Civil Procedure

William VanDercreek*
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Abstract

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

1. Disqualification of Judges

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

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

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versity, 1952. Thanks and appreciation to Cathleen O'Dowd for help with research and
writing this article.
lege to a prospective juror. In courts where judges are assigned randomly to cases, the statute is not intended to provide for a second or a third draw.

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

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

An affidavit stating the facts and reasons for the belief must be filed and accompanied by a certificate of good faith. However, technical noncompliance will not bar a claim which otherwise states sufficient facts to warrant a party's fear that he will not receive a fair trial by the assigned judge. A certificate of counsel that affidavit and motion were made in good faith did not negate motion to disqualification be denied).

4. Id.

5. Id. (fact that attorney representing former wife in past dissolution proceeding was actually running judge's ongoing reelection campaign would give rise to reasonable basis to believe that conflict of interest might exist and that he might not receive a fair trial); McCoy v. McCoy, 488 So. 2d 899 (Fla. 3d Dist. Ct. App. 1986) (trial judge should have disqualified himself in case in which he was admitted formal association of one of the parties); Richards v. Kaney, 490 So. 2d 1299 (Fla. 5th Dist. Ct. App. 1986) (motion should be denied (contention that prejudice was demonstrated by adverse pretrial rulings was not sufficient grounds for disqualifying judge).)

6. Cuda, 488 So. 2d at 627.


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


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

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

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

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

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

"A motion to disqualify shall be made within a reasonable time after discovery of the facts constituting grounds for disqualification."

In Fischer v. Knack, the Supreme Court of Florida found that a motion filed eleven days after all the testimony had been taken and five days after the judge had announced his ruling was not timely under Rule 1.432. Likewise, in Estate of Paulk v. Lindamood, the court fixed the motion for disqualification untimely where it was filed well after entry of final judgment. "One of the purposes of the timeliness requirement is to avoid the adverse effect on the other party to the proceeding and the problems of a retrial with its resulting costs and delay."

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

3. Cadele v. Vizale, 488 So. 2d 627 (Fla. 4th Dist. Ct. App. 1986) (movant's failure to comply with statutory requirements that he attach to motion to disqualify judge a certificate of counsel that affidavit and motion were made in good faith did not make the motion to disqualify be denied).
4. Id.
5. Id. (fact that attorney representing former wife in past dissolution proceeding was actually running judge's ongoing reelection campaign would give rise to reasonable fear in holder's part that conflict of interest might exist and that he might not receive a fair trial); McKay v. McKay, 488 So. 2d 898 (Fla. 3d Dist. Ct. App. 1986) (trial judge should have disqualified himself in case in which he was admitted formal written opinion of one of the parties); Richards v. Kaney, 490 So. 2d 1299 (Fla. 3rd Dist. Ct. App. 1986) (rental Sands denied contention that prejudice was demonstrated by adverse rental rulings was not sufficient grounds for disqualifying judge).
6. Cadele, 488 So. 2d at 627.
8. Fischer, 497 So. 2d at 240.
10. Fischer, 497 So. 2d at 243.
11. Davis v. Nutaro, 510 So. 2d 304 (Fla. 4th Dist. Ct. App. 1986) (in arguing that showed in support of motion for recusal, judge intentionally placed himself in an adversarial role, requiring disqualification); Lake v. Edwards, 501 So. 2d 797 (Fla. 5th Dist. Ct. App. 1987) (trial judge, who attempted to review allegations of merits for disqualification exceeded proper scope of inquiry in attempting to refute the allegations and established sufficient grounds for disqualification); Stimpson Computing Data Co., Inc. v. Knack, 508 So. 2d 482 (Fla. 3rd Dist. Ct. App. 1987) (trial judge properly considered merits of defendant's grounds for disqualification).
verse judicial rulings, however, have not been found to be a basis for
disqualification. All persons who appear in court expect to receive a
determination of their cases based upon the merits of the case and not
upon some extrinsic circumstances, such as friendship or enmity be-
tween judge and lawyer, or political persuasion of the judge, or his rel-
gious convictions, or his financial investments, or social contacts.

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

B. Counsel

1. Generally

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

12. Leigh v. Smith, 503 So. 2d 899 (Fla. 5th Dist. Ct. App. 1987) (diss. that judge assisted opposing attorney in trial of case by signaling when to make motion or raise objection was sufficient to warrant disqualification of judge).
15. Fischer, 497 So. 2d at 240.
16. Simpson Computing, 508 So. 2d at 482.
17. Regis Corp. v. Fasco Corp., 496 So. 2d 833 (Fla. 5th Dist. Ct. App. 1986)

At the conclusion of the disciplinary proceedings, its principle concerns in these pro-
ducts are to protect the public, to warn other members of the legal
profession about the consequences of similar misconduct, to impose ap-
propriate punishment on errant lawyers and to allow for and encourage
information and rehabilitation.

The referee's findings of fact are presumed correct and will be up-
held unless clearly erroneous and lacking in evidentiary support. The
unreasonableness of an order involving disqualification of counsel must be de-
termined by testing it against the standards imposed by the Disciplinary

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

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

A public reprimand is the appropriate sanction when the attorney

21. Roy v. Stucker, 491 So. 2d 1211 (Fla. 1st Dist. Ct. App. 1986) for purposes of 607.21(2)(b), a lawyer who learns that he may be called as a witness other than on
behalf of his client may continue representation until it is apparent that his testimony
is or may be prejudicial to his client, prejudicial being sufficiently adverse to factual
interest or account of events offered on behalf of one's client).
23. The Florida Bar In re Roth, 500 So. 2d 117 (Fla. 1986).
24. Id.
25. The Florida Bar In re White, 506 So. 2d 400 (Fla. 1987).
verse judicial rulings, however, have not been found to be a basis for
disqualification.12 “All persons who appear in court expect to receive
a determination of their cases based upon the merits of the case and are
upon some extrinsic circumstances, such as friendship or enmity be-
tween judge and lawyer, or political persuasion of the judge, or his reli-
gious convictions, or his financial investments, or social contacts.”13

The trial judge is vested with authority to reduce his ruling to
writing when the matters have been tried and orally ruled upon prior to
the filing of the motion for disqualification.14 However, a judge faced
with a motion for recusal should first resolve that motion before mak-
ing additional rulings.15 A successor judge who has not heard all of the
evidence on the issues tried before the predecessor judge may not re-
vote a portion of that judge’s order.16

