Evidence: 1992 Survey of Florida Law

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Abstract

This year’s survey of Florida evidence has once again followed the same predictable patterns as seen in previous survey years.

KEYWORDS: proof, guilty, rape
license of persons convicted of certain drug related offenses, including possession, sale, and trafficking in controlled substances. Other drug related offenses, such as purchasing cocaine, are not similarly sanctioned.
I. INTRODUCTION

This year's survey of Florida evidence has once again followed the same predictable patterns as seen in previous survey years. Hearings and relevance issues generated the most case law during the survey period, while criminal decisions outnumbered civil cases in evidentiary case law. Unlike other years, a surprising number of reversals occurred during the survey period because of cross-examination mistakes and improper comments in opening statement and closing argument by counsel.

Fortunately, for the practitioner, few legislative changes occurred in the rules of evidence for 1992. The changes came in sections 90.502(2), the lawyer-client privilege, 90.503, the psychotherapist-patient privilege, 90.616(2), the exclusion of witnesses, and in 90.953, the admissibility of duplicates.

This year's Survey of Florida Evidence will include sections on opening statement, leading questions, and closing arguments. Though these sections may be more appropriate in a Trial Advocacy article, they will be focused on in this article because of the unusual number of cases that have arisen during the year and what appears to be a misunderstanding of the law in surrounding these areas. Additionally, some older cases will be reexamined, since a complete understanding of the law cannot be achieved without a discussion of these cases.

II. RULINGS ON EVIDENCE

A. Contemporaneous Objections

Section 90.104 of the Florida Statutes requires a timely objection in

3. Id. at 440 (amending Fla. Stat. § 90.503 (1991)). The change expands the privilege by aiding specified therapists to the definition of "psychotherapist."
4. Id. at 747 (amending Fla. Stat. § 90.616 (1991)).
5. Id. at 879 (amending Fla. Stat. § 90.953 (1991)).
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Section 90.104 of the Florida Statutes requires a timely objection in

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order to preserve a point for appeal. Objections which are not timely made are waived. The appellate courts are unable to consider an assertion of error in the admission of evidence, made in the trial court, if counsel fails to make a contemporaneous objection at trial. The absence of a contemporaneous objection, therefore, renders the appellate court unable to address the alleged error.

During the survey period, some rather interesting appellate decisions attempted to circumvent the clear language of section 90.104. In Thomas v. State, the First District Court of Appeal took a rather circuitous route in order to find that error had been preserved. In Thomas, the defendant was convicted for the sexual battery of a child under the age of twelve. The issue was whether the similar fact evidence, otherwise known as "Williams Rule" evidence, was properly admitted. The district court, in a split decision on rehearing, found that "Williams Rule" evidence was not properly admitted and reversed.

In reaching the merits in Thomas, the district court wrote an extensive footnote outlining the reasons why the error was preserved for appellate review. First, the majority maintained that the State did not timely argue that the issue was not adequately preserved. The majority indicated that the State's motion for rehearing acknowledged that this procedural waiver was not timely argued in its answer brief. The dissent, however, points out that it is irrelevant whether the State raises "the absence of a defense objection" in its answer brief, there can be no "waiver" of a procedural maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means.

(3) Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge.

9. A proper contemporaneous objection has two primary ingredients, both of which are needed to preserve objections for appellate review. First, the objection must be timely. If counsel does not promptly object, the problem is waived. Second, the objection must be specific. Failure to state the correct grounds for objection will waive it. The appellate court have strictly monitored this rule.
13. Thomas, 599 So. 2d at 158.
14. Id. at 161 n.1.

15. Id. at 164 (Miner, J., dissenting). Arguably, the State is not required to file an answer brief. The appellate court would not have the benefit of an adversarial position but would still be required to examine the record to determine if the issues are preserved and merit discussion.
16. Id at 161 n.1. The majority felt that a contemporaneous objection was not needed since the court's ruling was made on the morning of trial and the state and defense considered the ruling conclusive on the issue. Therefore, it was futile to make further objections.
17. Thomas, 599 So. 2d at 164.
18. Cornell v. State, 523 So. 2d 562, 566 (Fla.), cert. denied, 488 U.S. 871 (1988). But cf. Border v. State, 472 So. 2d 1370 (Fla. 3d Dist. Ct. App. 1985). When evidence has been ruled inadmissible in a motion in limine it may, in fact, not be necessary to offer the excluded testimony at trial to preserve the issue for appeal. The purpose of the motion is to prevent a proffer of the evidence at trial, therefore, a party who abides by the court's ruling should not be put in a position of waiver. However, if in doubt, regarding the motion in limine, call a side bar, out of the presence of the jury, and thoroughly proffer the evidence so that a proper appellate record can be made. This is especially true if the motion in limine did not contain a complete and thorough proffer.
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The majority next argues that the issue was preserved because on the morning of trial the defense objected to the admissibility of the collateral crime evidence in what appears to be a motion in limine. However, the dissent correctly points out that the issue was waived for purposes of appellate review because defense counsel failed to make a contemporaneous objection when the collateral crime evidence was introduced at trial. Prior Florida Supreme Court cases have held that “even when a motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review.”

Finally, the majority argues that the issue was preserved because, after an off-the-record side bar conference during trial, a limiting instruction regarding collateral crime evidence was given. The majority surmises that the collateral crime evidence must have been discussed at this unreported side bar conference. To bolster its position, the majority also argues that at the hearing for a new trial neither the prosecutor nor the trial court expressed a concern that the issue was not properly preserved. The dissent, however, once again points out that without an adequate record of what transpired at the unrecorded side bar conference, the majority is improperly speculating that a specific objection to the collateral crime evidence was interjected. Given the specificity which the Florida Supreme Court, in recent years, has required to preserve an issue for appeal, it seems highly suspect that an unrecorded objection at side bar would suffice. The fact

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19. See *Cornell v. State*, 523 So. 2d 562, 566 (Fla.), cert. denied, 488 U.S. 871 (1988). But see *Bender v. State*, 472 So. 2d 1370 (Fla. 3d Dist. Ct. App. 1985). When evidence has been ruled inadmissible in a motion in limine it may, in fact, not be necessary to offer the excluded testimony at trial to preserve the issue for appeal. The purpose of the motion is to prevent a proffer of the evidence at trial, therefore, a party who abides by the court’s ruling should not be put in a position of waiver. However, if in doubt, regarding the motion in limine, call a side bar, out of the presence of the jury, and thoroughly proffer the evidence so that a proper appellate record can be made. This is especially true if the motion in limine did not contain a complete and thorough proffer.
that the preservation issue was not argued at the hearing for a new trial is irrelevant to preserving the issue for appellate review. You cannot undo the failure to preserve an issue. It is strictly a procedural matter which bars appellate review. Additionally, the dissent pointed out that the appellant acknowledged in his rehearing response that he did not object to the similar fact evidence at trial as required.\textsuperscript{21}

The \textit{Thomas} decision is a good case to learn what not to do when faced with preserving errors for appellate review. Though the defendant in \textit{Thomas} was fortunate that a majority of the district court took a liberal view regarding preserving error,\textsuperscript{22} it is good practice to follow some simple rules and make an airtight trial record for appeal. A trial attorney should never consider a pre-trial motion, which was denied by the trial court, as being a sufficient substitute for a contemporaneous objection at trial, no matter how close in time, or conclusive, the motion was to the actual admittance of the evidence.\textsuperscript{23} Trial counsel should \textit{never} consider "going off the record" during trial.\textsuperscript{24} Trial counsel should always state a specific ground for the objection. Trial counsel should state every possible ground available to him for excluding (or admitting) the evidence. Trial counsel should \textit{never} consider that a post-judgment motion will preserve an error to which a contemporaneous objection was not made during the trial. Trial counsel should \textit{never} count on the generosity of the appellate court to preserve the error for them.

Another district court case which seems to slant the reasoning behind section 90.104 is \textit{Flanagan} v. \textit{State}.\textsuperscript{26} In one of the longest district court opinions written in recent times,\textsuperscript{27} the First District Court of Appeal affirmed the conviction of the defendant for the sexual battery of the defendant's mentally retarded nine year-old daughter. The defendant in \textit{Flanagan} argued that the trial court erred by denying his motion for mistrial based on an improper comment by the prosecutor during opening statement.\textsuperscript{28} According to the opinion, the trial court overruled the objection but did not rule on the motion for mistrial.\textsuperscript{29} The First District Court of Appeal ruled that the defendant's failure to secure a ruling on the motion was considered a waiver and, therefore, the issue was not preserved for appellate review.\textsuperscript{30}

The \textit{Flanagan} opinion is considered unusual since the opinion states that the "trial court overruled the objection but did not rule on the motion for mistrial." If the objection was, in fact, overruled, then there was no need to rule on the motion for mistrial.\textsuperscript{31} Had the trial court sustained the objection, then a motion for mistrial must be made to preserve the issue for appellate review.\textsuperscript{32} If an objection is overruled, it is ludicrous to ask for a mistrial, since the trial court has already ruled against you. The objection itself calls the court's attention to the error alleged to have prejudiced the party making the objection and to the possibility that a mistrial may be the next order of business, if the objection is sustained.\textsuperscript{33}

The \textit{Flanagan} court flatly misses the mark in its ruling on this evidentiary issue. To support its proposition that the issue was not preserved, since the trial court did not rule on the motion for mistrial, the

\textsuperscript{21} \textit{Thomas}, 599 So. 2d at 166 (Miner, J., dissenting).

\textsuperscript{22} The majority's opinion on the substantive merits of the case was very good and, for the most part, correctly analyzed and decided the collateral crimes issue. The error which the majority saw in the admittance of the collateral crimes evidence may also have been the impetus which inspired the liberal interpretation of the preservation issue.


\textsuperscript{24} \textit{But see Holmes v. Mornahl}, 427 So. 2d 378 (Fla. 4th Dist. Ct. App. 1984) (motion in limine made immediately before witness testified, no waiver occurred where there was no subsequent objection to testimony of witness). \textit{The Holmes} case can still be distinguished from \textit{Thomas} because the motion in \textit{limine} to \textit{Thomas} occurred before the start of the trial and not immediately before the witness testified, as in \textit{Holmes}.

\textsuperscript{25} The author can envision no useful purpose for going off the record during trial. Every conversation pertaining to the case should be of record. There is no, arguably, valid reason for unrecorded conversation about a case. Any discussions that are not about the case should not be brought up and in any case, still do not warrant going off the record.

\textsuperscript{26} \textit{Flanagan}, 586 So. 2d at 1092 (citing \textit{LeRetteley v. Harris}, 354 So. 2d 1213 (4th Dist. Ct. App.), cert. denied, 359 So. 2d 1216 (Fla. 1980)).

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\textsuperscript{31} Id. at 1092 (emphasis added).

\textsuperscript{32} See \textit{Taylor v. State}, 583 So. 2d 323 (Fla. 1991) (Defendant was not required to request curative instruction or move for mistrial in order to preserve alleged error in prosecutor's closing argument after his objection to prosecutor's argument was overruled), \textit{Hilton v. State}, 573 So. 2d 284 (Fla. 1990) ("The State notes that this Court held that for an objection to a prosecutor's comment to be preserved for appeal, the objection must be preceded by a motion for mistrial. However, we believe this rule to be purposeless where, as here, the objection is overruled." Id. at 288. "Of course, if the court sustains an objection, the party still must bear the responsibility of moving for a mistrial, if appropriate." Id. at 288 n.3)).

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25. Such as a motion for new trial, in arrest of judgment, etc.
27. Id. The opinion covered 40 pages and there were nine separate concurring and/or dissenting opinions filed in this en banc opinion on what the en banc court designated as a "Motion for Rehearing or to Certify Conflict or to Certify Question." Id.
28. Id. at 1092.
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district court cites to LeRetteley v. Harris. However, in LeRetteley, the Appellant failed to get a ruling on his objection. This is vastly different than what occurred in Flanagan, at least according to the record on this point. It appears that in Flanagan, defense counsel objected to the improper statement and simultaneously moved for a mistrial. Once a ruling was secured, overruling the objection, there was no need to reach the motion for mistrial, and failure to rule on the motion for mistrial was simply irrelevant to preserving the issue for review. The issue was already preserved. The First District incorrectly cites to LeRetteley, which involved the failure to secure a ruling on an objection. LeRetteley does not stand for the blanket proposition that failure to rule on a motion for mistrial, where the objection was overruled, will automatically waive the error. It is apparent though, from wading through this lengthy case, that the justices could agree on very little, let alone the preservation issue. The only way the ruling in Flanagan can be justified is if the facts were not set out correctly by the district court, otherwise, this decision is just plain wrong.

B. Offers of Proof

When a trial court excludes evidence, the trial attorney must make an "offer of proof" in order to preserve the issue for appeal, unless the offer of proof was apparent from the context of the questions being asked. This is one of the most abused sections of the evidence code. It usually leads to an inevitable call to your malpractice carrier wherein the trial attorney attempts to explain why his ex-client is suing him. There is no excuse for

failure to proffer excluded evidence, it is just sloppy lawyering. However, I have seen time and again where a lawyer gets his evidence excluded and then fails to proffer (for the record and the appellate court) what that evidence was. Ironically, the excluded evidence is usually crucial to the case, and failing to proffer the evidence almost inevitably destroys any chance of a favorable outcome at the appellate level.

Examining this year's stock of cases once again demonstrates that trial attorneys still violate this area with regularity. In Fernandez-Carballo v. State, the Third District Court of Appeal affirmed the defendant's conviction for unarmed robbery when the defendant failed to make an offer of proof. The defendant claimed that the victim had made specific statements to the police regarding the robbery which were inconsistent with the trial testimony. However, since the defendant's attorney made no profit of the inconsistent statements made by the victim to the police, the district court would not consider a reversal on this ground. Perhaps this case will be seen on the pages of the Florida Law Weekly in the form of a collateral attack.

In Strapp v. State, the Third District Court of Appeal affirmed the defendant's conviction for aggravated battery with a firearm and grand theft auto when the defendant failed to preserve for review the trial court's refusal to allow him to cross-examine the victim regarding his probationary status at the time of the incident. Had the victim been on probation at the time of the incident, he may have had a motive to lie, as it to the events of the incident, in order to curry favor with the State and to protect his probationary status. The defendant would thus have been demonstrating to the jury the obvious bias of the witness in favor of the State. However, the district

35. 354 So. 2d at 1213.
36. Id. at 1214.
37. 586 So. 2d at 1092.
38. Taylor, 583 So. 2d at 323; Holton, 573 So. 2d at 284.
39. It is interesting to note that the majority opinion was written by Justice Miner, the same justice that dissented in the Thomas case. It seems that Justice Miner keys on waiver issues, even when they don't exist.
40. See Taylor, 583 So. 2d at 323; Holton, 573 So. 2d at 284. The only way the Flanagan opinion can be justified is if 1) the objection was sustained and then the motion for mistrial was made but not ruled upon, or 2) no objection was made, only a motion for mistrial was made, and the motion was not ruled upon. However, both of these conjectures belie the facts set out by the district court.
41. FLA. STAT. § 90.104(1)(b) (1991). A proper offer of proof merely requires that when evidence is excluded that the substance of evidence be made known to the court. If the substance of the proof is not apparent from the record, the appellate court will be unable to render a decision on the excluded evidence and will, thus, dismiss the argument for failure to proffer. In re Hawkins, 449 So. 2d 97 (Fla. 1984) (Editors have inserted substance of the excluded evidence before it.)
42. 580 So. 2d 1004 (Fla. 3d Dist. Ct. App. 1991).
43. Id. Without the proffer of the inconsistent statements, the trial court correctly precluded the testimony, as inadmissible hearsay. Though the facts in Fernandez don't abet, in many instances a robbery is a one-on-one situation. Inconsistent testimony can be crucial in this type of case, especially if the identification is poor and the victim is untruthful. The district court conjectured that no proffer was forthcoming because no inconsistencies were made, as the defense attorney was on a fishing expedition in the hope that some inconsistencies would be uncovered. It is hoped that the defense attorney had some theory of the case more viable than simply fishing for nonexistent evidence.
44. FLA. R. CIV. P. 3.150 (Generally used when a criminal defendant makes a claim of ineffective assistance of counsel against his trial counsel. It usually ends in procedural putting wherein the defendant's motion is denied at the trial and appellate levels after a couple of years.)
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court pointed out that the defendant "never made an offer of proof on this matter or any argument to this effect in the trial court." The district court explained exactly what was required of the trial attorney in this case and stated:

Given this confused state of the record, we conclude that defense counsel was required to make a clear offer of proof in the record as to what he expected to prove on cross examination of the complaining witness. Counsel should have informed the trial court that he intended to establish that the complaining witness was on probation at the time of the charged incident and thus the witness' credibility, not his character, was suspect as the latter had a motive to lie to protect his probationary status and to curry favor with the State. No such offer of proof or argument was made below, because, as previously stated, it probably was never counsel's intention to introduce such evidence. In any event, we conclude that the point urged by the defendant is being made for the first time on appeal and has not been properly preserved for appellate review.

The moral of the story is twofold: first, if you didn't make the argument or offer of proof, at the trial court level, you can't make the argument for the first time on appeal. Second, if you don't make a proper offer of proof in the trial court (and you have a habit of repeating this mistake), you should make sure your malpractice premiums are paid up or you should have enough money in the bank to go into another line of work. You shouldn't be doing trial work.

Occasionally, the appellate court will be in a generous mood and bail the attorney out. However, you should never count on this. Proffer your excluded evidence for the record. In O'Shea v. O'Shea, the First District Court of Appeal reversed the trial court and held that a proffer of testimony was unnecessary for the appellate court to determine the propriety of the excluded evidence. In O'Shea, the district court ruled that the substance of the evidence sought was apparent from the context within which the

questions were asked. For instance, "[w]hen asked whether or not Archer could provide a proper environment for raising a child, the mother's lawyer objected to the relevancy of the question and the trial court sustained the objection. When Ann Ripely was asked about Archer's relationship with his own nine-year-old son, the mother's lawyer objected and the objection was sustained. Since the best interests of the child were at stake, these questions were relevant to the case and it was error to exclude them. Since the substance of the evidence was apparent from the context of these questions, there was no need for an offer of proof.

The O'Shea case illustrates a situation where an offer of proof was deemed unnecessary by the appellate court. However, as the case demonstrates, appellate counsel still argued that the issues were not properly preserved, thus resulting in the opinion by the district court regarding offers of proof. Why take the unneeded chance that the substance of the evidence will be evident from the context of the questions asked. Always, always, proffer your excluded evidence, and your legal argument, for the trial court. It gives the trial court an opportunity to hear your evidence and perhaps to change its ruling, it makes a clear record for the appellate court to examine, and preserves your issue for appellate review. You should never count on the appellate court to be so generous when it comes to preserving your issues in the trial court. An appellate attorney will always attempt to find a procedural bar to a legal issue rather than reach the substantive merits of the issue, if for no other reason than to give the appellate court an easy out, if they want to rule against you on a tough issue. Therefore, always make a habit of making the substance of your excluded evidence made known to the trial court by an offer of proof.

III. JUDICIAL NOTICE

Through the proper use of judicial notice the trial attorney can save

47. Id. at 27-28. The district court's examination of the trial court record demonstrated that defense counsel was attempting to establish that the witness was on probation at the time of the witness' prior criminal conviction. This was an impermissible attack on the witness' character. See Fla. STAT. § 90.404; Espinoso v. State, 589 So. 2d 887 (Fla. 1991).
49. Unless of course the error is fundamental. See Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978).
51. Id. at 408.
52. Id. at 407.
53. Id. at 406.
54. Judicial notice encompasses §§ 90.201-.207 of the evidence code. Section 90.201 provides: Matters which must be judicially noticed.—
A court shall take judicial notice of:
(1) Decisions, constitutional, and public statutory law and resolutions of the Florida Legislature and the Congress of the United States.
court pointed out that the defendant "never made an offer of proof on this matter or any argument to this effect in the trial court." The district court explained exactly what was required of the trial attorney in this case and stated:

Given this confused state of the record, we conclude that defense counsel was required to make a clear offer of proof in the record as to what he expected to prove on cross examination of the complaining witness. Counsel should have informed the trial court . . . that he intended to establish that the complaining witness was on probation at the time of the charged incident and thus the witness' credibility, not his character, was suspect as the latter had a motive to lie to protect his probationary status and to curry favor with the state. No such offer of proof or argument was made below, because, as previously stated, it probably was never counsel's intention to introduce such evidence. In any event, we conclude that the point urged by the defendant is being made for the first time on appeal and has not been properly preserved for appellate review.48

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48. Streep, 588 So. 2d at 28 (citations omitted).

49. Unless of course the error is fundamental. See Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978).

50. 585 So. 2d 405 (Fla. 1st Dist. Cl. App. 1991).
(2) Florida rules of court that have statewide application, its own rules, and the rules of United States courts adopted by the United States Supreme Court.
(3) Rules of court of the United States Supreme Court and of the United States Courts of Appeal.

