufficient substantive evidence available. The Florida Supreme Court initially agreed that the witnesses’ recanted grand jury testimony could be introduced as substantive evidence but remanded without deciding whether this testimony alone was enough to sustain a criminal conviction. At Moore’s trial, the state relied solely on the witnesses’ recanted grand jury testimony. Both witnesses testified for Moore and claimed that they lied to the grand jury. However, the jury returned a second degree murder verdict. On appeal the Fourth District held “that in the absence of some competent corroborating evidence the admittedly perjured testimony of the witnesses did not constitute sufficient competent evidence" to support Moore's
The Florida Supreme Court noted its jurisdiction to answer what it considered a certified question of great public importance. The supreme court felt the proper question to be addressed was whether "a prior inconsistent statement [is] sufficient evidence to sustain a conviction when the prior inconsistent statement is the only substantive evidence of guilt?" In a short but important opinion, the court held that while prior inconsistent statements under section 90.801(2)(a) are admissible for corroborative purposes and to fill gaps in the government's reconstruction of criminal events, that "in a criminal prosecution, a prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt." The rationale for this was that "the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements." The court's conclusion in Moore is probably the best solution to a difficult problem. Admittedly Moore may lead to the dismissal of charges against persons who are factually guilty. However, since Moore is limited to situations where prior inconsistent statements are the only substantive evidence of guilt, it will probably not have a widespread effect upon the prosecution's ability to bring criminal charges. For example, in Moore itself, the two turncoat witnesses testified that the robbery-killing was witnessed by an additional adult woman and two runaway juvenile prostitutes. The Florida Supreme Court's opinion does not explain why the state did not call any of these three additional witnesses at trial. If one of these three alleged witnesses had testified and implicated the defendant, then Moore's result would have been different. The prior inconsistent statements would have been admissible for corroboration and would not have constituted the sole evidence sufficient to sustain a conviction.

C. Sworn Statements to Police Officers as an "Other Proceeding" Under Section 90.801(2)(a)

The second major area of caselaw discussing prior inconsistent statements involved the construction of the "other proceeding" language found in section 90.801(2)(a). Before the survey period, there was conflict between the district courts of appeal involving this. The Fifth District preferred to adjudicate such questions on a case-by-case basis, while the Third and Fourth Districts opted for a "bright line" test excluding any statements given under police interrogation from the definition of "other proceeding" under section 90.801(2)(a). In Delgado-Santos v. State, the Florida Supreme Court attempted to finally answer "whether [section 90.801(2)(a)] of our Evidence Code permits admission, as substantive evidence at trial, of a trial witness's prior inconsistent statement made during police interrogation." The court opted for the "bright line" test. However, since the supreme court's decision is so brief, reference to the Third District's opinion is necessary to understand this case. Santos and a co-defendant were accused of the killing of a gas station owner during the course of a robbery. Two weeks after the killing, the sixteen year old co-defendant, while undergoing almost six hours of police interrogation, made a statement under oath to police officers implicating both himself and Santos in the killing. However, the co-defendant blamed Santos for the actual killing and claimed Santos planned the robbery. Both Santos and his co-defendant were separately indicted for first degree murder. While their cases were pending, the co-defendant pleaded guilty to armed robbery and second degree murder. Then before Santos's trial, the co-defendant indicated that he would not testify against Santos. To remedy this problem, the state was permitted to call the co-defendant.

488. Moore, 473 So. 2d at 688.
489. Moore, 485 So. 2d at 1281.
490. Id.
491. Id.
492. Id.
493. Most commentators facing this issue agree with Moore's result. See e.g., Blakely, Liars, Turncoats, and Hearsey, 9 Litigation 38 (1983) (The author argues that when prior inconsistent statements of turncoat witnesses provide the only evidence on a critical issue, they should be disallowd); Goldman, Guilt by Intuition: The Inefficiency of Prior Inconsistent Statements to Convict, 65 N. C. L. Rev. 1 (1986).
494. See, e.g., Kirkland v. State, 495 So. 2d 831 (Fla. 1st Dist. Ct. App. 1986) (It was not error to use victim's prior inconsistent under oath to convict defendant since the statement "was not the sole evidence of the appellant's guilt." Id. at 834.)
496. 497. Id. 498. Id.
The Florida Supreme Court noted its jurisdiction to answer what it considered a certified question of great public importance. The supreme court felt the proper question to be addressed was whether "a prior inconsistent statement [is] sufficient evidence to sustain a conviction when the prior inconsistent statement is the only substantive evidence of guilt?" In a short but important opinion, the court held that while prior inconsistent statements under section 90.801(2)(a) are admissible for corroborative purposes and to fill gaps in the government's reconstruction of criminal events, "in a criminal prosecution, a prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt." The rationale for this was that "the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements." The court's conclusion in Moore is probably the best solution to a difficult problem. Admittedly Moore may lead to the dismissal of charges against persons who are factually guilty. However, since Moore is limited to situations where prior inconsistent statements are the only substantive evidence of guilt, it will probably not have a widespread effect upon the prosecution's ability to bring criminal charges. For example, in Moore itself, the two turncoat witnesses testified that the robbery-killing was witnessed by an additional adult woman and two runaway juvenile prostitutes. The Florida Supreme Court's opinion does not explain why the state did not call any of these three additional witnesses at trial. If one of these three alleged witnesses had testified and implicated the defendant, then Moore's result would have been different. The prior inconsistent statements would have been admissible for corroboration and would not have constituted the sole evidence sufficient to sustain a conviction.

c. Sworn Statements to Police Officers as an "Other Proceeding" Under Section 90.801(2)(a)

The second major area of caselaw discussing prior inconsistent statements involved the construction of the "other proceeding" language found in section 90.801(2)(a). Before the survey period, there was conflict between the district courts of appeal involving this. The Fifth District preferred to adjudicate such questions on a case-by-case basis, while the Third and Fourth Districts opted for a "bright line" test excluding any statements given under police interrogation from the definition of "other proceeding" under section 90.801(2)(a).

In Delgado-Santos v. State, the Florida Supreme Court attempted to finally answer "whether [section 90.801(2)(a)] of our Evidence Code permits admission, as substantive evidence at trial, of a trial witness's prior inconsistent statement made during police interrogation." The court opted for the "bright line" test. However, since the supreme court's decision is so brief, reference to the Third District's opinion is necessary to understand this case. Santos and a co-defendant were accused of the killing of a gas station owner during the course of a robbery. Two weeks after the killing, the sixteen year old co-defendant, after undergoing almost six hours of police interrogation, made a statement under oath to police officers implicating both himself and Santos in the killing. However, the co-defendant blamed Santos for the actual killing and claimed Santos planned the robbery. Both Santos and his co-defendant were separately indicted for first degree murder. While their cases were pending, the co-defendant pleaded guilty to armed robbery and second degree murder. Then before Santos's trial, the co-defendant indicated that he would not testify against Santos. To remedy this problem, the state was permitted to call the co-defendant...