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12. Leigh v. Smith, 503 So. 2d 989 (Fla. 5th Dist. Ct. App. 1987) (alleges that judge assisted opposing attorney in trial of case by signaling when to make motion or raise objection was sufficient to warrant disqualification of judge).
15. Fischer, 497 So. 2d at 240.
16. Stempson Computing, 508 So. 2d at 482.
19. The Florida Bar v. Simmons, 508 So. 2d 341, 343 (Fla. 1987).
21. Ray v. Stuckey, 491 So. 2d 1211 (Fla. 1st Dist. Ct. App. 1986) (for purposes of DR 5-102(B), a lawyer who learns that he may be called as a witness other than on
behalf of his client may continue representation until it is apparent that his testimony is or may be prejudicial to his client, prejudicial being sufficiently adverse to factual assertions or account of events offered on behalf of one’s client).
23. The Florida Bar In re Roth, 500 So. 2d 117 (Fla. 1986).
24. Id.
25. The Florida Bar In re Whitlock, 506 So. 2d 400 (Fla. 1987).
is guilty of representing adverse parties, failing to adequately pursue client's case, or engaging in fraudulent and dishonest conduct. Suspension is proper when the attorney engages in an unauthorized practice of law, neglects legal matters, possesses and uses illegal drugs, or charges illegal and excessive fees. Disharmony, the most extreme sanction, is recommended when the attorney has been found guilty of commingling client and attorney funds, stealing client funds, violating numerous counts of criminal laws, or misappropriating client trust funds. Generally, an attorney who drafts documents is not a guarantor that documents will be litigation free or will accomplish everything the client might want, otherwise, attorneys would have to routinely insure their work. Furthermore, attorneys are not responsible for failing to accurately predict changes on unsettled points of law.

27. The Florida Bar v. Brooks, 504 So. 2d 1227 (Fla. 1987); The Florida Bar v. Brennan, 508 So. 2d 813 (Fla. 1987).
29. The Florida Bar v. Valdes, 507 So. 2d 609 (Fla. 1987); The Florida Bar v. John, 509 So. 2d 285 (Fla. 1987); The Florida Bar v. Chase, 492 So. 2d 1231 (Fla. 1986) (allowing a non-lawyer to engage in an unauthorized practice of law, among other unprofessional activities, warranted a three-year suspension); The Florida Bar v. Dales, 496 So. 2d 813 (Fla. 1986) (Supreme Court permanently enjoined an unlicensed lawyer from describing himself as an attorney and from rendering legal advice on matters concerning real estate transactions).
30. The Florida Bar v. Graves, 508 So. 2d 344 (Fla. 1987); The Florida Bar v. Sharman, 504 So. 2d 1236 (Fla. 1987).
31. The Florida Bar v. Holtsinger, 505 So. 2d 1329 (Fla. 1987); The Florida Bar v. Rosen, 495 So. 2d 180 (Fla. 1986) (an attorney convicted on federal felony charge of knowingly and intentionally possessing cocaine with intent to distribute was subject to a three-year suspension of membership in the State Bar).
32. The Florida Bar v. Lowe, 508 So. 2d 6 (Fla. 1987).
34. The Florida Bar v. Tumil, 503 So. 2d 1230 (Fla. 1986).
35. The Florida Bar v. Lopez-Castro, 508 So. 2d 10 (Fla. 1987) (convictions or eleven counts of violating criminal laws in connection with efforts to invest proceeds from marijuana smuggling operation warrants disbarment).
36. The Florida Bar v. Weissman, 508 So. 2d 327 (Fla. 1987).
42. Xenus Corp. v. Sharifi, 502 So. 2d 1003 (Fla. 5th Dist. Ct. App. 1987).
is guilty of representing adverse parties,\textsuperscript{46} failing to adequately pursue a client's case,\textsuperscript{47} or engaging in fraudulent and dishonest conduct.\textsuperscript{48} Suspension is proper when the attorney engages in an unauthorized practice of law,\textsuperscript{49} neglects legal matters,\textsuperscript{50} possesses and uses illegal drugs,\textsuperscript{51} or charges illegal and excessive fees.\textsuperscript{52} Disbarment, the most extreme sanction, is recommended when the attorney has been found guilty of commingling client and attorney funds,\textsuperscript{53} stealing client funds,\textsuperscript{54} violating numerous counts of criminal laws,\textsuperscript{55} or misappropriating client trust funds.\textsuperscript{56}

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sonableness of the time expended for the fee amount.\(^{48}\) While it is better practice to plead attorney fees, the party is not required to plead them where they are allowed by statute.\(^{49}\)

A default judgment only admits entitlement to liquidated damages.\(^{50}\) A request for attorneys fees following a default, which is characterized as a request for unliquidated damages, may not be resolved by the court without allowing the party against whom the fees are to be assessed an opportunity to be heard as to the amount to be awarded.\(^{52}\) Where one party takes a voluntary dismissal, the opposing party is the prevailing party for the purposes of an attorney fee award.\(^{53}\) When an offer of judgment is silent as to attorneys fees, entitlement to the fees is to be determined by the trial court independently of the merits.\(^{54}\) It is not proper to order one party to pay the other's attorney's fees as a sanction for sham pleadings.\(^{55}\)

The federal lodestar method of determining attorneys fees applies only to fees imposed ancillary to a primary action against a non-client either under common-law principles or pursuant to statutory authorization.\(^{56}\) The purpose of the method is to protect third parties from excessive awards over which they have no contractual or adversarial role.\(^{57}\) The factors required to compute a reasonable fee using the lodestar formula are set out in Florida Patient's Compensation Fund v. Rowe.\(^{48}\)


72. Stuart Plaza, Ltd. v. Atlantic Coast Dev. Corp. of Martin County, 491 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1986).


77. Stabinski, 490 So. 2d at 159.

78. 427 So. 2d 1145 (Fla. 1983). (In computing the fee, the trial judge should:

1. determine the number of hours reasonably expended on the litigation;

2. determine the reasonable hourly rate for the type of litigation;

3. multiply the result of (1) and (2), and when appropriate;

4. adjust the fee on the basis of the contingent nature of the litigation or

II. Pleadings

Filing issues continue to generate a number of appeals. Although the federal pleading rules are similar to Florida's, there appear proportionately fewer pleadings cases decided by the United States Court of Appeals for the Eleventh Circuit than by the Florida Appeals Court. Rate 1.05, governing the commencement of actions, states that "every action of a civil nature shall be deemed commenced when the complaint or petition is filed. Tendering a correct filing fee is not a prerequisite to filing a complaint." Therefore, in Outboard Marine Domestic International Sales Corporation v. Florida Stevedoring Corporation,\(^{58}\) the complaint was deemed filed when originally received and docketed by the clerk of the lower court, though it was subsequently returned because of an insufficient filing fee check. A trial court is not required to consider affidavits if they are not timely filed.\(^{59}\) Affirmative defenses to a complaint may be raised in a responsive pleading, unless the basis for the defense appears on the face of the complaint or the defense is statutorily specified as one that may not be raised on the complaint itself.\(^{60}\)
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81. 494 So. 2d 226 (Fla. 2d Dist. Ct. App. 1986).
82. 489 So. 2d 493 (Fla. 4th Dist. Ct. App. 1986).
83. 514 So. 2d 323 (Fla. 3d Dist. Ct. App. 1986).
84. Van Zamft & GMRR v. South Florida Water Management Dist., 489 So. 2d 779 (Fla. 2d Dist. Ct. App. 1986) (trial court not required to consider affidavits filed not served by mail on Friday before Monday hearing absent motion for continuance to permit additional time for filing of affidavits).
be raised by motion. 64 The statute of limitations is an affirmative defense; 65 however, where it appears on the face of a prior pleading, it may be asserted as a ground for a motion to dismiss. 66 Where fraud is pleaded as an affirmative defense, allegations relating thereto should be specific and facts constituting fraud clearly stated. 67 Rule 1:190 governs the amending and supplementing of pleadings. The rules require that leave to amend a complaint be freely granted when justice so requires, and that it should be denied when the privilege has been abused, or when it is clear that the pleading cannot be amended to state a cause of action, 68 or when diligence during discovery is lacking. 69 An amendment to a timely filed pleading relates back to the date of filing of the original pleading where a party is not correctly described, 70 but not where a separate party has been added to the pleadings. 71 

