CIVIL JURY TRIAL BENCHBOOK

A project of the Florida Court Education Council's Publications Committee

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This benchbook is a revision of former Circuit Judge Lowell Bray's 2014 Civil Jury Trial Benchbook.

NOTE: Starting March 13, 2020, all jury trials in Florida were halted because of the coronavirus pandemic. On May 21, 2020, the Florida Supreme Court issued an administrative order (AOSC20-31) creating a pilot program for civil jury trials to be held using remote technology. The program will explore ways jury trials may be held again using health-related distancing during the pandemic.

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To open links to citations, place your cursor over the citation and press Control+Click, or right click on the item and choose "open hyperlink". Most of the legal citations are hyperlinked to the Westlaw database. When you click on a link, you will be asked for your Westlaw sign on information. Once you are signed on, you should be able to retrieve all of the Westlaw hyperlinks you select. Some rules of court and statutes are linked directly to the primary source.

Chapter One

Meeting with Counsel

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II. Courtroom Decorum

(to be handed to counsel)

The requirements stated in these rules are minimal, not all inclusive, and are intended to emphasize and supplement, not supplant or limit, the ethical obligations of counsel under the Rules of Professional Conduct or the time honored customs of attorneys in the courtroom. This court suggests the following minimum standards be followed for all attorneys appearing in this division.

When appearing in this court, unless excused by the court, all counsel (including all persons at the counsel table) shall:

1. Stand as court is opened, recessed or adjourned.

2. Stand when the jury enters or retires from the courtroom.

3. Stand when addressing, or being addressed by, the court.

4. Stand at the lectern while making opening statements or closing arguments.

5. Stand at the lectern while examining any witness; except that counsel may approach the clerk's desk or the witness for purposes of handling or tendering exhibits. Ask the court for permission to approach the witness.

6. Address all remarks to the court, not to opposing counsel.

7. Avoid disparaging personal remarks or acrimony toward opposing counsel and remain wholly detached from any ill feeling between the litigants or witnesses.

8. Refer to all persons, including witnesses, other counsel, and the parties, by their surnames and not by their first or given names.

9. Examine or cross-examine each witness without any questioning by co-counsel. The attorney stating the objections, if any, during direct examination shall be the attorney recognized for cross-examination.

10. Request permission before approaching the bench. Any documents counsel wishes to have the court examine should be handed to the clerk.

11. Not tender to a witness any paper or exhibit previously marked for identification. Any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel.

12. State only the legal grounds for any objection within the hearing of the jury and should withhold all further comment or argument unless elaboration is requested by the court.

13. Not repeat or echo the answer given by the witness.

14. Make all offers of or requests for a stipulation privately, not within the hearing of the jury.

15. Not express, in opening or in closing argument, personal knowledge or opinion concerning any matter in issue, nor read or purport to read from deposition or trial transcripts, nor suggest to the jury, directly or indirectly, that it may or should request transcripts or the reading of any testimony by the reporter.

16. Admonish all persons at counsel table that gestures, facial expression, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

17. Avoid making personal remarks about counsel. The personal history or peculiarities of counsel on opposing sides should not be alluded to. Personal colloquies between counsel which cause delay or promote confusion should be avoided.

18. Treat adverse witnesses and parties with fairness and consideration. No abusive language or offensive personal references shall be indulged.

19. Conduct himself or herself before the court and with other lawyers with candor and fairness. The contents of a paper, the testimony of a witness, the language or argument of opposing counsel, or the language of a decision or other authority cited should not knowingly be misinterpreted. Evidence known to be misinterpreted should not be offered. In an argument addressed to the court, remarks or statements should not be interjected to influence the jury or spectators.

20. Not make suggestions looking to the comfort or convenience of jurors within the jury's hearing. Before and during trial, a lawyer should attempt to avoid communicating with jurors, even as to matters foreign to the cause.

21. Promote respect for the court and its judgments by counsel by yielding gracefully to the rulings of the court. Remarks to the contrary should be avoided, in court and out. Easy and ample means to correct errors are afforded by orderly procedure.

(The above materials on Courtroom Decorum were prepared using materials developed by the late Honorable Peter J. T. Taylor, Circuit Court Judge, Thirteenth Judicial Circuit, Tampa, Florida. The Florida Supreme Court in *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280 (Fla. 2013), mandated that each judicial circuit create a local professionalism panel to receive and resolve professionalism complaints informally, and attorneys should refer to the standards of professionalism and civility in each circuit. For the Conferences of Circuit Judges and County Court Judges and Trial Lawyers Section of The Florida Bar Guidelines for Professional Conduct (L. Trial Conduct and Courtroom Decorum), see Section III of Chapter 13.)