488. Moore, 473 So. 2d at 688.
489. Id., 485 So. 2d at 1281.
490. Id.
491. Id.
492. Id.
493. Most commentators facing this issue agree with Moore's result. See e.g., Blaisley, Liars, Turncoats, and Hearsay, 9 Litigation 38 (1983) (The author argues that when prior inconsistent statements of turncoat witnesses provide the only evidence on a critical issue, they should be disallowed.); Goldman, Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict, 65 N.C.L. Rev. 1 (1986). However, not all states agree with Moore's result. See e.g., State v. Garnes, 229 Kan. 368, 624 P.2d 448 (1981).
494. See, e.g., Kirkland v. State, 495 So. 2d 831 (Fla. 1st Dist. Ct. App. 1986) (It was not error to use victim's prior inconsistent under oath to convict defendant since the statement "was not the sole evidence of the appellant's guilt." Id. at 834.).
496. 497 So. 2d 1199 (Fla. 1986).
497. Id.
498. Id.
as a court witness and to impeach him with the prior inconsistent statement given under oath to the police. However, when the state also offered the statement as direct evidence of Santos's guilt, the defense unsuccessfully objected to its receipt. After Santos's conviction, he appealed to the Third District which found in his favor.***

After noting the similarity between Federal Rule of Evidence 801(d)(2)(A) and section 90.801(2)(a), the Third District conducted an intensive examination of the federal rules' legislative history to determine whether or not the words "other proceeding" should include statements made under oath to police officers during interrogation.V

The court noted that the legislative history clearly indicated that the term "other proceeding" was meant to cover grand jury statements. However, the district court concluded that "the term should not be applied to any situation which is not at least close to that analogue." The Third District felt that not only the federal rules' legislative history but also the general definition of "proceeding" required this conclusion.V

As the court stated, "[e]ven taking alone, the word 'proceeding' itself implies—employing various permutations of the expression—a degree of formality, convention, structure, regularity and replicability of the process in question." Grand jury testimony and other quasi formalized proceedings contain these safeguards; however, investigatory interrogation does not. Thus, the Third District believed the term "other proceeding" could not have been legislatively intended to include any form of police interrogation.V

Despite this attempt to establish a "bright line" test excluding police interrogation from "other proceeding" under section 90.801(2)(a), the First District Court of Appeals in Kirkland v. State refused to extend the Delgado-Santos holding beyond the police interrogation environment itself. Kirkland was charged with beating his girlfriend after breaking into her apartment. Shortly after the alleged beating, the victim's mother called two police officers to the scene. These police officers found the victim had been beaten about the face and was in a semi-conscious state requiring hospitalization. Although the victim indicated the defendant had beaten her and said she wanted to sign a complaint against him, the police officers felt her condition recommended against her doing so at that time. The day after the beating, two police officers visited the victim at the hospital. One of them, who had also been called to her apartment and had discussed the alleged beating with her at that time, brought with him a typed statement on a complaint form ready for her signature. After explaining the purpose of the sworn complaint, this officer placed the victim under oath and had her sign it.

At trial, after the victim denied remembering the facts in the complaint, the state offered the complaint itself as a prior inconsistent statement under oath pursuant to section 90.801(2)(a). In its initial decision, the First District found that "the environment that spawned [the witness's] statement in Delgado-Santos was far different from that which existed in the instant case" and considered the Third District's bright line test too restrictive.*** The First District also disagreed with Delgado-Santos's legislative history analysis, finding instead that the language "other proceeding" was not expressly restricted by such modifiers as "official", "formal".***

After the First District's initial opinion in Kirkland, the Florida Supreme Court decided Delgado-Santos. On rehearing in Kirkland the First District still declined to use a bright line test.*** Instead, the court refused to believe "that the Supreme Court intended that its holding disqualified the kind of statement given in the instant case, i.e. a sworn statement given by an assault victim in her hospital room to a police officer/note public for the purpose of securing a warrant and instituting prosecution..." Kirkland thus casts doubts whether the Florida Supreme Court's alleged "bright line" test for the definition of "other proceeding" under section 90.801(2)(a) really settles this issue. Hopefully the Florida Supreme Court will grant review in Kirkland and decide this matter once and for all.

500. Id. at 73.
501. Id.
502. Id.
503. Id.
504. Id.
505. Id.
506. Id. at 78.
507. 495 So. 2d 831 (Fla. 1st Dist. Ct. App. 1986).
508. Id. at 833.
509. Id.
510. Id.
511. Kirkland, 497 So. 2d at 742.
512. Id.

https://nsuworks.nova.edu/nlr/vol11/iss4/6

94
as a court witness and to impeach him with the prior inconsistent statement given under oath to the police. However, when the state also offered the statement as direct evidence of Santos's guilt, the defense unsuccessfully objected to its receipt. After Santos's conviction, he appealed to the Third District which found in his favor.***

After noting the similarity between Federal Rule of Evidence 801(d)(2)(A) and section 90.801(2)(a), the Third District conducted an intensive examination of the federal rules' legislative history to determine whether or not the words "other proceeding" should include statements made under oath to police officers during interrogation.*** The court noted that the legislative history clearly indicated that the term "other proceeding" was meant to cover grand jury statements.*** However, the district court concluded that "the term should not be applied to any situation which is not at least close to that analogue."***

The Third District felt that not only the federal rules legislative history but also the general definition of "proceeding" required this conclusion.*** As the court stated, "[e]ven taking alone, the word 'proceeding' itself implies—employing various permutations of the expression—degree of formality, convention, structure, regularity and replicability of the process in question."*** Grand jury testimony and other quasi formalized proceedings contain these safeguards; however, investigative interrogations do not. Thus, the Third District believed the term "other proceeding" could not have been legislatively intended to include any form of police interrogation.*** Despite this attempt to establish a "bright line" test excluding police interrogation from "other proceeding" under section 90.801(2)(a), the Florida District Court of Appeal in Kirkland v. State*** reversed the Delgado-Santos holding beyond the police interrogation environment itself. Kirkland was charged with beating his girlfriend after breaking into her apartment. Shortly after the alleged beating, the victim's mother called two police officers to the scene. These police officers

1987] Debatable Evidence

Evidence 1389

found the victim had been beaten about the face and was in a semi-conscious state requiring hospitalization. Although the victim indicated the defendant had beaten her and said she wanted to sign a complaint against him, the police officers felt her condition recommended against her doing so at that time. The day after the beating, two police officers visited the victim at the hospital. One of them, who had also been called to her apartment and had discussed the alleged beating with her at that time, brought with him a typed statement on a complaint form ready for her signature. After explaining the purpose of the sworn complaint, this officer placed the victim under oath and had her sign it.

At trial, the victim denied remembering the facts in the complaint, the state offered the complaint itself as a prior inconsistent statement under oath pursuant to section 90.801(2)(a). In its initial decision, the First District found that "the environment that spawned [the witness's] statement in Delgado-Santos was far different from that which existed in the instant case"*** and considered the Third District's "bright line test too restrictive."*** The First District also disagreed with Delgado-Santos's legislative history analysis, finding instead that the language " 'other proceeding' [was] not expressly restricted by such modifiers as 'official', 'formal'."***

After the First District's initial opinion in Kirkland, the Florida Supreme Court decided Delgado-Santos. On rehearing in Kirkland the First District still declined to use a bright line test.*** Instead, the court refused to believe "that the Supreme Court intended that its holding disqualified the kind of statement given in the instant case, i.e. a sworn statement given by an assault victim in her hospital room to a police officer/notary public for the purpose of securing a warrant and instigating prosecution . . . ."*** Kirkland thus casts doubts whether the Florida Supreme Court's alleged "bright line" test for the definition of "other proceeding" under section 90.801(2)(a) really settles this issue. Hopefully the Florida Supreme Court will grant review in Kirkland and decide this matter once and for all.

499. Delgado-Santos, 471 So. 2d at 75.
501. Delgado-Santos, 471 So. 2d at 76-77.
502. Id. at 77.
503. Id.
504. Id.
505. Id.
506. Id. at 78.
507. 495 So. 2d 831 (Fla. 1st Dist. Ct. App. 1986) aff'd on reh'g, 497 So. 2d 30 (Fla. 1st Dist. Ct. App. 1986).
508. Id. at 833.
509. Id.
510. Id.
511. Kirkland, 497 So. 2d at 742.
512. Id.