Section 90.201 provides:

Matters which may be judicially noticed.—
A court may take judicial notice of the following matters, to the extent that they are not embraced within § 90.201:
(1) Special, local, and private acts and resolutions of the Congress of the United States and of the Florida Legislature.
(2) Decisional, constitutional, and public statutory law of every other state, territory, and jurisdiction of the United States.
(3) Contents of the Federal Register.
(4) Laws of foreign nations and of an organization of nations.
(5) Official actions of the legislative, executive, and judicial departments of the United States and of any state, territory, or jurisdiction of the United States.
(6) Records of any court of this state or of any court of record of the United States or of any other state, territory, or jurisdiction of the United States.
(7) Rules of court of any court of this state or of any court of record of the United States or of any other state, territory, or jurisdiction of the United States.
(8) Provisions of all municipal and county charters and charter amendments of this state, provided they are available in printed copies or as certified copies.
(9) Rules promulgated by governmental agencies of this state which are published in the Florida Administrative Code or in bound written copies.
(10) Duty enacted ordinances and resolutions of municipalities and counties located in Florida, provided such ordinances and resolutions are available in printed copies or as certified copies.
(11) Facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court.
(12) Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.
(13) Official seals of governmental agencies and departments of the United States and of any state, territory, or jurisdiction of the United States.

Section 90.202 provides:

Compulsory judicial notice upon request.—
A court shall take judicial notice of any matter in s. 90.202 when a party requests it and:
(1) Gives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request.
(2) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.
(2) Florida rules of court that have statewide application, its own rules, and the rules of United States courts adopted by the United States Supreme Court.
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(2) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Section 90.204 provides:

Determination of propriety of judicial notice and nature of matter noticed.

(1) When a court determines upon its own motion that judicial notice of a matter should be taken or when a party requests such notice and shows good cause for not complying with s. 90.203(1), the court shall afford each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed.

(2) In determining the propriety of taking judicial notice of a matter or the nature thereof, a court may use any source of pertinent and reliable information, whether or not furnished by a party, without regard to any exclusory rule except a valid claim of privilege and except for the exclusions provided in s. 90.403.

(3) If a court resorts to any documentary source of information not received in open court, the court shall make the information and its source a part of the record in the action and shall afford each party reasonable opportunity to challenge such information, and to offer additional information, before judicial notice of the matter is taken.

FLA. STAT. § 90.204 (1991).
Section 90.205 provides:

Denial of a request for judicial notice.—Upon request of counsel, when a court denies a request to take judicial notice of any matter, the court shall inform the parties at the earliest practicable time and shall indicate for the record that it has denied the request.

Section 90.206 provides:

Instructing jury on judicial notice.—The court may instruct the jury during the trial to accept as a fact a matter judicially noticed.

Section 90.207 provides:

Judicial notice by trial court in subsequent proceedings.—The failure or refusal of a court to take judicial notice of a matter does not preclude a court from taking judicial notice of the matter in subsequent proceedings, in accordance with the procedures specified in ss. 90.201-90.206.

the trial court. In criminal cases, when using judicial notice, care should be taken that the trial court does not take judicial notice of an essential, and material, element of a criminal charge. Since due process requires that all essential elements of the crime charged be proven beyond a reasonable doubt, judicially noticing an essential element of the crime will get a reversal. The proper use of judicial notice in a criminal case is illustrated in Graves v. State. In Graves the prosecution had the trial court judicially notice a survey map which was used by the State to demonstrate the location of the school in relation to the drug transaction. The defense argued that the trial court was judicially noticing an essential element of the crime charged. The district court correctly pointed out that the State did not use the map to establish an essential element of the crime but instead used the map at trial "to aid the officer testifying to the jury as to the actual site he had made his measurements." The actual measurements made by the officer established the essential element of the crime, not the map. Therefore, judicial notice of the map was properly made by the trial court and, apparently, effectively used by the prosecution.

The fact that judicial notice can be taken of all judicial records does not automatically mean that all the materials contained in the judicial records are admissible. This point is illustrated in Allstate Insurance Co. v. Greyhound Rent-a-Car, Inc. In Allstate, an appeal was taken when the trial court granted a rehearing because it failed to take judicial notice of the deposition of a material witness. The deposition was taken in a similar case involving the same facts and the same opposing party. The district court

55. Items in § 90.201 are mandatory and the trial court must take judicial notice of the items outlined in this section. In the absence of a specific request by trial counsel, items in § 90.202 are permissive and it is within the trial court's discretion to decide whether it will notice the matters listed in this section. However, judicial notice of facts enumerated in § 90.202 become mandatory, if specifically requested by trial counsel and if trial counsel satisfies the requirements of §§ 90.203, 204.


57. Id. The defendant in Graves was charged with the sale of cocaine within 1,000 feet of a school. See Fla. Stat. § 893.135(1)(e) (1989). An essential element of the crime is that the sale of the controlled substance was "in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, secondary school." Florida Standard Jury Instruction in Criminal Cases.

58. Id.

59. Of course, if the map was being used to establish the exact boundaries of the school, this could be problematic.


62. Id. at 483.
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62. Id. at 483.

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64. 595 So. 2d 175 (Fla. 2d Dist. Ct. App. 1992).

65. Id. at 176. The facts indicate that the charging lien was never made a part of the trial court record. Id.

66. Id.; see also Kosteks v. Johnson, 85 So. 2d 594 (Fla. 1958).

67. See MICHAEL H. GRAHAM, Handbook of Florida Evidence § 200 (1987). "If the court meets to any documentary source of information not received in open court, the court must make the information and its source a part of the record in the action and must afford each party a reasonable opportunity to challenge such information . . . ." Id.
IV. RELEVANCE

As in previous survey years, relevance issues predominated over all other evidentiary case law except hearsay, and as in previous years, the same relevance problems arose. Areas such as collateral crimes evidence and character evidence seem to be universally abused year in and year out. Though relevance issues tend to be fact specific, proper analysis of a relevance problem will help the practitioner evaluate, utilize, and correctly argue relevance issues before the trial court.

A. Admissibility of Relevant Evidence

A proper relevance analysis should always begin with the utilization of the two forms of relevance: logical relevance and legal relevance. First, is the evidence logically relevant? Does the evidence prove or disprove a material fact in issue? Second, is the evidence legally relevant? Will the evidence be prohibited by specific statutory law, privilege or constitutional right, or will its probative value be outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence?

The use of logical and legal relevance was appropriately demonstrated by the First District Court of Appeal in Johnson v. State. In Johnson, the defendant was arrested for possession of cocaine. Prior to the arrest, a police officer, from a position of concealment, observed the defendant engage in a suspected drug transaction. After observing the transaction, the defendant was placed under arrest and cocaine was found. During cross-examination defense counsel asked where the officer was located when he observed the defendant’s actions which lead to the arrest. The State objected and defense counsel argued that "effective cross-examination, by which counsel hoped to challenge the officer’s ability to see the activities leading to the [defendant’s] arrest, required disclosure of the officer’s point of observation." The trial court ruled that the officer could be questioned regarding his ability to see, but the officer’s location was not relevant.

In reversing the trial court, the district court applied the test for logical and legal relevance. Since logically relevant evidence tends to prove or disprove a material fact, the district court found that the evidence was logically relevant because the officer’s testimony was based on his observations of the [defendant’s] actions was the crucial evidence establishing probable cause for the [defendant’s] arrest. The reliability of his observations was of critical importance. Accordingly, his testimony as to the location from which he made the observations was material and logically relevant.

The district court found that the evidence was not excluded under the test for legal relevance and stated:

Section 90.403 sets forth the test for legal relevance, providing that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." However, none of these circumstances were present in the case before us, so the testimony was legally relevant under 90.403.

Because the testimony was relevant, [the officer] should have been required to reveal the location from which the made his observations, unless such testimony was barred by some privilege, constitutional right, statute or rule.

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68. Relevance encompasses §§ 90.401-410 of the Florida Statutes.

Section 90.401 provides: "Definition of relevant evidence.—Relevant evidence is evidence tending to prove or disprove a material fact." Fla. Stat. § 90.401 (1991).

Section 90.402 provides: "Admissibility of relevant evidence.—All relevant evidence is admissible, except as provided by law." Fla. Stat. § 90.402 (1991).


71. The particular facts of a case will define the material, relevant issues which are generally, unique for that case. The uniqueness of each relevance case is based on the logical connection between the evidence, and the matter it is being offered to prove or disprove, in that particular factual setting. Consequently, slight changes in the fact pattern can produce substantially different results.

72. Though some court opinions divide legal relevance into two subcategories, the author's position is that once it has been demonstrated that an item of evidence will prove, or disprove, a material fact in issue, then the only basis for excluding the item from evidence is legal relevance. Therefore, other means of excluding an item from evidence, whether it is by statute, privilege, or a rule of exclusion under the evidence code such as § 90.403, will fall under the term of legal relevance. See CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 90.402.1 (2d ed. 1984).

tions, and (2) protecting [the officer’s] safety, should be use the same observation point in the future. These reasons are not recognized by any privilege, constitutional right, statute or rule. Accordingly, the evidence was not exempt from disclosure.80

The Johnson case illustrates the proper rationale and analysis for logical and legal relevance and should be utilized by the practitioner whenever a relevance analysis is needed.81

B. Exclusion on Grounds of Prejudice or Confusion

Though exclusion under section 90.40382 is categorized as legal relevance, and is employed whenever a relevance analysis is undertaken, this segment will focus on the balancing test utilized specifically under this evidentiary section. In Miller v. State,83 the Florida Supreme Court utilized

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80. Id. at 135 (citations omitted).
81. See also Story v. State, 589 So. 2d 939 (Fla. 2d Dist. Ct. App. 1991), decided during the survey period. Story is another example of the court applying the logical and legal relevance analysis to an evidentiary problem. In Story, the trial court erred in excluding evidence of the defendant’s employees’ fraud. The case arose out of the defendant’s sales of the same fruit to different employees from the same groves. In other words, the defendant sold fruit which did not exist. The defendant wished to present evidence of fraud perpetrated by her employees against her corporation in which the employees sold fictitious groves of fruit, which did not exist, to her corporation. The defendant wanted to demonstrate her reliance on these employees’ recommendations that she entered into contracts with different companies because the employees told her that the groves, in fact, existed. Id. at 940-41. If the defendant could demonstrate that she relied on these recommendations when she entered into the contracts to sell the nonexistent fruit, the defendant would effectively negate the intent and knowledge requirement in the criminal charges.

The district court agreed that the evidence was logically relevant to prove a material fact in issue, knowledge and intent, therefore, excluding the evidence of her employees’ fraud was reversible error. Id. at 942. Additionally, the district court found that the defendant’s story was corroborated by both state and defense witnesses and that the excluded evidence would have supported the defendant’s testimony that she believed she was purchasing the necessary groves of fruit to meet her corporations’ demand, while in reality, the groves did not exist. Id.

82. Section 90.403 of the Florida Statutes provides:

Exclusion on grounds of prejudice or confusion.—Relevance evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.


83. 17 Fla. L. Weekly $185 (Mar. 27, 1992).

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the balancing test in 90.403 in finding that the probative value of a breath alcohol test was outweighed by its potential to cause prejudice or confusion. In Miller, the defendant was charged with DUI (driving under the influence) and was given a breath test one hour and twenty minutes after driving. The breath test registered .1484 and the defendant, after exercising his constitutional rights, refused to tell police when he had consumed his last alcoholic beverage. In deposition, the State’s expert toxicologist testified that it was impossible to determine with reasonable certainty the defendant’s blood-alcohol level at the time the defendant was driving.85 Additionally, the State’s toxicologist testified that it was possible that the defendant’s blood alcohol level was below the legal limit of .10 at the time of driving. Based on these statements, defense counsel filed a motion to suppress,86 which the trial court granted. The Third District Court of Appeal reversed the trial court’s decision and certified the issue to be of great public importance.

The Florida Supreme Court was faced with balancing the probative value of the breath test results with the prejudicial effect the reading would have on the jury, since the reading was taken one hour and twenty minutes after the defendant drove his vehicle.87 In other words, as the time between the defendant’s driving and the breath test increases, the probative value of the breath test results decreases, since the breath test results become less reliable in defining the defendant’s actual impairment at the time of driving.88

84. The legal limit in Florida is .10, therefore, the defendant was .04 over the legal limit. See Fla. Stat. 316.193 (1991).
85. This is because alcohol is not completely absorbed into the system immediately upon being consumed. Some of the recently consumed alcohol will remain in the stomach. Therefore, the blood alcohol level may rise over time as this alcohol is absorbed. Miller, 17 Fla. L. Weekly at $185.
86. The opinion reports that a motion to suppress was filed, however, since this was an opinion based on an evidentiary argument it is more properly considered a motion in limine.
87. It should be noted that DUI cases are notorious for setting forth the most peculiar laws known to exist. Caution should always be advised when reading a drunk driving case as the courts have tended to bend over backwards to uphold a conviction in these types of cases. This can be attributed to the intense public outcry and mass carnage on our roadways attributed to drunk driving. See South Dakota v. Neville, 459 U.S. 553 (1983). "The escalating slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." Id. at 558 (quoting, among others, Inslee v. Abrams 332 U.S. 432, 439 (1947)); see also State v. Hoch, 500 So. 2d 597, 601 (Fla. 3d Dist. Ct. App. 1986).
88. The reason for this decrease in the probative value of the breath test is twofold. First, the substantive offense of DUI is committed at the time of driving, therefore, the breath
tions, and (2) protecting the officer's safety, should he use the same observation point in the future. These reasons are not recognized by any privilege, constitutional right, statute or rule. Accordingly, the evidence was not exempt from disclosure.80

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The district court agreed that the evidence was logically relevant to prove a material fact in issue, knowledge and intent, therefore, excluding the evidence of her employees' fraud was reversible error. Id. at 942. Additionally, the district court found that the defendant's story was corroborated by both state and defense witnesses and that the excluded evidence would have supported the defendant's testimony that she believed she was purchasing the necessary groves of fruit to meet her corporations' demand, while in reality, the groves did not exist. Id.

82. Section 90.403 of the Florida Statutes provides:

Exclusion on grounds of prejudice or confusion.—Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

83. 17 Fla. L. Weekly S185 (Mar. 27, 1992).

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the balancing test in 90.403 in finding that the probative value of a breath alcohol test was outweighed by its potential to cause prejudice or confusion. In Miller, the defendant was charged with DUI (driving under the influence) and was given a breath test one hour and twenty minutes after driving. The breath test registered .1484 and the defendant, after exercising his constitutional rights, refused to tell police when he had consumed his last alcoholic beverage. In deposition, the State's expert toxicologist testified that it was impossible to determine with reasonable certainty the defendant's blood-alcohol level at the time the defendant was driving.85 Additionally, the State's toxicologist testified that it was possible that the defendant's blood alcohol level was below the legal limit of .10 at the time of driving. Based on these statements, defense counsel filed a motion to suppress,86 which the trial court granted. The Third District Court of Appeal reversed the trial court's decision and certified the issue to be of great public importance.

The Florida Supreme Court was faced with balancing the probative value of the breath test results with the prejudicial effect the reading would have on the jury, since the reading was taken one hour and twenty minutes after the defendant drove his vehicle.87 In other words, as the time between the defendant's driving and the breath test increases, the probative value of the breath test results decreases, since the breath test results become less reliable in defining the defendant's actual impairment at the time of driving.88

84. The legal limit in Florida is .10, therefore, the defendant was .04 over the legal limit. See FLA. STAT. 316.193 (1991).
85. This is because the alcohol is not completely absorbed into the system immediately upon being consumed. Some of the recently consumed alcohol will remain in the stomach. Therefore, the blood alcohol level may rise over time as this alcohol is absorbed. Miller, 17 Fla. L. Weekly at S185.
86. The opinion reports that a motion to suppress was filed, however, since this was an exclusion based on an evidentiary argument it is more properly considered a motion in limine.
87. It should be noted that DUI cases are notorious for setting forth the most peculiar laws known to exist. Caution should always be advised when reading a drunk driving case as the courts have tended to bend over backwards to uphold a conviction in these types of cases. This can be attributed to the intense public outcry and mass carnage on our roadways attributed to drunk driving. See South Dakota v. Neville, 459 U.S. 553 (1983). "The alarming slaughter on our highways, most of which should be avoidable, now reaches the amazing figure only heard of on the battlefield." Id. at 558 (quoting, among others, Briehauf v. Abram 352 U.S. 432, 439 (1957)); see also State v. Hoch, 500 So. 2d 597, 601 (Fla. 3d Dist. Ct. App. 1986).
88. The reason for this decrease in the probative value of the breath test is twofold. First, the substantive offense of DUI is committed at the time of driving, therefore, the breath
The Florida Supreme Court examined two approaches to the problem. In the first approach, the blood alcohol level was:

[A]dmissible evidence if obtained within a reasonable time after the defendant was stopped, even if the state cannot provide a scientific basis for extrapolating the blood alcohol content back to the time when the defendant was operating a vehicle. . . . [T]he inability of the state to "relate back" was a question of credibility or the weight of the evidence, not admissibility, and that evidence of blood-alcohol content thus was admissible provided an unreasonable amount of time had not elapsed until the test was taken. 80

In the second approach, the:

[T]he inability to "relate back" a defendant's blood alcohol content rendered the numerical reading of the test inadmissible because of its potential unreliability. However, the State still would be entitled to introduce evidence showing that, at the time the test was taken, the defendant tested positive for alcohol, provided the trial court gave a cautionary instruction. 80

alcohol level at the time of driving is the relevant basis for the violation, not a breath alcohol reading hours later. Second, alcohol absorption into the system is not steady, or the same, for any two people. In other words, impairment, or drunkenness, comes from the quantity of alcohol that is absorbed into a person's bloodstream. This absorption occurs at different rates for each individual. This is due to a person's metabolism, amount, time, and quantity of food the person ate, whether the person had any illness, the person's age, sex, etc. The longer the time between the person's driving and the breath test, the greater the inaccuracy in the reading. A person could be less impaired while driving, than one hour later when the breath test is given, since the person's blood alcohol level could be on the rise. A person could down a pint of whiskey and immediately jump into his car and drive. If he is stopped and immediately given a breath test, it is unlikely his breath reading will be even close, or over, the legal limit in Florida. This is due in part to the fact that the alcohol has not had time to absorb into the person's bloodstream and cause impairment. However, one hour, or more, later this same person could be substantially over the legal limit in Florida. Unless the reading can be extrapolated (this is a scientific term which analyzes a group of factors which can indicate the blood alcohol reading at the time of driving) back to the time of driving, a person could be wrongly convicted for DUI when, in fact, the person was innocent. 89

90. Miller, 17 Fla. L. Weekly at S185.

91. Drunk driving is a misdemeanor in Florida, since DUI, under § 316.193 of the Florida Statutes, is violated by impairment not drunkenness. The significance of this difference is that the burden of proof by the State is lessened considerably when, simple impairment, as opposed to drunkenness, must be proven beyond a reasonable doubt.

92. Miller, 17 Fla. L. Weekly at S186.

93. Id. The potential problem with the supreme court's analysis is the lack of guidance for the lower courts in determining what crucial factors must be balanced on a case by case basis. The trial courts must determine the mere chronological time in striking the correct balance of factors under § 90.403. The trial court must properly balance three crucial factors, including individual facts pertinent only to the case before the trial court. These factors are the time of driving, the time of the blood alcohol reading, and the numerical value of the breath reading. These three factors, and those facts available to the trial court in each individual case, will provide the blend needed to reach the correct result.

A reading of .28, taken one hour and twenty minutes after driving, will be much more probative of impairment at the time of driving than a .12 taken one hour after driving, as applied to the .10 legal limit in Florida. Since it takes more alcohol by volume, and a longer period of time to absorb into the bloodstream, it is more likely that the .28 reading would still be over the .10 legal limit in Florida had the breath reading been taken one hour and twenty minutes earlier than the .12 reading taken one hour earlier. In other words, taking all the scientific factors and applying common sense to them leads to two simple conclusions. First, you had to drink more to reach the .28, than the .12 and, second, it will take longer to reach the .28 and longer to come down from the .28 than the .12. Therefore, it will be more likely that at the time of driving the .28 reading would still have been over .10 than the .12. Of course, there is still the argument that the .12 was much higher while driving and that the individual's blood alcohol reading at the time of testing was descending instead of increasing. But the obvious truth is still apparent. If you cannot extrapolate and, therefore, do not know if the blood alcohol level was rising or falling, it is still apparent that the .28 blood is more likely to be over the .10 limit than the .12. In other words, no matter whether the .28 was "rising" or "falling" at the time of the breath test, by working back to the time of driving the breath reading would probably still be over .10. However, the .12 would only
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90. Miller, 17 Fla. L. Weekly at S185.

90. Id. at S185-86. The cautionary instruction would merely inform the jury that the defendant had alcohol in his blood at the time the test was taken and that such evidence standing alone is insufficient to demonstrate the defendant was impaired or had an unlawful blood alcohol level. Id.