Chapter Two

Greeting the Jury

I. Greeting the Jury
(Monologue)

Good morning, ladies and gentlemen. Welcome. All of us here appreciate your coming to serve this week. For our system of justice to work, it is essential that citizens like yourselves be willing to come and work with us.

I would like for you to be acquainted with the court personnel with whom you will be working.

II. Introduction of Participants and Their Roles, SJI (Civil) 201.2

Who are the people here and what do they do?

Judge/Court: **I am the judge. You may hear people occasionally refer to me as "The Court." That is the formal name for my role. My job is to maintain order and decide how to apply the rules of the law to the trial. I will also explain various rules to you that you will need to know in order to do your job as the jury. It is my job to remain neutral on the issues of this lawsuit.**

Parties: **A party who files a lawsuit is called the Plaintiff. A party that is sued is called the Defendant.**

Attorneys: **The attorneys have the job of representing their clients. That means they speak for their client here at the trial. They have taken oaths as attorneys to do their best and to follow the rules for their profession.**

Plaintiff's Counsel: **The attorney on this side of the courtroom,** (introduce by name)**, represents** (client name) **and is the person who filed the lawsuit here at the courthouse. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will be referred to most of the time as "the plaintiff."** (Attorney name)**, will you please introduce who is sitting at the table with you?**

[Plaintiff without Counsel: **(**Introduce claimant by name**), on this side of the courtroom, is the person who filed the lawsuit at the courthouse. (**Claimant**) is not represented by an attorney and will present [his] [her] side of things to you [himself] [herself].**]

Defendant's Counsel: **The attorney on this side of the courtroom,**

(introduce by name)**, represents** (client name)**, the one who has been sued. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will be referred to most of the time as "the defendant."** (Attorney name)**, will you please introduce who is sitting at the table with you?**

[Defendant's Counsel: **The attorney on this side of the courtroom,** (introduce by name)**, represents** (client name)**, the one who has been sued. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant." [His] [Her] client** (defendant uninsured or underinsured motorist carrier) **is** (claimant's name) **motor vehicle insurance company and provided [him] [her] [uninsured] [underinsured] motorist coverage, which may be available to pay some or all of the damages that may be awarded.**]*****

**Use the bracketed paragraph above when the case involves an uninsured or underinsured motorist carrier.*

[Defendant without Counsel: **(**Introduce defendant by name**), on this side of the courtroom, is the one who has been sued. (**Defendant**) is not represented by an attorney and will present [his] [her] side of things to you [himself] [herself].**]

Court Clerk: **This person sitting in front of me,** (name)**, is the court clerk. [He] [She] is here to assist me with some of the mechanics of the trial process, including the numbering and collection of the exhibits that are introduced in the course of the trial.**

Court Reporter: **The person sitting at the stenographic machine,** (name)**, is the court reporter. [His] [Her] job is to keep an accurate legal record of everything we say and do during this trial.**

Bailiff: **The person over there,** (name)**, is the bailiff. [His] [Her] job is to maintain order and security in the courtroom. The bailiff is also my representative to the jury. Anything you need or any problems that come up for you during the course of the trial should be brought to [him] [her]. However, the bailiff cannot answer any of your questions about the case. Only I can do that.**

Jury: **Last, but not least, is the jury, which we will begin to select in a few moments from among all of you. The jury's job will be to decide what the facts are and what the facts mean. Jurors should be as neutral as possible at this point and have no fixed opinion about the lawsuit.**

In order to have a fair and lawful trial, there are rules that all jurors must follow. A basic rule is that jurors must decide the case only on the evidence presented in the courtroom. You must not communicate with anyone, including friends and family members, about this case, the people and places involved, or your jury service. You must not disclose your thoughts about this case or ask for advice on how to decide this case.

I want to stress that this rule means you must not use electronic devices or computers to communicate about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages to or from anyone about this case or your jury service.

You must not do any research or look up words, names, [maps], or anything else that may have anything to do with this case. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else.

Many of you may have cell phones, tablets, laptops or other electronic devices with you here in the courtroom.**

** *The trial judge should select one of the following two alternative instructions explaining the rules governing jurors' use of electronic devices, as explained in Note on Use 1.*

Alternative A: **[All cell phones, computers, tablets, or other types of electronic devices must be turned off while you are in the courtroom. Turned off means that the phone or other electronic device is actually off and not in a silent or vibrating mode. You may use these devices during recesses, but even then you may not use your cell phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings or audio recordings of the proceedings or of your fellow jurors. After each recess, please double check to make sure your cell phone or electronic device is turned off. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. You cannot have in the jury room any cell phones, computers, or other electronic devices. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. A contact phone number will be provided**

to you.]