Published by NSUWorks, 1987
B. Hearsay Exceptions

1. State of Mind

Section 90.803(3) of the Florida Statutes is commonly known as the state of mind exception to the hearsay rule.815 State of mind can be an important aspect in many civil and criminal cases. When a statement clearly reflects that the declarant's state of mind, the only remaining issue usually is whether that person's state of mind is relevant to the instant lawsuit. Changes in the substantive law therefore directly affect whether out of court statements may be admissible under the state of mind exception. Morris v. State816 recently provided an excellent example of the relationship between the state of mind exception and the substantive law governing a case. Former Dolphin football player Eugene "Mercury" Morris was convicted of various narcotics charges involving cocaine. Evidence at trial showed that in the summer of 1982, Morris hired a friend, Fred Donaldson to do gardening at Morris's home. At that time, Donaldson was on probation, a part of which necessitated his making restitution. When Donaldson unsuccessfully attempted to collect money Morris owed him for gardening, Donaldson began believing that Morris was intentionally failing to pay him to have Donaldson sent back to jail. Donaldson then called the police on August 6, 1982 and reported Morris's alleged involvement in cocaine dealing. Donaldson subsequently arranged for Morris to meet with himself and an undercover agent posing as Donaldson's drug dealing friend and also made several recorded phone calls to Morris's home. On August 18th, police arrested Morris and several others at Morris's home for dealing cocaine. Morris subsequently plead not guilty and raised an entrapment defense.

At trial, neither the state nor the defense called Donaldson as a witness. The defense unsuccessfully attempted to introduce the testimony of Eugene Gotbaum who would allegedly stated that he had known Donaldson for several years and that Donaldson had allegedly told Gotbaum several months before Morris's arrest that he intended setting up Morris in a drug deal. The trial court excluded this testimony finding it was inadmissible hearsay.818

After Morris's conviction on several drug charges, he appealed...
B. Hearsey Exceptions

1. State of Mind

Section 90.03(3) of the Florida Statutes is commonly known as the state of mind exception to the hearsay rule.** State of mind can be an important aspect in many civil and criminal cases. When a statement clearly reflects that the declarant's state of mind, the only remaining issue usually is whether that person's state of mind is relevant to the instant lawsuit. Changes in the substantive law therefore directly affect whether out of court statements may be admissible under the state of mind exception.**

Dobson: Evidence

*Dobson v. State** recently provided an excellent example of the relationship between the state of mind exception and the substantive law governing a case. Former Dolphins football player Eugene "Mercury" Dobson was convicted of various narcotics charges involving cocaine. Evidence at trial showed that in the summer of 1982, Dobson hired a friend, Fred Donaldson, to do gardening at Dobson's home. At that time, Donaldson was on probation, a part of which necessitated his making restitution. When Donaldson unsuccessfully attempted to collect money Morris owed him for gardening, Donaldson began believing that Morris was intentionally failing to pay him to have Donaldson sent back to jail. Donaldson then called the police on August 6, 1982 and reported Morris’s alleged involvement in cocaine dealing. Donaldson subsequently arranged for Morris to meet with himself and an undercover agent posing as Donaldson’s drug dealing friend and also made several recorded phone calls to Morris’s home. On August 18th, police arrested Morris and several others at Morris’s home for dealing cocaine. Morris subsequently pleaded not guilty and raised an entrapment defense.

At trial, neither the state nor the defense called Dobson as a witness. The defense unsuccessfully attempted to introduce the testimony of Eugene Dobson who would have allegedly stated that he had known Donaldson for several years and that Donaldson had allegedly told Dobson several months before Morris’s arrest that he intended setting up Morris in a drug deal. The trial court excluded this testimony finding it was inadmissible hearsay.*** After Morris’s conviction on several drug charges, he appealed claiming that Donaldson’s statement was relevant to his entrapment defense and that he should have been permitted to introduce it through Dobson’s testimony even though Donaldson was not a witness. The Third District Court of Appeal rejected this claim and affirmed Morris’s conviction.** The Third District recognized that state of mind exception allows the introduction of out of court statements for their truth in two situations. One is where the statement shows "the declarant’s state of future intent to perform an act, if the occurrence or performance of that act is at issue."** The second is when the statement would "show the declarant’s state of mind at the time the statement is made when it is an issue in the case."** However the third district found Donaldson’s state of mind was not an issue for two reasons. The first was that even though Morris claimed entrapment, Florida’s substantive law of entrapment then followed the subjective approach focusing upon the defendant’s predisposition as opposed to the government’s conduct.** Secondly, no evidence disputed that Donaldson had contacted the police and arranged for Morris to make the cocaine sale to the undercover agent.** Thus, Donaldson’s conduct following the alleged making of the statement did not require any explanation. The Florida Supreme Court in an important decision illustrating the relationship between the hearsay rule and relevancy reversed Morris’s conviction for improper exclusion of Dobson’s preferred testimony.***

The supreme court recognized that the correct resolution of the issue concerning Dobson’s testimony required examining the Florida law of entrapment.** After the Third District’s decision in *Morris v. State*, the Florida Supreme Court in *Cruz v. State* had changed the substantive law of entrapment from a focus primarily on the defendant’s predisposition to a two-part inquiry. The new test required trial courts to determine whether the defendant has met the initial burden of establishing that the police have engaged in impermissible conduct before submitting an entrapment issue to the jury.** If the initial burden is

---

514. 456 So. 2d 471 (Fla. 3d Dist. Ct. App. 1984), rev’d, 487 So. 2d 29 (Fla. 1986).
515. Id. at 474.
met then the state must disprove entrapment, which requires proving the defendant's predisposition, beyond a reasonable doubt. In evaluating whether this is done, Florida's Standard Jury Instruction (Criminal) 3.04(c) instructs the jury to consider whether the defendant was "persuaded, induced or lured into committing the offense...[by a] law enforcement officer, or someone acting for the officer." In Morris, there was no dispute Donaldson, the informant, was working for the police when he made the recorded phone calls to Morris and arranged the aborted drug sale. The trial testimony further showed that before Donaldson's first recorded phone call to Morris, he had urged Morris to become involved with the drug deal in a way in which Morris could pay Donaldson back for the money owed from the gardening. Since this constituted sufficient evidence for a prima facie case of entrapment, the Florida Supreme Court found that "Gotham's testimony regarding Donaldson's statement of intent to set up Morris should have been before the jury for consideration as to whether, as an agent of the police, Donaldson impermissibly induced Morris, prior to the telephone call on August 6, to commit the crimes for which he was convicted." Under section 90.803(3)(a) of the Florida Statutes Donaldson's statement expressing his intent to set up Morris up in a drug deal was admissible to show that he subsequently engaged in conduct which did not. Morris is extremely important, not only for its discussion of the standard of mind accuses exception, but also for how it emphasizes the relationship between the underlying substantive law in a case and the admissibility of evidence. Both the Third District and the Florida Supreme Court actually made correct decisions in Morris. At the time of its decision, the Third District Court of Appeal correctly applied the language of section 90.803(3) in light of the existing subjective entrapment defense. However since the substantive law of entrapment changed between the third district's decision and its own consideration of the case, the Florida Supreme Court's decision was also correct.

525. See Morris, 487 So. 2d at 293-294 (quoting Florida Standard Jury Instruction 3.04(c)).
526. Id. at 294.
527. For the only other recent case dealing with the state of mind exception see Wells v. State, 492 So. 2d 712 (Fla. 1st Dist. Ct. App. 1986) (Statements of an intended homicide victim could not be admitted to show defendant's intention to kill or the intended victim in a case in which the defendant's state of mind, not the state of mind of someone else). For a recent, brief article offering a good discussion of this area see McElroy, State of Mind, 13 LITIGATION 27 (1986).