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

64 In re Estate of Hammer, 511 So. 2d 708 (Fla. 4th Dist. Ct. App. 1987).
66 Fla. R. Civ. P. 1:140(b); Hofer, 481 So. 2d 939.
71 Id.
74 Fla. R. Civ. P. 1:190(b); Brady v. Jones, 491 So. 2d 1272 (Fla. 2d Dist. Ct. App. 1986).

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they had been raised in the pleadings. 75 A cross-claim is dependent upon an original or primary action to support it. 76 Unlike third party actions, the rules do not require service of a cross-claim by summons, but contemplate service as provided by Rule 1:080. Where such cross-claim defendant has not answered or otherwise appeared, then a summons would be appropriate. Likewise, a cross-claim which is not a separate pleading under Rule 1:100(a) but is a part of the answer, is not effective against a co-defendant if not served prior to dismissal. In Lope v. Brown, 77 it was found that a cross-claim did not survive dismissal of the original proceeding where it was made in the same pleading as the initial answer but not served prior to the dismissal.

A court cannot modify any judgment unless an issue of modification is properly presented to it by appropriate proceedings and each party is given an opportunity to be heard on the issue. 78 A motion for judgment on the pleadings must be decided wholly on the pleadings without the aid of outside matters. 79 Such a motion is only proper if, on undisputed facts, the trial court could conclude that the moving party is entitled to judgment as a matter of law. 80 The rule against splitting causes of action requires that all relief arising out of a single transaction or event be sought and recovered in one action. 81 The rule is founded on the policy reason that finality is established and promotes greater stability in the law, avoids vexatious and multiple lawsuits arising out of a single incident and is consistent with the absolute necessity of bringing litigation to an end. 82 In Thermon Inc. v. Woodruff, 83 the Fourth District Court of Appeal found that the relief sought in a second action should have been brought in the original proceeding where it was filed by the same party
be raised by motion.44 The statute of limitations is an affirmative defense,45 however, where it appears on the face of a prior pleading, it may be asserted as a ground for a motion to dismiss.45 Where fraud is pleaded as an affirmative defense, allegations relating thereto should be specific and facts constituting fraud clearly stated.46 Rule 1.190 governs the amending and supplementing of pleadings. The rules require that leave to amend a complaint be freely granted when justice so requires, and that it should be denied when the privilege has been abused, or when it is clear that the pleading cannot be amended to state a cause of action,46 or when diligence during discovery is lacking.46 An amendment to a timely filed pleading relates back to the date of filing of the original pleading where a party is not correctly described,46 but not where a separate party has been added to the pleadings.46

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

III. Parties, Witnesses and Jurors

A. Parties

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

B. Witnesses

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

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

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

C. Jurors

1. Jury Selection

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

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

87. 483 So. 2d 771 (Fla. 4th Dist. Ct. App. 1985).
90. Id.
92. Id.
in the same court, involved the same parties, and arose out of identical facts and circumstances, but involved a different remedy. Likewise, where a defendant has a claim against the plaintiff that arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim, the defendant must plead his claim as a compulsory counterclaim. Consolidation is appropriate where there is a possibility of inconsistent verdicts and the interest of judicial economy outweighs any prejudice which might arise from delay caused thereby.

III. Parties, Witnesses and Jurors

A. Parties

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

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

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

2. Post-Trial Interviews of Jurors

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

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

An alternate juror's presence and active participation in jury deliberations creates a fundamental, reversible error, requiring a new trial.

100. Toot v. Video Electronics, Inc., 491 So. 2d 533 (Fla. 1986).
101. Ter Kerk, 486 So. 2d 547.
103. Toot, 491 So. 2d at 533.
104. State v. Castillo, 486 So. 2d 565 (Fla. 1986) (presenting issue of improper use of peremptories for first time on motion for mistrial, after jury is sworn, is not timely).
106. 487 So. 2d 1118 (Fla. 1st Dist. Ct. App. 1986).
107. Perl v. K-Mart Corp., 493 So. 2d 542 (Fla. 3d Dist. Ct. App. 1986) (plaintiff's voir dire question, as to whether juror had ever been party in lawsuit, and response of juror, who stated his company had been sued once but did not recall any other involvement in litigation when in fact juror and his company had been involved in a litigation at least 20 times, was concealment of material fact on voir dire examination not due to plaintiff's negligence; therefore, new trial was required).
108. Press v. Amica Mutual Ins. Co., 483 So. 2d 83 (Fla. 2d Dist. Ct. App. 1986) (decision, in personal injury action, to allow jury interview was not abuse of discretion when movants supported motion with affidavit of juror's sister, stating that damages had been determined by lot, which is clearly illegal).
110. Press, 483 So. 2d at 83.
111. South v. Palm Bay Club, Inc., 486 So. 2d 31 (Fla. 3d Dist. Ct. App. 1986) (trial court did not abuse its discretion in negligence action by refusing to declare mistrial on basis that counsel for defendant had improper contact with juror where communication had nothing to do with merits of case and trial judge questioned juror and was assured by her that such contact would not affect her decision).
112. Smook, 483 So. 2d at 496. Orange County v. Fuller, 502 So. 2d 1364 (Fla. 5th Dist. Ct. App. 1987) (absent sufficient allegations of juror misconduct relating to events which are extrinsic to verdict, inquiry into deliberations of jury is prohibited).
113. Smook, 483 So. 2d at 496.
which a challenge is to be made. 106 The trial court cannot require both parties to exercise all of their peremptory challenges simultaneously in writing. 107 Where counsel fails to exhaust his peremptory challenges, it is not error to deny additional peremptory challenges where prosecution and defense simultaneously request a peremptory challenge for a prospective juror. 108 Absent exceptional circumstances, a trial judge may not selectively swear individual jurors prior to the opportunity of counsel to view as a whole the entire panel from which peremptory challenges are to be made. 109 Objections to the improper use of peremptories must be raised prior to the jury's being sworn. 109

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IV. Jurisdiction Over the Person

A. Generally

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

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

Entry of summary final judgment and denial of rehearing denies the court of jurisdiction to further amend the complaint. Once parties are dropped from the action, in personam jurisdiction over the parties is lost and can be regained only by new service of process.