Citing to the "spirit" underlying Florida's drunk-driving law, the Florida Supreme Court aligned itself with the majority of courts and chose the first approach. The Florida Supreme Court found that the inability to "relate back" the blood alcohol reading is a question of weight and not admissibility. What is a reasonable time will, of course, depend upon the facts of each case. Examining what an "unreasonable" time lapse was the court simply stated that "we believe a test is conducted at an unreasonable time if the results of that test do not tend to prove or disprove a material fact, or the probative value of the evidence is outweighed by its potential to cause prejudice or confusion."92 Applying this test to the totality of the facts in the case, the supreme court found that a one hour and twenty minute delay between the time of driving and the breath test was not unreasonable nor was the probative value outweighed by the potential for prejudice or confusion.93 Other cases examined section 90.403, but few added any new

91. Drunk driving is a misdemeanor in Florida, since DUI, under § 316.196 of the Florida Statute, is violated by impairment not drunkenness. The significance of this difference is that the burden of proof is on the State, rather than the defendant, and thus, the evidence must be beyond a reasonable doubt.

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93. Id. The potential problem with the supreme court's analysis is the lack of guidance for the lower courts in determining what crucial factors must be balanced on a case by case basis. The trial courts must go beyond the mere chronological time in striking the correct balance of factors under § 90.403. The trial court must properly balance three crucial factors, including individual facts pertinent only to the case before the trial court. These factors are the time of driving, the time of the blood alcohol reading, and the numerical value of the breath reading. These three factors, and those facts available to the trial court in each individual case, will provide the blend needed to reach the correct result.

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twists in balancing the probative value of the evidence versus the prejudicial effect it has on the jury.96

C. Character Evidence in General

It seems that no matter how many cases are decided on character evidence,96 the same mistakes continue to be made. Many people have

be over the .10 limit if at the time of driving the blood alcohol reading was "failing". Therefore, the numerical reading of the blood alcohol test is critical in determining whether the time lapse between driving and breath test is reasonable.

94. See Potting v. State, 589 So. 2d 390 (Fla. 1st Dist. Cl. App. 1991). Videotape showing in great detail the decaying, animal-revived remainders of a body lying in a wooded area constituted reversible error where there was other reliable evidence for the undisputed identity of the body; see also Norstrom v. State, 587 So. 2d 1148 (Fla. 4th Dist. Cl. App. 1991). Evidence that the defendant drank several beers was relevant to the issue of reckless driving even if the amount of the alcohol in his system would not support a charge of drunk driving since the state emphasized to jurors that it was not contending the defendant was drunk but simply that the alcohol had some effect. Id. at 1152. In essence, the mere fact that the defendant had alcohol in his system would be probative of the defendant’s reckless driving and would outweigh any danger of unfair prejudice that evidence may have on the jury given the context within which it was used in this case.

95. Section 90.404 of the Florida Statutes provides:

Character evidence, when admissible.—

(1) CHARACTER EVIDENCE GENERALLY.—Evidence of a person’s character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:

(a) Character of accused.—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.

(b) Character of victim.—

1. Except as provided in s. 794.022, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or

2. Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.

(c) Character of Witness.—Evidence of the character of a witness, as provided in ss. 90.608-90.610.

(2) OTHER CRIMES, WRONGS, OR ACTS.—

(a) Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b) When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the

problems with character evidence for a number of reasons, one of which is the inability to understand the difference in character and reputation or the interplay between sections 90.404 and 90.405. Character is a general description of a person’s disposition, either with respect to a particular trait such as honesty or peacefulness, or over all disposition. Reputation is the method of proving a person’s character. In other words, character is the subject of the proof, and reputation is the most frequently approved means for proving it.

The purpose for which character evidence will be used in trial will determine the admissibility of the evidence. Character evidence can be divided into three areas of use: first, character evidence can be used circumstantially; second, character evidence can be used as direct evidence; and third, character evidence can be used for impeachment.

When evidence of a person’s character trait is offered to show what his acts (and his state of mind) probably were on a given occasion, the evidence is being used circumstantially.96 This is the most widely used area of character evidence and it is controlled by section 90.404(1) of the evidence

state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

3. Nothing in this section affects the admissibility of evidence under s. 90.610.


Section 90.405 provides:

Methods of proving character.—

(1) REPUTATION.—When evidence of the character of a person or of a trait of his character is admissible, proof may be made by testimony about his reputation.

(2) SPECIFIC INSTANCES OF CONDUCT.—When character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of his conduct.


96. An example of the circumstantial use of character evidence is when evidence is submitted that an individual was a peaceful person. This is offered for the inference that the person acted peacefully at a time relevant to the controversy.
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96. An example of the circumstantial use of character evidence is when evidence is admitted that an individual was a peaceful person. This is offered for the inference that the person acted peacefully at a time relevant to the controversy.
Section 90.405 determines what methods you can use to prove the circumstantial evidence of character. The admissibility of the character evidence is governed by section 90.404. When using character evidence circumstantially under section 90.404(1) the only method of proof available is controlled by section 90.405(1).

Evidence of a person's character trait is offered as "direct" evidence of what his character trait is, or was, when that question is one of the ultimate issues of fact in the case. This is probably the most infrequently used area of character evidence and the one that causes the most problems. In the great majority of cases, character is being used "circumstantially," and

97. Fla. Stat. § 90.404(1) (1991). The general rule under § 90.404(1) is one which excludes evidence when the evidence is used circumstantially to demonstrate that an individual acted in conformity with it on a particular occasion. The exclusion of § 90.404(1) only operates to exclude circumstantial use of character evidence. When the character evidence is used for direct proof, going to an essential element of the charge, § 90.404 does not apply. Id.

Herein lies the downfall of many trial attorneys and judges. The inability to determine if character is an essential element, which it rarely is, or if character is being used circumstantially, which it usually is, always causes problems. When character is used circumstantially to demonstrate that a person acted in conformity with that character on a particular occasion, the evidence is not relevant and is excluded under § 90.404(1). It would only be permitted if character or a trait of character is an essential element of a charge, claim, or defense.


99. Under § 90.404(4) the only proof available to an individual using 90.404(1) is reputation evidence. Testimony by opinion, or specific instances of conduct, is not permitted. This applies to evidence being used on direct examination and does not apply to cross examination. On cross examination of the reputation witness inquiry is allowed into specific instances of conduct subject to certain limitations.

Section 90.405(1) does not contain the last sentence contained in FED. R. EVID. 404(a) that "on cross examination inquiry is allowable into relevant specific instances of conduct." The phrase was deleted from the draft rule by our Legislature. However, there was no intent to change the prior law by the Legislature when they altered this section. Apparently, the deletion resulted from the Legislature's misperceived concern that inclusion of the sentence would permit "Do you know?" questions rather than "Have you heard?" questions on cross exam. See Grahame, supra note 67, at 227 n.10.

100. Examples of when character is being used as direct evidence is a libel action in which a defamatory statement that "Mr. Jones is a crook," was made. Evidence would be admissible in this case to prove that Mr. Jones was a criminal. Another example when character is used as direct evidence would be a situation where evidence of the competency of the driver of an automobile would be admissible in an action for negligent entrustment of the motor vehicle to the incompetent driver.

101. The cases when character is actually "in issue" are relatively few. See Ehrhardt, supra note 72, at 154; accord Graham, supra note 67, at 232. If character or a trait of character of a person may itself be an essential element of a charge, claim or defense in a civil or criminal case, and, thus, in the strictest sense, may be in issue. If character is "in issue" then, in addition to reputation testimony, specific instances of conduct are recognized as a proper part of the party's case-in-chief.

"In issue" has been defined as "an operative fact which under the substantive law determines the legal rights and obligations of a party, proof of the character trait may be made by evidence of specific acts." Ehrhardt, supra note 72, at 154. Confusion often results for attorneys and judges alike when reading case decisions in this area. Very few things are "in issue," however, many things are "an issue" in a case. However, this distinction is glossed over in many written opinions by our courts and, oftentimes, causes confusion when the case is read by practitioners, trial judges, and other appellate courts. Character is never "in issue" when it is used circumstantially, the character evidence must be an essential element of a charge, claim or defense to be "in issue" and, thus, a direct use of character evidence.

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Herein lies the downfall of many trial attorneys and judges. The inability to determine if character is an essential element, which it rarely is, or if character is being used circumstantially, which it usually is, always causes problems. When character is used circumstantially to demonstrate that a person acted in conformity with that character on a particular occasion, the evidence is not relevant and is excluded under § 90.404(1). It would only be permitted if character or a trait of character is an essential element of a charge, claim, or defense.

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is not being used as "direct" evidence. 101

When evidence of a person’s character trait for truth and veracity is offered as bearing directly upon the credibility of a testimonial witness, the character evidence is being used for an impeachment purpose and is governed by sections 90.608 through 90.610. Remember, section 90.404 governs character evidence only with regard to the propensity or the probability that the opposing party, or defendant, did the act in question. Character evidence offered under sections 90.608 through 90.610 relates only to whether the witness is a truthful person.

A case illustrating the circumstantial use of character evidence is Lowler v. State. 102 In Lowler, the defendant was convicted of possession of cocaine within 1000 feet of a school. During the trial, the police officer testified that the location where the defendant was arrested was a known narcotics area. The district court, in reversing the conviction, stated that:

[I]n characterizing the location as a narcotics area, [the detective’s] testimony went far beyond the mere reporting of observations made at or near the time of the arrest. It is well settled that reference to the area in which a defendant is arrested as a location known to be inhabited by drug dealers is prohibited because such reference is irrelevant to the issue of guilt. Evidence of this type, impugning the area’s reputation, is introduced only to show bad character or propensity, and may unduly prejudice the jury. In a prosecution for possession of illegal drugs, the fact that a police officer knows that an arrest scene

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words, it allows the jury to disregard the facts in the case before it, and find guilt based on speculation and inferences established from other cases and facts. 108

D. Collateral Crime, Similar Fact Evidence

When it comes to sheer abuse, misuse, and prejudice, you can't beat section 90.404(2), otherwise known as the collateral crimes, similar fact evidence, or 'Williams Rule' section of the evidence code. 109 In the hands of an attorney that properly applies section 90.404(2), it can be some of the most devastating evidence introduced into a trial. 110 However, improper application of 90.404(2) will almost always get a reversal in a close case. 111

During the survey period a number of cases were decided, but only a few merit discussion here. 112 In Thomas v. State, 113 the introduction of

the one pending, is to open the door to a Pandora's box of collateral issues and, ultimately, reversible error.

108. See also Ivey v. State, 586 So. 2d 1230 (Fla. 1st Dist. Ct. App. 1991) where the district court ruled that an aggravated battery defendant's testimony, that she and the victim were fighting as the defendant was going to call the police, was not offered as evidence of a personal trait of the defendant's character where the testimony concerned her actions during a single event and, therefore, the trial court erred in permitting the State to cross-examine the defendant about previous misdemeanor convictions for battery and exhibition of a deadly weapon.

Since the defendant did not put on any character evidence for the State to rebut, the State improperly entered the misdemeanor convictions, which had the effect of demonstrating to the jury that the defendant had a propensity to commit the crime being charged, aggravated battery.


110. Section 90.404(b) is mostly used in criminal cases, however, application has been made in civil trials. See Trees v. K-Mart Corp., 467 So. 2d 401 (Fla. 4th Dist. Ct. App. 1985); Gatto v. Public Supermarket, Inc., 387 So. 2d 377 (Fla. 3d Dist. Ct. App. 1980).

111. The intricate aspects of "Williams Rule" evidence are too numerous to lay out in detail in the short space of a survey article, however, every trial practitioner should be intimately familiar with this area of the evidence code, especially those attorney's practicing criminal law. Two treatises on Florida Evidence are a must for practitioners. See, BIERBARDT, supra note 72, § 404; GRAHAM, supra note 67, § 404.


is a reputed narcotics area does not prove anything in issue and is "patently prejudicial." 103

In a close case where credibility may decide the outcome, circuman-
tual use of character evidence to demonstrate propensity will get a reva-
In this case, evidence was used circumstantially to demonstrate that be-
cause the defendant was in a "known narcotics area" the defendant must be
selling illegal drugs. 105 The district court held that "the defendant has the right to be tried based on the evidence against him,
not on the characteristics or conduct of certain classes of criminals in
general." 106

The testimony inferred that because the police have arrested other
people that had a large amount of cash on them and that in their opinion
these people were drug dealers, then since the defendant had a large amount
of cash on him, he must also be a drug dealer. This is a propensity argument
in its purest form and avoids the bounds of logic and reason that forms the
basis of our evidence code. The jury could, in essence, convict, not on the
facts and testimony in the particular case before it, but may consider what
occurs in other cases where cash is found on an individual. 107 In other

103. Id. at 935 (emphasis added) (citations omitted).
104. See Lowder, 898 So. 2d at 935. In most poor urban areas that are blighted with
crime and narcotics, many innocent people will also be living in the area. To characterize
everyone who is unfortunate enough to live in these areas as a criminal, or drug dealer, is to
misapprehend the problem. Many jurors, composed of mostly white middle class
persons who would choose to live there must be involved in the illicit activity, otherwise,
they would just move out of the area. This thought process fails to appreciate the actual
reality that many law abiding Americans simply cannot afford to move into less afflicted
areas.

105. Id. at 934-35. The defendant testified that part of the money found on him was
given to him by his girlfriend to buy a used care and that the remaining money was his
earnings from Jay-Ali where he had been earlier in the evening. This testimony was
corroborated by other witnesses. Id. at 934.
106. Id. at 935.
107. Innumerous things could differentiate other cases from the case the jury is hearing.
A change of one or two facts, can make another case completely irrelevant to the pending
case. To allow a jury to hear what the officer perceives to be important in cases outside of
words, it allows the jury to disregard the facts in the case before it, and find
guilt based on speculation and inferences established from other cases and facts. 108

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So. 2d 350 (Fla. 3d Dist. Ct. App. 1992); Espinosa v. State, 589 So. 2d 887 (Fla. 1st Dist.
Smith, 586 So. 2d 1237 (Fla. 2d Dist. Ct. App. 1991); Dawson v. State, 585 So. 2d 443 (Fla.

"Williams Rule" evidence caused a reversal in this sexual battery case of a child under the age of twelve. The district court held:

The defendant was charged with sexual battery of a child under twelve years of age. The State filed a notice of intent to rely on similar fact evidence which had occurred twelve years earlier. The "Williams Rule" evidence consisted of a Georgia crime where the defendant had driven a thirteen year old girl to an orchard and had non-consensual intercourse with her. The defendant pointed out that no familial or custodial setting was present in either case and there was no blood relationship between Appellant and the victim in the "Williams Rule" case or between him and the victim in the present case. The State argued that the "Williams Rule" evidence is proper because it is relevant to show that defendant availed himself of the opportunity to sexually molest young girls in his custody when the situation presented itself and that the defendant occupied a position of trust in a familial context in both cases.

The "Williams Rule" facts indicated that the victim was not related to the defendant by blood and did not live in the same household with the victim. The victim testified that the defendant came to her house and took her and three other children to a plum orchard while her mother was away. After the other children were dropped off at the orchard, the defendant took the victim down a road where he forced her to have sexual intercourse with him on the ground in front of the car.

In the present case, the victim lived with her mother and two sisters. The defendant did not live in the household and there was no blood relationship with the defendant and the victim. The rape took place when the defendant was visiting her house and the defendant and the child went to the store to purchase something. The defendant took the victim down a dark road and the sexual activity occurred on the front seat of the car.

The State never demonstrated what material fact in issue the similar fact evidence would establish in the case. The State seemed to indicate that the "Williams Rule" evidence went to prove "opportunity" and a "scheme or plan." In other words, the State argued that the defendant creates opportunities to be alone with small children and takes advantage of them. The district court's analysis of the case demonstrates the fallacy in the State's argument.

Neither opportunity nor scheme or plan is a disputed factual issue relevant to specific elements of the charge against [defendant]. None of the elements of the charged sexual battery requires the State to prove a scheme or plan; nor do the elements of the offense require proof of opportunity. Although the State had to prove that [defendant] was present at the time and place when the charged offense allegedly occurred, [defendant] admitted he was present at the time and place, and his defense at trial did not create any issue as to opportunity to commit the offense.

Even if it may be fair to say that the Georgia episode demonstrates that [defendant] had previously taken advantage of a similar opportunity to commit a sexual offense on a young girl, the only reasonably permissible inference to be drawn from that fact is the defendant's propensity to commit an offense, an improper purpose under section 90.402(2)(a). Opportunity in this sense is not what the statute speaks to by its reference to "opportunity" being in issue...

Nor do we discern how the 1976 Georgia episode demonstrates a plan or scheme of unique criminal conduct sufficient to support an inference that [defendant] committed the sexual battery in 1988. There

114. Id. at 158 (quoting Hearing v. State, 513 So. 2d 122, 124 (Fla. 1987)).
115. Id. at 160.
116. The Florida Supreme Court's decision in Hearing v. State, appears to lessen the stringent rules governing the admissibility of similar fact evidence in cases where the defendant occupies a position of trust in the familial context.
117. Id. at 161.
118. Id. The State must not have been present when the facts were established in court. It is hard to imagine that the State's argument for the similar fact evidence established an element under § 90.402(2)(a) and could be a legitimate basis for the use of this evidence. I imagine a more plausible explanation for the State's use of this evidence is the fact it was just plain prejudicial when put before the jury and would ensure a conviction.
119. Thomas, 599 So. 2d at 161.
"Williams Rule" evidence caused a reversal in this sexual battery case of a child under the age of twelve. The district court held:

'[T]he trial court's admission of the similar fact evidence of another crime is error requiring remand for a new trial because the similar fact evidence offered by the state and the facts underlying the instance case are not "strikingly similar" and fail to "share some unique characteristics or combination of characteristics which sets them apart from other offenses and such evidence is not relevant to prove any material fact in issue."'

The defendant was charged with sexual battery of a child under twelve years of age. The State filed a notice of intent to rely on similar fact evidence which had occurred twelve years earlier. The "Williams Rule" evidence consisted of a Georgia crime where the defendant had driven a thirteen year old girl to an orchard and had non-consensual intercourse with her. The defendant pointed out that no familial or custodial setting was present in either case and there was no blood relationship between Appellant and the victim in the "Williams Rule" case or between him and the victim in the present case. The State argued that the "Williams Rule" evidence is proper because it is relevant to show that defendant availed himself of the opportunity to sexually molest young girls in his custody when the situation presented itself and that the defendant occupied a position of trust in a familial context in both cases.

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simply is no unique fact or characteristic involved in either incident that supports an inference from the occurrence of the Georgia episode that [defendant] employed a like plan or scheme in the instant case.124

The district court pointed out that if every time the defendant took a child for a ride a similar offense was committed, then the inference created by the Georgia episode may be admitted. However, two totally isolated and unrelated incidents occurring twelve years apart do not prove a scheme or plan under section 90.404(2)(a). The State's weak excuse for establishing the relevance of the "Williams Rule" evidence, in relation to some material fact in issue, lead to the reversal of an, otherwise, horrendous case.

E. Rape Shield Law

Section 90.404(b) of the Florida Statutes permits a criminal defendant to introduce pertinent character traits of a victim. However, this section is specifically limited in rape cases by section 794.022, otherwise known as the Florida Rape Shield Statute.125 The statute sets up a procedure to determine the admissibility of a victim's previous sexual conduct. Previous sexual conduct is ordinarily deemed inadmissible under this statutory section, unless an in camera hearing is held prior to trial to determine the relevance of the evidence.126

124. Id. at 163-64.
125. Rules of Evidence—
(1) The testimony of the victim need not be corroborated in a prosecution under s. 794.011 or s. 794.041.
(2) Specific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in a prosecution under s. 794.011 or s. 794.041. However, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease; or, when consented by the victim is in issue, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is similar to the conduct or behavior in the case that it is relevant to the issue of consent.
(3) Notwithstanding any other provision of law, reputation evidence relating to a victim's prior sexual conduct or evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual assault shall not be admitted into evidence in a prosecution under s. 794.011 or s. 794.041.


127. The rape shield law is a Legislative reaction geared to protect the rights of victims.122 However, as noted by other legal writers,125 the Legislature's attempt to protect the victim's rights could emasculate the wrongfully accused defendant of his only defense by preventing him from presenting favorable evidence on his behalf. The Rape Shield statute attempts to eradicate the exclusion of certain types of evidence, by allowing an accused having geared to establishing the substance of the defense evidence, at it applies to the defendant's defense at trial.122 However, the statute can still miss the mark when it interferes with the defendant's confrontation right or, otherwise, deprives the defendant from presenting a full and fair defense.