2. Past Recollection Recorded

The Florida Evidence Code's hearsay exceptions make several concessions to the fallibility of human memory. One of them is the past recollection recorded exception. Section 90.803(5) of the Florida Statute defines this exception as "[a] memorandum or record concerning a matter which a witness once had knowledge of, but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made by the witness when the matter was fresh in his memory and to reflect that knowledge correctly." According to Hendrie v. State, was the only recent case discussing this exception. During Hendrie's burglary trial, the state called a witness who had been interviewed on the night of the defendant's arrest. This witness previously told the police he had seen several men lurking around homes on the street, prompting him to call the police. At trial, the witness was unable to identify the defendant as one of the two men but claimed he could have done so on the night in question. The state then called the officer who interviewed the witness and asked him to relay the information that he had received from the witness and included in his police report. The defense objected, but the trial court allowed the police report in as a "more accurate statement of [the witness's] observations." On appeal, the First District Court of Appeal found that admission of the police officer's testimony about his report's information was error. The state argued that section 90.803(5) permitted the report's introduction. However, the First District rejected this argument since "[h]e report from which the officer testified as to what [the witness] told him was not made by the witness", but was a synopsis made by the office. Given the brief synopsis of the testimony reported in Hendrie, the First District's ruling on the report's admissibility was probably correct but perhaps for the wrong reasons. The witness certainly was not able to "testify fully and accurately." Likewise, the police record concerned "a matter about which [he] once had knowledge." Moreover, the report was made at a time when the matter was fresh in the witness's memory. What was questionable about the
met then the state must disprove entrapment, which requires proving the defendant's predisposition, beyond a reasonable doubt. In evalu- ing whether this is done, Florida's Standard Jury Instruction (Criminal) 3.04(c) instructs the jury to consider whether a defendant was "persuaded, induced or lured into committing the offense . . . by a law enforcement officer, or someone acting for the officer." 525

In Morris, there was no dispute Donaldson, the informant, was working for the police when he made the recorded phone calls to Morris and arranged the aborted drug sale. The trial testimony further showed that before Donaldson's first recorded phone call to Morris, he had urged Morris to become involved with the drug deal as a way in which Morris could pay Donaldson back for the money owed from the gardening. Since this constituted sufficient evidence for a prima facie case of entrapment, the Florida Supreme Court found that "Gotbaum's testimony regarding Donaldson's statement of intent to set up Morris should have him before the jury for consideration as to whether, as an agent of the police, Donaldson impermissibly induced Morris, prior to the telephone call on August 36, to commit the crimes for which he was convicted." 526

Under section 90.903(3)(a) of the Florida Statutes Donaldson's statement expressing his intent to set Morris up in a drug deal was admissi- ble to show that he subsequently engaged in conduct which did not. Morris is extremely important, not only for its discussion of the state of mind hear say exception, but also for how it emphasizes the relationship between the underlying substantive law in a case and the admissibility of evidence. Both the Third District and the Florida Supreme Court actually made correct decisions in Morris. At the time of its decision, the Third District Court of Appeal correctly applied the language of section 90.903(3) in light of the existing subjective entrapment defense. However since the substantive law of entrapment changed between the third district's decision and its own consideration of the case, the Florida Supreme Court's decision was also correct. 527

525. See Morris, 487 So. 2d at 293-294 (quoting Florida Standard Jury Instruction 3.04(c)).
526. Id at 294.
527. For the only other recent case dealing with the state of mind exception, see Wells v. State, 492 So. 2d 712 (Fla. 1st Dist. Ct. App. 1986) (Statement of the intended victim could not be admitted to show defendant's intention if the intended victim's statement was not admissible to show the declarant's state of mind, not the state of mind of someone else.). For a recent, brief article offering a good discussion of this area, see McAllister, State of Mind, 13 Litigation 57 (1986).

2. Past Recollection Recorded

The Florida Evidence Code's hearsay exceptions make several conces- sions to the fallibility of human memory. One of them is the past recollection recorded exception. Section 90.903(5) of the Florida Statute defines this exception as "[a] memorandum or record concerning a matter about which a witness once had knowledge, but now has insuffi- cient recollection to enable him to testify fully and accurately, shown to have been made by the witness while the matter was fresh in his mem- ory and to reflect that knowledge correctly." In Hendrich v. State 530 Hendrich was the only recent case discussing this exception. During Hendrich's burglary trial, the state called a witness who had been interviewed on the night of the defendant's arrest. This witness previously told the police he had seen several men lurking around homes on the street, prompting him to call the police. At trial, the witness was unable to identify the defendant as one of the two men but claimed he could have done so on the night in question. The state then called the officer who interviewed the witness and asked him to relay the information that he had received from the witness and included in his police report. The defense objected, but the trial court allowed the police report in as a "more accurate statement of [the witness's] observations." 531 On appeal, the First District Court of Appeal found that admission of the officer's testimony about his report's information was error. 532 The state argued that section 90.903(5) permitted the report's intro- duction. However, the First District rejected this argument since "[t]he report from which the officer testified as to what [the witness] told him was not made by the witness," however, was a synopsis made by the officer. 533 Given the brief synopsis of the testimony reported in Hendrich, the First District's ruling on the report's admissibility was probably correct but perhaps for the wrong reasons. The witness cer- tainly was not able to "testify fully and accurately." Likewise, the police record concerned "a matter about which [he] once had knowl- edge." Moreover, the report was made at a time when the matter was fresh in the witness's memory. What was questionable about the

530. Id at 709.
531. Id.
532. Id.
report was whether it reflected the witness’s knowledge accurately, especially since it was a synopsis. The first district apparently felt that only written statements made by the witness himself or herself should be admissible under the past recorded recollection exception. However, there is no reason why the police officer’s report could not have qualified under section 90.803(5), if after the report had been prepared, the witness had an opportunity to review it and acknowledge its accuracy. This is what was missing in Hendrieth—not that the report was not physically “made by the witness.” Many reports are made by professionals who do not actually write or transcribe them, but who later review them for accuracy. In mandating that the actual recording must be done by the witness whose report is being offered for admission, Hendrieth judicially creates an admission requirement which is not within section 90.803(5)’s language or spirit.

3. Statements Against Penal Interest

The United States Supreme Court has not completely clarified the relationship between the Sixth Amendment’s Confrontation Clause and the hearsay rule. The Court has noted that “[i]t is evident that the Constitution was intended to exclude some hearsay.” The main way in which it does so is by requiring a face-to-face confrontation at trial where witnesses against the defendant can be cross-examined in the presence of the trier of fact. Absent such a confrontation, hearsay statements usually can be admitted only when they meet two requirements. The statement’s declarant must be unavailable and the statement must have adequate indicia of reliability for the fact finder to rely on it.

The Florida Supreme Court’s concern over this relationship was the main rationale behind its recent decision in Nelson v. State reversing a criminal conviction for improper admission of statements allegedly against a declarant’s penal interest. In Nelson, a defendant was charged with the contract robbery and murder of a Clearwater resident. Investigation led the police to suspect two Indiana residents, Nelson and Echols, as being involved in the murder. The Indiana state police enlisted the aid of Echols former son-in-law to help gather evidence against the two. The son-in-law, Adams, secretly recorded several conversations he had with Echols in which Echols specified Nelson as the triggerman. Echols did not testify at Nelson’s trial based upon his Fifth Amendment Privilege against Self-Incrimination. However, the trial court admitted his statements to Adams implicating Nelson as statements against interest pursuant to section 90.804(2)(c) of the Florida Statutes.

In a short but important decision for both prosecutors and defense counsel, the Florida Supreme Court reversed Nelson’s convictions and ordered a new trial. The supreme court noted section 90.804(2)(c)’s last sentence declares that “[a] statement or confession which is offered against the accused in a criminal action, and which is made by a co-defendant or other person implicating himself and the accuser, is not within this exception.” Based upon this language alone, the court felt Echols’s statement should have been excluded. Additionally, the supreme court found that since Echols refused to testify and there was no way defense counsel could cross-examine the tape recording, admission of the tape recording fell within the Bruton rule establishing that “[t]he admission of a confession of a co-defendant who does not take the stand and deprives a defendant of his rights of his sixth amendment confrontation.

Readers should note that the language of section 90.804(2)(c) may actually provide more protection than the Confrontation Clause requires. Under past United States Supreme Court decisions establishing the dual requirements for admission of hearsay, the first requirement was certainly met in Nelson since the declarant was unavailable. The question then became whether or not Echols’s statement to Adams had sufficient indicia reliability to merit its admission despite Nelson’s lack of opportunity to cross-examine Echols. The Court has previously indicated that “[i]n re trial under the hearsay exception. The Court has previously indicated that “[i]n re trial under the hearsay exception.