Alternative B: **[You cannot have any cell phones, tablets, laptops, or other electronic devices in the courtroom. You may use these devices during recesses, but even then you may not use your cell phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings, or audio recordings of the proceedings or your fellow jurors. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. A contact phone number will be provided to you.]**

What are the reasons for these rules? These rules are imposed because jurors must decide the case without distraction and only on the evidence presented in the courtroom. If you investigate, research, or make inquiries on your own outside of the courtroom, the trial judge has no way to make sure that the information you obtain is proper for the case. The parties likewise have no opportunity to dispute or challenge the accuracy of what you find. That is contrary to our judicial system, which assures every party the right to ask questions about and challenge the evidence being considered against it and to present argument with respect to that evidence. Any independent investigation by a juror unfairly and improperly prevents the parties from having that opportunity our judicial system promises.

Any juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. A mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. If you violate these rules, you may be held in contempt of court, and face sanctions, such as serving time in jail, paying a fine or both.

All of your communications with courtroom personnel, or me, will be part of the record of these proceedings. That means those communications shall either be made in open court with the court reporter present or, if they are in writing, the writing will be filed with the court clerk. This means, if you are outside the courtroom, any communication with me must be in writing, unsigned, and handed directly to the bailiff. Do not share the content of the writing with anyone, including other jurors. I have instructed the courtroom personnel that any communications you have with them outside of my presence must be reported to me, and I will tell the parties and their attorneys

about any communication from you that I believe may be of interest to the parties and their attorneys.

However, you may communicate directly with courtroom personnel about matters concerning your comfort and safety, such as [juror parking] [location of break areas] [how and when to assemble for duty] [dress] [what personal items can be brought into the courthouse or jury room] [list any other types of routine ex parte communications permitted].

If you become aware of any violation of these instructions or any other instruction I give in this case, you must tell me by giving a note to the bailiff.

NOTES ON USE FOR 201.2

1. Florida Rule of Judicial Administration 2.451 directs trial judges to instruct jurors on the use of cell phones and other electronic devices. During the trial, the trial judge may remove the jurors' cell phones or other electronic devices. The trial judge also has the option to allow the jurors to keep the cell phones and electronic devices during trial until the jurors begin deliberations. Rule 2.451 prohibits jurors from using the cell phones or electronic devices to find out information about the case or to communicate with others about the case. The jurors also cannot use the electronic devices to record, photograph, or videotape the proceedings. In recognition of the discretion rule 2.451 gives trial judges, this instruction provides two alternatives: (A) requiring jurors to turn off electronic devices during court proceedings and removing their cell phones and electronic devices during deliberations; or (B) removing the cell phones and electronic devices during all proceedings and deliberations. These instructions may be modified to fit the practices of a trial judge in a particular courtroom. These instructions are not intended to limit the discretion of the trial court to control the proceedings.

2. The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specified means of communication or research as technology develops.

3. Florida Rule of Civil Procedure 1.431(i)(2) requires the court, by pretrial order or statement on the record with opportunity for objection, to set forth the scope of routine, ex parte communications. Rule 1.431(i)(3) mandates an instruction during voir dire regarding the limitations on jurors' communications with the court and courtroom personnel. The court should make sure that courtroom personnel are also aware of the limitations on their communications

with jurors.

4. The introduction of the uninsured/underinsured motorist carrier is required because the plaintiffs are entitled to have the jury know that the joined carrier is the plaintiffs' uninsured/underinsured carrier. *Lamz v. Geico General Insurance Co.*, 803 So. 2d 593 (Fla. 2001); *Medina v. Peralta*, 724 So. 2d 1188 (Fla. 1999).

[Editor's note: For a discussion of civil contempt, see Chapter 3 of Contempt Benchguide (OSCA 2018)*.]*

III. Instructions on Jury Communications

SJI (Civil) Section 200

QUALIFICATIONS INSTRUCTION

Many of you have electronic devices such as cell phones, smartphones, tablets, and laptops. Even though you have not yet been selected as a juror, there are some strict rules that you must follow about electronic devices.

When you are called to a courtroom, the judge will give you specific instructions on the use of electronic devices. These rules are so important that the judge may tell you that you must turn off your cell phone or other electronic devices completely or that you cannot have your cell phone or electronic devices in the courtroom. If someone needs to contact you in case of an emergency, the judge will provide you with a phone number where you can receive messages.