This scenario was played out in the case of Lewis v. State.126 The defendant in Lewis was convicted on two counts of sexual assault upon a child and five counts of sexual activity with a child under the age of eighteen while in a position of familial authority.127 The defense theory at trial was that the victim, the defendant's stepdaughter, had fabricated the charges in order to prevent her mother, and the defendant, from discovering, through a gynecological exam, that she was sexually active with her boyfriend.128 During trial, the defendant's proffer129 of the cross-examination of the victim would have established that the victim was sexually active with her boyfriend both before and after the alleged incidents with the defendant.130 Additionally, the proffer established that the victim had lied to her mother, regarding her sexual activity with her boyfriend, and that her parents had put her on restriction because of letters she had written to her boyfriend containing sexually explicit language expressing her desire to have intercourse with her boyfriend.

The defense contended that the proffered evidence was relevant as it demonstrated the victim's motive to lie and accuse the defendant of sexual

122. Id. at 923.
123. Id.
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\item \textsuperscript{126} Fla. Stat. \textsuperscript{794.022(2)} (1991).
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The rape shield law is a Legislative reaction geared to protect the rights of victims.\textsuperscript{127} However, as noted by other legal writers,\textsuperscript{128} the Legislature's attempt to protect the victim's rights could emasculate the wrongly accused defendant of his only defense by preventing him from presenting favorable evidence on his behalf. The Rape Shield statute attempts to ameliorate the exclusion of certain types of evidence, by allowing an in camera hearing geared to establishing the substance of the defense evidence, as it applies to the defendant's defense at trial.\textsuperscript{129} However, the statute can still miss the mark when it interferes with the defendant's confrontation rights or, otherwise, deprives the defendant from presenting a full and fair defense.

This scenario was played out in the case of Lewis v. State.\textsuperscript{130} The defendant in Lewis was convicted on two counts of lewd and lascivious assault upon a child and five counts of sexual activity with a child under the age of eighteen while in a position of familial authority.\textsuperscript{131} The defense theory at trial was that the victim, the defendant's stepdaughter, had fabricated the charges in order to prevent her mother, and the defendant, from discovering, through a gynecological exam, that she was sexually active with her boyfriend.\textsuperscript{132} During trial, the defendant's proffer\textsuperscript{133} of the cross-examination of the victim would have established that the victim was sexually active with her boyfriend both before and after the alleged incidents with the defendant.\textsuperscript{134} Additionally, the proffer established that the victim lied to her mother, regarding her sexual activity with her boyfriend, and that her parents had put her on restriction because of letters she had written to her boyfriend containing sexually explicit language expressing her desire to have intercourse with her boyfriend.

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\item \textsuperscript{127} The public policy behind the statute is that a victim of a sexual assault should not be subjected to having her sexual history brought up in open court.
\item \textsuperscript{129} If the defendant is claiming that the sexual encounter was consensual, for instance, evidence of a pattern of conduct or behavior on the part of the victim will be admitted. \textit{Fla. Stat.} 794.022(2) (1991).
\item \textsuperscript{130} 591 So. 2d 922 (Fla. 1991).
\item \textsuperscript{131} Id. at 923.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} The trial court had reserved ruling on the State's motion in \textit{limine} to suppress evidence of the victim's sexual activity with her boyfriend. \textsuperscript{Id.}
\item \textsuperscript{134} Id.
\end{itemize}
misconduct to prevent the further disclosure of her sexual relationship with her boyfriend. Therefore, the evidence must be admitted to allow for a full and fair cross-examination. The State countered that the testimony should be inadmissible under the Rape Shield statute and, even if that statute didn't apply, the evidence should be excluded under 90.403, since it was more prejudicial than probative.\footnote{Lewis, 591 So. 2d at 923-24.}

The trial court did not rule on the State's objection under the Rape Shield statute but instead excluded the evidence based on the Florida Supreme Court's decision in\footnote{Lewis, 591 So. 2d at 924.} the case of\footnote{Id. at 925 (quoting in part Lewis v. State, 570 So. 2d 412, 419 (Ala. Dissenting)).} Marr v. State.\footnote{Id.} In Marr, the supreme court held that the Rape Shield statute excluded evidence of a victim's prior sexual activity with one other than the accused because it is generally irrelevant for determining the guilt of the accused.\footnote{Id. at n.5.} The trial court did allow evidence that the victim had a boyfriend whom the defendant and her mother did not want her to see and that they placed her on restriction because of some letters she wrote to the boyfriend.\footnote{327. Lewis, 591 So. 2d at 925 (quoting in part Lewis v. State, 570 So. 2d 412, 419 (Ala. Dissenting)).} Consequently, the jury did not hear any facts regarding the victim's sexual activity with her boyfriend, her concealment of this activity when confronted by her mother, or the victim's attempts to prevent the defendant and her mother from confirming this sexual activity through a gynecological exam.\footnote{328. Lewis, 591 So. 2d at 925 (quoting in part Lewis v. State, 570 So. 2d 412, 419 (Ala. Dissenting)).}

The district court of appeal affirmed the trial court's exclusion of the evidence and the issue was certified to the Florida Supreme Court. In reversing the district court, the supreme court stated that "[i]n light of the nature of [the defendant's] defense, the limitation of cross-examination effectively deprived [the defendant] of the opportunity to confront his accuser and present his defense."\footnote{329. Lewis, 591 So. 2d at 925 (quoting in part Lewis v. State, 570 So. 2d 412, 419 (Ala. Dissenting)).} The supreme court recognized the general rule of relevance as it applies to prior sexual conduct of a sexual battery victim and recognized that section 794.022 is a codification of that rule. The supreme court specifically indicated that its ruling was predicated on this general rule of relevance and was not implicating, nor casting doubt, on the continued validity of section 794.022.\footnote{330. Lewis, 591 So. 2d at 925 (quoting in part Lewis v. State, 570 So. 2d 412, 419 (Ala. Dissenting)).} However, only a myopic reading of the case would lead one to believe that 794.022 would allow such evidence to be excluded.\footnote{331. Lewis, 591 So. 2d at 925 (quoting in part Lewis v. State, 570 So. 2d 412, 419 (Ala. Dissenting)).}

The trial court may impose reasonable limitations on a defendant's cross-examination to prevent harassment, prejudice, confusion of the issues, witness' safety, or repetitive interrogation. However, a limitation which has the effect of precluding adequate cross-examination denying the defendant his confrontation rights or preventing the defendant from establishing a full and fair defense must give way to the defendant's constitutional rights. The limitation restricted the defendant from demonstrating that the victim had fabricated the accusations to conceal her sexual relationship with her boyfriend; thus, by shifting blame to the defendant, for information which would have been revealed in the gynecological exam, the victim was relieved of personal responsibility. Since the entire case was based on the victim's accusations, the limitation prevented the defendant from having a fundamentally fair trial.\footnote{332. Lewis, 591 So. 2d at 925 (quoting in part Lewis v. State, 570 So. 2d 412, 419 (Ala. Dissenting)).}

F. \textit{Offer to Plead Guilty; Withdrawn Pleas of Guilty}

Errors involving offers to plead guilty and withdrawn guilty pleas, under section 90.410,\footnote{333. Section 90.410 provides:} are rarely violated, however, improper admissibility of this type of evidence can have a devastating impact on the jury. Section

\begin{itemize}
\item[142.] Demonstrating that our district courts of appeal are not going to make such fine distinctions between the general rule of relevance excluding prior sexual conduct and § 794.022, see Castro v. State, 591 So. 2d 1076 (Fla. Dist. Ct. App. 1991) (where the district court reversed a sexual battery conviction based on the defendant's excluded proffer of evidence demonstrating the victim's motive to fabricate the accusations against the defendant). In Castro the trial court excluded the evidence based on § 794.022 and the district court reversed citing to Lewis. However, the supreme court indicated that Lewis was decided on purely relevance grounds and did not implicate § 794.022. Nevertheless, any exclusion of evidence, regardless of the section, will not be upheld when it violates a defendant's rights under the Sixth Amendment. The supreme court's distinction is meaningless.
\item[143.] The supreme court noted that the excluded cross-examination would have had a strong impact on the jury by demonstrating the falsity of the victim's accusations. A reasonable juror would have gotten a different impression of the victim's credibility if the proffered testimony had been allowed by the trial court.\footnote{Lewis, 591 So. 2d at 926.}
\item[144.] Section 90.410 provides:
\begin{itemize}
\item[145.] Offer to plead guilty, nolo contendere; withdrawn pleas of guilty.—Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.
\item[146.] FLA. STAT. § 90.410 (1991).
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misconduct to prevent the further disclosure of her sexual relationship with her boyfriend. Therefore, the evidence must be admitted to allow for a full and fair cross-examination. The State countered that the testimony should be inadmissible under the Rape Shield statute and, even if that statute didn’t apply, the evidence should be excluded under 90.403, since it was more prejudicial than probative.\(^\text{135}\)

The trial court did not rule on the State’s objection under the Rape Shield statute but instead excluded the evidence based on the Florida Supreme Court’s decision in Marr v. State.\(^\text{136}\) In Marr, the supreme court held that the Rape Shield statute excluded evidence of a victim’s prior sexual activity with one other than the accused because it is generally irrelevant for determining the guilt of the accused.\(^\text{137}\) The trial court did allow evidence that the victim had a boyfriend whom the defendant and her mother did not want her to see and that they placed her on restriction because of some letters she wrote to the boyfriend.\(^\text{138}\) Consequently, the jury did not hear any facts regarding the victim’s sexual activity with her boyfriend, her concealment of this activity when confronted by her mother, or the victim’s attempts to prevent the defendant and her mother from confirming this sexual activity through a gynecological exam.\(^\text{139}\)

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\(^{135}\) Lewis, 591 So. 2d at 923-24.

\(^{136}\) 494 So. 2d 1139 (Fla. 1986).

\(^{137}\) Lewis, 591 So. 2d at 924.

\(^{138}\) Id.

\(^{139}\) Id.

\(^{140}\) Id. at 925 (quoting in part Lewis v. State, 570 So. 2d 412, 419) (Allen, J., dissenting).

\(^{141}\) Id. at n.5.

\(^{142}\) Demonstrating that our district courts of appeal are not going to make such fine distinctions between the general rule of relevancy excluding prior sexual conduct and § 794.022, see Castro v. State, 591 So. 2d 1076 (Fla. 3d Dist. Ct. App. 1991) (where the district court reversed a sexual battery conviction based on the defendant’s excluded proffer of evidence demonstrating the victim’s motive to fabricate the accusations against the defendant). In Castro the trial court excluded the evidence based on § 794.022 and the district court reversed citing to Lewis. However, the supreme court indicated that Lewis was decided on narrow relevance grounds and did not implicate § 794.022. Nevertheless, any exclusion of evidence, regardless of the section, will not be upheld when it violates a defendant’s rights under the Sixth Amendment. The supreme court’s distinction is meaningless.

\(^{143}\) The supreme court noted that the excluded cross-examination would have had a strong impact on the jury by demonstrating the falsity of the victim’s accusations. A reasonable jury would have gotten a different impression of the victim’s credibility if the prefereed testimony had been allowed by the trial court. Lewis, 591 So. 2d at 926.

\(^{144}\) Section 90.410 provides:

Offer to plead guilty; nolo contendere; withdrawn pleas of guilty—Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered to explain why the plea or offer was made.

90.410 is best illustrated by Professor Ehrhardt in his treatise on Florida Evidence where he states:

Evidence of
(a) any statement made during the course of plea discussions or negotiations with the prosecution, which do not result in a guilty plea, or which result in a guilty plea which is later withdrawn;
(b) a plea of nolo contendere;
(c) a guilty plea, later withdrawn; or
(d) any statements made in connection with any of these pleas is inadmissible under section 90.410 if offered against the person making the statement in a civil or criminal proceeding.145

In order to encourage full and frank discussions regarding plea bargaining between the defendant and the prosecution, plea negotiations, statements or discussions are not admissible in court.146 Likewise, withdrawn pleas are inadmissible in a subsequent action, otherwise, it would negate the withdrawal ordered by the court. A plea of no contest, or an offer to plead no contest, is also inadmissible for the simple reason that by entering the plea the defendant is avoiding an admission of guilt. Since there is no admission of guilt, evidence of such a plea is irrelevant.147

In Dawson v. State,148 the policy behind section 90.410 was disregarded and the prosecutor was allowed to question the defendant concerning a plea offer which the defendant made before trial. Needless to say, the district court of appeal reversed this case and stated

Section 90.410 aids in promoting both the efficiency and fairness of our system of justice. Guilty pleas are an essential part of our criminal justice system, and candor in plea discussions aids greatly in the reaching of agreements between the defendant and the state. Additionally, allowing admission of evidence of prior plea negotiations leaves an indelible impression of guilt on the jurors' minds. We agree that the purpose of § 90.410 is of such importance that violation of that section cannot be deemed harmless.149

145. EHRHARDT, supra note 72, § 410.1.
146. See Fla. R. CRIM. P. 3.172(b). This section of the Florida Rules of Criminal Procedure also restricts the admissibility of evidence regarding plea bargaining.
147. A no contest plea which results in a conviction may still be admissible under 90.610 for impeachment purposes in a subsequent action.
149. 62 So. 2d 484 (citations omitted).

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Obviously, a quick way to reversal is to violate this section of the evidence code. Since pleas leave such a strong impression on the jury, i.e. why would the defendant plea bargain if he's not guilty, harmless error will merely be a shelter for this type of error.150

V. PRIVILEGES151

A. Lawyer-Client Privilege

Section 90.502 of the Florida Statutes was amended by the legislature to include, as a privileged communication, information between a person seeking or receiving services from HRS under the child support enforcement program and the attorney representing the agency. Whether this

150. This case reminds me of a time when I was asked by an attorney how they could get some particular testimony into evidence. My first question was why is the testimony relevant? The response was "because it will prejudice the other side's case." Wrong answer: Obviously, any evidence entered by one party against another will be prejudicial to the opposing party's case, however, it certainly does not mean that the evidence is admissible. If you give this type of response in court, your evidence should not come in.

Lawyer-client privilege.—
(1) For purposes of this section:
(a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
(b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.
(c) A communication between lawyer and client is "confidential: if it is not intended to be disclosed to third persons other than:
1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
2. Those reasonably necessary for the transmission of the communication.
(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.
(3) The privilege may be claimed by:
(a) The client.
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(b) A guardian or conservator of the client.
addition is necessary is open for debate.\(^{153}\)

If it is a true lawyer-client relationship, then why add this amendment.

If we attempted to define every lawyer-client relationship that would be considered privileged, I'm sure a small book could be written. It can only be assumed that the necessity of adding this amendment to section 90.502 is due to the fact that a problem with the lawyer-client relationship has been recognized, as it exists in this HRS relationship, and an amendment to this section would alleviate this problem.

B. Psychotherapist-Patient Privilege

One of the few legislative changes in the evidence code came in section 90.503, the psychotherapist—patient privilege.\(^{154}\) The change expands the system of jurisprudence. The attorney-client privilege is strictly construed. See United States v. Nixon, 418 U.S. 683 (1974). This is because the attorney-client privilege is viewed as an exception to the general rule that any witness with knowledge of the facts may be called to testify regarding what he or she knows. Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). In American jurisprudence the trial process is a search for the truth. Wigmore stated in his treatise on Evidence that

\[\text{The privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worthy of preservation for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.}\

153. If it is a true attorney-client relationship, as defined in the code, why the needless duplication of spelling it out again. It can only be assumed that no true "attorney-client" relationship exists, for the HRS relationship, under the present wording of § 90.502. Therefore, an amendment stating that such a privileged relationship exists was added.

It would be better to add a whole new privileged section entitled "HRS-Client Privilege" instead of adding this section into 90.502 where it does not belong. If it's a true attorney-client relationship, then it will already be covered by § 90.502. If it's not a true attorney-client relationship, as defined by § 90.502, then make it a separate privileged section in the code, if there are strong public policy considerations for having such a privilege in the first place.

I doubt any of our legislators took a hard look at how privileges are viewed in our
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I. R. H. WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. ed. 1961) (emphasis added); see also United States v. Zolin, 491 U.S. 544, 562 (1989) ("[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.").


The section now reads as follows:

Psychotherapist-patient privilege—

1. For purposes of this section:

(a) A "psychotherapist" is:

1. A person authorized to practice medicine in any state or nation, or reasonable believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;

2. A person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;

3. A person licensed or certified as a clinical social worker, marriage and family therapist, or mental health counselor under the laws of this state, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

4. Treatment personnel of facilities licensed by the state pursuant to chapter 396, or chapter 397, facilities designated by the
privilege by adding specified therapists to the definition of "psychotherapist."

Several cases reached the appellate courts on psychotherapist-patient issues, the most important of which was the *en banc* opinion by the Third

Department of Health and Rehabilitative Services pursuant to chapter 394 as treatment facilities, or facilities defined as community mental health centers pursuant to s. 394.907(1), who are engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

(b) A "patient" is a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

(c) A communication between psychotherapist and patient is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the patient in the consultation, examination, or interview.
2. Those persons necessary for the transmission of the communication.
3. Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist.

(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of his mental or emotional condition, including alcoholism and other drug addiction, between himself and his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

3. The privilege may be claimed by:
(a) The patient or his attorney on his behalf.
(b) A guardian or conservator of the patient.
(c) The personal representative of a deceased patient.
(d) The psychotherapist, but only on behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.

There is no privilege under this section:
(a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
(b) For communications made in the course of a court ordered examination of the mental or emotional condition of the patient.
(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any claim or defense.

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155. 590 So. 2d 446 (Fla. 3d Dist. Ct. App. 1991). The case is important from a civil pleading's standpoint, since it rejected extending a duty of care to psychotherapists for injuries caused by their patients. This duty of care has been adopted, in a ground breaking case, in California.

156. Id. at 451. The complaint also alleged that the doctor failed to prescribe the proper medications for Blaylock.

157. Id.


159. Id.

160. Boynton, 590 So. 2d at 448.

161. Id. (quoting in part from Tarasoff, 551 P.2d at 354 (Mosk, J., concurring and dissenting)).

162. Id.

163. Id. at 451.
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(b) For communications made in the course of a court ordered examination of the mental or emotional condition of the patient.

(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Id.

District Court of Appeal in Boynton v. Burglass. On May 13, 1986, Lawrence Blaylock shot and killed Wayne Boynton, Jr. Blaylock was an outpatient of psychiatrist Milton Burglass. Boynton's parents sued Burglass for malpractice and alleged that the doctor failed to hospitalize Blaylock, failed to warn Boynton, Jr., his family, or the police, that Blaylock was violence prone and had threatened serious harm to Boynton, Jr.156 Doctor Burglass moved to dismiss the complaint for failure to state a claim for relief. The trial court granted the motion with prejudice and the district court affirmed in an en banc opinion.157

The case was one of first impression in Florida and the plaintiffs urged the district court to adopt the rule announced in California's landmark decision in Tarasoff v. Regents of Univ. of California158 which held 'that a psychiatrist who allegedly knows, or should know, that a patient of his presents a serious threat of violence to a third party has a duty to warn the intended victim.'159

In rejecting this position, the district court explained that Florida courts have been unwilling to impose liability based on the defendant's failure to control the conduct of a third party.160 The district court felt that "when the duty sought to be imposed is dependent upon standards of the psychiatric profession, we are asked to embark upon a journey that 'will take us from the world of reality into the wonderland of clairvoyance.'"161 The district court reasoned that psychiatry represents a gray area with regard to foreseeability and predictability of future dangerousness, since psychiatry is anything but an exact, objective, or methodical science.162 The district court then rejected the plaintiff's contentions that Doctor Burglass had a duty to warn and found that such a duty would be potentially fatal to effective patient-therapist relationships.163

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Confidentiality is the cornerstone of the psychiatrist-patient relationship. The psychotherapist-patient privilege is codified in the Florida Evidence Code, section 90.503, Florida Statutes (1985). Had Doctor Burglass disclosed Blaylock's real or apparent threat to Boynton, he would have breached not only his ethical duty to his patient, but also section 90.503.