B. Service of Process on Natural Persons

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

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

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

C. Service of Process on Corporations

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

119. O.A. Winburn v. First Florida Nat'l Bank of Live Oak, 490 So. 2d 230 (Fla. 1st Dist. Ct. App. 1986); Finkelenstein v. Southeast Bank, N.A., 490 So. 2d 97 (Fla. 4th Dist. Ct. App. 1986) (trustees waived challenge to trial court's jurisdiction over family trust due to bank's failure to sue trustees in capacity as trustees when trustees failed to raise issue on motion to dismiss complaint or on a motion to disprove temporary restraining order and when trustees agreed to entry of temporary restraining order that precluded discontinuance of principal trust).
121. Meyer v. Roese, 482 So. 2d 444 (Fla. 2d Dist. Ct. App. 1986); Cummings v. Palm Beach Marble & Tile, Inc., 497 So. 2d 711 (Fla. 4th Dist. Ct. App. 1986) (defendant waived objection to insufficiency of service of process where defendant invoked jurisdiction of court by filing cross-claim asking for affirmative relief).
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119. O.A. Winburn v. First Florida Nat’l Bank of Live Oak, 490 So. 2d 220 (Fla. 1st Dist. Ct. App. 1986); Finkelstein v. Southeast Bank, N.A., 490 So. 2d 939 (Fla. 4th Dist. Ct. App. 1986) (trustees waived challenge to trial court’s jurisdiction over family trust due to bank’s failure to sue trustees in capacity as trustees when trustees failed to raise issue on motion to dismiss complaint or on a motion to dismiss temporary restraining order and when trustees agreed to enter of temporary restraining order that precluded dissipation of principal of trust).
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The purpose of service is to give a defendant proper notice that it is amenable to a plaintiff’s claim, to advise the defendant of the nature of that claim, and to afford the defendant an opportunity to defend against the claim.184 Service of process cannot be “refused” by the party to whom it is directed.185 A party cannot prevail in an argument attacking the sufficiency of service by certified mailing, in those cases where it is appropriate, when the party has taken affirmative action to avoid acceptance of the certified mailing.186 For purposes of service of process, a party’s “usual place of abode” may not be the same as the party’s “residence,”187 and this rule must be strictly complied with.188

When two actions between the same parties are pending in different circuits, jurisdiction lies in the circuit where service of process is first perfected.189 Absent a valid long-arm statute, a judgment in personam against a nonresident who does not enter a voluntary general appearance or otherwise waive personal service can only be predicated upon jurisdiction over the person acquired by service of process with the state.190

C. Service of Process on Corporations

A plaintiff seeking to obtain jurisdiction over a nonresident defendant carries the initial burden of alleging sufficient jurisdictional
facts to bring the case within the purview of the state's long-arm statute.\(^{132}\) Once plaintiff meets this burden, the defendant must submit evidence by sworn affidavits to contest allegations of the complaint.\(^{133}\) Strict construction of the Florida long-arm statute is required.\(^{134}\)

Before a state court may acquire personal jurisdiction over a foreign corporation, the foreign corporation must have initiated some minimum contact with the foreign state, so that maintenance of the suit does not offend traditional notions of fair play and substantial justice.\(^{135}\) For there to be minimum contacts, it is necessary that there be some act by which the foreign corporation purposefully avails itself of the privilege of conducting activities within the state, thus invoking the benefits and protection of its laws.\(^{136}\) Ownership of real estate in Florida by itself does not constitute a "business" or "business venture within the meaning of Florida Statutes Section 48.181.\(^ {137}\) Florida Statutes Sections 48.181 and 48.193 require that there be a "connexity between the cause of action and the defendant corporation's activities within the state.\(^ {138}\)

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

D. Constructive Service of Process

Substituted service of process statutes require strict compliance.\(^ {141}\) To support such service of process on a defendant, the complaint must allege the jurisdictional requirements prescribed by statute\(^ {142}\) and establish the threshold requirement of the inability to effectuate personal service.\(^ {143}\) A failure to do so should result in granting a motion to quash service.\(^ {144}\) The statutory requirements are not satisfied where service of process is made by delivering the summons and complaint on an agent lacking authority to accept service.\(^ {145}\) The Fifth District Court of Appeal in Knabb v. Morris,\(^ {146}\) found


133. Id.


136. Norwest Bank Minneapolis, N.A. v. American Continental Ins. Co., 49 So. 2d 101 (Fla. 4th Dist. Ct. App. 1960) (national banking association with offices only in Minnesota and which has assigned mortgages on condominiums located in Florida as result of solicitation of Minnesota mortgage worker, and which had never conducted business in Florida, lacked sufficient minimum contacts under long-arm statute to be subject to court's personal jurisdiction in mortgage insurer's declaratory judgment action concerning coverage for claims made by banks); Herman v. Sunset Commercial Bank, 481 So. 2d 98 (Fla. 3d Dist. Ct. App. 1986) (failure to make payment in Florida as guarantor of note in default, as required by guaranty contract, did not constitute sufficient minimum contacts to permit exercise of long-arm jurisdiction over guarantor); Meyer v. Auto Club Ins. Ass'n, 492 So. 2d 1314 (Fla. 1986) (Florida lacal jurisdiction over insured's claim against insurer for medical and lost wage benefits stemming from automobile accident which occurred in Florida where, at time of accident, insured and insurer were both nonresidents and insurer had no contacts with Florida); Damoth v. Reinita, 485 So. 2d 881, 883 (Fla. 2d Dist. Ct. App. 1986) (vendor's ownership of real property in state was deliberate, nonfortuitous, and continuous act, through which vendor purportedly availed himself of benefits and protections of state and local law and obliged himself to pay property taxes, so that he could reasonably foresee being brought into state court to litigate a suit relating to option on property, which could not have come into being but for his own ownership of that property; establishing sufficient "minimum contacts" to bring him within personal jurisdiction of state courts without offending traditional notions of fair play and substantial justice); American Vision Center, Inc. v. Nat'l Yellow Pages Directory Service, Inc., 500 So. 2d 642 (Fla. 2d Dist. Ct. App. 1986).


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


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


146. 492 So. 2d 839, 841 (Fla. 5th Dist. Ct. App. 1986).
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If constructive service of process on a nonresident defendant must be used, only in rem or quasi in rem jurisdiction is conferred upon the court. Therefore, where personal service is not made, service of process on a nonresident made through the Secretary of State is invalid when based solely on ownership of real property within Florida. Substituted service is improper on a resident where there is no allegation or evidence that the defendant was a nonresident or was concealing his whereabouts. Service of process by publication, pursuant to Florida Statutes Section 48.011, is not available for a suit to recover judgment on a promissory note.

