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SANDON'S TOP RULES
FLORIDA CIVIL PROCEDURE, FLORIDA CRIMINAL PROCEDURE, FLORIDA EVIDENCE

1. Civil Procedure

Capacity: You do not need to allege capacity to sue or be sued in any filings. However, the initial pleading served on behalf of a minor party shall specifically aver the age of the minor party. A minor or incompetent who does not have an appointed representative may sue by next friend or guardian ad litem.

Public Officers: When a public officer is sued in her official capacity (e.g. for injunctive relief), there is an automatic substitution if the officer dies or leaves office. Names may be changed in court papers at any time. Any misnomer in the papers not affecting substantial rights is disregarded.

Substitute or Abode Service: An individual may be served by leaving a copy of the summons and complaint at his usual place of abode, with any person residing therein age 15 or older, and informing that person of the contents. Fla. Stat. 48.031(1). The term "usual place of abode" means the place where defendant is actually living at the time of service.

Service by Mail: A plaintiff can request a defendant to waive formal service of process by a sheriff (or person appointed to serve papers) or by publication and to accept service by mail. Acceptance of service by mail does not waive any objection to venue or personal jurisdiction. If a defendant is served by mail after waiving her right to personal service, she has 60 days from the date of the requested waiver to respond to the complaint. Fla. R. Civ. P. 1.070(i)

Who may serve process? Service may be effected by any of the following persons: (1) The sheriff, (2) A special process server appointed by the sheriff, or (3) an "elisor" (Any person appointed by the court who is over the age of 18, and has no interest in the outcome of the case). Service may not be rendered by a party to the action.

Claim for Relief: each claim for relief should contain:

(1) a short, plain statement of the **grounds of jurisdiction** (e.g., this is an action for damages that exceed $15,000);

(2) a short, plain **statement of the ultimate facts** showing that the pleader is entitled to relief; and

(3) **a demand for judgment for the relief** to which the pleader deems himself entitled, which may be in the alternative or of several different types. Fla. R. Civ. 1.110(b)

Defense Motions: Every defense in law or fact to a claim for relief in a pleading must be asserted in the responsive pleading (if one is required). However, the following defenses may be made, at the option of the pleader, by a preanswer motion: lack of jurisdiction over the subject matter or person, improper venue, insufficiency of process or service of process, failure to state a cause of action upon which relief can be granted (including an affirmative defense on the face of the claim); and failure to join an indispensable party. Defensive motions are treated as motions to dismiss.

Responsive Pleading: If the court denies a defense motion (improper service of process, venue etc.,) or postpones disposition until trial, a responsive pleading must be filed within **10 days** after notice of the court's actions, unless a different time is fixed by the court. Fla. R. Civ. P. 1.140(a)(2).

Time to Answer: Unless a different time is prescribed in a Florida statute, an answer must be filed within **20 days** after service of the pleading containing the claim(s) to which the answer is made. Fla. R. Civ. P. 1.140(a)

Exceptions:

(1) If a **preanswer motion** to dismiss or for a more definite statement is **denied or postponed for trial**, the time to answer is **10 days after the court's order.**

(2) If a **preanswer motion** for more definite statement is **granted**, the time to answer is **10 days after service of the more definite statement.**

(3) If the court permits or requires **the filing of an amended or more responsive pleading** this pleading must be served **within 10 days of notice of the court's action.**

Note: A motion to strike as redundant, immaterial, or scandalous or as a **sham does not toll** the time to answer.

Amendment: As a matter of course, a pleading may be amended once before a responsive pleading is served or, if no responsive pleading is required and the action has not been placed on the trial calendar, within 20 days of service of the pleading. The party filing a motion to amend a pleading must attach the proposed amended pleading to the motion. Fla. R. Civ. P. 1.190

- Filing a pre-answer motion (like a motion to dismiss) does not preclude or alter the right to amend.