If the trial judge allows you to keep your cell phones, computers, or other electronic devices, you cannot use them to take photographs, video recordings, or audio recordings of the proceedings in the courtroom or your fellow jurors. You must not use them to search the Internet or to find out anything related to any cases in the courthouse.

Why is this restriction imposed? This restriction is imposed because jurors must decide the case without distraction and only on the evidence presented in the courtroom. I know that, for some of you, these restrictions affect your normal daily activities and may require a change in the way you

are used to communicating and perhaps even in the way you are used to learning.

If you investigate, research, or make inquiries on your own, the trial judge has no way to make sure that the information you obtain is proper for the case. The parties likewise have no opportunity to dispute or challenge the accuracy of what you find. Any independent investigation by a juror unfairly and improperly prevents the parties from having that opportunity our judicial system promises.

Between now and when you have been discharged from jury duty by the judge, you must not discuss any information about your jury service with anyone, including friends, co-workers, and family members. You may tell those who need to know where you are that you have been called for jury duty. If you are picked for a jury, you may tell people that you have been picked for a jury and how long the case may take. However, you must not give anyone any information about the case itself or the people involved in the case. You must also warn people not to try to say anything to you or write to you about your jury service or the case. This includes face-to-face, phone or computer communications.

I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages, including e-mail and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.

The judge will tell you when you are released from this instruction. Remember, these rules are designed to guarantee a fair trial. It is important that you understand the rules as well as the impact on our system of justice if you fail to follow them. If it is determined that any one of you has violated this rule, and conducted any type of independent research or investigation, it may result in a mistrial. A mistrial would require the case to be tried again at great expense to the parties and the judicial system. The judge may also impose a penalty upon any juror who violates this instruction. All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution of every case.

NOTE ON USE

This instruction should be given in addition to and at the conclusion of the instructions normally given to the prospective jurors. The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specified means of communication or research as technology develops.

IV. Swearing the Venire

[Madam] [Mr.] Clerk, please swear the prospective jurors.

Chapter Three

Voir Dire

XI. Peremptory Challenges

XII. Discriminatory Challenges

I. Opening
(Monologue)

A. Opening Monologue

The first case set for trial on this date is _____, plaintiff(s), versus _____, defendant(s).

Is counsel for the plaintiff(s) ready to proceed to trial?

Is counsel for the defendant(s) ready to proceed to trial?

B. SJI (Civil) 201.1, Description of the Case

(Prior to Voir Dire)

Welcome. [I] [The clerk] will now administer your oath.

Now that you have been sworn, I'd like to give you an idea about what we are here to do.

This is a civil trial. A civil trial is different from a criminal case, where a defendant is charged by the state prosecutor with committing a crime. The subject of a civil trial is a disagreement between people or companies [or others, as appropriate], where the claims of one or more of these parties have been brought to court to be resolved. It is called "a trial of a lawsuit."

This is a case about (insert brief description of claim(s) and defense(s) brought to trial in this case).*

The incident involved in this case occurred on (date) **at** (location). (Add any other information relevant to voir dire).

The principal witnesses who will testify in this case are (list witnesses).

NOTE ON USE FOR 201.1

*See, for example, 401.2.

C. SJI (Civil) 201.3, Explanation of the Voir Dire Process

Voir Dire:

The last thing I want to do, before we begin to select the jury, is to explain to you how the selection process works.

Questions/Challenges: **This is the part of the case where the parties and their lawyers have the opportunity to get to know a little bit about you, in order to help them come to their own conclusions about your ability to be fair and impartial, so they can decide who they think should be the jurors in this case.**

How we go about that is as follows: First, I'll ask some general questions of you. Then, each of the lawyers will have more specific questions that they will ask of you. After they have asked all of their questions, I will meet with them and they will tell me their choices for jurors. Each side can ask that I exclude a person from serving on a jury if they can give me a reason to believe that he or she might be unable to be fair and impartial. That is what is called a challenge for cause. The lawyers also have a certain number of what are called peremptory challenges, by which they may exclude a person from the jury without giving a reason. By this process of elimination, the remaining persons are selected as the jury. It may take more than one conference among the parties, their attorneys, and me before the final selections are made.