V. Venue

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

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

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

147. Id.
155. Mellinar, 483 So. 2d at 509; Chrysler, 506 So. 2d at 67.
156. Fla. R. Civ. P. 1.140(b).
159. Fla. R. Civ. P. 1.060 (b).
161. Id.
164. Id.
165. J.C. Armstrong, 481 So. 2d at 43.
166. 484 So. 2d 1370, 1371 (Fla. 3d Dist. Ct. App. 1986).
168. Valiant Air Command Inc. v. Frank K. Collins Assoc., 500 So. 2d 577, 578 (Fla. 5th Dist. Ct. App. 1986).
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It is generally recognized that the plaintiff has the prerogative to initially select venue and need not plead or prove its appropriateness. The defendant bears the burden of proving that venue is improper. Rule 1.140(b) recognizes improper venue as a defense and requires that “the grounds upon which any of the enumerated defenses are based . . . shall be stated specifically and with particularity in the responsive pleading or motion.”

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

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

147. Id.
148. 489 So. 2d 141 (Fla. 3d Dist. Ct. App. 1986).
157. Mellinias, 483 So. 2d at 509; Chrysler, 506 So. 2d at 67.
is often changed where there is inconvenience to one of the parties, as in the majority of witnesses being located in a jurisdiction other than that where the action is presently being brought.

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

VI. Discovery

A. Generally

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


169. Id.


171. Caribou Security Sys., Inc. v. Security Control Sys., Inc., 486 So. 2d 654 (Fla. 3d Dist. Civ. App. 1988) (request to produce, which included request for defendant’s corporate minutes, financial records, lease agreements and bank statements, was too broad in scope as to time and lacked specificity as related to issues as made by for pleadings; and were unwarranted intrusions on defendant’s business, as well as burdensome).

172. Id. at 656.
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(175) Fla. R. Civ. P. 1.280 (b)(1); Fischer v. Hofmann Wholesale Nurseries, Inc., 497 So. 2d 413, 414 (Fla. 4th Dist. Ct. App. 1986) (interrogatory in which accuser was asked to break down hours he worked for his clients was not burdensome and was discoverable where such information was relevant to claim against accountant for breach of contract and for negligence; not required to disclose names and addresses of his clients in response to interrogatory where these are not relevant to the claim); Reis v. Bloom, 506 So. 2d 1113 (Fla. 4th Dist. Ct. App. 1987).


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


(180) Ferrigno v. Yoder, 495 So. 2d 866 (Fla. 2d Dist. Ct. App. 1986) (trial court abused its discretion in entering order precluding each of two plaintiffs from attending the deposition of the other on the basis of defendant's asserted need to ask questions of the two independently in order to elicit candid responses).


(182) Id.
preclude irreparable injury.183

B. Work Product/Attorney-Client Privilege

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

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

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

184. Id. at 1243; Sear Roebuck & Co. v. Scott, 481 So. 2d 608 (Fla. 4th Dist. Ct. App. 1986) (incident report on slip and fall which occurred in department store was not discoverable, though such reports were routinely prepared by department store, where report was prepared pursuant to written procedure established by store's regional counsel for anticipating litigation).
185. Rahaid, 495 So. 2d at 1244.
186. Id.
189. Id.
190. Id.
191. Id.

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

C. Sanctions

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

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

VII. Offer of Judgment

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

192. Id.
193. Id.
198. United States Automobile Ass'n v. Strasser, 492 So. 2d 399 (Fla. 4th Dist. Ct. App. 1986) (court abused its discretion in denying default judgment as a sanction for the interrogatories and request for admission were ultimately answered).
199. Michell, 485 So. 2d at 919.
200. Stoner, 495 So. 2d at 1127.
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\textsuperscript{183} Ruhsland v. Gibeault, 495 So. 2d 1243, 1244 (Fla. 5th Dist. Ct. App. 1986)

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

\textsuperscript{185} Ruhsland, 495 So. 2d at 1244.

\textsuperscript{186} Id.

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

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

\textsuperscript{189} Id.

\textsuperscript{190} Id.

\textsuperscript{191} Id.

\textsuperscript{192} Id.

\textsuperscript{193} Id.

\textsuperscript{194} Mitchum v. Grubbs, 485 So. 2d 891 (Fla. 1st Dist. Ct. App. 1986).

\textsuperscript{195} Stoner v. Verkasen, 493 So. 2d 1126 (Fla. 4th Dist. Ct. App. 1986).

\textsuperscript{196} Fla. R. Civ. P. 1.380(b)(2)(B).

\textsuperscript{197} Dean Witter Reynolds, Inc. v. Hammock, 489 So. 2d 761 (Fla. 1st Dist. Ct. App. 1986).

\textsuperscript{198} United Automobile Ass'n v. Strasser, 492 So. 2d 399 (Fla. 4th Dist. Ct. App. 1986) (court abused its discretion in entering default judgment as a sanction were interpleaders and request for admissions were ultimately answered).

\textsuperscript{199} Mitchum, 485 So. 2d at 891.

\textsuperscript{200} Stoner, 493 So. 2d at 1127.

\textsuperscript{201} S.N.W. Corp. v. Abraham, 491 So. 2d 1223 (Fla. 4th Dist. Ct. App. 1986).

\textsuperscript{202} Kennard v. Forchini, 495 So. 2d 924 (Fla. 4th Dist. Ct. App. 1986).
against a claim may serve an offer on the adversary party to allow judgment to be taken against him for the money or property or the effect specified in his offer with costs then accrued."

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

**VIII. Default**

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

204. 495 So. 2d 924 (Fla. 4th Dist. Ct. App. 1986).
205. 495 So. 2d 925.
206. Id.
207. Cheek, 511 So. 2d at 977.
208. 511 So. 2d at 982.
209. United States Automobile Ass’n, 492 So. 2d at 399; Bellflower v. Cushman & Wakefield of Florida, Inc., 510 So. 2d 1130 (Fla. 2d Dist. Ct. App. 1987); Championship Wrestling from Florida Inc. v. Deblasio, 508 So. 2d 1274 (Fla. 4th Dist. Ct.

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

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

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

110. United States Automobile Ass’n, 492 So. 2d at 399.
111. Monte Campbell Crane Co. v. Hancock, 510 So. 2d 1104 (Fla. 4th Dist. Ct. App. 1987).
113. 485 So. 2d 467 (Fla. 3d Dist. Ct. App. 1986).
114. Fla. R. Civ. P. 1.500(c).
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been committed with willful disregard of or gross indifference to an or-
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\textsuperscript{290} VanDercreek v. VanDercreek, 61 So. 2d 977 (Fla. 1952).

\textsuperscript{291} Fla. R. Cv. P. 1.442; Cheek v. McGowan Electric Supply Co., 511 So. 2d 977 (Fla. 1987).

\textsuperscript{292} 495 So. 2d 924 (Fla. 1986).

\textsuperscript{293} 495 So. 2d 924 (Fla. 1986).

\textsuperscript{294} Id. at 925.

\textsuperscript{295} Id.

\textsuperscript{296} Cheek, 511 So. 2d at 977.

\textsuperscript{297} Id. at 982.