Relation Back: Amendments relate back to the date of the original pleading when the conduct, transaction, or occurrence set forth in the amended pleading was set forth or attempted to be set forth in the original pleading (i.e., the amendment relates to the same transaction or occurrence). This is significant when the statute of limitations period has run between the filing of the original pleading and the amended pleading. Note, however, that the statute of limitations **does** bar causes of action in the amended pleading that are new and distinct from those set forth in the original pleading.

Administrative Provisions of Class Action Suits:

Dismissal or Compromise: Once determined to be maintainable on behalf of a class, a claim or defense may not be voluntarily dismissed or settled without judicial approval after notice to all members of the class.

Homeowner, Condominium, or mobile Homeowners' Associations:
A homeowner, condominium, or mobile homeowners' association may sue in its name on behalf of all association members concerning matters of common interest, including claims involving the common elements and the representations of the developer pertaining to any existing or proposed commonly used facilities. Fla. R. Civ. P. 1.221, 1.222

Pretrial conference: A meeting of the parties to simplify issues, amend pleadings, obtain admissions, discuss experts, and discuss juror notebooks. Pretrial conferences are not mandatory in all cases. The court can order a conference to occur, or a party can make a motion for it. However, once the court makes an order or a party makes a motion, it BECOMES mandatory and now must occur. Parties must appear on at least 20 days' notice and failure to attend may result in dismissal of action, strike the pleadings, etc.

Case management conference: A meeting of the parties, mostly about scheduling, logistics, discovery, and settlement. It is also voluntary or ordered by the court. We can have both a pretrial conference and a case management conference—they're not exclusive.

Intervention: Intervention is a device by which a nonparty enters the case on his own motion. It is not compulsory; i.e. a person is not compelled to intervene. It is also discretionary with a court whether to permit the intervention. When is the motion made? At any time while case is pending (e.g., intervention is no longer timely during jury deliberation). [Fla. R. Civ. P. 1.230]

Impleader-Third Party Practice: Impleader is a device a defendant may (but is not required to) use to bring in a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against her. She does so by filing a third-party complaint and having it served upon the third-party defendant. [Fla. R. Civ. R. 1.180]

- Note: If the defendant asserts a counterclaim, the plaintiff is now also able to implead third parties related to that counterclaim.

Interpleader: Interpleader is a device by which persons having conflicting claims against a stakeholder may be joined as defendants and required to interplead so that the stakeholder may avoid exposure to double liability. [Fla. R. Civ. P. 1.240]

Oral Depositions: **Any Party May Depose Anyone.**

- **A party by Notice:** If the deponent is a party or an officer, director, or managing agent of a party, mere notice is enough to compel attendance.

- **Nonparty by Subpoena:** If the deponent is anyone other than a party, his attendance can be compelled only by subpoena. The subpoena (including one for a videotaped deposition); must state the methods for recording the testimony. Employees of a party (other than officers or managing agents) are nonparties. Fla. R. Civ. P., 1.310(b)(4), 1.410(c), (d); Fla. Statute 48.031.

- **Place:** The plaintiff is usually required to go where the action is pending for her deposition if she does not reside there. The defendant's deposition is usually taken at her county of residence or business if it differs from the venue of the action. A corporate defendant's deposition is usually taken at its principal place of business. A deposition of a nonparty witness can be taken in any county in Florida where the witness may validly be served or anywhere else in the United States by using the subpoena power of an appropriate court at that place.

- **Before Complaint Has Been Filed (by Court Order):** A person wishing to perpetuate her own testimony or that of another person regarding any matter cognizable but not yet filed in a Florida court may (upon verified petition) obtain a court order for oral or written deposition. Service must be made upon all expected adverse parties and the person to be deposed, following rules for service of process. The motion will be granted if the court is satisfied that perpetuation of testimony may prevent a failure or delay of justice. Fla. R. Civ. P. 1.290(a).

- **Videotape Depositions:** Oral depositions by videotape are authorized without order of the court. The notice must state that the deposition will be recorded by videotape, and must give the name and address of the operator. The deposition also must be stenographically recorded, unless otherwise agreed by the parties. Fla. R. Civ. P. 1.130(b)(4).