Imposing on Dr. Burglass a duty to warn would not only run afoul of the psychiatrist-patient confidentiality privilege, but would also severely hamper, if not destroy, the relationship of trust and confidence that is crucial to the treatment of mental illness... Requiring a psychotherapist to breach that privilege in order to warn a third party would inhibit the free expression vital to diagnosis and treatment and would, undermine the very goals of psychiatric treatment.166

Some other cases decided important issues regarding section 90.503. In Arias v. Urban,165 the district court found that the psychotherapist-patient privilege was the patient's to either assert or waive, not a third party. Therefore, a minor's parents could not waive the privilege when they denied allegations contained in the plaintiff's complaint that they knew or should have known that their son would injure someone if they left him unsupervised.166 In Schouw v. Schouw,167 a similar case to Arias, the district court held that while the mental health of a parent, in a child custody case, is relevant, the mere allegations of mental instability are insufficient to place that parent's mental health in issue and overcome the psychotherapist-patient privilege in section 90.503.168 In Jett v. Florida,169 the district court held that the defendant was denied discovery in a case for capital sexual battery and lewd assault, when the defendant was denied the opportunity to take the depositions of a psychotherapist and psychologist that examined the child victims.170 The district court found that section 415.512 of the Florida Statutes,171 which abrogates the privileged communications under section 90.503, applies to capital sexual battery though this section only appears to abrogate the privilege in child abuse and neglect cases.172

VI. WITNESSES

A. The "Deadman's" Statute

The "Deadman's Statute" is codified in section 90.602(3) of the

164. Id. at 450-51.
166. Id. at 231-32. The plaintiff's claimed that by denying these allegations the defendants' placed their son's mental and emotional condition directly in issue. The district court disagreed with the plaintiff's that the privilege could be waived merely because a third party denied the plaintiff's allegations, since the privilege can only be asserted by the patient.
168. Id. at 231 (citations omitted). Naturally, in this child custody battle both parties brought into question the other parties psychological fitness to be the custodial parent. However, mere allegations, without sufficient factual support, will not overcome the privilege.
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168. Id. at 1201 (citations omitted). Naturally, in this child custody battle both parties brought into question the other parties psychological fitness to be the custodial parent. However, mere allegations, without sufficient factual support, will not overcome the privilege.
172. The district court, again, waived and remanded the defendant’s conviction and sentence, however, slightly differing reasoning was employed. The en banc court held that waiver of the psychotherapist-patient privilege through § 415.512 makes the information available to the alleged perpetrator as well as the victim or the State. Additionally, it is not essential that the defendant be charged with child abuse or neglect in order for the privilege to arise. It will be sufficient if the actual charges constitute child abuse. The prosecutor cannot avoid application of the statutory waiver by failing to allege in the information, the relationship between the abuser and the abused child. Through the rehearing en banc was decided outside the Survey Period, it is included herein to help the reader understand when the psychotherapist-patient privilege under § 90.503 can be abrogated through statutory law.

Section 90.602 provides in pertinent part:

Testimony of interested persons.—

(1) No person interested in an action or proceeding against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or against the assignee, committee, or guardian of a mentally incompetent person, shall be examined as a witness regarding any oral communication between the interested person and the person who is deceased or mentally incompetent at the time of the examination.

(2) This section does not apply when:

(a) A personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or the assignee, committee, or guardian of a mentally incompetent person, is examined on his own behalf regarding the oral communication.

(b) Evidence of the subject matter of the oral communication is offered by the personal representative, heir at law, assignee, legatee, devisee, or survivor...
evidence code and is a narrow prohibition preventing the testimony of an interested person regarding transactions and communications between an interested person and an individual who has since died. The "Deadman's Statute" protects the estate of a deceased against false and fraudulent claims, since the deceased is not able to testify, and refute oral evidence of claims against his, or her, estate.

One case of interest was decided during the survey period. In In re: Estate of Margaret E. Walker, the deceased had left all of her real and personal property to the Appellants. However, there was no express indication as to whether the personal property included intangible, as well as tangible assets. Therefore, the personal representative of the estate, distributed over two hundred thousand dollars of a stock brokerage account to the First Presbyterian Church of Delray Beach as the residuary beneficiary. The Appellants filed a petition seeking a construction of the will and codicil supporting their entitlement to the proceeds of the brokerage account and for removal of the personal representative of the estate for improper administration.

The trial court allowed the personal representative to testify concerning the intent of the deceased. The personal representative drafted the will and codicil in this case and was appointed as personal representative in the case. As personal representative, the attorney was subject to surcharge and/or removal as personal representative should the Appellants prevail. The district court found that the attorney was an interested person under section 90.602, since he was subject to removal or surcharge for distributing assets improperly. As an interested person, the personal representative fell under the constraints of the "Dead Man's" statute and the trial court could not rely on his testimony regarding his conversations with the deceased about the intent of her will and codicil. Therefore, the district court reversed the trial court and ordered that judgment be entered for the

of a deceased person, or the assignee, committee, or guardian of a mentally incompetent person.

Id. 174. See FIA. STAT. § 90.05 (1975). This statutory section was where the original "Deadman's Statute" was codified.


176. Id. at 1804.

177. Id. The personal representative was also the attorney who drafted the last will and codicil.

178. Id. 179. Id.

Appellants. Upon a rehearing en banc, the district court withdrew its previous opinion and upheld the trial court's decision to allow the personal representative to testify concerning the intent of the deceased. The en banc court determined that there was no basis to conclude that the personal representative would gain or lose from any interpretation of the deceased's will. The personal representative's fee would, apparently, be based on quantum meruit since no other basis for the fee was argued. Therefore, based on this analysis the personal representative was not an interested party within the meaning of the dead man's statute.

B. Who May Impeach

Section 90.608 is perhaps one of the most important sections in the evidence code for the trial attorney. Understanding how and when to impeach can create tremendous impact with the jury, in addition to being the vehicle behind full and complete cross-examination. One of the most important areas in section 90.608 is the ability to demonstrate to the jury that a witness is biased. Demonstrating a bias, which would color a witness' testimony, is the single most important area in getting, otherwise, marginal evidence admitted.

A case illustrating this point is Gorham v. State, where the defendant was charged with first degree murder. The case against Gorham was largely circumstantial and relied heavily on the defendant's use of the


181. Id. The en banc court dismissed the surcharge argument in determining whether the personal representative was an interested party.

182. Section 90.608 of the Florida Statutes provides:

Who may impeach—
Any party, including the party calling the witness, may attack the credibility of a witness by:

(1) Introducing statements of the witness which are inconsistent with his present testimony.

(2) Showing the witness is biased.

(3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.

(4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he testified.

(5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.


183. 597 So. 2d 782 (Fla. 1992).
evidence code and is a narrow prohibition preventing the testimony of an interested person regarding transactions and communications between an interested person and an individual who has since died.\textsuperscript{174} The "Deadman's Statute" protects the estate of a decedent against false and fraudulent claims, since the decedent is not able to testify, and refute oral evidence of claims against his, or her estate.

One case of interest was decided during the survey period. In \textit{In re: Estate of Margaret E. Walker},\textsuperscript{175} the deceased had left all of her real and personal property to the Appellants. However, there was no express indication as to whether the personal property included intangible, as well as tangible assets.\textsuperscript{176} Therefore, the personal representative of the estate, distributed over two hundred thousand dollars of a stock brokerage account to the First Presbyterian Church of Delray Beach as the residuary beneficiary. The Appellants filed a petition seeking a construction of the will and codicil supporting their entitlement to the proceeds of the brokerage account and for removal of the personal representative of the estate for improper administration.\textsuperscript{177}

The trial court allowed the personal representative to testify concerning the intent of the deceased.\textsuperscript{178} The personal representative drafted the will and codicil in this case and was appointed as personal representative in the case. As personal representative, the attorney was subject to surcharge and/or removal as personal representative should the Appellants prevail. The district court found that the attorney was an interested person under section 90.602, since he was subject to removal or surcharge for distributing assets improperly.\textsuperscript{179} As an interested person, the personal representative fell under the constraints of the "Dead Man's" statute and the trial court could not rely on his testimony regarding his conversations with the deceased about the intent of her will and codicil. Therefore, the district court reversed the trial court and ordered that judgment be entered for the

1. Evidence code and is a narrow prohibition preventing the testimony of an interested person regarding transactions and communications between an interested person and an individual who has since died. The "Deadman's Statute" protects the estate of a decedent against false and fraudulent claims, since the decedent is not able to testify, and refute oral evidence of claims against his, or her estate.

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\textsuperscript{174} See \textit{Fla. Stat. § 90.05} (1975). This statutory section was where the original "Deadman's Statute" was codified.


\textsuperscript{176} Id. at 1804.

\textsuperscript{177} Id. The personal representative was also the attorney who drafted the last will and codicil.

\textsuperscript{178} Id.

\textsuperscript{179} Id.


\textsuperscript{181} Id. The en banc court dismissed the surcharge argument in determining whether the personal representative was an interested party.

\textsuperscript{182} Sections 90.608 of the Florida Statutes provides:

Who may impeach—

Any party, including the party calling the witness, may attack the credibility of a witness by:

(1) Introducing statements of the witness which are inconsistent with his present testimony.

(2) Showing the witness is biased.

(3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.

(4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he testified.

(5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.


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victim’s credit cards following the murder and the defendant’s fingerprints found on a receipt near the victim’s body.184 Two witnesses testified to having seen a man run from the scene of the crime, however, one witness stated that Gorham was definitely not the man and the other witness, Ms. Ada Johnson, did not see the man’s face though she thought it was Gorham.185 In closing argument, the State reiterated that Ms. Johnson had nothing to gain from her testimony. However, unbeknownst to the defense, Ms. Johnson was a paid confidential police informant and was paid a small fee related to Gorham’s case during the pendency of the trial. This information was never turned over to the defense.186 The Florida Supreme Court, in reversing the defendant’s conviction, explained that had the defense been in possession of the information, the witness’ credibility could be attacked and her bias demonstrated.187 The supreme court stated that “[a] witness’ relationship to a party, personal obligations to a party, or employment by a party all have been recognized as proper questions on cross-examination going to the interest and bias of the witness.”188

In Nelson v. State,189 the district court reversed the defendant’s murder conviction when the trial judge improperly restricted the defendant’s cross-examination of the only eyewitness to the events, the triggerman to this contract killing. The defendant and his friend, Mrs. Wilson, were charged with the murder-for-hire killing of Mrs. Wilson’s estranged husband during an acrimonious divorce proceeding. Ken McKenzie was the triggerman hired to Kill Mr. Wilson and admitted to doing the actual shooting. McKenzie testified that he shot and killed the victim while he was seated in his parked car.190 The police investigating the scene found traces of marijuana in the victim’s car. When McKenzie was arrested he had cocaine in his possession.

During cross-examination of McKenzie, defense counsel sought to elicit testimony regarding prior drug dealings between McKenzie and the victim and drug dealing as a general means of McKenzie supporting himself.191 Upon objection, defense counsel explained that Mr. McKenzie had his own separate motive to kill the victim. This motive would have cast a doubt on McKenzie’s credibility when he claimed that he only did the shooting at the defendant’s request. The trial court initially ruled for the defense but when defense counsel sought to continue cross-examination in this area the trial court sustained an objection to it.192

The district court noted that matters tending to show bias, prejudice or improper motive do not have to be within the scope of direct examination for such questioning to be proper cross-examination.193 The inability to impeach the State’s key witness caused reversible error, since this witness was the only person who could testify to the defendant’s actions in arranging the murder and was the only one who could put the defendant at the scene of the murder. The district court found that the defense was entitled to demonstrate that based on the prior drug dealings between the witness and the victim, the witness was biased, and otherwise, improperly motivated with his testimony.194 Failure to allow the jury the benefit of this impeaching evidence denied the defendant a fair trial.

Impeachment with prior inconsistent statements and contradiction by other witnesses, is always a powerful cross-examination tool for the practitioner. However, care should be taken when attempting to use extrinsic evidence to impeach a witness. To be admissible, the extrinsic evidence must contradict a fact which is not collateral.195 In all types of impeachment, if a witness is cross-examined concerning a collateral or irrelevant matter, the attorney is bound by the answer given.

A case which demonstrates this rule is Dempsey v. Shell Oil Co.196

In Dempsey, reversible error occurred when the trial judge allowed the plaintiff to be questioned and impeached about the manner and reasons for his separation from a prior job. The plaintiff was struck by a Shell Oil truck under nighttime conditions while walking to work. During trial, the defendant (Shell Oil Co.) read into evidence a portion of the plaintiff’s deposition,197 where he denied being involuntarily terminated from a prior

184. Id. at 784.
185. Id.
186. Id.
187. Id. at 784.
188. Gorman, 597 So. 2d at 784 (citations omitted). The supreme court also examined the information from the standpoint that the information was Brady material. See Brady v. Maryland, 373 U.S. 83 (1963) regarding the disclosure of exculpatory evidence. However, based on the Federal case law regarding Brady violations the supreme court’s conclusion that a reasonable probability existed that the result of the proceeding would have been different had the information been disclosed, based solely on a Brady violation, is in doubt.
190. Id.
191. Id.
192. Id. at 552.
193. Id.
194. Nelson, 602 So. 2d at 552.
196. Id. describing whether counsel could even enter into evidence this part of the deposition the district court stated: "Shell has suggested no basis for admitting Dempsey's [he plaintiff] testimony concerning his former employment other than to serve as a basis to
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job that he had years before this incident. The plaintiff pointed out that the defendant could ask the plaintiff about the prior job termination, but because this is a collateral issue, the defendant is precluded from bringing in collateral evidence.

In reversing this case the district court agreed with the plaintiff's assertion that the witness' testimony was not proper impeachment of his credibility and highly prejudicial to his case, which was largely based upon the jury's conclusion as to the credibility of the two people involved in the accident. Additionally, evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness. The district court reasoned that through this questioning the defendant suggested to the jury, that because the plaintiff was not truthful about something important, he was not credible in his other trial testimony. This was crucial, since the jury's decision rested with the credibility of two opposing witnesses.

It seems that whenever an attorney wants to get some prejudicial evidence in, he just tells the court that it goes to the credibility of the witness. The judge hears that mystical word "credibility" and, like magic, the evidence comes in. I keep wondering if someone will consider that the testimony is not proper for impeachment, is unduly prejudicial, or just plain collateral to the issues being tried.

When I read cases where a deposition in read into evidence, I always get the feeling that everyone seems to forget that wide latitude is allowed for deposition questions, since the standard for questions in deposition is "anything that is reasonably calculated to lead to admissible evidence." Therefore, it seems like simple common sense that everything you asked in deposition won't necessarily be relevant, admissible evidence at trial. Remember, at trial you have evidentiary rules, which for the most part are nonexistent in a deposition.

I question this conclusion. Why is prior job termination logically relevant to the issues presented in this case.

No claim was made for lost wages or loss of earning capacity, that would make this an impeachment on a material fact.

Unlike Federal Rule of Evidence 608, which allows a limited use for "specific instances of conduct" for impeachment, the Florida Rules of Evidence specifically exclude "specific instances of conduct" from use as impeachment. See EHRHARDT, supra note 72, § 610.8.

Additionally, the district court noted that during the impeachment the defendant was able to extract the fact that the plaintiff was fired because he was careless. This would have bolstered the defendant's position that the plaintiff was careless in the incident before the jury, even though this evidence was not independently admissible to shed light on the plaintiff's conduct in the present accident. It would be considered improper character evidence.

C. Character Evidence of Witness as Impeachment

During the survey period, one case attempted to clear up an ambiguity that has arisen in our evidence code regarding section 90.609(2). In Arias v. State, the defendant argued that the trial court improperly excluded evidence concerning her truth and veracity after vigorous cross-examination by the State. The defendant argued that this cross-examination constituted an attack on her credibility and, therefore, she should have been able to call character witnesses.

In examining the problem, the district court acknowledged that an ambiguity exists in section 90.609(2). Section 90.609(2) only allows evidence of truthful character when the character of the witness for truthfulness has been attacked by reputation evidence. The Federal Evidence Code, section 608, uses the identical language as the Florida Evidence Code but adds the phrase "or otherwise" at the end of the sentence. The Federal code allows for evidence of truthful character when the character of the witness has been attacked by reputation evidence or some other means of attack on the witness' truthful character. Since Florida had omitted the phrase "or otherwise" from its code, did it have the effect of precluding evidence of truthful character when the witness' character is attacked by something other than reputation evidence?

The district court found that the omission of the "or otherwise" language did not have the effect of changing pre-code law that vigorous, sustained cross-examination can have the net effect of a direct attack on the witness' character for truthfulness. Therefore, despite the omission of the "or otherwise" language, such an attack will allow evidence of truthful character even though the witness' character was not attacked by reputation evidence.

203. Section 90.609 of the Florida Statutes provides:

Character of witness as impeachment.—A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that:

1. The evidence may refer only to character relating to truthfulness.

2. Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.


207. The district court found that the trial court did not abuse its discretion in excluding the defendant's character evidence for truthfulness. This belief the district court's conclusion that a sustained attack on the witness' credibility on cross-examination can trigger the use.

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202. Id. at 264.
204. The district court found that the trial court did not abuse its discretion in excluding the defendant's character evidence for truthfulness. This belies the district court's conclusion that a sustained attack on the witness' credibility on cross-examination can trigger the use

impeach him by calling his former employer." Id. at 377 (emphasis added).

It seems that whenever an attorney wants to get some prejudicial evidence in, he just tells the court that it goes to the credibility of the witness. The judge hears that mystical word "credibility" and, like magic, the evidence comes in. I keep wondering if someone will consider that the testimony is not proper for impeachment, is unduly prejudicial, or just plain collateral to the issues being tried.

197. Id. at 375. When I read cases where a deposition is read into evidence, I always get the feeling that everyone seems to forget that wide latitude is allowed for deposition questions, since the standard for questions in deposition is "anything that is reasonably calculated to lead to admissible evidence." Therefore, it seems like simple common sense that everything you ask in deposition won't necessarily be relevant, admissible evidence at trial. Remember, at trial you have evidentiary rules, which for the most part are nonexistent in a deposition.

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199. No claim was made for lost wages or loss of earning capacity, that would make this an impeachment on a material fact.

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D. Conviction of Certain Crimes as Impeachment

It seems inevitable that someone during the survey period would violate the simple constraints of section 90.610. Section 90.610 allows the following colloquy during cross-examination of a witness:

Q: Have you ever been convicted of a felony? or Have you ever been convicted of a crime involving dishonesty or false statement?
A: Yes.
Q: How many times?

Stop, do not pass go, do not collect your $500 dollars. This is it, you can ask no further questions in this area. If the witness answers the questions correctly, the questioning ceases. You can't ask the witness about the type of crimes committed. This is a definite, no! You cannot specify the nature of the crime which the witness was convicted or the sentence that of truthful character evidence. However, the district court may have meant that on the record before them, the cross-examination did not amount to a sustained attack on the witness' credibility, therefore, the evidence of truthful character, though admissible after a vigorous cross-examination for truthfulness, was not supported by the record on the facts of this case.

Arias, 593 So. 2d at 264.

208. Section 90.610 of the Florida statutes provides:

Conviction of certain crimes as impeachment.—

1. A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:

(a) Evidence of such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.

(b) Evidence of juvenile adjudications are inadmissible under this subsection.

2. The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.

3. Nothing in this section affects the admissibility of evidence under s. 90.404 or s. 90.608.


209. If the answer is NO, then you must prove up the convictions by entering into evidence certified copies of the judgment of conviction for each crime when it next becomes your turn to enter in evidence, i.e. rebuttal.

210. You can only ask these questions, if such convictions have, in fact, occurred.

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was imposed. However, this simple rule is violated, year in and year out.

One of the cases illustrating this position is Porter v. State. In Porter, the State asked the defendant if he had been convicted of a felony. The defendant responded affirmatively and the State asked the defendant the number of convictions. After the defendant testified he had three felons, the State asked the defendant if he had been convicted of a crime of dishonesty. The defendant testified that he had not been convicted of such a crime and the State then proceeded to inquire into the nature of the prior misdemeanor convictions for petit theft and the six prior felony convictions. The trial court overruled defense counsel's objections. To make matters worse, the State, during closing argument, elaborated on the nature of the defendant's convictions and specifically named each and every one for the jury's edification.

The district court of appeal reversed this unique application of impeachment technique. Additionally, the district court felt application of harmless error would be inappropriate "[c]onsidering the cross examination in this case and the fact that [the defendant's] defense was an alibi defense ...."

Another classic example of trial technique is brought to you from Okaloosa County in the First District Court of Appeal. There, in Gavins v. State, the Prosecution tried another novel approach to impeachment with prior convictions. After asking the defendant if he had previously been convicted of a felony and how many times, and upon the defendant correctly answering "yes, five times," the Prosecution, apparently, thought the defendant "opened the door" to further inquiry into those "nameless, faceless" felonies. The Prosecutor pounced on the opportunity to bring out the defendant's past record of burglary, grand theft, and aggravated assault. Over defense objection, all the defendant's prior transgressions were laid

212. Id. at 1159.
213. Id.
214. I think we can attribute some of the problems in court to communication, i.e. the place where I was recently in court when an attorney asked a witness if "she had reason to believe in an accident on such a date." The witness smartly replied that "she never thought you had to have a reason to be in an accident."
215. Porter, 593 So. 2d at 1159.
217. When the nature of the crime is improperly revealed to a jury during impeachment, it is extremely prejudicial. If any facts are also revealed, this has the effect of bringing in similar fact evidence, without the necessary hearing or ten day notice requirement.
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before the jury. The Prosecution, readying for the kill, put the final touches on an overwhelming display of trial prowess by giving the following brilliant closing oration that stunned the jury and brought the onlookers to their feet when he stated:

The defendant asked you to believe him when he told you this story. This is from a man who deals in crack cocaine. This is from a man who had been convicted of escape, not once, but twice. This is from a man who has been convicted of aggravated assault. This is from a man who has been convicted of grand theft. This is from a man who is a known and convicted burglar.218

The jury returned a verdict of guilty on all counts. The district court reversed and remanded for a new trial.219 To prevent reversal when impeaching with prior criminal convictions do this: ask the required two questions, get two answers from the witness, and then stop. Do not go into the nature, type, or facts, of the prior criminal convictions.