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completed service of responsive pleading on or before the date the de-
fault was entered,\textsuperscript{307} and where the answer was filed prior to the de-
fault hearing, but after expiration of the time allowed for filing an


\textsuperscript{298} 1977); Troop v. City of Lighthouse Point, 506 So. 2d 29 (Fla. 4th Dist. Ct. App.

\textsuperscript{299} 1987); Mintiman v. Rowe Int'l, Inc., 511 So. 2d 766 (Fla. 1987).

\textsuperscript{300} United States Automobile Ass'n, 492 So. 2d at 399.

\textsuperscript{301} Mine Campbell Crane Co. v. Hancock, 510 So. 2d 1104 (Fla. 4th Dist. Ct.

\textsuperscript{302} App. 1987).

\textsuperscript{303} Fla. R. Cv. P. 1.500(b); Barnett Bank of South Florida, N.A. v. Piccohi,

\textsuperscript{304} 92 So. 2d 1373 (Fla. 4th Dist. Ct. App. 1987); Belcher v. Ferrara, 511 So. 2d 1089

\textsuperscript{305} (Fla. 3d Dist. Ct. App. 1987).

\textsuperscript{306} 495 So. 2d 467 (Fla. 3d Dist. Ct. App. 1986).

\textsuperscript{307} 495 So. 2d 924 (Fla. 4th Dist. Ct. App. 1986).

\textsuperscript{308} 495 So. 2d 1130 (Fla. 2d Dist. Ct. App. 1987); Championship Wrestling from Florida Inc. v. Deblasio, 508 So. 2d 1274 (Fla. 4th Dist. Ct.

\textsuperscript{309} Fla. R. Cv. P. 1.500(c).

\textsuperscript{310} Barnett Bank of Southwest Florida, N.A. v. Anderson, 488 So. 2d 923 (Fla.

\textsuperscript{311} 4th Dist. Ct. App. 1986).

\textsuperscript{312} Affordable Homes, Inc. v. McKinney-Green, Inc., 509 So. 2d 407 (Fla. 1st

\textsuperscript{313} Dist. Ct. App. 1987).

\textsuperscript{314} Id.

\textsuperscript{315} Sunshine Sec. & Detective Agency v. Wells Fargo Armored Services Corp.,

\textsuperscript{316} 48 So. 2d 246 (Fla. 3d Dist. Ct. App. 1986).

\textsuperscript{317} Gibraltar Serv. Corp. v. Lone & Associates, 488 So. 2d 582 (Fla. 4th Dist.

\textsuperscript{318} 2d 582 (Fla. 1986).
answer.219

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

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

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

IX. Dismissal

A. Generally

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

219. Haitian Community Flamingo Auto Parts Corp. v. Landmark First Nat’l Bank, 505 So. 2d 170 (Fla. 1986) (dismissal with prejudice of negligence action against Dept. of Corrections and two of its physicians for alleged negligent treatment of injury, as sanction for litigants in serving witness and document lists, lateness in submission of interrogatories, verdict form and pretrial stipulation, and failure of plaintiffs’ counsel to attend attorney’s conference, was abuse of discretion, even though plaintiff’s counsel was late in complying with every date set by pretrial order, where plaintiff’s counsel was in compliance with pretrial order by date of pretrial conferences).


221. Livingstone v. State of Florida Dept. of Corrections, 481 So. 2d 2 (Fla. 1st Dist. Ct. App. 1985) (dismissal with prejudice of negligence action against Dept. of Corrections and two of its physicians for alleged negligent treatment of injury, as sanction for litigants in serving witness and document lists, lateness in submission of interrogatories, verdict form and pretrial stipulation, and failure of plaintiffs’ counsel to attend attorney’s conference, was abuse of discretion, even though plaintiff’s counsel was late in complying with every date set by pretrial order, where plaintiff’s counsel was in compliance with pretrial order by date of pretrial conferences).


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

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IX. Dismissal

A. Generally

Dismissal of actions is generally governed by Rule 1.420. Its use as a sanction, however, is specifically permitted under Rule 1.200(c) for failure to attend a pretrial conference. Courts have broadly interpreted the rule so as to allow dismissal for failure to comply with any legitimate order. Although the court's exercise of authority is discretionary, dismissal is considered a drastic remedy which is to be used only in extreme situations. Determining whether the trial court has abused its discretion in dismissing a cause of action requires weighing the severity and prejudicial effect of counsel's actions against the loss to the innocent litigant of his cause of action. Usually, dismissal is improper, absent any showing of wilful or intentional disregard of the trial court's order.

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

228. Livingston v. State of Florida Dep't of Corrections, 481 So. 2d 2 (Fla. 1st Dist. Ct. App. 1985) (dismissal with prejudice of negligence action against Dept. of Corrections and two of its physicians for alleged negligent treatment of injury, as sanction for failure in serving witness and document lists, latency in submission of interrogatories, verdict form and pretrial stipulation, and failure of plaintiff's counsel to attend attorney's conference, was abuse of discretion, even though plaintiff's counsel was in compliance with every date set by pretrial order, where plaintiff's counsel was in compliance with pretrial order by date of pretrial conferences).
230. Livingston, 481 So. 2d at 3.
231. Garlart v. Dixie Ins. Co., 495 So. 2d 785 (Fla. 4th Dist. Ct. App. 1986) (dismissal of complaint without prejudice was too severe a sanction for failure of plaintiff's counsel to appear at scheduled pretrial conference, absent any showing of wilful or intentional disregard of trial court's order).
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plaintiff fails to establish that untimeliness impaired the fairness of the proceedings or correctness of the action. In Adams v. Lieberman, it was found improper to grant a motion to dismiss where the court went beyond the four corners of the complaint by considering a prior judgment in plaintiff's favor in another case. A properly filed dismissal divests the court of jurisdiction.

B. Failure to Prosecute

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

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

A notice or a motion for trial filed at a time when the case is not at issue is a nullity and does not constitute proper record activity sufficient to defeat an otherwise valid motion to dismiss for lack of prosecution. An order permitting an attorney to withdraw from the case does not constitute record activity to defeat dismissal. Non-record litigation activity may, in some cases, constitute good cause why an action should not be dismissed for an absence of record activity for one year or more. However, the non-record activity must meet a standard equaling with a compelling reason for failure to prosecute.