535. Id.
536. In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const. amend. VI.
538. Id. at 66.
539. 490 So. 2d 32 (Fla. 1986).
540. Id. at 33.
541. Id. at 34-35.
542. Id. at 34. See Fla. Stat. § 90.804(2)(c).
543. Id.
545. Nelson, 490 So. 2d at 34.
547. Id. at 66 (finding that former testimony represents such a firmly noted...
report was whether it reflected the witness’s knowledge accurately, especially since it was a synopsis. The first district apparently felt that only written statements made by the witness himself or herself should be admissible under the past recorded recollection exception. However, there is no reason why the police officer’s report could not have qualified under section 90.803(5), if after the report had been prepared, the witness had an opportunity to review it and acknowledge its accuracy. This is what was missing in Hendrieth—not that the report was not physically “made by the witness.” Many reports are made by professionals who do not actually write or transcribe them, but who later review them for accuracy. In mandating that the actual recording must be done by the witness whose report is being offered for admission, Hendrieth judicially creates an admission requirement which is not within section 90.803(5)’s language or spirit.

3. Statements Against Penal Interest

The United States Supreme Court has not completely clarified the relationship between the Sixth Amendment’s Confrontation Clause and the hearsay rule. The Court has noted that “[t]he historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay.” The main way in which it does so is by requiring a face-to-face confrontation at trial where witnesses against the defendant can be cross-examined in the presence of the trier of fact. Absent such a confrontation, hearsay statements usually can be admitted only when they meet two requirements. The statement’s declarant must be unavailable and the statement must have adequate indicia of reliability for the fact finder to rely on it.

The Florida Supreme Court’s concern over this relationship was the main rationale behind its recent decision in Nelson v. State, reversing a criminal conviction for improper admission of statements allegedly against a declarant’s penal interest. In Nelson, a defendant was charged with the contract robbery and murder of a Clearwater resident. Investigation led the police to suspect two Indiana residents, Nelson and Echols, as being involved in the murder. The Indiana state police enlisted the aid of Echols former son-in-law to help gather evidence against the two. The son-in-law, Adams, secretly recorded several conversations he had with Echols in which Echols specified Nelson as the triggerman. Echols did not testify at Nelson’s trial based upon his Fifth Amendment Privilege against Self-Incrimination. However, the trial court admitted his statements to Adams implicating Nelson as statements against interest pursuant to section 90.804(2)(c) of the Florida Statutes.

In a short but important decision for both prosecutors and defense counsel, the Florida Supreme Court reversed Nelson’s convictions and ordered a new trial. The supreme court noted section 90.804(2)(c)’s last sentence declares that “[a] statement or confession which is offered against the accused in a criminal action, and which is made by a co-defendant or other person implicating himself and the accused, is not within this exception.” Based upon this language alone, the court felt Echols’s statement should have been excluded. Additionally, the supreme court found that since Echols refused to testify and there was no way defense counsel could cross-examine the tape recording, admission of the tape recording fell within the Bruton rule establishing that “[t]he admission of a confession of a co-defendant who does not take the stand and deprives a defendant of his rights of his sixth amendment confrontation.”

Readers should note that the language of section 90.804(2)(c) may actually provide more protection than the Confrontation Clause requires. Under past United States Supreme Court decisions establishing the dual requirements for admission of hearsay, the first requirement was certainly met in Nelson since the declarant was unavailable. The question then became whether or not Echols’s statement to Adams had sufficient indicia reliability to merit its admission despite Nelson’s lack of opportunity to cross-examine Echols. The Court has previously indicated that “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”

535. Id.
536. "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..." U.S. Const. amend. VI.
538. Id. at 66.
539. 490 So. 2d 32 (Fla. 1986).
540. Id. at 33.
541. Id. at 34-35.
542. Id. at 34. See Fla. Stat. § 90.804(2)(c).
543. Id.
545. Nelson, 490 So. 2d at 34.
546. See Roberts, 448 U.S. at 63-66.
547. Id. at 66 (finding that former testimony represents such a firmly noted
However, the Court last term established that not all statements that might be characterized as declarations against penal interest under the hearsay rule can be considered as having sufficient indicia of reliability to satisfy the Confrontation Clause. Indeed, the Court appears to have established the rule that any alleged declarations against penal interest made after the declarant’s arrest should be considered as confessions of a co-defendant and excluded pursuant to Bruton unless the co-defendant testifies and is available for cross-examination. However, in Nelson the alleged declaration against penal interest was made before Echois’s arrest, not afterward. The United States Supreme Court has not yet decided whether pre-arrest alleged statements against penal interest bear sufficient indicia of reliability to satisfy the Confrontation Clause when the declarant is unavailable. Assuming the Court finds such statements sufficiently reliable to meet Confrontation Clause concerns, then section 90.804(2)(c)’s present language would actually give more protection to a defendant than the Confrontation Clause requires. If so, the Florida legislature may consider amending this provision to coincide with the United States Supreme Court’s Confrontation Clause decisions.

IX. The “Best Evidence” Rule

The Best Evidence Rule originally provided that when a party sought to prove a document’s contents only the original was generally admissible. However, the Florida Evidence Code has substantially liberalized this requirement. Section 90.953 of the Florida Statutes generally makes a duplicate admissible to the same extent as an original with several minor exceptions. Additionally, if neither a duplicate

exception.

549. Indeed the Court specifically rejected “categorization of the hearsay involved in this case as a simple ‘declaration against penal interest.’ That concept defines too large a class for meaningful Confrontation Clause analysis.” Id. at 2064, n. 5.
550. For the only other recent decision against arrest case see Walker v. State, 483 So. 2d 791 (Fla. 1st Dist. Ct. App. 1986) (A letter in a murder case purporting to be from the killer but not written by the defendant still could not qualify as a declaration against interest since it lacked sufficient corroboration to demonstrate its trustworthiness).
551. See J.H. v. State, 480 So. 2d 680 (Fla. 1st Dist. Ct. App. 1985) (The Best Evidence Rule was violated by failure to introduce original copy of alleged voluntary child care agreement.).
552. Fla. Stat. § 90.953 (1985). Under § 90.953 a duplicate will not suffice if:

nor an original is available, section 90.954 provides for admission of any “other evidence” to prove the content of a writing in several specific situations. Given the extent to which these provisions have liberalized the Florida pre-Code approach, documents should rarely be excluded due to failure to satisfy the Best Evidence Rule. Furthermore, the Florida Evidence Code has so simplified the Best Evidence Rule, by eliminating categories of secondary evidence, that trial courts should have no problem following it. Thus, it is somewhat surprising that several cases were reversed during this survey period on Best Evidence Rule issues.

Garcia v. Lopez involved a lawsuit concerning an alleged agreement to make a will. When the plaintiff and his wife were divorced, Garcia transferred all his interest in their house to her. This was based upon the promise that the wife, Maria, would leave the house to Garcia.

(1) The document or writing is a negotiable instrument as defined in s. 673.104, a security as defined in s. 679.102, or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment. (2) A genuine question is raised about the authenticity of the original or any other document or writing. (3) It is unfair, under the circumstances, to admit the duplicate in lieu of the original.

553. These situations exist when:

(1) All originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith. (2) An original cannot be obtained in this state by any judicial process or procedure. (3) An original was under the control of the party against whom offered at a time when he was put on notice by the pleadings or by written notice from the adverse party that the contents of such original would have been subject to proof at the hearing, and such original is not produced at the hearing. (4) The writing, recording, or photograph is not related to a controlling issue.

554. Garcia v. Lopez, 483 So. 2d 470 (Fla. 3d Dist. Ct. App. 1986); Hernandez v. Pino, 482 So. 2d 450 (Fla. 3d Dist. Ct. App. 1986). The only plausible reason for the number of Best Evidence Rule reversals is the lack of attention these sections have received from commentators even when the Florida Evidence Code was in its embryonic stages. For example, Ehhardt, A Look At Florida's Proposed Code of Evidence, 2 Fla. St. U. L. Rev. 681 (1974) does not discuss the new Code’s changes in the Best Evidence Rule, while Hicks & Matthews, Evidence, 31 U. Miami L. Rev. 951 (1977), comparing the Florida Evidence Code with pre-code Florida law and with the Federal Rules of Evidence gave the Best Evidence Rule only three and one-half pages of attention.