- **Use of Part of Deposition:** If only part of a deposition is offered by a party, any adverse party may require him to introduce any other part that ought to be considered in fairness.

- **Costs:** A nonparty may condition the preparation of deposition copies on payment in advance of the reasonable cost of preparing the copies. In turn, the requesting party must provide copies of the deposition to all other parties, also upon the payment of reasonable costs.

Depositions, Oral and Written – Nonparty Deponent

- **Failure of Party Given Notice to Attend:** The court may order a party who fails to attend a deposition for which she had notice, to pay any other party who attended in person or through counsel the reasonable expenses incurred by him in attending, including attorneys' fees. [Fla. R. Civ. P. 1.310(h)]
- **Failure of Party to Serve Subpoena on Witness:** A party who fails to serve a subpoena on a witness who fails to attend the deposition may also be sanctioned as described above.

Affirmative use of deposition at trial: A deposition may be used affirmatively if the deponent, whether or not a party:

(1) is dead;
(2) is farther than 100 miles from the place of trial or outside of the State of Florida and thus beyond the subpoena power of the court (**unless** the party offering the deposition procured the absence);
(3) is unable to attend or testify because of age, sickness, infirmity, or imprisonment;
(4) is unable to be found for the purpose of being subpoenaed, or having been subpoenaed, refuses to come; or
(5) is an expert or skilled witness even if she is available. (i.e., an expert does not need to come back and testify in person, if we have a deposition. No need to pay the expert fees again!)

Discovery Costs: Each party bears her own costs of discovery. The winning party is usually awarded costs at the end of the case (i.e., the losing party reimburses the winning party for the winner's costs). However, the cost of depositions can be recovered only if they served a useful purpose in the trial. Normally, the cost of the original deposition, the court reporter's per diem, and the cost of one copy are recoverable items of expense if the deposition is used as evidence or for impeachment purposes.

Voluntary Dismissal Without Prejudice: The law in Florida is that an action can be voluntarily dismissed without prejudice only once; the second time will be with prejudice even if the second dismissal occurs by court order rather than by notice. Voluntary dismissal is not allowed if:

(1) A **counterlaim** has been filed that cannot be adjudicated independently,
(2) A motion for **summary judgment is pending**, or
(3) **Property** has been seized and is in the custody of the court.

Lis Pendens: Lis pendens an instrument filed with the court that operates as constructive notice that there is pending litigation with respect to an interest in, or ownership of, property. If a lis pendens has been filed against a party in the action, a notice or stipulation of voluntary dismissal of that party or of the entire case shall be recorded and cancels the lis pendens in the public records without the necessity of an order of court.

Motion to View: On a motion by either party, the jury may be taken to view the premises or other tangible things relating to the controversy. The party making the motion must advance the sum to defray the expenses which expense shall be taxed as costs if the party who advanced it prevails.

Motion for Judgment on the Pleadings: After the **pleadings are closed**, but within such time as not to delay the trial, any party may move for judgment on the pleadings. This might occur if:

(1) The **pleadings do not indicate that any facts are in dispute** (and therefore there is nothing for the factfinder to evaluate), or
(2) The **plaintiff's complaint has failed to allege a cause of actio**n, or
(3) The defendant's **answer has failed to state a sufficient defense.**

A motion for judgment on the pleadings seeks a final adjudication of the issues presented in the lawsuit. The judge concludes that the moving party is entitled to a **judgment as a matter of law on the basis of the allegations** made by the opposing party. This motion can be made after the time period has expired for the last responsive pleading. The judge may only review the pleadings themselves and any exhibits attached to the pleadings. The judge may not consider affidavits or other evidence.

Summary Judgment: A motion for summary judgment will be granted where **there is no issue of material fact and the moving party is entitled to judgment as a matter of law.** This often occurs where the parties stipulate as to the facts of the case.