Purpose of Questioning: **The questions that you will be asked during this process are not intended to embarrass you or unnecessarily pry into your personal affairs, but it is important that the parties and their attorneys know enough about you to make this important decision. If a question is asked that you would prefer not to answer in front of the whole courtroom, just let me know and you can come up here and give your answer just in front of the attorneys and me. If you have a question of either the attorneys or me, don't hesitate to let me know.**

Response to Questioning: **There are no right or wrong answers to the questions that will be asked of you. The only thing that I ask is that you answer the questions as frankly and as honestly and as completely as you can. You [will take] [have taken] an oath to answer all questions truthfully and completely and you must do so. Remaining silent when you have information you should disclose is a violation of that oath as well. If a juror violates this oath, it not only may result in having to try the case all over again but also can result in civil and criminal penalties against a juror personally. So, again, it is very important that you be as honest and complete with your answers as you possibly can. If you don't understand the question, please raise your hand and ask for an explanation or clarification.**

In sum, this is a process to assist the parties and their attorneys to select a fair and impartial jury. All of the questions they ask you are for this purpose. If, for any reason, you do not think you can be a fair and impartial juror, you must tell us.

NOTES ON USE FOR 201.3

The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of delivery. It may be useful in cataloging the subjects to be covered in an introductory instruction.

II. Voir Dire Examination
(Dialogue)

This case involves (read a brief statement of the case).

1. You have heard a statement of what this case is about. Do any of you know anything about this case, either through your own personal knowledge or by discussion with anyone else, or by reading or hearing about it in any of the news media?

(a) Without telling us what you know, please tell us how you know.

(b) Do you have a state of mind with reference to this incident which would in any way prevent you from acting with impartiality?

(c) Do you feel that you can eliminate and disregard everything you have heard or read pertaining to this case and render an impartial verdict based solely upon the evidence presented in this courtroom?

2. Would counsel for the plaintiff please stand and introduce yourself and everyone at your table? Would counsel for the defense please stand and introduce yourself and everyone at your table?

Do any of you recognize any of these individuals as someone to whom you are related by blood or marriage or someone with whom you are acquainted through a professional, business, or social relationship?

(a) In what capacity have you known _____?

(b) Would your knowledge of _____ prevent you from acting with impartiality in this cause?

(c) Would your knowledge of _____ cause you to give greater or lesser weight to (his/her) side of this case?

3. Counsel for the plaintiff and then counsel for the defense will now read to you the names of the witnesses who may be called during the case. If any name should happen to be called twice, or if someone mentioned now does not actually testify later, you should not place any significance on that fact.

(after each lawyer finishes:)

Do you recognize any of these names as those individuals to whom you are related by blood or marriage or as someone with whom you are acquainted through a professional, business, or personal relationship?

(if answer is affirmative:)

(a) In what capacity have you known _____?

(b) Would your knowledge of _____ prevent you from acting with impartiality in this case?

(c) Would your knowledge of _____ cause you to give greater or lesser weight to any testimony that (he or she) might give in this case?

4. Do any of you have any physical disabilities in matters of hearing, sight, or otherwise, which would cause you any difficulty in performing your duty as a juror in this case?

5. Do you have any feeling toward any of the parties or attorneys in this action which might affect your ability to serve as an impartial juror?

6. If you are selected as a juror in this cause, will you render a fair and impartial verdict based upon the evidence presented in this courtroom and the law as it pertains to this particular case as instructed by the court?

7. Do you have any reason why you cannot give this case your undivided attention and render a fair and impartial verdict?

8. If you are selected as a juror in this case, can you render a fair and impartial verdict, basing your verdict solely upon the evidence presented in this courtroom?

9. Will you promise to accept and follow the court's instructions on the

law, even if you find that you disagree with the law and wish it were different?

10. I am now going to ask you a number of questions individually. Please speak up so that the lawyers can hear you. I have advised the lawyers that they will not be allowed to ask these questions again. Counsel, if you are unable to hear, stop us so that we may correct that. For the first round of questions, and for that round only, please stand when you answer so that we are sure that we have the right name associated with the right person. On the first round, please stand and give us the following information:

(a) Your name

(b) What city or subdivision you live in

(c) If you came from some other area of the country, where you came from

(d) Your occupation, or former occupation if you are retired

(e) Your spouse's occupation

(f) Your children's occupations if they are old enough to be employed

Don't think you have to remember all of that; I will prompt you as we go.

(after completing this round)

11. My remaining questions I will ask of one row at a time. If your answer is yes, please raise your hand and be sure I see it since I will have some follow-up questions to ask.

The first question I have is: have you ever before served as a juror? (first row, second...)

(if affirmative answer, follow up)

(a) Criminal or civil (explain difference)?

(b) Where?

(c) How long ago?

(d) Did you have an opportunity to reach a verdict?