Since the Code’s passage, the most detailed discussion of the Best Evidence Rule is C. Emmert, FLORIDA EVIDENCE 595-620 (2d ed. 1984).

555. 483 So. 2d at 470.
However, the Court last term established that not all statements that might be characterized as declarations against penal interest under the hearsay rule can be considered as having sufficient indicia of reliability to satisfy the Confrontation Clause.\(^{548}\) Indeed, the Court appears to have established the rule that any alleged declarations against penal interest made after the declarant’s arrest should be considered as confessions of a co-defendant and excluded pursuant to Bruton unless the co-defendant testifies and is available for cross-examination.\(^{548}\) However, in Nelson the alleged declaration against penal interest was made before Echols’s arrest, not afterward. The United States Supreme Court has not yet decided whether pre-arrest alleged statements against penal interest bear sufficient indicia of reliability to satisfy the Confrontation Clause when the declarant is unavailable. Assuming the Court finds such statements sufficiently reliable to meet Confrontation Clause concerns, then section 90.804(2)(c)’s present language would actually give more protection to a defendant than the Confrontation Clause requires. If so, the Florida legislature may consider amending this provision to coincide with the United States Supreme Court’s Confrontation Clause decisions.\(^{880}\)

IX. The “Best Evidence” Rule

The Best Evidence Rule originally provided that when a party sought to prove a document’s contents only the original was generally admissible.\(^{681}\) However, the Florida Evidence Code has substantially liberalized this requirement. Section 90.953 of the Florida Statutes generally makes a duplicate admissible to the same extent as an original with several minor exceptions.\(^{682}\) Additionally, if neither a duplicate exception).

549. Indeed the Court specifically rejected “categorization of the hearsay involved in this case as a simple `declaration against penal interest.’ That concept defines too large a class for meaningful Confrontation Clause analysis.” Id. at 2064, n.5.
550. For the only other recent declaration against interest case see Walker v. State, 483 So. 2d 791 (Fla. 1st Dist. Ct. App. 1986) (A letter in a murder case purporting to be from the killer but not written by the defendant still could not qualify as a declaration against interest since it lacked sufficient corroboration to demonstrate trustworthiness.).
551. See J.H. v. State, 480 So. 2d 680 (Fla. 1st Dist. Ct. App. 1985) (The Best Evidence Rule was violated by failure to introduce original copy of alleged voluntary child care agreement.).

nor an original is available, section 90.954 provides for admission of any “other evidence” to prove the content of a writing in several specific situations.\(^{883}\) Given the extent to which these provisions have liberalized the Florida pre-Code approach, documents should rarely be excluded due to failure to satisfy the Best Evidence Rule. Furthermore, the Florida Evidence Code has so simplified the Best Evidence Rule, by eliminating categories of secondary evidence, that trial courts should have no problem following it. Thus, it is somewhat surprising that several cases were reversed during this survey period on Best Evidence Rule issues.\(^{884}\)

Garcia v. Lopez\(^{885}\) involved a lawsuit concerning an alleged agreement to make a will. When the plaintiff and his wife were divorced, Garcia transferred all his interest in their house to her. This was based upon the promise that the wife, Maria, would leave the house to Garcia

(1) The document or writing is a negotiable instrument as defined in s. 673.104, a security as defined in s. 678.102, or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment. (2) A genuine question is raised about the authenticity of the original or any other document or writing. (3) It is unfair, under the circumstances, to admit the duplicate in lieu of the original.

553. These situations exist when:

(1) All originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith. (2) An original cannot be obtained in this state by any judicial process or procedure. (3) An original was under the control of the party against whom offered a time at which he was put on notice by the pleadings or by written notice from the adverse party that the contents of such original would be subject to proof at the hearing, and such original is not produced at the hearing. (4) The writing, recording, or photograph is not related to a controlling issue.

554. Garcia v. Lopez, 483 So. 2d 470 (Fla. 3d Dist. Ct. App. 1986); Hernandez v. Pino, 482 So. 2d 450 (Fla. 3d Dist. Ct. App. 1986). The only plausible reason for the number of Best Evidence Rule reversals in the lack of attention these sections have received from commentators even when the Florida Evidence Code was in its embryonic stages. For example, Erhardt, A Look at Florida’s Proposed Code of Evidence, 2 Fla. St. U.L. Rev. 681 (1974) does not discuss the new Code’s changes in the Best Evidence Rule, while Hicks & Matthews, Evidence, 31 U. Miami L. Rev. 951 (1977), comparing the Florida Evidence Code with pre-code Florida law and with the Federal Rules of Evidence gave the Best Evidence Rule only three and one-half pages of attention.

Since the Code’s passage, the most detailed discussion of the Best Evidence Rule is C. Erhardt, Florida Evidence 595-620 (2d ed. 1984).

555. 483 So. 2d at 470.
in her will. This agreement was reduced to writing by Garcia's attorney, Taylor, who drafted and notarized the agreement for the respective parties. The agreement was also executed at Taylor's office with both Taylor and his wife witnessing it. When Garcia's wife died, she left the house to the defendant, her niece. The niece offered the will for probate and Garcia demanded that title to the house be given to him pursuant to the agreement. When Lopez refused, the instant suit to enforce the alleged agreement resulted. At trial, Garcia offered a photostatic copy of the agreement and testified that Taylor had the original. Unfortunately, the attorney had died before trial, and his wife testified she had destroyed some of his papers. She further testified that she could not locate the original of the agreement. On the photostatic copy, the signature of Garcia's wife and Taylor's signature as the attesting witness both appeared as reproductions. However, the signature of the attorney's wife as the second required attesting witness appeared in blue ink as an original signature. Taylor's wife could not remember whether the execution and witnessing of the agreement was done at the same time, although she testified that was the way it usually was done. Both Garcia and his attorney's wife testified she signed the original, and the wife testified that she witnessed both original signatures. However, the trial court held the photostatic copy inadmissible and found for the niece. The Third District Court of Appeal in a brief but important decision, reversed. The court began by noting that a duplicate is generally admissible to the same extent as the original. Section 90.951(4)(a) of the Florida Statute defines a duplicate as anything produced by a technique "that accurately reproduces the original." However, Lopez contended the signed copy was not an accurate reproduction, because the attorney's wife's signature appeared not as a copy but as an original signature. The Third District Court of Appeal was willing to assume that the copy was not a duplicate. However, that still did not end the matter. The court noted that section 90.954 provided for admission of other evidence of a writing's contents when an original is lost or destroyed and the proponent has not done so in bad faith. Examining the evidence, the court found that "Garcia made the required showing that the original was destroyed or lost without bad faith on his part, and the defendants offered no evidence to controvert Garcia's account of the loss of the original." Thus, the trial court should have admitted the photostatic copy as neither an original nor a duplicate but as "other evidence" under section 90.954. After this, "the factfinder must then decide whether to believe [the attorney's wife's] testimony that she witnessed the execution of the agreement and that she signed the original." Since the copy had been improperly excluded, the Third District Court of Appeal reversed in Garcia's favor and remanded for further proceedings.