(1) A claimant may move for summary judgment at any time after 20 days from commencement of the action, or after service of a motion for summary judgment by an adverse party.
(2) A defending party may move at any time.
(3) The summary judgment maybe partial or complete and supported or opposed with affidavits, depositions, pleadings, admissions, and answers to interrogatories.

Directed Verdict: A directed verdict in favor of a moving party is appropriate if, considering only the evidence in favor of the nonmoving party, and drawing all reasonable inferences therefrom in her favor, the judge concludes that **no reasonable jury could return a verdict in favor of the nonmoving party**.

Motion for a New Trial: A party may file a motion for a new trial within 15 days after the entry of the judgment. The court can also award a new trial on its own motion within 15 days after the entry of judgment. The motion will be granted if there was a prejudicial error during the trial:

- Jury tampering
- Error in evidentiary ruling
- Error in jury instructions
- Verdict contrary to the weight of the evidence (but JNOV not granted)
- Newly discovered evidence that could not have been discovered with diligence, though in existence.

Motion for a Belated Directed (also called a JNOV): It must be in writing and filed within 15 days after rendition of the verdict. To make a motion for JNOV the party must have moved for directed verdict during trial.

- This motion may be made in the alternative for a motion for a new trial. In other words, both motions can be made simultaneously.

Motion in arrest of judgment (civil): There is such a thing as a *civil* motion in arrest of judgment, and it is different from the criminal motion. It is a common law motion, similar to a JNOV but it is only available to the defense (the plaintiff cannot use this motion).

Polling of Jury: After the verdict is returned by the foreman but before the jury is dismissed, the losing party may have the jury polled; i.e., each individual juror questioned as to his or her verdict.

Post-Verdict Interview of Jurors: A party who believes that grounds for legal challenge of a verdict exist may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to challenge. The motion must be served within 15 days of the verdict (can be extended for good cause shown). The motion must state the grounds for challenge. The interview may take place only upon order of court, and the court may prescribe the place, manner, conditions and scope of the interview. Fla. R. Civ. P. 1.431(h).

Motions for Costs and Attorney's Fees: Any party seeking a judgment for costs, attorneys' fees, or both must serve a motion no later than 30 days after filing the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal concluded the action as to that party. Fla. R. Civ. P. 1.525

Relief from Judgments

- **Within One Year After Judgment:** A motion for relief from final judgments or orders may be filed within one year after judgment for:
  (1) Mistake, inadvertence, surprise, excusable neglect;
  (2) Newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial; or
  (3) Fraud (whether intrinsic-inside the courtroom, e.g. perjury; or extrinsic-outside the courtroom), misrepresentation, or other misconduct of the adverse party.
- **At any reasonable time**: A motion for relief from judgments may be filed at any reasonable time when:
  (1) The judgment is void;
  (2) The judgment has been satisfied, released or discharged; a prior judgment on which it was based has been reversed or otherwise vacated, or it is no longer equitable that the judgment have prospective application; or
  (3) A final divorce judgment was based on a fraudulent financial affidavit.

Subpoenas may be Duces Tecum. Subpoenas may direct the bringing of papers, records, films, etc. Service of notice to an adverse party to produce evidence at trial has the same effect as a subpoena served on that party.

The distance at which a person must respond for discovery varies with residency.

- A **resident** of Florida can be forced to respond only in the county where the deponent resides, is employed, or transacts business in person, or such other convenient place as is fixed by order of court.
- A **nonresident** of Florida can be forced to respond only in the county where the deponent was served or other convenient place as is fixed by order of court.

Motion to Quash or Modify: A court may, on motion, quash or modify the subpoena if the subpoena is unreasonable and oppressive, or condition denial of the motion upon the advancement by the party issuing the subpoena of the reasonable costs of producing the papers, etc.

Enlargement: Any time prescribed may be enlarged by the court with or without motion if a request is made before the time expires. If the request is made after the time expires, a motion is required and will be granted only for **excusable neglect**.