E. Mode and Order of Interrogation and Presentation220

1. Leading Questions

People are probably wondering if some earth shattering case came out on leading questions during the survey period. The answer is no. Well, you may ask, what am I doing with a section entitled "Leading Questions" in this year's survey. The answer is simple. No matter how many cases I try, whether they are civil or criminal, county or circuit, Federal or State, one universal problem exists. Yes, you guessed it, leading questions.221 Just

as you get on a roll in direct examination, here it comes, "Objection, your Honor, Leading," "Sustained." Therefore, I never leave for trial without my American Express Card and one beautifully written Third District Court of Appeal opinion on leading questions, Porter v. State.222

In Porter, the defendant was the only witness for the defense. During direct examination the following colloquy took place:

Q: Did you ever sell heroin to Sandra Tavania?
MR. GINSBURG [the prosecutor]: Objection; leading.
THE COURT: Sustained.
Q: Did you ever make a sale of heroin . . .
MR. GINSBURG: Objection.
THE COURT: The objection is sustained as to the last question.223

Justice Pearson quickly pointed out that the abbreviated definition of a leading question, i.e. one that can be answered yes or no, is misleading.

The real meaning of this definition is that a question that suggests only the answer yes is leading; a question that suggests only the answer no is leading; but a question which can be answered either yes or no, and suggests neither answer as the correct one is not leading.224

enforced. Though the formalistic approach is good to teach correct courtroom technique, many students carry this "leading question objection" over to actual courtroom experience. Hence, the problem. Couple that with the fact that most judges consider any question ending in a yes or no answer to be leading and you have an irritating problem.

218. Gaviot, 587 So. 2d at 490.
219. Id.
221. I believe part of the problem with people's understanding of leading questions is the way we are taught in law school. In trial advocacy classes, everyone is taught the correct procedure to ask direct examination questions. Each sentence should start with who, what, when, where, why, how, explain and describe. In this way, the credibility of your witness is enhanced because he is able to converse freely with the jury, and becomes the center of attention as he or she discloses their testimony.

Though this procedure is correct, not every question lends itself to such formalistic approach in a courtroom setting. For instance, if I wanted to ask the witness if a door was opened or closed, I find it easier to ask the witness "Was the door open or closed" as oppose to "What position was the door in" or "Describe the position of the door." Most instructor's have an all object rule in effect during teaching sessions and in order to get the student to move away from leading question objection, the leading question objection is strictly
before the jury. The prosecution, readying for the kill, put the final touches on an overwhelming display of trial prowess by giving the following brilliant closing oration that stunned the jury and brought the onlookers to their feet when he stated:

The defendant asked you to believe him when he told you this story. This is from a man who deals in crack cocaine. This is from a man who had been convicted of escape, not once, but twice. This is from a man who has been convicted of aggravated assault. This is from a man who has been convicted of grand theft. This is from a man who is known and convicted burglar.214

The jury returned a verdict of guilty on all counts. The district court reversed and remanded for a new trial.219 To prevent reversal when impeaching with prior criminal convictions do this: ask the required two questions, get two answers from the witness, and then stop. Do not go into the nature, type, or facts, of the prior criminal convictions.

E. Mode and Order of Interrogation and Presentation220

1. Leading Questions

People are probably wondering if some earth shattering case came out on leading questions during the survey period. The answer is no. Well, you may ask, what am I doing with a section entitled "Leading Questions" is this year's survey. The answer is simple. No matter how many cases I try, whether they are civil or criminal, county or circuit, Federal or State, one universal problem exists. Yes, you guessed it, leading questions.221 Just as you get on a roll in direct examination, here it comes, "Objection, your Honor, Leading." "Sustained." Therefore, I never leave for trial without my American Express Card and one beautifully written Third District Court of Appeal opinion on leading questions, Porter v. State.222 In Porter, the defendant was the only witness for the defense. During direct examination the following colloquy took place:

Q: Did you ever sell heroin to Sandra Tavasis?

MR. GINSBURG [the prosecutor]: Objection; leading.

THE COURT: Sustained.

Q: Did you ever make a sale of heroin . . .

MR. GINSBURG: Objection.

THE COURT: The objection is sustained as to the last question.223

Justice Pearson quickly pointed out that the abbreviated definition of a leading question, i.e. one that can be answered yes or no,224 is misleading.225

The real meaning of this definition is that a question that suggests only the answer yes is leading; a question that suggests only the answer no is leading; but a question which can be answered either yes or no, and suggests neither answer as the correct one is not leading.226

221. See, The Tropics, 172 So. 2d at 490.
222. Id.
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Hence, the problem. Couple that with the fact that most judges consider any question ending is a yes or no answer to be leading and you have an irritating problem. 222. 386 So. 2d 1209 (Fla. 3d Dist. Ct. App. 1980). This opinion is one of the few, and only, cases in existence where improper use of a leading question objection lead to a reversal. It is also memorable, since this was the second time the district court reversed this same case. The case was written by Justice Daniel Pearson of the Third District Court of Appeal.

This case, on leading questions, is a classic which should be in everyone's trial notebook. I have often presented this case to the judge, after a leading question objection, explained to the trial judge, why my question was not leading. On many occasions the judge made the case, and overruled any further leading question objections. 223. Id. at 1210-11.
225. Porter, 386 So. 2d at 1211.
226. Id. see also United States v. Durham, 319 F.2d 590 (4th Cir. 1963) (The essential question is whether it so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be irrespective of an actual memory).
Justice Pearson noted that no objections are more frivolous than leading question objections.\textsuperscript{227} The Justice quoted the New Jersey Supreme Court, which determined that the direct examination question "At any time did you intentionally strike anybody with this ax?" was not leading, and stated:

The objection that the question was leading was unsound. In a sense every question is leading. If interrogation did not lead, a trial would go nowhere. Indeed one vice of a question such as, "what is your position in this case?" is that it does not lead enough, and thus would deny the opposing party an opportunity to guard against the rankest kind of improper proof. A question must invite the witness's attention to something. No formula can be stated with confidence that it will embrace all situations. But it may be said that ordinarily a question is not improperly leading unless it suggests what answer should or contains facts which in the circumstances can and should originate with the witnesses. See generally McCormick, Evidence § 6 (1954); \textit{3} Wigmore, Evidence §§ 769-72 (3d ed. 1940). The question whether Abbott intentionally struck any of the Scaranos with the ax was perfectly proper; we do not see how else it could be phrased.\textsuperscript{228}

The frustration of having opposing counsel make frivolous, meritless objections for leading questions can infringe even the best trial attorneys. The frustration is only magnified by the trial court's continued indulgence in sustaining these objections. If you're a trial lawyer, you should have a copy of this case.

\textbf{F. Exclusion of Witnesses}

One of the few legislative changes in the evidence code came in section 90.616,\textsuperscript{229} the exclusion of witnesses. The amendment to section 90.616

\textsuperscript{227} \textsc{Porter}, 386 So. 2d at 1211 n.4. "In general, no objections are more frivolous than those which are made to questions as leading ones. Objections to questions as leading are generally capricious and not intended to subserve the ends of justice." \textit{Id}. (citing \textsc{Nichols} v. \textsc{Dowling}, 1 Stack 81 (1815)).

\textsuperscript{228} \textit{Id}. at 1211-12 (quoting \textsc{State} v. \textsc{Abbott}, 174 A.2d 881, 889 (1961) (citation omitted)).

\textsuperscript{229} 1992 Fla. Sess. Law Serv. 747 (West) (amending FLA. STAT. § 90.616 (1991)).

This section now provides:

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Exclusion of witnesses.--

(1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).

(2) A witness may not be excluded if he is:
\end{quote}

\begin{itemize}
\item\textit{(a)} a party who is a natural person.
\item\textit{(b)} in a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative.
\item\textit{(c)} a person whose presence is shown by the party's attorney to be essential to the presentation of the party's case.
\item\textit{(d)} in a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of the minor child victim or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.
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(20) A party who is a natural person.

(b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative.

(c) A person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause.

(d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of the minor child victim or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.


231. See Jones v. State, 44 Fla. 74, 32 So. 793 (1902).

232. 385 So. 2d 1056 (Fla. 1st Dist. Ct. App.), review denied, 593 So. 2d 1056 (Fla. 1992).

233. Id. at 1058.
The district court affirmed the conviction and found that the questions inquired about the observations of the defendant's behavior and was not asking for an opinion regarding the defendant's sanity. The district court went on to state that "noneserts may testify as to a defendant's mental condition based on personal knowledge of the defendant gained in a time period reasonable proximate to the events giving rise to the prosecution."235

During the Defense case-in-chief, the defendant called his wife to the stand and asked her the following question: "Mrs. Hansen, do you have an opinion as to whether Jens Hansen knew the consequences of his actions on September 1, 1989?"236 The State objected and the trial court sustained the objection. The district court affirmed the trial court's ruling and pointed out that although lay opinion on sanity is permissible, a witness cannot testify to purely legal conclusions. The value of lay opinion testimony on sanity is the ability to relay observations regarding the defendant's behavior. It is not helpful to have the lay witness speculate regarding the consequences of that behavior, as that does not convey what the witness has perceived, pursuant to section 90.701,237

B. Basis of Opinion Testimony by Experts

During the survey period, the Third District Court of Appeal reversed a case predicated on negligence and medical malpractice due to numerous errors regarding the expert testimony.236 In Young-Chin v. Homestead,236

the plaintiff was injured in an automobile accident and hospitalized. During his hospitalization the plaintiff contracted aspiration pneumoni-240. The plaintiff was placed in a head down position aggrivating the pneumonitis. The infection caused a high fever, but the plaintiff was not started on antibiotics for several days. The plaintiff's condition deteriorated. Though the plaintiff's physician ordered that he be placed in the Intensive Care Unit, the hospital did not have any empty ICU beds. The plaintiff died shortly thereafter.241

During direct examination, the defendant's expert testified that the plaintiff had little chance of surviving his brain injuries.242 The expert based this opinion on his view that a microscopic examination of the plaintiff's brain tissue would have exhibited tearing, however, no microscopic examination of the plaintiff's brain was performed. The only test available to the defense expert was a scan of the plaintiff's brain. This scan revealed no evidence of tears.243

The district court found that the trial court should not have permitted the defense expert's testimony regarding the brain injuries in the absence of

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235. Id.
236. Id.
237. Id. (emphasis added). It is important for the reader to distinguish between situations where an opinion on the ultimate issue is permissible under § 90.703, and situations where the witness is drawing legal conclusions or speculating from the observable facts and not testifying regarding what the witness perceived, or is not otherwise qualified to render such an opinion. Examples where an opinion is permissible include the situation where a qualified physician testifies as to the cause of bruises and contusions on a victim's throat, Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986), or where a qualified accident investigation expert expresses an opinion regarding the cause of an automobile accident, Zwing v. Henninger, 530 So. 2d 318 (Fla. 2d Dist. Ct. App. 1988). Additionally, examples where opinions are impermissible include situations where a witness attempts to express his or her opinion regarding the guilt or innocence of a defendant in a criminal case, Libby v. State, 540 So. 2d 171 (Fla. 2d Dist. Ct. App. 1988), or an opinion as to whether a victim is telling the truth, Tingle v. State, 536 So. 2d 202 (Fla. 1988).

Section 90.704 of the Florida Statutes provides:

Bases of opinion testimony by experts.—The facts or data upon which an expert basis an opinion or inference may be those perceived by, or made known to,
any physical evidence on which to base his opinion. An expert opinion is inadmissible when it is based on insufficient data. The trial court allowed the defense expert to give a prognosis for the defendant based on an inference of what the defendant's microscopic brain tissues might have revealed, even though no microscopic slides existed. There were no facts underlying the expert's opinion and, therefore, this opinion was inadmissible.

VIII. HEARSAY

As in previous survey years, hearsay continued to generate the most evidentiary decisions. However, despite the number of cases examining hearsay issues, few created any new law. Instead, common hearsay mistakes continue to plague the appellate courts.

244. Id.
245. FLA. STAT. § 90.705(2) 1991; see also Husky Indus., Inc. v. Black, 434 So. 2d 988 (Fla. 4th Dist. Ct. App. 1983); Martin v. Story, 97 So. 2d 343 (Fla. 2d Dist. Ct. App. 1957).
246. Young-Chan, 627 So. 2d at 882.
247. Hearsay is defined in § 90.801 of the Florida Statutes, which provides:

Hearsay: definitions; exceptions.  
(1) The following definitions apply under this chapter:
(a) A "statement" is:
1. An oral or written assertion;
2. Nonverbal conduct of a person if it is intended by him as an assertion.
(b) A "declarant" is a person who makes a statement.
(c) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
(a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition;
(b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication; or
(c) One of identification of a person made after perceiving him.

Additionally, admissibility of hearsay is governed by § 90.802 of the Florida Statutes, which provides: "Hearsay rule.—Except as provided by statute, hearsay evidence is inadmissible." Id. § 90.802.
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A. HEARSAY—Generally

To understand the use of hearsay, the practitioner must start with the general rule that out-of-court statements, used to prove the truth of the facts asserted in them, are generally inadmissible in court unless 1) the statements fall within an exception to the hearsay rule,248 2) the statements are used for some relevant purpose other than for the truth of the matter asserted,249 3) the statements do not fall within the definition of hearsay,250 or 4) the proceeding being conducted has relaxed the prohibition against the use of hearsay.251 After determining if the statement falls under one of the exceptions, the practitioner should then determine the relevance of the statement. The relevance of the statement will be determined by the facts at issue and the hearsay exception being used.

It is very common to see attorneys attempting to admit out of court statements because it is not for the truth of the matter asserted. When attempting to demonstrate why the statement is relevant, if it is not being used to prove the truth of its contents, attorneys generally resort to a

248. See id. §§ 90.803, 804.
249. An example would be an out-of-court statement used to demonstrate notice. Therefore, an out-of-court statement by a garage mechanic to the driver of a car that his tires are defective is not hearsay, if it is offered to prove that the driver had notice of the defective brakes. However, if it were offered to prove the brakes were, in fact, defective, the statement would be hearsay.
250. There are four types of statements: interrogatory, exculpatory, imperative and declaratory. Only a declaratory statement is considered hearsay because by definition only a "declaratory" statement is one that contains facts or opinions. Additionally, factual observations are not hearsay unless they convey a statement or assertion.
251. An example is a probationary hearing. Hearsay is admissible in a probation revocation hearing. However, the revocation cannot be based on hearsay alone. See Davis v. Sun, 474 So. 2d 1246 (Fla. 4th Dist. Ct. App. 1985); Clayton v. State, 422 So. 2d 83 (Fla. 2d Dist. Ct. App. 1982).

Generally, in suppression hearings the court may rely on hearsay and other evidence that would not be admissible at trial. See United States v. Raddatz, 447 U.S. 667 (1980).

Another example where hearsay can be admitted, despite the evidentiary exclusion, is implied consent hearings. See Fla. TRAFFIC CT. R. 6.185.

Rule 6.185—Implied consent hearings.— (a) Procedures. In all hearings arising under section 322.261, Florida Statutes, the following procedure shall be followed:
   (1) Proceedings under this rule shall be governed by the provisions of the Florida Evidence Code, except that otherwise inadmissible hearsay shall be permissible to establish compliance with Section 322.261(3)(a), Florida Statutes.

The practitioner should always check with the statutes and rules to determine what evidentiary exclusions may apply.
common, misplaced, argument. The argument goes something to the effect that the statement is being offered to prove that something was said to, or by, the witness."252  

This exact argument was made by the prosecution in a first degree murder trial in *Wright v. State.*253  In *Wright,* the prosecution introduced, over Defense objection, hearsay statements that the victim told a witness the day before the murder.254 Those statements were to the effect that the defendant had broken the victim's nose, that the defendant was no longer allowed in the house and that the victim had changed the locks.255 The prosecution argued that the statements were not offered to prove the truth of the matter asserted but were introduced "only to prove that something was said to this witness."256 The trial judge agreed and overruled the Defense objection.257  

The Florida Supreme Court concluded that the trial court abused its discretion in allowing the hearsay statements into evidence. In examining the relevance of the statements, based on the prosecutions arguments that the statements were relevant to prove that something was said to the witness, the supreme court stated that "[t]he only relevance of this out-of-court statement was to prove the truth of the matters asserted by the declarant, Aset. Therefore, the statement was hearsay."258 It is difficult to perceive what fact in issue would be proven, or disproven, in this murder case because of something that was said to the witness.

252. An example of a situation where this argument might be valid is in a situation where the statement is offered for the limited purpose of proving that the declarant was conscious after an accident. However, if there is no issue regarding whether the witness was conscious, then proving that the statement was made to, or by, someone will not prove or disprove a material fact and is therefore, not relevant. A statement is generally not relevant if its sole purpose is to demonstrate that it was made.

The statement that "Mr. Jones is a crook" made by the defendant in a defamation action is admissible not for the truth of the matter asserted, i.e. that Mr. Jones is a crook but for the fact it was made. In a defamation action there must be proof that the defamatory statement was made and that the defendant made the statement.

253. 586 So. 2d 1054 (Fla. 1991).
254. *Id.* at 1030.
255. *Id.*
256. *Id.* It is hard to imagine why, or how, it was relevant to the case that something was said to this particular witness. In other words, what fact in issue in this murder case would have been more or less probative for the fact that something was said to this witness.

257. There were numerous errors in this case, which resulted in the case being reversed and retried.

258. *Wright,* 586 So. 2d at 1030.

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A situation demonstrating the correct use of out-of-court statements for a nonhearsay purpose is *Harrison v. Housing Resources Mgt.*259  In *Harrison,* the victim was assaulted in her apartment complex. The victim sued the apartment complex and alleged that the management company breached its duty to use reasonable care for the safety of the tenants when it failed to warn the victim of previous criminal activity on the premises and failed to implement reasonable security measures.260 The trial court excluded, as hearsay, police incident reports revealing that crimes had occurred on the premises in the two years prior to the attack upon the victim.261 The district court found that the exclusion of these reports was error, since the reports were not offered to prove the truth of the matters contained in them. Allegations that criminal activity had occurred in the vicinity was relevant, since the issue of foreseeability was an issue in this negligence case.262  

B. Prior Consistent Statements

Prior consistent statements continue to be the bane of trial judges, appellate judges and trial attorneys everywhere. It is problematic for the trial attorney opposing the improper admittance of this evidence because prior consistent statements will, generally, bolster the opposing party's witness's credibility before the jury and, invariably, prejudice the objecting

260. *Id.* at 66.
261. *Id.*
262. *Id.* The truth of the matter asserted in the police reports was not in issue. It did not matter whether these reports were true or not. The police reports were merely used to determine whether the management company could have reasonably foreseen the criminal activity in the area and failed to warn the victim and, whether the management company could reasonably foresee the need to implement reasonable security measures for the protection of its tenants because of this criminal activity. See *Czerniewski v. Sunrise Point Condominium,* 540 So. 2d 199 (Fla. 3d Dist. Ct. App. 1989) (Evidence of prior crimes in the vicinity is relevant in a premises liability case.).

263. Section 90.801(2)(b) of the Florida Statutes provides:

Hearsay; definitions; exceptions.—  

(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is:  

(b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication

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\footnote{259}{588 So. 2d 64 (Fla. 1st Dist. Ct. App. 1991).}

\footnote{260}{Id. at 66.}

\footnote{261}{Id.}

\footnote{262}{Id. The truth of the matter asserted in the police reports was not in issue. It did not matter whether these reports were true or not. The police reports were merely used to determine whether the management company could reasonably foresee the criminal activity in the area and failed to warn the victim and, whether the management company could reasonably foresee the need to implement reasonable security measures for the protection of its tenants because of this criminal activity. See Czerwinski v. Sunrise Point Condominium, 540 So. 2d 199 (Fla. 3d Dist. Ct. App. 1988) (Evidence of prior crimes in the vicinity is relevant in a premises liability case.).}

\footnote{263}{Section 90.801(2)(b) of the Florida Statutes provides:

\textit{Hearsay; definitions; exceptions. --

(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is:

(b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication...}\n
\textit{Fla. Stat. § 90.801(2)(b) (1991).}
party’s case. It is problematic for the trial judge because this error can and does, in close cases, cause reversals. It is problematic for the appellate judges because they must determine whether the improper admission of the prior consistent statement and the facts of the case equal harmless error. In other words, it causes more needless work for everyone. Much of this needless consumption of time can be avoided if the following prerequisites are followed when attempting to enter prior consistent statements: 1) Has the declarant testified? 2) Has the declarant been subjected to cross-examination regarding the statement? 3) Is the prior consistent statement used to rebut an express or implied charge of fabrication or improper influence? 365

In Keller v. State, 365 the district court of appeal found that the trial court erred when it allowed six witnesses to testify to statements a victim made to them regarding an alleged attack. The state argued that the prior consistent statements of the victim were admissible to rebut the implication that the victim changed her story after the deposition, but before the trial, because of coaching by the prosecutor and the victim’s advocate. However, the district court stated that no indication of recent fabrication was

264. If the declarant is not testifying you cannot enter a prior consistent statement of the declarant. The court in Keller v. State, 366 So. 2d 1236, 1239 (Fla. 5th Dist. Ct. App. 1980) found error when the prior consistent statement was entered before the declarant testified at trial and was subject to cross-examination.