Hernandez v. Pino, also involved the construction of section 90.954. Hernandez was a dental patient who had consulted Pino for problems involving loose teeth. The doctor advised him that none of his teeth were good. Hernandez had a congenital palate defect which required him to wear a denture. When the defendant recommended extracting all Hernandez's teeth, he allegedly promised that even after they were taken out, the denture could be used satisfactorily. After the extraction Hernandez continued having problems eating and consulted a second dentist, Dr. Schiff, who made him new dentures but told Hernandez they would continue falling out because of still existing mouth deformities. Hernandez then filed a dental malpractice suit against Dr. Pino contending that his actions fell below the standard of care required. After the lawsuit was filed, the doctor's counsel released his set of plaintiff's x-rays taken by the dentist before pulling all Hernandez's teeth. These x-rays had previously been examined by the dentist who ultimately fitted Hernandez with new dentures. Dr. Schiff had made certain notations based on the x-rays and preserved these in his treatment records. The defendant's counsel had also previously shown the x-rays to an expert selected by the defense for litigation. When Hernandez discharged his original counsel, his new attorney was unsuccessful in obtaining the x-rays from the first one. Ultimately, it was established that these x-rays were lost after Dr. Pino had released them to the first attorney.

The defense moved for summary judgment claiming that based upon the doctor's examination and the x-rays, Hernandez's teeth needed to be extracted since there was no alternative method available for treatment.
in her will. This agreement was reduced to writing by Garcia's attorney, Taylor, who drafted and notarized the agreement for the respective parties. The agreement was also executed at Taylor's office with both Taylor and his wife witnessing it. When Garcia's wife died, she left the house to the defendant, her niece. The niece offered the will for probate and Garcia demanded that title to the house be given to him pursuant to the agreement. When Lopez refused, the instant suit to enforce the alleged agreement resulted. At trial, Garcia offered a photostatic copy of the agreement and testified that Taylor had the original. Unfortunately, the attorney had died before trial, and his wife testified she had destroyed some of his papers. She further testified that she could not locate the original of the agreement. On the photostatic copy, the signature of Garcia's wife and Taylor's signature as the attesting witness both appeared as reproductions. However, the signature of the attorney's wife as the second required attesting witness appeared in blue ink as an original signature. Taylor's wife could not remember whether the execution and witnessing of the agreement was done at the same time, although she testified that was the way it usually was done. Both Garcia and his attorney's wife testified she signed the original, and the wife testified that she witnessed both original signatures. However, the trial court held the photostatic copy inadmissible and found for the niece. The Third District Court of Appeal in a brief but important decision, reversed. The court began by noting that a duplicate is generally admissible to the same extent as the original. Section 90.951(3)(a) of the Florida Statute defines a duplicate as anything produced by a technique "that accurately reproduces the original..." However, Lopez contended the signed copy was not an accurate reproduction, because the attorney's wife's signature appeared in blue ink as a copy but as an original signature. The Third District Court of Appeal was willing to assume that the copy was not a duplicate. However, that still did not end the matter. The court noted that section 90.954 provided for admission of other evidence of a writing's contents when an original is lost or destroyed and the proponent has not done so in bad faith. Examining the evidence, the court found that "Garcia made the required showing that the original was destroyed or lost without bad faith on his part, and the defendants offered no evidence to controvert Garcia's account of the loss of the original." Thus, the trial court should have admitted the photostatic copy as neither an original nor a duplicate but as "other evidence" under section 90.954. After this, "the factfinder must then decide whether to believe [the attorney's wife's] testimony that she witnessed the execution of the agreement and that she signed the original." Since the copy had been improperly excluded, the Third District Court of Appeal reversed in Garcia's favor and remanded for further proceedings.

Hernandez v. Pino also involved the construction of section 90.954. Hernandez was a dental patient who had consulted Pino for problems involving loose teeth. The doctor advised him that none of his teeth were good. Hernandez had a congenital palate defect which required him to wear a denture. When the defendant recommended extracting all Hernandez's teeth, he allegedly promised that even after the were taken out, the denture could be used satisfactorily. After the extraction Hernandez continued having problems eating and consulted a second dentist, Dr. Schiff, who made him new dentures but told Hernandez they would continue falling out because of still existing mouth deformities. Hernandez then filed a dental malpractice suit against Dr. Pino contending that his actions fell below the standard of care required. After the lawsuit was filed, the doctor's counsel released his set of plaintiff's x-rays taken by the defendant before pulling all Hernandez's teeth. These x-rays had previously examined by the dentist who ultimately fitted Hernandez with new dentures. Dr. Schiff had made certain notations based on the x-rays and preserved these in his treatment records. The defendant's counsel had also previously shown the x-rays to an expert selected by the defense for litigation. When Hernandez discharged his original counsel, his new attorney was unsuccessful in obtaining the x-rays from the first one. Ultimately, it was established that these x-rays were lost after Dr. Pino had released them to the first attorney.

The defense moved for summary judgment claiming that based upon the doctor's examination and the x-rays, Hernandez's teeth needed to be extracted since there was no alternative method available

556. Id. at 471.
557. Id. at 472.
558. Id. at 471.
560. Garcia, 483 So. 2d at 471.
561. Id.
562. Id.
563. Id.
564. Id. at 472.
565. 483 So. 2d at 430.

Published by NSUWorks, 1987
to save them. In opposition to this motion, Plaintiff filed the affidavit of another dentist stating that he examined Dr. Schiff's treatment records and believed that several of Hernandez's teeth may have been saved if treated properly and that removing all of his remaining teeth without a complete evaluation violated the requisite standard of care. In ruling on the motion, the trial court found the x-rays were crucial and since they were lost entered summary judgment for the defendant. However, the Third District Court of Appeal reversed. The third district acknowledged that "where a party in possession loses or destroys crucial record evidence a burden is imposed on that party to prove that the loss or destruction was not in bad faith." However, since Hernandez was not given an opportunity to prove the loss only constituted ordinary negligence, the court assumed that this was what happened. The Third District had previously held that when a party has lost or destroyed evidence in its possession without an opponent having had a chance to examine it, sanctions such as striking claims or answers are appropriate. However, in this case, the Third District found the facts warranted a different result. Pino had given the x-rays to his own expert, for examination before plaintiff's former attorney lost them. Furthermore, the defendant doctor himself had reviewed the x-rays and had noted them based upon them. Likewise, Dr. Schiff, who ultimately made the new set of dentures for Hernandez, had examined and noted what the x-rays showed. The Third District therefore concluded that "[he] has been no showing by the defendant and none is apparent from the record, that he is unable to defend against the claim for negligent treatment." Turning to the best evidence issue, the court noted Florida had not yet decided whether x-rays should come within requirements of the Best Evidence Rule, although there was a strong suggestion that this should be so in the sponsor's note to section 90.952. Assuming that the Best Evidence Rule covered x-rays, the third district found that section 90.954 would specifically provide that "other evidence" of a writing or photograph's content would be admissible when "all originals are lost or de-

X. Summaries

While the Florida Evidence Code was promulgated mainly to govern trial court proceedings, attorneys should note its provisions have been increasingly applied to administrative hearings. In *Tallahassee Housing Authority v. Unemployment Appeal's Commission*, the failure to recognize this resulted in a reversal. The Housing Authority fired an employee for alleged misconduct stemming from excessive absenteeism. After Barron, the employee, filed for unemployment compensation benefits, a hearing was held before a referee. The Housing Authority's administrative assistant responsible for keeping all employee time records testified and produced a three page summary of Barron's attendance record showing he was absent 298 hours during the 1983 work year. The summary was based upon her research into time records and attendance sheets plus old time cards, for that year. Before the hearing, the employee had not seen the summary and was unprepared to answer its contents, although Barron claimed that the amount of time represented was excessive. Based upon this testimony, the referee denied Barron any unemployment compensation benefits. However, the Unemployment Appeals' Commission reversed finding the summary relied upon was inadmissible hearsay evidence and could not be used to show the employee was discharged for misconduct. The First District Court of Appeal, affirmed the Commission's reversal and rejected the Housing Authority's argument that showing of continued absenteeism alone was sufficient to justify termination for misconduct. The district court admitted that excessive absenteeism may be

566. Id at 452.
567. Id at 451.
568. Id at 453.
569. Id.
571. Hernandez, 482 So 2d at 453.
572. Id.
573. Id.
574. Id (quoting Fla. Stat. § 90.954(1)(1985)).
575. Id at 454.
576. 483 So. 2d at 413 (Fla. 1986).
577. Id at 414.
578. Id.
to save them. In opposition to this motion, Plaintiff filed the affidavit of another dentist stating that he examined Dr. Schiff’s treatment records and believed that several of Hernandez’s teeth may have been saved if treated properly and that removing all of his remaining teeth without a complete evaluation violated the requisite standard of care. In ruling on the motion, the trial court found the x-rays were crucial and since they were lost entered summary judgment for the defendant. However, the Third District Court of Appeal reversed.