- **EXCEPTIONS**: The court may **not** extend the time for:
  (1) Motion for belated directed verdict;
  (2) Motion for new trial or rehearing;
  (3) Sua sponte grant of new trial;
  (4) Motion for amendment of judgment;
  (5) Motion for relief from judgment
  (6) Notice of appeal; or
  (7) Petition for certiorari. Fla. R. Civ. P. 1.090 (b).

Disqualification of a Judge: Any party may move to disqualify the judge assigned to the action on any grounds provided by statute, by rule, or by the Code of Judicial Conduct. Fla. Stat. 38.02. Among the available grounds are: (i) the party fears that she will not receive a fair trial because of specifically described prejudice or bias of the judge; (ii) the judge, the judge's spouse, or someone related to the judge (within the third degree) has an interest in, or is a party to, the proceeding; (iii) the judge is a material witness in the case; or (iv) the judge's spouse or person within the third degree relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge. The judge has authority to enter an order of disqualification on the judge's own initiative. Once a judge has been disqualified, the **next judge** can only be disqualified if the judge rules that she cannot in fact be fair or impartial in the case.

- A relative in the third degree is a great grandparent, or the descendent of a great grandparent.

Temporary Injunction

- **Without Notice:** A temporary injunction may be granted **without** written or oral notice to the adverse party **only** if:
  - (1) It appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition;
  - (2) The movant's attorney certifies in writing any efforts that have been made to give notice; and
  - (3) The reasons why notice should not be required are stated.

  Fla. R. Civ. P. 1.610(a)(1)
- **Procedure:** No evidence other than the affidavit or verified pleading may be used to support the application for a temporary injunction, **unless** the adverse party appears at the hearing or has received reasonable notice of the hearing.
- **Bond:** No temporary injunction may be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if wrongfully enjoined.

Exclusions from Mediation and Arbitration: The following actions are excluded from mediation and arbitration:

(1) Bond estreatures (forfeiture of a criminal bail bond);
(2) Habeas corpus, certiorari, mandamus, and extraordinary writs;
(3) Bond validations (issuance of a new municipal bond); and
(4) Civil or criminal contempt.

Motion in Lieu of Scire Facias. Scire Facias is an antiquated writ that is used to "revive" a judgment that has expired. For example, if a money judgment against defendant has expired without being paid, the plaintiff can return to court and seek to "revive" the judgment. Scire facias would then require the defendant to appear in court and "show cause" why the judgment should not be revived and enforced. **Florida has abolished the writ of scire facias.** However, any relief available by scire facias may be granted on motion after notice instead.

2. Criminal Procedure

When State May Avoid Providing Counsel. The state need not provide free defense counsel:

(1) If the violation charged is **not punishable by incarceration;** or

(2) If the **crime is a misdemeanor or ordinance violation** and the judge, at least 15 days prior to trial, files a written order certifying that the **defendant will not be incarcerated** in the case pending trial or probation violation hearing, or as part of a sentence after trial, guilty or nolo contendere plea, or probation violation hearing. The 15-day requirement may be waived by the defendant or defense counsel.

Custody: If a defendant remains in custody and is not charged by information or indictment within **30 days** of arrest or service of capias, the court on the 30th day, with notice to the state, must order the defendant automatically released on his own recognizance by the **33rd day** unless formal charges are filed, or if the state shows good cause, the court must order the defendant to be automatically released on his own recognizance on the **40th day** unless formal charges are filed. Fla. R. Crim. P. 3.134

Pleas: Breach by Defendant: During the plea bargaining process, the prosecutor may have agreed to go along with a defendant's plea only if the defendant agrees to some specific terms (e.g., to remain drug free). To be enforceable, such terms must be made part of the plea entered in open court. If the defendant fails to comply, the state may move to vacate the plea and sentence within 60 days after the defendant's noncompliance. Unless the defendant admits to the noncompliance, the court must conduct an evidentiary hearing to find if there has been substantial noncompliance with the express terms of the plea. If the court finds substantial noncompliance, then the court may vacate the plea or sentence. When the plea and sentence are vacated, the court must set the matter for trial within 90 days of the date of the order vacating the plea and sentence. Fla. Crim. P. 3170(g).