X. Summary Judgment

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

253. Braun v. Jones, 481 So. 2d 544 (Fla. 5th Dist. Ct. App. 1986) (remanded to consider whether discovery via video taped depositions, while done without court order, constitutes sufficient nonrecord activity precluding dismissal).
plaintiff fails to establish that untimeliness impaired the fairness of the proceedings or correctness of the action.\(^\text{387}\) In Adams v. Lieberman,\(^\text{386}\) it was found improper to grant a motion to dismiss where the court went beyond the four corners of the complaint by considering a prior judgment in plaintiff’s favor in another case. A properly filed dismissal divests the court of jurisdiction.\(^\text{388}\)

B. Failure to Provoke

Rule 1.420(e) is not self-executing.\(^\text{389}\) It requires action by the court or a filing of a motion to dismiss, and such action must be undertaken before there is further prosecution of the cause.\(^\text{390}\) It is the date of filing, not the date of service, that commences and concludes the running of the one-year period (without record activity) which is required for a dismissal for failure to prosecute.\(^\text{391}\) Filing of notice for trial,\(^\text{392}\) paying a new filing fee,\(^\text{393}\) filing an interrogatory requesting the names of previously undisclosed witnesses,\(^\text{394}\) or notice of hearing,\(^\text{395}\) or an order of an administrative judge transferring the cause from one judge to another,\(^\text{396}\) are examples of what might constitute record activity sufficient to preclude dismissal. The notice for trial defeats a motion to dismiss even where the two motions have been filed simultaneously.\(^\text{398}\)

In Karcher v. F.W. Schinz & Associates, Inc.,\(^\text{399}\) the plaintiff’s single interrogatory seeking the basis for certain denials made by the defendant in response to a request for admissions - both of which had been filed one year earlier - did not genuinely hasten the suit toward disposition, and therefore, did not constitute genuine record activity which precluded dismissal. A prematurely filed motion to dismiss for lack of prosecution is not the type of record activity which will toll the one-year period addressed in Rule 1.420(e) because it is not the type of activity intended and reasonably calculated to hasten the cause to judgment.\(^\text{400}\)

A notice or a motion for trial filed at a time when the case is not at issue is a nullity and does not constitute proper record activity sufficient to defeat an otherwise valid motion to dismiss for lack of prosecution.\(^\text{401}\) An order permitting an attorney to withdraw from the case does not constitute record activity to defeat dismissal.\(^\text{402}\)

Non-record litigation activity may, in some cases, constitute good cause why an action should not be dismissed for an absence of record activity for one year or more.\(^\text{403}\) However, the non-record activity must meet a standard equaling with a compelling reason for failure to prosecute.\(^\text{404}\)

X. Summary Judgment

A motion for summary judgment “shall be rendered if . . . there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.”\(^\text{405}\) However, it is necessary that the party moved against be given notice and be allowed an opportunity to present evidence.\(^\text{406}\)

\(^{236}\) Ponte v. Alvarez, 491 So. 2d 1268 (Fla. 2d Dist. Ct. App. 1986).


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


\(^{240}\) Barnes v. Escambia County Employees Credit Union, 489 So. 2d 879 (Fla. 1st Dist. Ct. App. 1986); City of Miami v. Katz, 498 So. 2d 635 (Fla. 3d Dist. Ct. App. 1986).


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

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

\(^{244}\) Henkel v. Chua, 507 So. 2d 791 (Fla. 4th Dist. Ct. App. 1987) (paying filing fee “was active measure intended and calculate to hasten suit to judgment”).


\(^{247}\) Fisher v. Rodgers, 496 So. 2d 241 (Fla. 3d Dist. Ct. App. 1986).
unity to meet the question of whether there exists a genuine issue of material fact. Therefore, in *Fruhmorgen v. Watson*, it was improper for the trial court to grant an oral motion for summary judgment on the day the case was set for trial.

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

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

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

257. *Fla. R. Civ. P. 1.510 (c).*
258. 490 So. 2d 1032, 1033 (Fla. 2d Dist. Ct. App. 1987).
262. *Singer*, 510 So. 2d at 639.
266. *Zabran*, 495 So. 2d at 1199; *DeMesme*, 498 So. 2d at 675.
269. *DeMesme*, 498 So. 2d at 673.
270. 487 So. 2d 1204 (Fla. 1st Dist. Ct. App. 1986).
276. *Sylvester v. City of Delray Beach*, 486 So. 2d 607 (Fla. 4th Dist. Ct. App. 1986) (purposes at the times of the two motions are different as are the considerations; with summary judgment all proper pleadings of the non-movant are taken to be true, ultimately raised in the answer.)
tunity to meet the question of whether there exists a genuine issue of material fact. The motion must be served at least twenty days before hearing. Therefore, in Frumhorgen v. Watson, it was improper for the trial court to grant an oral motion for summary judgment on the day the case was set for trial.

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

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

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

258. 490 So. 2d 1032, 1033 (Fla. 2d Dist. Ct. App. 1987).
262. Singer, 510 So. 2d at 639.
265. Zabranz, 495 So. 2d at 1199; DeMemes, 498 So. 2d at 673.
XI. Directed Verdict

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

A motion for directed verdict must be made at the close of all the evidence, otherwise the court is deemed to have submitted the action to the jury. A failure to move for a directed verdict also results in a waiver of the right to have the trial court consider a motion for judgment notwithstanding the verdict.

XII. Res Judicata/Collateral Estoppel

In order for a final judgment to bar further litigation based upon principles of res judicata or claim preclusion, the judgment must reflect the "identity of" the thing sued for, the cause of action, the persons or parties of the action, and the quality in the person for or against whom the claim is made. Res judicata is an affirmative defense that must be pled. Merely mentioning a prior proceeding is not sufficient proof that the question presented in any subsequent litigation has been previously adjudicated.

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

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

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

XIII. New Trial

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

Unlike orders granting new trial, the trial court need not specify the grounds for granting a rehearing in a non-jury case. Furthermore, in these cases, additional testimony may be taken on any or all issues for full development of essential facts so that the trial judge may order a more accurate judgment. And the trial court, if convinced of having committed an error, may correct that error on motion for rehearing.

XIV. Costs and Interest

A. Costs

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

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

297. 496 So. 2d 158 (Fla. 3d Dist. Ct. App. 1986).
298. Id.
303. 484 So. 2d 603 (Fla. 4th Dist. Ct. App. 1986).
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297. 496 So. 2d 158 (Fla. 3d Dist. Ct. App. 1986).
298. Id.
302. FLA. R. CIV. P. 1.530 (f).
303. 484 So. 2d 603 (Fla. 4th Dist. Ct. App. 1986).
307. Id.
309. FLA. STAT. § 57.041 (1985).
312. Ots, 489 So. 2d at 1189.
313. Caicere, 489 So. 2d at 869.
314. Id.
315. Ots, 489 So. 2d at 1189.
316. Id.
317. Caicere, 489 So. 2d at 869.
taxed to the attorney when the attorney is found guilty of the charges brought against him. Rule 1.442 provides that "if the judgment finally obtained by the adverse party is not more favorable than the offer, he must pay the costs incurred after the making of the offer." A "Judgment finally obtained" means a judgment which has disposed of the case and become final after all rights to appellate review have been exhausted. The Third District Court of Appeal, in Kay v. Bricker, held that all costs incurred after the attorney's settlement offer in the malpractice action were to be borne by the client when the judgment after set-off was not more favorable that the offer. The provisions in Rule 1.442 are grounded upon the public policy of avoiding trials and ensuing appeals by the imposition of cost sanctions.