(e) Was there anything about that service that you feel would make it difficult for you to serve again?

12. People involved in jury trials, other than those of us for whom it is part of our job, usually fall into one of three categories – plaintiff (someone who is suing someone else), defendant (someone being sued or charged with a crime), or witness (someone called to the courtroom to testify). Have you, yourself, or has some family member or close personal friend been involved in a trial as a plaintiff, defendant, or witness?

(if affirmative answer, follow up)

(a) Was that you or someone else?

(b) As which, plaintiff, defendant, or witness?

(c) Criminal or civil?

(d) Where?

(e) How long ago?

(f) Is there anything about that trial, either the way it was conducted, the results, or anything else which might affect your ability to be fair and impartial in this case?

13. Have you ever been involved in a lawsuit that did not result in a trial?

(if affirmative answer, follow up)

(a) When?

(b) Where?

(c) Would anything about that matter affect your ability to be fair and impartial in this case?

14. Have you or has anyone in your immediate family or a close personal friend had any specialized training in the law?

15. Have you ever been employed in a job which required you to evaluate claims for any kind of property loss or personal injury?

16. Do you recognize anyone seated here with you as a prospective juror

as someone to whom you are related or with whom you are acquainted?

(optional questions)

1. Have you or has any member of your immediate family or a close personal friend ever suffered an injury so serious as to require time off from work or that would have required time off had the person been employed?

(if affirmative answer, follow up)

(a) Who suffered the injury?

(b) What type of injury?

(c) Are/is (you/he/she) still under a doctor's care?

(d) Do/does (you/he/she) still suffer from the injury?

(e) Was there a claim filed as a result of the injury?

(f) Will that experience affect your ability to be fair and impartial in this case?

2. Have you or has any member of your immediate family or any close personal friend ever had training in medicine, nursing, or health care?

3. Do you currently have a driver's license?

4. Do you have any strong feelings for or against chiropractors or chiropractic treatment?

5. Have you ever had any property taken by a governmental agency?

6. Do you have any training in real estate?

III. Alternate Monologue and Examination

Is the plaintiff ready to proceed?

Is the defendant ready to proceed?

Good morning, ladies and gentlemen. I am Judge _____. I will be the judge presiding over the jury selection as well as the civil trial.

1. The court realizes that service on a jury panel is not always convenient. However, service on a jury panel affords you an opportunity to be part of the administration of justice by which the legal affairs and liberties of your fellow men and women are determined and protected. I will make every effort to see that your time is not wasted. The estimated length of this trial is _____ days. The hours we generally work are from _____ a.m. to _____ p.m. with breaks every 1½ hours and a 1½ hour break for lunch.

2. The attorneys and I will be asking you questions to help us decide which of you will serve as jurors in this case. The questions are asked to determine if your decision in this case might be influenced by some personal experience or special knowledge that you have concerning the subject of this trial, the parties, the witnesses, or attorneys, or by opinions that you now hold. It is not unusual for people to have strong feelings about certain subjects or to identify with or feel some partiality toward someone. Nor is this wrong. However, the parties need to know about such feelings because they may tend to influence your thinking about this case. Consequently you should answer as completely as possible our questions about such matters.

Please understand that these questions are not meant to embarrass you or to pry into your personal affairs. They are intended to obtain a fair and impartial jury to try this case. It is your duty to answer completely and truthfully all of the questions that will be asked of you. Any failure to answer truthfully and completely may require this case to end in a mistrial or to be tried again.

3. Each side, the plaintiff and defendant, has a certain number of "peremptory challenges," by which I mean each side can challenge you and ask that you be excused without giving a reason. If you are excused by either side, please do not feel offended or feel that your honesty or integrity is being questioned. It is not.

4. So that you will know the person with whom you will be working and their duties, I will introduce our bailiff. Our bailiff is _____. He/She enforces the court's orders, has charge of the jury, and maintains security. If you have any questions about your personal welfare, apart from questions about the case being tried, you should direct these questions to the bailiff.

5. It may be necessary during the jury selection as well as the trial for me to talk privately to the attorneys here at the bench or with jurors out of the room. Please don't speculate on what these conferences are about. The bench conference should in no way affect your duty as a prospective juror or juror in this case.

6. I will now randomly select 14 individuals to take a seat in the jury box as directed by the bailiff. Please follow the bailiff's instruction.

(swear in the jury panel)

7. Do any of you know anything about this case, either through your own personal knowledge, rumor, or by discussion with someone else, or have you read or heard about it in the news media?