Motion to Depose to Perpetuate Testimony

- **Timeliness:** A motion to depose to perpetuate testimony must be made after the filing of an indictment or information. A proper motion must be granted if filed more than **10 days** before trial. The trial court has discretion to deny an otherwise proper motion if it is filed within 10 days before trial.
- **Use at Trial:** The deposition may not be used or read into evidence if the witness can be produced at trial. No party may read into evidence the deposition of any person whose absence was caused by that party.

Demand for Speedy Trial: An accused may file a demand for trial within 60 days at any time after the filing of formal charges if he as a bona fide desire to go to trial. A copy of the demand must be served on the prosecuting attorney. A demand is a representation that the accused is available for trial, has investigated his case, and will be prepared for trial within five days. A defendant who files a demand is not later entitled to a continuance or to withdraw the demand unless good cause is shown. The court must hold a calendar call no later than five days from the filing of the demand. At the calendar call the court must set the case for trial to commence at a date no less than five days nor more than 45 days from the date of the calendar call.

Notice of Expiration of Speedy Trial Time:

- If a defendant made a **demand** for a speedy trial in any criminal action, and the **trial has not commenced within 50 days from such demand**, the defendant may file a notice of expiration of speedy trial time.
- If the defendant **did not make a demand** for a speedy trial, and the trial has not commenced within **90 days from arrest for a misdemeanor, 175 days from arrest for a felony, or 90 days from the order of mistrial for a retrial**, the defendant may file a notice of expiration of speedy trial time.
- The court must then hold a hearing within **five days** of the motion. If the court finds no reason for excusing the delay, it will order that the defendant be tried within **10 days**. If, through no fault of the defendant, there is no trial within the 10 days, on motion for discharge the defendant will be forever discharged.
- Note: The Florida Supreme Court has held that a **violation of the five- and ten-day period is harmless if a defendant is actually brought to trial within 15 days** of filing his notice of expiration. [State v. Salzero, 714 So. 2d. 445 (Fla. 1998)].
- **Trial begins** when the pool of potential jurors (the venir) is sworn for voir dire (initial jury selection).

Discharge due to speedy trial violation: Prior to granting a discharge, the trial court must determine that none of the following applies:

(1) A valid extension has been granted and has not expired;
(2) The failure to hold the trial is attributable to the accused, a co-defendant, or their counsel;
(3) The accused or his counsel was unavailable for a proceeding where their presence was required by the rules; and
(4) The demand for speedy trial is invalid.

Extension of Time: Times for speedy trial may be waived or extended during the time period by court order. In case of **exceptional circumstances** not avoidable or foreseeable (**not** including general congestion of the court calendar), including:

(1) Unexpected unavailability of a uniquely necessary witness;
(2) Unusual complexity of the case that makes timely preparation unreasonable;
(3) Evidence currently unavailable that will become available;
(4) Unexpected developments necessitating delay;
(5) Accommodation of a co-defendant where there is reason not to sever; or
(6) Where defendant has caused major delay or disruption.

Peremptory Challenges: The limits for peremptory challenges are, for each side:

- **Ten for capital,** or life felonies;
- **Six for all other felonies;** and
- **Three for any misdemeanor.**

If two or more defendants are jointly tried, each gets the regular number of challenges and the state gets the sum of those for all defendants.

Venue: The state or the defendant may move for a change of venue on the ground that a fair and impartial trial cannot be had in the county where the case is pending for any reason (other than claiming that the judge is prejudiced). The motion must be in writing and be accompanied by: (1) affidavits of the movant and at least 2 other persons; and (2) a certificate by the movant's counsel that the motion is made in good faith. The motion must be filed at least 10 days before the case is called for trial (unless good cause is shown for the delay).