B. Prejudgment Interest

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

318. The Florida Bar v. Lehman, 485 So. 2d 1276 (Fla. 1986); The Florida Bar v. Golden, 502 So. 2d 891 (Fla. 1987).
322. Cheek, 483 So. 2d at 1373.
327. Florida Steel Corp. v. Adaptable Developments Inc., 503 So. 2d 1232 (Fla. 1986).

Civil Procedure

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

XV. Relief From Judgment

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

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

The rule is essentially verbatim the Federal Rule 60(b) without the latter's clause. The rule serves as a mechanism to correct inadvertent decisions which are the result of oversight, neglect or accident, or to correct mistakes made in the ordinary course of litigation. The trial court can correct its non-final order or reconsider any of its interlocutory rulings prior to final judgment. Relief is in appropriate where the order is not final, not itself subject to appeal or re-

330. 488 So. 2d 647 (Fla. 5th Dist. Ct. App. 1986).
331. 4d.
taxed to the attorney when the attorney is found guilty of the charges brought against him. 318 Rule 1.442 provides that "if the judgment finally obtained by the adverse party is not more favorable than the offer, he must pay the costs incurred after the making of the offer." 319 A "judgment finally obtained" means a judgment which has disposed of the case and become final after all rights to appellate review have been exhausted. 320 The Third District Court of Appeal, in Kay v. Bricker, 321 held that all costs incurred after the attorney’s settlement offer in the malpractice action were to be borne by the client where the judgment after set-off was not more favorable that the offer. The provisions in Rule 1.442 are grounded upon the public policy of avoiding trials and ensuing appeals by the imposition of cost sanctions. 322

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318 The Florida Bar v. Lehrman, 485 So. 2d 1276 (Fla. 1986); The Florida Bar v. Golden, 502 So. 2d 891 (Fla. 1987).
319 Fla. R. Civ. P. 1.442.
321 485 So. 2d 486 (Fla. 3d Dist. Ct. App. 1986).
322 Cheek, 483 So. 2d at 1373.
327 Florida Steel Corp. v. Adaptable Developments Inc., 503 So. 2d 1232 (Fla. 1986).

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

330 488 So. 2d 647 (Fla. 5th Dist. Ct. App. 1986).
331 Id.
332 Fla. R. Civ. P. 1.540 (b).
lief," and is subject to a pending rehearing motion. The test to determine whether an order is final or interlocutory in nature is whether the case has been disposed of by an order and whether any question remains open for judicial determination. Essentially, a final decree marks the end of judicial labor.

A meritless defense is a precondition to any relief herein. Therefore, in Napo Paints, Inc. v. LaPorte (U.S.), Inc., the third district held that the defendant was not entitled to relief where his motion was unsworn, failed to set forth any facts of an alleged meritorious defense, and adduced no affidavits, evidence or testimony in support thereof. Failure to be informed by one’s spouse about the receipt of a summons and complaint does not establish excusable neglect under this rule. Nor does failure to file defensive pleadings or to appear at a motion for attorney’s fees, since neither are legally required. Failure to reverse jurisdiction so as to award injunctive relief after a final judgment awarding damages has been entered, does not result in mistake, inadvertence or excusable neglect. Failure to receive notice of hearing entitles a party to relief from judgment. A judgment entered without due service of process or a judgment entered upon a

339. Id. at 459.
341. Id.
342. Orlando Partners, Ltd. v. Classic Tour Lines, 492 So. 2d 1117 (Fla. 3d Dist. Ct. App. 1986) (affidavit by wife stating she had been served with summons and complaint and told her husband about receipt of such papers, and that she received notice of hearing on motion for entry of default but forgot to mention it to her husband until after time for hearing had passed, and husband’s affidavit concuring with wife’s except that he did not recall wife’s telling him about receipt of summons and complaint did not establish excusable neglect justifying vacation of default entered against husband and wife).
346. Falkner v. Amertifin Federal Savings & Loan Ass’n’s, 489 So. 2d 758 (Fla. 3d Dist. Ct. App. 1986) (trial court obligated to grant relief from judgment dismissing

matter entirely outside the issues made by the pleadings is void.

Therefore, as a matter of law and in compliance with Rule 1.540, the trial court is obligated to grant relief from a void final judgment. Failure to comply with Rule 1.080 service requirements has been held to constitute grounds for liberal application of Rule 1.540(b) relief from judgment.

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

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

complain, where plaintiffs did not receive notice of hearing on motion to dismiss until after hearing).
348. Falkner, 489 So. 2d at 758.
349. Owen, 483 So. 2d at 453 (copy of all orders or judgments to be transmitted to all parties).
352. 504 So. 2d 1372 (Fla. 3d Dist. Ct. App. 1987).
353. Id.
354. Id.
356. Miller, 484 So. 2d at 1221.

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

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

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

339. *Id.* at 459.
341. *Id.*
342. Orlando Partners, Ltd. v. Classic Tour Lines, 492 So. 2d 1117 (Fla. 3d Dist. Ct. App. 1986) (affidavit by wife stating she had been served with summons and complaint and told her husband about receipt of such papers, and that she received notice of hearing on motion for entry of default but forgot to mention it to her husband until after time for hearing had passed, and husband's affidavit concurring with wife's except that he did not recall wife's telling him about receipt of summons and complaint did not establish excusable neglect justifying vacating of default entered against husband and wife).
346. *Falkner v. Amerifirst Federal Savings & Loan Ass'n*, 497 So. 2d 758 (Fla. 3d Dist. Ct. App. 1986) (trial court obligated to grant relief from judgment dismissing suit entirely outside the issues made by the pleadings is void. Therefore, as a matter of law and in compliance with Rule 1.540, the trial court is obligated to grant relief from a void final judgment.

Rule 1.080 service requirements have been held to constitute grounds for liberal application of Rule 1.540(b) relief from judgment.

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

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

348. *Falkner*, 499 So. 2d at 758.
349. *Owen*, 483 So. 2d at 453 (copy of all orders or judgments to be transmitted to the trial parties).
352. *Id.*, 353. *Id.*
354. *Id.*
356. Miller, 484 So. 2d at 1221.

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Evidence

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I. Introduction

This article represents the third annual survey discussing recent evidentiary developments in Florida. Having followed the Florida appellate courts carefully for three years, the author has been able to discern several general trends in Florida evidence law worth noting briefly. First, as in most years since the Florida Evidence Code’s passage in 1976, very few important statutory evidentiary changes were made in 1987. Second, a statistical overview of the recent cases dis-

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1. The 1987 Florida legislature did not pass any bill altering the Evidence Code.

2. The Florida Supreme Court took a leader role in setting the trend for this year. See 1987 Fla. Laws 112, § 4. The 1987 Florida Service of Notices Act was also the subject of significant litigation.

3. Another component of this year’s evidentiary developments was the increasing use of electronic devices in the courtroom. See 1987 Fla. Laws 112, § 4. The increasing use of electronic devices in the courtroom was also the subject of significant litigation. See 1987 Fla. Laws 112, § 4.