265. Following the prerequisites of section 90.801(2) the declarant must testify and be subject to cross-examination concerning the statement. Whether a third party can be used to bring out the prior consistent statement of the declarant is open for argument. Michael Graham, in his treatise on Florida Evidence, believes it can and states:

Where admissible, the prior consistent statement may be testified to by either the witness, or by any other person with personal knowledge of the statement. Section 90.801(2)(b) requires that the declarant testify at the trial and that he or she be subject to cross-examination concerning the prior statement, a requirement that is satisfied so long as the declarant is available to be recalled.

266. The key to remember is that to rebut an express or implied charge that the witness has been influenced to testify falsely or that his testimony is a recent fabrication, the prior consistent statement must have occurred before the motive to influence cause extent into existence. 367

267. 366 So. 2d 1236 (Fla. 5th Dist. Ct. App. 1980). The court in Keller v. State, 366 So. 2d 1236, 1239 (Fla. 5th Dist. Ct. App. 1980) found error when the prior consistent statement was entered before the declarant testified at trial and was subject to cross-examination.

268. Brunchi, 365

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revised in the record, Defense counsel was merely testing the credibility of the witness. 369

The district court also found that the statements of the victim to the police officers, regarding the incident, were not admissible as prior consistent statements. 370 The statements were made during the course of a criminal investigation after the alleged attack. The district court found that enough time had passed to permit reflection and possibly the inception of a motive to fabricate. 371 The district court held that the victim's prior consistent statements testified to by these witnesses were inadmissible hearsay and served only to impermissibly bolster the victim's credibility in front of the jury. 372 Thus, as this case demonstrates, improper use of prior consistent statements can and will cause needless reversals, especially when the balance of the case hangs on the credibility of one witness over another.

C. Then Existing Mental, Emotional or Physical Condition

Section 90.803(3) of the Florida Statutes 373 is loosely referred to as

269. Id. Numerous cases hold that police officers are not permitted to recount a victim's description of the crime. See, e.g., Rayso v. State, 580 So. 2d 398 (Fla. 3rd Dist. Ct. App. 1991), Perez v. State, 571 So. 2d 714 (Fla. 2nd Dist. Ct. App. 1990). 270. Id. at 1239.

271. Section 90.803(3)(a) of the Florida Statutes provides:

(a) A statement of the declarant’s then existing state of mind, emotion, physical sensation, including a statement of intent, pain, distress, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant’s state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
2. Prove or explain acts of subsequent conduct of the declarant.
3. However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant’s will.
2. A statement made under circumstances that indicate its lack of trustworthiness.
party's case. It is problematic for the trial judge because this error can and does, in close cases, cause reversals. It is problematic for the appellate judges because they must determine whether the improper admittance of the prior consistent statements and the facts of the case equal harmless error. In other words, it causes more needless work for everyone. Much of this needless consumption of time can be avoided if the following prerequisites are followed when attempting to enter prior consistent statements: 1) Has the declarant testified? 2) Has the declarant been subjected to cross-examination regarding the statement? 3) Is the prior consistent statement used to rebut an express or implied charge of fabrication or improper influence?

In Keller v. State, the district court of appeal found that the trial court erred when it allowed six witnesses to testify to statements a victim made to them regarding an alleged attack. The state argued that the prior consistent statements of the victim were admissible to rebut the implication that the victim changed her story after the deposition, but before the trial, because of coaching by the prosecutor and the victim's advocate. However, the district court stated that no indication of recent fabrication was revealed in the record. Defense counsel was merely testing the credibility of the witness.

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264. If the declarant is not testifying you cannot enter a prior consistent statement of the declarant. The court in Keller v. State, 586 So. 2d 1258, 1260 (Fla. 5th Dist. Ct. App. 1991) found error when the prior consistent statement was entered before the declarant testified at trial and was subject to cross-examination.

265. Following the prerequisites of section 90.801(2) the declarant must testify and be subject to cross-examination concerning the statement. Whether a third party can be used to bring out the prior consistent statement of the declarant is open for argument. Michael Graham, in his treatise on Florida Evidence, believes it can and states:

Where admissible, the prior consistent statement may be testified to by either the witness, or by any other person with personal knowledge of the statement. Section 90.801(2)(h) requires that the declarant testify at the trial and that he or she be subject to cross-examination concerning the prior statement, a requirement that is satisfied so long as the declarant is available for recall. Graham, supra note 67, § 801.2; cf. United States v. West, 670 F.2d 675 (7th Cir. 1982) (where the circuit court of appeals rejected this argument, since the declarant must be subject to cross-examination concerning the statement). This tends to be difficult, if a third party is bringing out the prior consistent statement. The West court felt that the declarant should be asked the prior consistent statement on re-direct or the declarant should be recalled on rebuttal. Id. at 687.

266. The key to remember is that to rebut an express or implied charge that the witness has been influenced to testify falsely or that his testimony is a recent fabrication, the prior consistent statement must have occurred before the motive or influence came into existence. 267. 586 So. 2d 1258 (Fla. 5th Dist. Ct. App. 1991).

268. Id. at 1260. No argument was made regarding the entry of the prior consistent statements by third parties.
the state of mind exception to the hearsay rule. However, this exception is often confused with using state of mind for a nonhearsay purpose under section 90.801. If testimony concerning an out of court statement is used to demonstrate the state of mind of the person who heard the statement, the statement is not hearsay because it is not being offered for the truth of the matter asserted therein. The key is to determine whose state of mind the statement will affect. If the statement affects the declarant’s state of mind, then section 90.803(3) is probably the correct section. If the statement affects the listener’s state of mind, then the 90.803(3) exception cannot be utilized and the statement must have a nonhearsay purpose under section 90.801.276

This confusion was pointed out by the Florida Supreme Court in *Hodges v. State.*275 In *Hodges,* the trial court admitted, over defense objection, statements from two detectives that the victim in a first degree murder case, was adamant about prosecuting the defendant for indecent exposure.276 The prosecution argued that the statements were admissible under section 90.803(3).277 However, the supreme court pointed out that section 90.803(3) does not apply to statements of the victim when they are used to prove the state of mind, or motive, of the defendant. The declarant in this case, for purposes of section 90.803(3), was the victim. Under section 90.803(3), those statements could only be used to demonstrate the state of mind of the declarant, i.e. the victim, not the defendant. Since the victim’s state of mind was not in issue in the case, the statements were not admissible under section 90.803.278

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FLA. STAT. § 90.803(3)(a), (b) (1991).
274. If the hearsay exceptions in FLA. STAT. § 90.803 are examined, they are generally concerned with the effect on the declarant of the statement not the listener of the statement.
275. 595 So. 2d 929 (Fla. 1992).
276. Id. at 931. The defendant shot and killed the victim, after the victim filed a complaint against the defendant for indecent exposure. On the day before the defendant was to appear for a criminal diversion arbitration hearing, the victim was found dead in a store parking lot where she worked. She was shot dead by a rifle allegedly owned by the defendant. Id.
277. The victim’s statements were admitted to demonstrate her strong desire to prosecute the defendant for indecent exposure. The prosecution used the statements to prove that the defendant had a motive to kill the victim. The truth of the matter asserted was the victim’s adherence to her desire to prosecute the defendant and thus, the statements were hearsay and inadmissible unless an exception applied. Id. at 931 (citing FLA. STAT. § 90.803(3) (1991)).
278. Although § 90.803(3) would not apply to these statements, § 90.801 might apply if the State could demonstrate a nonhearsay use of the victim’s statements, such as the effect such statements had on the mind of a listener, such as the defendant. In other words, if the State used the victim’s statements to show the effect that the statements had on the defendant to demonstrate that the defendant could have formed the motive to eliminate the victim because of these statements, then the nonhearsay use of the statements would be admissible. The statement would not be used for the truth of the matter asserted, i.e. the victim’s desire to prosecute the defendant, but merely to demonstrate that having heard the statement, the defendant could have formed the motive for eliminating the victim.
279. A strikingly similar case regarding this issue was previously decided by the Florida Supreme Court in *Koon v. State,* 513 So. 2d 1253 (Fla. 1987), cert. denied, 108 S. Ct. 1124 (1988). In *Koon,* testimony that the United States Magistrate stated in the presence of the defendant that she would have dismissed the charges against him if only one witness testified against him, was not hearsay because "[a]n out-of-court statement is admissible to show knowledge on the part of the listener that the statement was made if such knowledge is relevant to the case. Here, the testimony was not offered to prove the truth of the magistrate’s statement but rather to show that having heard the statement, the defendant could have formed the motive for eliminating one of the two prosecution witnesses." Id. at 1255 (emphasis added) (citations omitted).
279. The Supreme Court in the *Hodges* case never addressed whether the victim’s statement had a nonhearsay use under § 90.801. The only reasonable explanation for this is that in order to demonstrate the effect a statement has on a listener, it must first be demonstrated that the listener heard the statements. There is no indication in the facts of *Hodges* that the victim told anyone, other than the two detectives, that she was adamant about prosecuting the defendant. Therefore, since there was no evidence that the victim’s statements were ever heard by the defendant, the statements could not come in as nonhearsay for the effect they had on the listener.
279. 595 So. 2d 245 (Fla. 1991). The defendant was convicted of first degree murder and kidnapping.
280. Id. at 252. The murder occurred shortly after this statement was made. The defense was claiming that death was accidental occurring during erotic sexual asphyxiation. According to Dr. Fateh, a forensic pathologist who testified for the defense, erotic sexual asphyxia is a phenomenon of abnormal sexual behavior in which pressure is applied to the neck that causes reduction in the blood supply to the brain, in turn causing sexual arousal and orgasm. The prosecution’s use of the statement in question was to rebut the Defense claim that the intercourse was voluntary and the death accidental. Id. at 249.

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D. Statements for Purposes of Medical Diagnosis or Treatment

When a patient consults a doctor for the purpose of obtaining a medical diagnosis or treatment of an ailment, the statements made by the patient of a presently existing physical condition are admissible under section 90.803(4) to prove the truth of the statements. Generally, when a person consults a physician for the purpose of obtaining treatment, the person has a strong motivation to be truthful because of the desire to receive prompt and effective treatment from the doctor. To effectively utilize section 90.803(4) the practitioner must adhere to the following rules: First, the statements must be made by the person seeking the treatment or by a person who has knowledge of the facts and is legally responsible for the patient when the patient cannot communicate the facts; second, a foundation establishing that the statement was made for the purpose of diagnosis or treatment; third, the person making the statement knew it was being made for that purpose; and fourth, the statement must be reasonably pertinent to diagnosis or treatment, this fourth factor being considered from the physician's perspective.

The case of Jones v. State illustrates a common misapplication of section 90.803(4). In Jones, the prosecution entered in statements of the victim, through two treating physicians, that during the medical examinations the victim identified the defendant as the perpetrator. The district court reversed the defendant's conviction and pointed out that the medical exam of the victim was for the express purpose of determining whether sexual abuse had occurred and the identity of the individual.

282. Section 90.803(4) of the Florida Statutes provides:
The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.—Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

283. 600 So. 2d 1138 (Fla. 5th Dist. Ct. App. 1992).
284. The medical examination was apparently for the treatment of gonorrhea the victim had contracted from the defendant.
285. Id. at 1139

286. Id. This would violate the second factor listed above that the statement was made for the purpose of diagnosis or treatment. Instead, the purpose of the examination, according to the district court was to determine whether sexual abuse had occurred and to identify the individual responsible for it.
288. Id. at 728.
289. Id.
290. Id. This was especially important testimony as it demonstrated that the doctor needed the information as it was reasonably pertinent to his treatment and diagnosis.
291. Id. The district court noted that "[w]ith regard to statements offered under the medical diagnosis/treatment exception to Florida's hearsay rule, we have held that what is reasonably pertinent to medical diagnosis or treatment is to be determined from the perspective of the healthcare provider to whom the statements are made rather than the usage point of an appellate court." Conley, 592 So. 2d at 728. The biggest difference between the Conley case and the Jones case is that in Conley the doctor's testimony was primarily set out demonstrating that the victim's statements were reasonably pertinent to the doctor's diagnosis and treatment and that this was specifically articulated from the physician's perspective.

The dissent in Conley noted that information that the victim was raped at gunpoint did not fall within the 90.803(4) exception for hearsay, as it was not relevant to the medical treatment. Id. at 733. However, the examining doctor had testified regarding bruises found on the victim's neck, therefore, the method and position of the assault may have been pertinent in addressing the victim's injuries. In any event, the district court declined to speculate as to what information the doctor found necessary in assessing the general

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Another case illustrating the problems associated with 90.803(4) is Conley v. State. In Conley, the victim was raped by the defendant, who was an acquaintance of hers. A doctor examined the victim within hours of the alleged rape. At trial, the doctor testified that “it is necessary when he examines a sexual-assault victim to obtain a history or a description of the event.” Since the victim did not know whether the defendant had ejaculated, the doctor testified that “he knew he needed to conduct vaginal, anal, and oral examinations and prepare microscopic slides to look for sperm.” The doctor also testified that he found it necessary to question the victim regarding the incident so that he knew where to concentrate his efforts in the examination. The district court found that the statements submitted met the prerequisites of section 90.803(4) because the doctor’s testimony demonstrated that the victim’s statements were reasonably pertinent to his diagnosis and treatment.

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E. Statements of a Child Victim

In 1985 the Florida Legislature created a limited exception for hearsay statements of children eleven years of age or less, if the statement describes an act of child abuse, or sexual abuse, as described by the child victim. The exception became known as section 90.803(23), the child victim hearsay exception. The use of section 90.803(23) is limited to children with physical, mental, emotional, or developmental age of eleven or less. The exception should not apply to statements of children who are witnesses but not victims. The exception is applicable to both criminal and civil cases.

To utilize section 90.803(23) the trial court must hold a hearing outside of the presence of the jury before a statement may be admitted under section 90.803(23). This hearing is to determine whether the circumstances surrounding the making of the statement demonstrates that the statement is reliable. The child does not have to be testifying competently for the child's out-of-court statement to be admitted in evidence. In a criminal action, the defendant must be given a ten day notice of the prosecution's intent to offer a statement under section 90.803(23). This requirement is similar to the notice requirement in section 90.404(2)(b) regarding "Williams Rule" evidence.

In last year's Survey of Florida Evidence, the author examined the case of Kopko v. State, where the Fifth District Court of Appeal reversed a defendant's sexual battery conviction when the trial court allowed a parade of witnesses to re-enact the child victim's out-of-court statements describing the criminal sexual acts. The Kopko court created a categorical rule of exclusion whenever repetitious prior consistent statements, deemed admissible under section 90.803(23), bolster the hearsay declarant's credibility.

The language of the statute clearly indicates its application is only for the child victim and not a witness. See contra Russell v. State, 572 So. 2d 940, 942 (Fla. 5th Dist. Ct. App. 1990) (statements of a child witness, not victim, admissible under section 90.803(23)).


294. See Perez, 536 So. 2d at 210; Townsend, 556 So. 2d at 818.

296. 577 So. 2d 956 (Fla. 5th Dist. Ct. App. 1991).


298. In essence, the Kopko court found that even though the criteria of section 90.803(23) is satisfied, where the child is able to testify fully regarding the circumstances of the alleged abuse, hearsay statements regarding the abuse are inadmissible prior consistent statements. 577 So. 2d at 962.

The author opined that the Kopko court erred in engrafting a separate rule of exclusion onto section 90.803(23). Instead, the author pointed out that an analysis of the statements under section 90.403 was the correct procedure. 1991 Survey, supra note 297, at 328-29.

The Florida Supreme Court agreed with that analysis and overruled Kopko.
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HEARSAY EXCEPTION, STATEMENT OF CHILD VICTIM.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statements made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:
   a. Testifies; or
   b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child’s participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to section 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child’s statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.


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298. In essence, the Kopko court found that even though the criteria of section 90.803(23) is satisfied, where the child is able to testify fully regarding the circumstances of the alleged abuse, hearsay statements regarding the abuse are inadmissible prior consistent statements. 577 So. 2d at 962.

The author opined that the Kopko court erred in engrafting a separate rule of exclusion onto section 90.803(23). Instead, the author pointed out that an analysis of the statements under section 90.403 was the correct procedure. 1991 Survey, supra note 297, at 328-29. The Florida Supreme Court agreed with that analysis and overruled Kopko.
This year the Florida Supreme Court decided the case of Pardo v. State, certified by the Third District Court of Appeal as being in direct conflict with Kopko. The defendant in Pardo was charged with seven counts of capital sexual battery on a child seven years of age. After conducting the necessary hearing for admission of the statements under 90.803(23), the trial court found the statements of three witnesses reliable enough to be admissible. However, the trial court also found that the State intended to call the child to testify at trial regarding the alleged crimes. After reviewing the Kopko case, the trial court ordered the hearsay statements excluded. The State took a writ of certiorari to the district court. The Third District Court of Appeal concluded that the trial court's order should not have been entered on the basis of Kopko and quashed the trial court's order and certified conflict with the Kopko decision.

The Florida Supreme Court in examining the conflict between these two district court cases noted that:

The district courts' decisions in Kopko and Pardo are not totally at odds. Both courts recognize that repetitious admission of prior consistent statements creates special concerns in the prosecution of criminal cases. The courts simply approach the problem from different perspectives. The Kopko court created a categorical rule of exclusion which fails to account for the plain language of the statute, while the Pardo court took account of the mechanism which already existed in the Florida evidence code for excluding the needless or prejudicial presentation of cumulative evidence.

Where the Fifth District Court of Appeal in Kopko added its own rule of exclusion to section 90.803(23), the Third District Court of Appeal in Pardo simply went to a mechanism already existing in the evidence code, section 90.403, which allows the exclusion of prejudicial, cumulative or confusing evidence. The Florida Supreme Court recognized the inherent problems that can arise when prior consistent statements are improperly used at trial and quoted the well reasoned case of Allison v. State.

The salutary nature and the necessity of such a rule are clearly apparent upon reflection in cases like the present, for without that rule a witness's testimony could be blown up out of all proportion of its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness. This danger would seem to us to be especially acute in criminal cases like the present where the prosecution is a minor whose previous out-of-court statement is repeated before the jury by adult law enforcement officers.

Accordingly, the Florida Supreme Court overruled the Kopko decision, since it added a separate rule of exclusion to section 90.803(23), and adopted the Pardo analysis by using section 90.403 to weigh the value of the child hearsay statements versus its prejudicial effect.

IX. OPENING STATEMENT AND CLOSING ARGUMENT

A. Introduction

Opening statement and closing argument are not technically governed by the rules of evidence. The reason is simple, at opening and closing, the trial court is not receiving evidence. On opening, the attorneys are commenting on evidence they will enter, on closing the attorneys are drawing inferences on evidence that has, or has not, already been entered. Therefore, the constraints on opening and closing are constitutionally based precepts of a fundamentally fair trial. Incidents that interfere with the
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\textsuperscript{299} 596 So. 2d 665 (Fla. 1992).
\textsuperscript{300} Id. at 666, see Fla. Stat. § 794.011(2) (1989) (providing for a sentence of twenty-five years to life or the death penalty for anyone over 18 years of age who commits sexual battery upon a person under twelve years of age).
\textsuperscript{301} Pardo, 596 So. 2d at 195.
\textsuperscript{302} 162 So. 2d 922 (Fla. 1st Dist. Ct. App. 1964).

\textsuperscript{303} The rule being discussed is that which disallows the use of prior consistent statements at trial.
\textsuperscript{304} 596 So. 2d 665, 668 (quoting Allison, 162 So. 2d at 924).
\textsuperscript{305} The Florida Supreme Court stated the proper analysis under 90.403 when prior consistent statements are deemed admissible under section 90.803(23).

[A] trial court must weigh the reliability and the probative value of a child victim's hearsay statement against the danger that the statement will unfairly prejudice the defendant, confuse the issues at trial, mislead the jury, or result in the presentation of needlessly cumulative evidence. In weighing these concerns, the court will be able to balance the rights of criminal defendants with those of the child victims that the statute seeks to protect.
fundamentally guaranteed fair trial are objectionable. However, the majority of the objections made to opening statement and closing argument generally are not based on an evidentiary violation.

B. Opening Statement

Instead of discussing the elements of a good opening statement, this section will explain what should not be done during opening statement. Aside from the various strategies of opening statement, such as personalizing a client, or developing a theory of the case, the concentrations here will be on the basics of opening.

First, opening statement, in its most basic form, is simply a statement of the facts of the case. It is not an argument about what those facts prove; it is not an opinion of the facts, it is not a time to draw inferences from those facts. It is simply a time to set out the facts that, in good faith, are believed to be provable. As indicated by its nomenclature, this is a statement; argument, which is allowed in closing, is not permitted.