Materials for Jury Deliberations: The judge may permit the jurors to take to their deliberations;

(1) A copy of the **formal charging instrument(s)** (information or indictment);
(2) Any **materials in evidence,** except a **deposition** (since that is really testimony);
(3) **Verdict forms** approved by the court after being inspected by both counsel; and
(4) A written **copy of all jury instructions** given (mandatory).

Right to a Jury Trial: A defendant has a right to jury trial for all criminal prosecutions (but some misdemeanor charges do not qualify).

- **All criminal cases are tried before 6 jurors except capital cases, which requires 12 jurors.**
  - **Waiver of jury (Judge acts as factfinder):** If the defendant wishes to waive the right to a jury, he must do so in **writing** and the **state must consent.**
  - **Waiver of complete jury:** In rare instances, the jury can deliberate with less than the full amount of jurors.
    - **EXAMPLE:** Defendant is on trial for possession of narcotics. There is a 6 member jury and no alternate. During trial, one of the jurors becomes ill and cannot participate further.
    - **RESULT:** The defendant can decide to proceed with the 5 person jury, if the waiver is **knowing, intelligent, and voluntary**. The **state does not need to consent** to this and it **does not need to be in writing**.
    - If the defendant refuses to proceed or cannot make a waiver, the court will declare a **mistrial**.
- The **court may permit the selection of one or more alternate jurors**. All alternates are discharged before the jury deliberates unless they replace a juror who cannot continue.
- In capital cases, alternate jurors are excused, with instructions to remain in the courtroom, just prior to the jury's retirement for deliberation. After the jury is out of the courtroom, the alternates are instructed that they may have to return for an additional hearing should the defendant be convicted of a capital offense. After this additional instruction (which the main jury does not hear), the alternates are permitted to leave.

Returning the Verdict

- **Polling the Jury:** Either side or the judge may have the jurors asked individually if that is their verdict. If there is dissent, the jury is sent back for further deliberation. [Fla. R. Crim. P. 3.450]
- **Judicial Comment:** The court is not to praise or criticize the verdict, but may thank the jurors for their service. [Fla. R. Crim. P. 3.451]
- **Multiple Defendants:** An agreed-upon verdict should reflect to which the defendant it is applicable, and jurors may convict or acquit one defendant, while remaining hung as to any other. [Fla. R. Crim. P. 3.520]

Motion for Judgment of Acquittal can be made at the close of the state's case. If the court finds that the evidence presented does not support a verdict of guilty, the court enters a judgment of acquittal and discharges defendant. A post trial motion may be made after a guilty verdict or mistrial within **10** days or such further time as the court may allow.

Motion for New Trial: The trial court **must** grant a new trial if any of the following is established:

(1) The jurors **decided the case "by lot" (at random), by average, by game of chance, etc.;**
(2) The verdict is **contrary to law or weight of the evidence;** or
(3) **Newly discovered evidence** would probably change the outcome, and the defendant with reasonable diligence, could not have discovered and produced the evidence for trial.

Motion in arrest of judgment (criminal): Unrelated to the civil motion, there is also a motion in arrest of judgment in criminal cases. Must be made within 10 days after the verdict. This motion is used when:

(1) Indictment is defective
(2) Court lacks jurisdiction
(3) Verdict is too vague to convict
(4) Defendant convicted of something not in the charging instrument

3. Florida Evidence

403 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

Routine Practice is admissible to prove conduct of an **organization**, whether corroborated or not and regardless of eyewitness. **Habit** of a person is admissible only if corroborated.

Statement or benevolent gesture expressing sympathy for a person involved in an accident made to that person or their family is **inadmissible** in a civil case, but statement of **fault** shall be admissible. "I want to pay the hospital costs" is inadmissible. "It was my fault, I ran the red light" is admissible.

- The federal rules categorize this as non-hearsay. Florida categorizes it as an exception to hearsay.

Character evidence is not admissible to prove action in conformity with it on a particular occasion.