[Insert if answer is yes.] (Do you have a state of mind with reference to the case which would in any way prevent you from acting impartially? Do you feel you could eliminate and disregard everything you have read or heard and render an impartial verdict solely upon the evidence presented in this courtroom?)

8. This case is scheduled for _____ days/weeks, commencing on _____. Do any of you have any physical defects — hearing, sight, or otherwise — which would render you incapable of performing your duty as a juror in this case, including sitting for perhaps 1½ to 2 hours at a time? If you heard this question, please raise your hand.

9. Now the attorney for the plaintiff will introduce himself/herself and the witnesses he/she intends to call. Then the attorney for the defendant will introduce himself/herself, his/her client, and the witnesses he/she will call. If you know any of the individuals named, you will need to inform the court.

Are you related by blood or marriage to or do you know the defendant (or witness) from any business or social relationship?

[Insert if answer is yes.]

(In what capacity?

Will this fact prevent you from acting with impartiality in this case?

Would your knowledge of _____ cause you to give greater or lesser weight to any statements he/she might make (or evidence presented by his/her attorney) (or testimony of witnesses in this case by reason of such knowledge?)

Do any of you know each other? *[To what extent would your relationship or acquaintance affect your ability to reach your own verdict and not a verdict of someone else on the jury?]*

10. Do you have any bias or prejudice either for or against the defendant or plaintiff?

11. If you are selected as a juror in this case, will you render a fair and impartial verdict based upon the evidence presented in this courtroom and the law of the state of Florida as it pertains to this particular case as instructed by the court? If any of you feel you cannot, raise your hand.

12. Do you have any other reason why you cannot give this case your individual attention and render a fair and impartial verdict?

13. Before the attorneys ask questions of you, please introduce yourself to the court and parties and provide the following information for the court:

(a) Your full name.

(b) Your employment, or prior employment if retired.

(c) Your spouse's name and employment or prior employment if retired.

(d) Your children's employment, if working, or prior employment if presently unemployed.

14. The attorneys will now ask questions of you. What they say is not evidence, nor is it the law. The court will instruct you on the law at a later time. I do ask that you listen attentively to their questions and respond audibly so that both sides can hear.

Counsel for plaintiff may now proceed with voir dire of the panel. Please do not ask questions I have already asked of the panel.

Counsel for defendant may now proceed with voir dire of the panel. Please do not ask questions I have already asked of the panel.

IV. Accepting the Jury
(Dialogue with Attorneys)

(after counsel has completed voir dire and talked with the client, call attorneys to the bench)

Does counsel for the plaintiff have any challenge for cause with respect to any member of the panel?

Does counsel for the defendant have any challenge for cause with respect to any member of the panel?

(rule on challenges)

With respect to the first six (twelve) prospective jurors, does plaintiff have any peremptory challenge?

With respect to the first six (twelve) prospective jurors, does defendant have any peremptory challenge?

(repeat until 6 or 12 are selected)

We will now consider the matter of an alternate. I will give each of you one challenge with respect to the alternate.

Does plaintiff wish to challenge Mr./Ms. _____ as the alternate?

Does defendant wish to challenge Mr./Ms. _____ as the alternate?

(repeat until alternate is selected)

Our jury will consist of *(read into the record the names of all the jurors and the alternate)*

Thank you, Counsel. Please step back.

(to venire)

Ladies and gentlemen, I am about to call the names of those who will be sitting on this jury. As your name is called, please come forward and take a seat as directed by our bailiff.

(when the jury is seated)

Madam (Mr.) Clerk, please swear the jurors to try the issues of this case.

(NOTE: If trial is not to begin until later in the week, defer swearing the jury until then.)

(Clerk: Do you solemnly swear that you will well and truly try the issues between _____, Plaintiff, and _____, Defendant, and render a true

verdict according to the law and the evidence?)

V. Trial Jury (Fla. R. Civ. P. 1.431)

(a) Questionnaire.

(1) The circuit court may direct the authority charged by law with the selection of prospective jurors to furnish each prospective juror with a questionnaire in the form approved by the supreme court from time to time to assist the authority in selecting prospective jurors. The questionnaire must be used after the names of jurors have been selected as provided by law but before certification and the placing of the names of prospective jurors in the jury box. The questionnaire must be used to determine those who are not qualified to serve as jurors under any statutory ground of disqualification.

(2) To assist in voir dire examination at trial, any court may direct the clerk to furnish prospective jurors selected for service with a questionnaire in the form approved by the supreme court from time to time. The prospective jurors must be asked to complete and return the forms. Completed forms may be inspected in the clerk's office and copies must be available in court during the voir dire examination for use by parties and the court.