The third district acknowledged that “where a party in possession loses or destroys crucial, record evidence a burden is imposed on that party to prove that the loss or destruction was not in bad faith.” However, since Hernandez was not given an opportunity to prove the loss only constituted ordinary negligence, the court assumed that this was what happened. The Third District had previously held that when a party has lost or destroyed evidence in its possession without an opponent having had a chance to examine it, sanctions such as striking claims or answers are appropriate. However, in this case, the Third District found the facts warranted a different result. Pino had given the x-rays to his own expert, for examination before plaintiff’s former attorney lost them. Furthermore, the defendant doctor himself had reviewed the x-rays and had notations based upon them. Likewise, Dr. Schiff, who ultimately made the new set of dentures for Hernandez, had been able to examine and note what the x-rays showed. The Third District therefore concluded that “[t]here has been no showing by the defendant and none is apparent from the record, that he is unable to defend against the claim for negligent treatment.” Turning to the best evidence issue, the court noted Florida had not yet decided whether x-rays should come within requirements of the Best Evidence Rule, although there was a strong suggestion that this should be so in the sponsor’s note to section 90.952. Assuming that the Best Evidence Rule covered x-rays, the third district found that section 90.954 would specifically provided that “other evidence” of a writing or photograph’s content would be admissible when “all originals are lost or de-

X. Summaries

While the Florida Evidence Code was promulgated mainly to govern trial court proceedings, attorneys should note its provisions have been increasingly applied to administrative hearings. In Tallahassee Housing Authority v. Unemployment Appeal’s Commission, the failure to recognize this resulted in a reversal. The Housing Authority fired an employee for alleged misconduct stemming from excessive absenteeism. After Barron, the employee, filed for unemployment compensation benefits, a hearing was held before a referee. The Housing Authority’s administrative assistant responsible for keeping all employee time records testified and produced a three page summary of Barron’s attendance record showing he was absent 298 hours during the 1983 work year. The summary was based upon her research into time records and attendance sheets plus old time cards, for that year. Before the hearing, the employee had not seen the summary and was unprepared to answer its contents, although Barron claimed that the amount of time represented was excessive. Based upon this testimony, the referee denied Barron any unemployment compensation benefits. However, the Unemployment Appeals’ Commission reversed finding the summary relied upon was inadmissible hearsay evidence and could not be used to show the employee was discharged for misconduct. The First District Court of Appeal, affirmed the Commission’s reversal and rejected the Housing Authority’s argument that showing of continued absenteeism alone was sufficient to justify termination for misconduct. The district court admitted that excessive absenteeism may be

566. Id. at 452.
567. Id. at 451.
568. Id. at 453.
569. Id.
571. Hernandez, 482 So. 2d at 453.
572. Id.
573. Id.
574. Id. (quoting Fla. Stat. § 90.954(1)(1985)).
575. Id. at 454.
576. 483 So. 2d at 413 (Fla. 1986).
577. Id. at 414.
578. Id.
misconduct but felt the Housing Authority must prove the
absence were indeed detrimental to the employer's interest. The Florida Su-
preme Court rejected the district court's finding on this particular point
holding that "a finding of misconduct... is justified when an employer
presents substantial competence evidence of an employee's excessive
unauthorized absenteeism." However, the court found the Tallahas-
see Housing Authority had not produced the required competent evi-
dence. Specifically, the court agreed with the Unemployment Ap-
peal's Commission that the summary of absences relied upon by the
referee had been erroneously admitted into evidence. Section 90.956
of the Florida Statutes allows the introduction of summaries when it is
impractical to examine the records upon which a particular summary is
based. However, the court noted section 90.956 specifies that the op-
posing party must be given "timely written notice of [the] intention to
use the summary, proof of which shall be filed with the court," and
additionally must make "the summary and the originals or dupli-
cates of the data from which the summary is compiled available for exam-
ing or copying, or both at a reasonable time and place." Neither
requirement had been satisfied in this particular case. The Housing Au-
thority argued unsuccessfully that its employee had actual notice of the
summary even though the formal notice section 90.956 required had not
been given. However, the supreme court did not accept this argu-
ment, instead finding that "[s]uch 'arguable' notice does not com-
port with the strict requirement of section 90.956 the timely written notice
be given." The court additionally found that the underlying data had not
been made available for inspection as required.

From a fairness standpoint, the Florida Supreme Court's decision
is probably correct. Unless the employee had some reason to believe a
summary was coming, there would be no way he could effectively re-
fute it when confronted with it for the first time at a hearing. Since
proof of excessive absences alone is now prima facie evidence of mis-
conduct, allowing the employee to be surprised by such a record would
essentially deprive him of a fair hearing. However, this decision is

580.  Id. at 1219.
581.  Tallahassee Hou. Auth., 483 So. 2d at 414.
582.  Id.
583.  Id.
585.  Id.; Tallahassee Hou. Auth., 483 So. 2d at 415.
586.  Tallahassee Hou. Auth., 483 So. 2d at 415.
587.  Id.
misconduct but felt the Housing Authority must prove the absence were indeed detrimental to the employer’s interest.580 The Florida Supreme Court rejected the district court’s finding on this particular point holding that “a finding of misconduct . . . is justified when an employer presents substantial competence evidence of an employee’s excessive unauthorized absenteeism.”581 However, the court found the Tallahassee Housing Authority had not produced the required competence evidence.582 Specifically, the court agreed with the Unemployment Appeal’s Commission that the summary of absences relied upon by the referee had been erroneously admitted into evidence.583 Section 90.956 of the Florida Statutes allows the introduction of summaries when it is impractical to examine the records upon which a particular summary is based.584 However, the court noted section 90.956 specifies that the opposing party must be given “timely written notice of [the] intention to use the summary, proof of which shall be filed with the court,” and additionally must make “the summary and the originals or duplicate of the data from which the summary is compiled available for examining or copying, or both” at a reasonable time and place.585 Neither requirement had been satisfied in this particular case. The Housing Authority argued unsuccessfully that its employee had actual notice of the summary even though the formal notice section 90.956 required had not been given. However, the supreme court did not accept this argument, instead finding that “[s]uch ‘arguable’ notice does not comport with the strict requirement of section 90.956 the timely written notice be given.”586 The court additionally found that the underlying data had not been made available for inspection as required.587

From a fairness standpoint, the Florida Supreme Court’s decision is probably correct. Unless the employee had some reason to believe a summary was coming, there would be no way he could effectively refute it when confronted with it for the first time at a hearing. Since proof of excessive absences alone is now prima facia evidence of misconduct, allowing the employee to be surprised by such a record would essentially deprive him of a fair hearing. However, this decision is troubling in one aspect. Section 90.956 talks about filing “with the court.” However, until all administrative processes were completed, no “court” was involved. The Florida Supreme Court did not decide with whom formal proof of notice must be filed when a summary will be offered in an administrative hearing. At least two possibilities seem to exist. Since the substitute for a court in this case would have been the Unemployment Compensation Commission’s hearing department, written notice could have been sent to the referee who would preside at the hearing. Furthermore, to protect itself, the employer could have sent the employee a certified copy of the notice. If these two steps had been taken, hopefully the Florida Supreme Court would have found section 90.956’s formal proof and notice requirement satisfied.

580. Id. at 1218.
581. Tallahassee Hous. Auth., 483 So. 2d at 414.
582. Id.
583. Id.
585. Id.; Tallahassee Hous. Auth., 483 So. 2d at 415.
586. Tallahassee Hous. Auth., 483 So. 2d at 415.
587. Id.