- **EXCEPTIONS:**
    - Pertinent Character of the **Accused** in a criminal case, if first offered by the accused (opening the door), or by prosecution to rebut the trait.
    - Pertinent Character of **Victim** if offered by the **Accused.** Example: Peaceful character trait of Victim by prosecution in a homicide case to rebut evidence that Victim was the aggressor.
    - The door is opened to testimony regarding reputation only. Not opinion!

Subsequent Remedial Measures are not admissible to prove negligence, a product defect, or culpable conduct in connection with the event. May prove other matters, such as ownership, control, or feasibility of precautionary measures, if controverted, or for impeachment.

Opinion Testimony by Lay Witnesses: The Code adopts a more restrictive view of the admissibility of opinions by lay witnesses. Lay opinions are admissible when:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in the form of opinions;
(2) The testimony will not mislead the trier of fact; **and**
(3) The opinions do not require special knowledge or training.

Authoritative Texts and Treatises: In Florida, authoritative publications can only be used **during cross-examination** of an expert. Excerpts from the publication may not be read into the record as substantive evidence. [F.E.C. 90.706] Moreover, the publication cannot be used to bolster the expert's credibility. [Erwin v. Todd, 699 So. 2d 275 (Fla. App. 1997)]

Privileges Related to Marriage: Florida recognizes the privilege for confidential communications made between spouses during the course of a valid marriage. The privilege continues even after the marriage is over. Either party can invoke this privilege.

- This privilege relates to communications only. The privilege does not prevent a spouse from testifying as to his or her *observations*.
- Florida does not recognize the doctrine of spousal immunity (i.e., the spouse can be called to testify, but certain communications may be privileged).
- The statement must be made in a confidential setting or manner to be privileged.

Clergy-Penitent Privilege: A confidential communication between a person and a cleric made privately for the purpose of seeking spiritual counsel and advice in the usual course of practice is privileged.

- **Who may invoke Privilege:** the person, the guardian or conservator of a person, the personal representative of a deceased person, or the member of the clergy.

Psychotherapist/Social Worker-Client Privilege: Florida also recognizes a psychotherapist-patient privilege for confidential communications between a patient and a psychotherapist for the purpose of diagnosis of a mental or emotional condition (including alcoholism and other drug addiction). Do not confuse this with the mere *physician/patient* relationship. A psychotherapist is defined as:

(1) a licensed or certified psychologist;
(2) a person licensed or certified as a clinical social worker, marriage or family therapist, or mental health counselor under Florida law
(3) a person authorized to practice medicine, or reasonably believed by the patient to be so authorized, who is engaged primarily in the diagnosis or treatment of mental or emotional condition
(4) treatment personnel of licensed facilities engaged primarily in diagnosis or treatment of mental or emotional conditions and
(5) an advanced registered nurse practitioner whose primary scope of practice is diagnosis or treatment of mental or emotional conditions [F.E.C. 90.503]

Exclusion and Sequestration of Witnesses: The Florida Evidence Code also provides that a witness in a criminal case may **not** be excluded from the courtroom during testimony of other witnesses if he is the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial. [F.E.C. 90.616]

Hearsay within hearsay: Florida permits admission of hearsay statements within other hearsay statements, as long as an exception exists for both levels of hearsay (e.g., A routine business record contains a statement made by a third-party regarding an immediate observation of an incident).

Hearsay exceptions:

(1) Spontaneous statement
(2) Excited utterance
(3) Statement made for medical treatment or diagnosis
(4) Business records
(5) Family records e.g. Bible
(6) Former testimony

Hearsay exceptions (declarant unavailable):

(1) Former testimony
(2) Statement under belief of impending death
(3) Statement against interest
(4) Statement of personal or family history

Dying Declarations-Statements Under Belief of Impending Death are admissible in all civil and criminal cases F.E.C 90.804(2)(b).

Judicial Power to Comment upon Evidence: The judge is prohibited from summing up the evidence or commenting to the jury on its weight or the credibility of the witnesses. [F.E.C. 90.106]

- The judge is permitted to call her own witnesses and ask questions directly to witnesses (as long as she does not show bias).