In a criminal case, the prosecution should be wary of commenting on the defendant's right to remain silent in opening statement. This situation occurred in Gilbert v. State, when the prosecution stated in its opening that "its gonna [sic] come down to . . . do I believe the defendant." Though the district court found this comment to be error, based on an examination of the whole record, the district court found that this error was harmless. However, the prosecution should avoid commenting on the defendant's silence or his statements, since this error may cause a reversal.

The opening statement should include only those facts which the attorney reasonably believes can be introduced into evidence. Where the statement of evidence presented in the opening turns out to be wrong, a mistrial will be denied if the comment made during opening statement was not so prejudicial that it vitiated the trial.

A "golden rule" violation can occur in opening statement as well as closing argument. No party, in a civil or criminal case, is exempt from violating the "golden rule." In Arias v. State, an attempted first degree murder prosecution case, the prosecutor's opening statement that the infant was still alive to smile on her first birthday was an improper comment which violated the "golden rule."

306. A golden rule violation can vitiate a party's right to a fair trial.
307. An example of some common objections to opening statements and closing arguments are: 1) appealing to prejudice of sympathy; 2) arguing case in opening statement; 3) commenting on facts not in evidence; 4) attacking opposing counsel; 5) giving personal opinion; 6) invading the province of the court by instructing the jury on the law; 7) misstating the law; 8) unfairly characterizing the witness; 9) improper comment on prior offenses; 10) violating the "golden rule."
308. A complete discussion of opening statement strategies is illustrated in James W. McElhaney, TRIAL NOTEBOOK (2d ed. 1987); James Jeans, TRIAL ADVOCACY (1975).
309. See Occhiocino v. State, 570 So. 2d 902 (Fla. 1990) ("Opening is not evidence, and the purpose of opening is to outline what an attorney expects to be established by the evidence.") Id. at 904. During its opening the State anticipated the defendant's insanity defense, since the defendant had entered a Not Guilty by Reason of Insanity Plea, and argued that the defendant was not insane. The defendant did not argue sanity at the trial and the Florida Supreme Court affirmed the conviction, since the record indicated that the prosecutor made a good faith attempt to outline the evidence the prosecutor reasonably anticipated at trial.

Although trial courts allow various leeway for the attorneys to develop their strategies and theories of the case, the concern here is the basic ground rules for opening statement. United States v. Dinitz, 424 U.S. 600 (1976) ("An opening statement has a narrow purpose and scope. It is to state what evidence will be presented and to make it easier for jurors to understand what is to follow.") Id. at 612. The opening statement is not a time for argument. Likewise, it is improper and, if done deliberately, unprofessional conduct to make statements during opening that will not or cannot be supported by proof at the trial.

310. See also Arias v. State, 481 So. 2d 1294 (Fla. Dist. Ct. App. 1986) (Attorney in opening may outline what he in good faith expects the evidence to show, and described evidence is not presented at the close of the attorney's case, notice for mistrial may be appropriate. The motion for mistrial is not appropriate when the comment is made.)
311. If an attorney questions whether a piece of evidence is admissible, it is advisable to exclude comment on this evidence in opening statement. If the evidence is excluded, a mistrial would probably not be appropriate. However, if the evidence was extensively discussed in opening, it may have left an indelible impression on the jurors minds which would violate the party's right to a fair trial in the event the evidence was excluded at trial.
312. See Randolph v. State, 556 So. 2d 808, 808-10 (Fla. 5th Dist. Ct. App. 1990).
313. A "golden rule" violation occurs when counsel urges a jury to place itself in the party's position to allow recovery, or verdict, that the jurors would want, if they were the party. Basically, this argument urges the jury to base their verdict on an impermissible ground such as sympathy, bias, etc., instead of the law and facts presented by the judge.
314. Attorney's often misread cases and believe that because a 'golden rule' violation was found to be harmless that the argument can continue to be made in court. This is incorrect. A golden rule violation is always error, however, based on the facts of the case the trial court may not have violated the party's right to a fair trial and is, thus, harmless. An attorney should never violate the golden rule and then argue to the trial court that another mistrial is necessary, since such a violation is still error.
315. 547 So. 2d 246 (Fla. 4th Dist. Ct. App. 1989).
316. Id. at 249. Additionally, a prosecutor should not comment on personal feelings in the case. This is improper, in both civil and criminal cases.
317. Id.
318. See Occhiocino, 570 So. 2d at 902; see also Ricardio v. State, 481 So. 2d 1294 (Fla. Dist. Ct. App. 1986) (Attorney in opening may outline what he in good faith expects the evidence to show, and described evidence is not presented at the close of the attorney's case, notice for mistrial may be appropriate. The motion for mistrial is not appropriate when the comment is made.)
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320. Id. at 249.
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317. Attorney’s often intended cases and believe that because a “golden rule” violation was found to be harmless that the argument can continue to be made in court. This is error. If the party’s argument is still in the closing argument, the party must have the party’s right to a fair trial and is, thus, harmless. An attorney should never violate the golden rule and then argue to the trial court that another party has violated the golden rule, but that the party’s right to a fair trial is, thus, harmless. An attorney should never violate the golden rule and then argue to the trial court that another party has violated the golden rule, but that the party’s right to a fair trial is, thus, harmless. An attorney should never violate the golden rule and then argue to the trial court that another party has violated the golden rule, but that the party’s right to a fair trial is, thus, harmless. An attorney should never violate the golden rule and then argue to the trial court that another party has violated the golden rule, but that the party’s right to a fair trial is, thus, harmless. Published by NSUWorks, 1982.
and inappropriate for opening statement. The comment was meant to appeal to the juror’s sympathy and bias, which is an indirect way of telling the jurors to decide the case on grounds other than the evidence presented. Attempting to appeal to the jury with such comments in opening statement will generally raise an objection from opposing counsel, a limiting instruction from the trial judge, and a nice reversal from the appellate court if the comment vitiated the opposing party’s right to a fair trial.

It is improper to attack an accused’s character in opening statement. It should always be remembered that the attorney should set out only those facts he or she in good faith can reasonably expect to prove. If the accused does not put his character in issue, then the attorney’s comment on this could be reversible error.

Although opening statement, and the time allowed for opening statement, is within the discretion of the trial court, the appellate courts have continuously found that trial courts have abused their discretion when opening statement has been arbitrarily limited. This limitation will, of course, be examined in light of the facts of each particular case.

C. Closing Argument

Closing argument is, perhaps, one of the most exciting parts of a trial. It is the culmination of days, weeks, months or, possibly even, years of work in the courtroom. It is a shame that closing argument tends to be one of the areas that is sometimes most responsible for reversals. This tends to happen for a number of reasons. Counsel, during closing argument, may get caught up in the emotion and fervor of the moment and step over the boundary of permissible comment. Sometimes an error that is made during the course of the trial is magnified by counsel in his closing argument, which precludes the appellate court from finding the evidentiary error to be harmless. In any event, care must be taken in mapping out the closing argument to be most effective with the jury, while, at the same time, minimizing common errors.

The Florida Supreme Court, in Bertolotti v. State, stated that "[t]he

319. Id. at 265 n.50.
321. See Knap v. Shores, 550 So. 2d 1155, 1156 (Fla. 3d Dist. Ct. App. 1988) (trial court, in an automobile accident case, improperly limited opening statement for both plaintiffs to ten minutes); Quarrel v. Minervini, 510 So. 2d 977 (Fla. 3d Dist. Ct. App. 1987) (time given to counsel for opening statement in a medical malpractice case was insufficient to allow counsel to fairly outline the case to the jury).
322. 476 So. 2d 130 (Fla. 1985) (per curiam).

323. Id. at 134.
324. Though the focus of these cases is both criminal and civil an excellent article on improper closing argument in Florida criminal cases can be found in J. Defoor II, Prosecutorial Misconduct in Closing Argument, 7 NOVA L.J. 444 (1983).
325. This section encompasses the "golden rule" violation.
327. The error was compounded by the fact that defense counsel improperly had the injured plaintiff excluded from the courtroom when he argued that the plaintiff was not the nearest party in interest. Defense counsel capitalized on this move in closing argument and now gets to do the case a second time.
328. 450 So. 2d 585 (Fla. 3d Dist. Ct. App. 1984).
329. Id. at 586.
330. 468 So. 2d 978 (Fla. 1985).
331. Id. at 981.
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The Florida Supreme Court, in Bertolotti v. State, stated that “[t]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Many attorneys inadvertently allow impermissible comments to creep into their closing arguments, while attempting to draw the proper inferences from facts that have, or have not been, entered into evidence. Improper comments can range from an appeal to the bias and passions of the jury to commenting on matters excluded from evidence. A brief synopsis of these areas follows.

1. Appeals to Bias, Passion and Sympathy

Appeals to the bias, passion and sympathy of the jury on closing argument will get a reversal in a close case. In Goodman v. West Coast Brace & Limb, Inc., a reversal was entered when statements made by defense counsel in closing argument of a products liability action, brought by the injured individual who was replaced by the bankruptcy trustee, made it appear that the real party in interest, the injured individual, had no interest or involvement in the case. The defense counsel was indirectly appealing to the bias and passions of the jury by indicating that the plaintiff was an impersonal bankruptcy trustee who was not injured.

In Gonzalez v. State, the district court found it improper to attempt ‘to paint the victim as an object of sympathy and color [defendants] as vile drug users who exposed their families to the street trade of drugs.’

Likewise, in State v. Wheeler, the Florida Supreme Court explained that it was improper for the prosecutor to state in closing argument that “[t]he defendant is supplying the drugs that eventually get to the school yards and eventually get to the school grounds and eventually get into your homes.” The case was reversed based on a “golden rule” violation.

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321. See Knapp v. Shores, 550 So. 2d 1155, 1156 (Fla. 3d Dist Ct. App. 1988) (trial court, in an automobile accident case, improperly limited opening statement for both plaintiffs to ten minutes); Quarrel v. Minervini, 510 So. 2d 977 (Fla. 3d Dist Ct. App. 1987) (time given to counsel for opening statement in a medical malpractice case was insufficient to allow counsel to fairly outline the case to the jury).
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be arrested in the past, and it is improper to comment that the witness knew the defendant from prison.

3. Personal Opinions

It is improper to state personal opinions in closing argument. In Alberson's Inc. v. Brady, it was improper for plaintiff's counsel during closing argument to assert his personal opinion as to the credibility of the plaintiff. In Blackburn v. State, it was improper for the attorney to say "I think" or "I believe." In Ryan v. State, it was improper to comment on law enforcement officials' belief in the defendant's guilt. In Duque v. State, it was improper for the prosecutor to state in closing argument that "I don't come into a courtroom with the wrong person. If that woman goes to jail that is on my conscience . . . I would cry at night if that girl is innocent behind bars. I wouldn't sleep." The district court in Murrey v. Birches, found it improper for counsel to assert his personal opinion regarding the credibility of a witness or the justness of his client's cause.

4. Comments on Matters Not in Evidence

Closing argument allows counsel to draw inferences from facts already in evidence, however, it does not allow counsel to comment on facts that were never entered into evidence or to draw inferences from facts that were not supported by the evidence. In Duque, the district court found it improper to comment on testimony that might have been offered by an excluded witness. It is also improper to refer to testimony which has been stricken, or a portion of a confession excluded by the trial court.

332. 444 So. 2d 1019 (Fla. 3d Dist. Ct. App. 1984).
333. 457 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1984). This case is a must reading on improper comment and prosecutorial misconduct at its pinnacle. This case is replete with improper, inflammatory comments, that needless to say received a strong rebuke from the district court of appeal.
334. The district court found that the prosecutor's comments in closing argument were so egregious as to rise to the level of fundamental error. In addition to appeals to bias and sympathy, the prosecutor also made personal attacks on defense counsel, commented in closing on facts not in evidence, commented on the defendant's failure to testify in violation of her Fifth and Sixth Amendment rights, and impermissibly vouched for the State's evidence.
335. 481 So. 2d 999 (Fla. 4th Dist. Ct. App. 1986).
336. A trial judge can and should intervene to prohibit improper comments, even when counsel does not object to such improper comments, however, this does not alleviate the duty of counsel to object to such improper comments. See Wasden v. Seaboard Coast Line R., 474 So. 2d 825, 831 (Fla. 2d Dist. Ct. App. 1985).
In *Hall v. State*, it was improper to ask the jury to feel sorry for the victim. Moreover, in *Ryan v. State*, it was error to argue to the jury that defendant was rich and had a big-city lawyer. The prosecutor was implying that because the defendant’s attorney was from a big city, and therefore, an outsider, he looked down on the people sitting on the jury. The prosecuting attorney also adopted a rich versus poor theme throughout closing argument. This case is a classic example of prosecutorial misconduct as the prosecutor attempted to violate every rule in the book on closing argument.

In *Kelley v. Munich*, it was improper for counsel during closing argument to state that he liked the jury when he picked them and he continued to like them. This was an attempt to curry favor with the jury and was unprofessional. The attorney should have been rebuked by the trial judge for such a comment.

2. Prior Offenses

It is improper to bring out fact that the defendant’s girlfriend was a prostitute. It is improper to comment on the defendant’s prior felonies and indicate what they were for in closing argument. It is also improper to point out that photographs in a photo album are of people who have been arrested in the past, and it is improper to comment that the witness knew the defendant from prison.

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335. The only thing more frustrating than having an attorney who continuously, and sometimes unknowingly, violates rule after rule is to have a trial judge who accepts such conduct. In either situation the dignity of the court and fairness of the proceeding is hurt when such actions are tolerated.
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court. In Ryan, the district court found it improper to refer to the way an individual looked, certain conversations and prior drug activity when these comments were not supported by the evidence. In Riggio v. Mariner Boat Works, Inc., the district court found it improper to counsel to challenge his opponent to explain matters in closing argument which are outside of the evidence and the issues. In Carroll v. Duker, the district court found that defense counsel in an auto accident case improperly commented on matters outside of the record when he told the jury that he obtained certain records concerning a previous accident which were not in evidence in the case before the court.

5. References to Witnesses not Called by Either Party

The cases cited in this section differ slightly from the line of cases dealing with situations wherein the State comments on the failure of the defendant to call a witness. In Williamson v. State, the defendant used the alibi that he was at a concert and called a friend to corroborate his story. The State argued that they could have brought in the whole neighborhood to tell the jurors what they saw, but the defense would have said these people were lying. The district court found that this was improper since it implied the existence of other witnesses and incriminating testimony. In Breiner v. State, the district court found error when the prosecutor argued that he did not need fingerprints since he had eyewitnesses, and that he could have brought in five or other witnesses to tell the same story. This was an improper reference to uncalled witnesses and how they would testify. In Wilder v. State, the defendant pointed out that the State failed to call the arresting officer to corroborate the testimony of its chief witness. The State responded that it could have called this officer but that his testimony would have just paralleled the chief witness’ story. The district court reversed the conviction finding that the State could not comment on testimony of a missing witness would give.

6. Sending a Message to the Community

No matter how many closing arguments you hear, you still find attorneys telling the jury to send a message to the community. Needless to say, this is improper. In Maercks v. Birchansky, the district court found the closing argument in a medical malpractice case warranted a new trial when counsel asked the jury as “for the conscience of the community” to “send a message with its verdict.” A similar situation occurred in Boothwright v. State, when the prosecution stated “I’m using you to send a message to folks that we’re not going to put up with this . . . . This is our country, our nation, it’s time to send em - send criminals a message we’re not going to tolerate it any more . . . .”

7. Personal Attacks on Opposing Counsel

You may not like your opposing counsel, but you can’t tell that to the jury. In Briggs v. State, the district court found that it was improper to comment on and bring into question the personal integrity of defense counsel by suggesting that counsel was not being truthful and was deliberately misleading the jury.

In Maercks v. Birchansky, the district court stated that it was improper to make derogatory personal remarks about opposing counsel. In Ryan v. State, the mecca of improper comment, the district court found that it was improper for the prosecutor to accuse defense counsel of not being honest with the jury.
court. In Ryan, the district court found it improper to refer to the way an individual looked, certain conversations and prior drug activity when these comments were not supported by the evidence. In Riggins v. Mariner Boat Works, Inc., the district court found it improper for counsel to challenge his opponent to explain matters in closing argument which are outside of the evidence and the issues. In Carroll v. Dobs worth, the district court found that defense counsel in an auto accident case improperly commented on matters outside of the record when he stated to the jury that he obtained certain records concerning a previous accident which were not in evidence in the case before the court.

5. References to Witnesses not Called by Either Party

The cases cited in this section differ slightly from the line of cases dealing with situations wherein the State comments on the failure of the defendant to call a witness. In Williamson v. State, the defendant used the alibi that he was at a concert and called a friend to corroborate his story. The State argued that they could have brought in the whole neighborhood to tell the jurors what they saw, but the defense would have said these people were lying. The district court found that this was improper since it implied the existence of other witnesses and incriminating testimony. In Breines v. State, the district court found error when the prosecutor argued that he did not need fingerprints since he had eyewitnesses, and that he could have brought in five other witnesses to tell the same story. This was an improper reference to uncalled witnesses and how they would testify. In Wilder v. State, the defendant pointed out that the State failed to call the arresting officer to corroborate the testimony of its chief witness. The State responded that it could have called this officer but that his testimony would have just paralleled the chief witness’ story. The district court reversed the conviction finding that the State could not comment on testimony a missing witness would give.

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350. 457 So. 2d at 1089-90.
351. 545 So. 2d 430 (Fla. 2d Dist. Ct. App. 1989).
352. Id. at 433; see also Maercks, 549 So. 2d at 200 (finding it was error to display to jury a plastic bag filled with canceled checks, which had been excluded from evidence).
354. Id. at 349.
355. See, e.g., State v. Michaels, 454 So. 2d 560 (Fla. 1984). In this section the State is commenting on testimony the uncalled witness would have given; in a Michaels situation the State is commenting on the failure of the defendant to call a witness.
357. Id. at 1126.
358. 462 So. 2d 831 (Fla. 4th Dist. Ct. App. 1985).
8. Miscellaneous Matters

The district court in Villavicencio v. State, found it improper to characterize the defendant's testimony as "rehearsed." The Florida Supreme Court, in Jackson v. State, found it to be improper to argue the substantive nature of impeaching evidence.

In Giese v. State, the district court found it improper to comment on future crimes the defendant might commit, other crimes the defendant might have committed, and crimes the defendant might commit to silence the witnesses. Finally, it is improper to misstate the law to the jury.

X. CONCLUSION

This year's Survey of Florida Evidence saw few legislative changes that will impact the evidentiary case law in the coming year. However, legislative changes noted in last year's Survey of Florida Evidence will begin to make their way to the appellate courts as issues involving the defendant's confrontation rights are challenged.

The Florida Supreme Court settled the conflict involving child hearsay statements among the district courts of appeal. However, the Supreme Court will still see more issues involving the child-victim hearsay rule as the trial courts struggle to strike the proper balance between the reliability and probative value of the hearsay statements versus the danger of unfair prejudice to the defendant.

The Florida Supreme Court's decision in Lewis v. State, will engender additional appellate issues as defense attorneys attempt to emancipate the Rape-Shield statute in an attempt to protect their client's confrontation rights and their ability to develop a full and fair defense at trial. The Florida Supreme Court's distinction between the general rule of relevancy which it utilized in ruling on the Lewis case, as opposed to a ruling directly implicating the Rape Shield Statute, will be lost on the

369. 449 So. 2d 966 (Fla. 5th Dist. Ct. App.), petition for review denied, 456 So. 2d 1182 (Fla. 1984).
370. 451 So. 2d 458 (Fla. 1984).
372. This is sheer speculation by the prosecutor and is an appeal to the bias and sympathy of the jurors that the defendant committed other unproven crimes.
375. 591 So. 2d 702 (Fla. 1991).
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In Gleason v. State,371 the district court found it improper to comment on future crimes the defendant might commit, other crimes the defendant might have committed, and crimes the defendant might commit to silence the witnesses.372 Finally, it is improper to misstate the law to the jury.373

X. CONCLUSION

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This coming year's conglomeration of evidence cases will undoubtedly be filled with issues involving collateral crimes and character evidence, as the extremely prejudicial nature of this evidence will cause close scrutiny by the appellate courts and reversals in the closer cases. Issues involving hearsay and use of prior consistent statements will be numerous as defense attorney's attack the use of cumulative child-victim hearsay statements. In summary, our appellate courts will once again be filled with old, and new, evidentiary issues as our trial courts make an arduous attempt to apply the evidence code in trial.

369. 449 So. 2d 966 (Fla. 5th Dist. Ct. App.), petition for review denied, 445 So. 2d 1182 (Fla. 1984).
370. 451 So. 2d 458 (Fla. 1984).
372. This is sheer speculation by the prosecutor and is an appeal to the bias and sympathy of the jurors that the defendant committed other unreported crimes.
375. 591 So. 2d 922 (Fla. 1991).