(b) Examination by Parties. The parties have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror must be determined by the court. The court may ask such questions of the jurors as it deems necessary, but the right of the parties to conduct a reasonable examination of each juror orally must be preserved.

(c) Challenge for Cause.

(1) On motion of any party the court must examine any prospective juror on oath to determine whether that person is related, within the third degree, to (i) any party, (ii) the attorney of any party, or (iii) any other person or entity against whom liability or blame is alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called, or has any interest in the action, or has formed or expressed any opinion, or is sensible of any bias or prejudice concerning it, or is an employee or has been an employee of any party or any person or entity against whom liability or blame is alleged in the pleadings, within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand indifferent to the action or any of the foregoing grounds of

objection exists or that the juror is otherwise incompetent, another must be called in the juror's place.

(2) The fact that any person selected for jury duty from bystanders or the body of the county and not from a jury list lawfully selected has served as a juror in the court in which that person is called at any other time within 1 year is a ground of challenge for cause.

(3) When the nature of any civil action requires a knowledge of reading, writing, and arithmetic, or any of them, to enable a juror to understand the evidence to be offered, the fact that any prospective juror does not possess the qualifications is a ground of challenge for cause.

(d) Peremptory Challenges. Each party is entitled to 3 peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of 3 peremptory challenges to each party on the side with the greater number of parties. The additional peremptory challenges accruing to multiple parties on the opposing side must be divided equally among them. Any additional peremptory challenges not capable of equal division must be exercised separately or jointly as determined by the court.

(e) Exercise of Challenges. All challenges must be addressed to the court outside the hearing of the jury in a manner selected by the court so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge, if for cause.

(f) Swearing of Jurors. No one shall be sworn as a juror until the jury has been accepted by the parties or until all challenges have been exhausted.

(g) Alternate Jurors.

(1) The court may direct that 1 or more jurors be impaneled to sit as alternate jurors in addition to the regular panel. Alternate jurors in the order in which they are called must replace jurors who have become unable or disqualified to perform their duties before the jury retires to consider its verdict. Alternate jurors must be drawn in the same manner, have the same qualifications, be subject to the same examination, take the same oath, and have the same functions, powers, facilities, and privileges as principal jurors. An alternate juror who does not replace a principal juror must be discharged when the jury retires to consider the verdict.

(2) If alternate jurors are called, each party is entitled to one

peremptory challenge in the selection of the alternate juror or jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of 1 peremptory challenge to each party on the side with the greater number of parties. The additional peremptory challenge allowed pursuant to this subdivision may be used only against the alternate jurors. The peremptory challenges allowed pursuant to subdivision (d) of this rule must not be used against the alternate jurors.

(h) Interview of a Juror. A party who believes that grounds for legal challenge to a verdict exist may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge. The motion must be served within 15 days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time. The motion must state the name and address of each juror to be interviewed and the grounds for challenge that the party believes may exist. After notice and hearing, the trial judge must enter an order denying the motion or permitting the interview. If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview.

(i) Communication with the Jury. This rule governs all communication between the judge or courtroom personnel and jurors.

(1) Communication to be on the Record. The court must notify the parties of any communication from the jury pertaining to the action as promptly as practicable and in any event before responding to the communication. Except as set forth below, all communications between the court or courtroom personnel and the jury must be on the record in open court or must be in writing and filed in the action. The court or courtroom personnel must note on any written communication to or from the jury the date and time it was delivered.

(2) Exception for Certain Routine Communication. The court must, by pretrial order or by statement on the record with opportunity for objection, set forth the scope of routine ex parte communication to be permitted and the limits imposed by the court with regard to such communication.

(A) Routine ex parte communication between the bailiff or other courtroom personnel and the jurors, limited to juror comfort and safety, may occur off the record.

(B) In no event shall ex parte communication between courtroom personnel and jurors extend to matters that may affect the outcome of

the trial, including statements containing any fact or opinion concerning a party, attorney, or procedural matter or relating to any legal issue or lawsuit.

(3) Instructions to Jury. During voir dire, the court must instruct the jurors and courtroom personnel regarding the limitations on communication between the court or courtroom personnel and jurors. On empanelling the jury, the court must instruct the jurors that their questions are to be submitted in writing to the court, which will review them with the parties and counsel before responding.

(4) Notification of Jury Communication. Courtroom personnel must immediately notify the court of any communication to or from a juror or among jurors in contravention of the court's orders or instructions, including all communication contrary to the requirements of this rule.

VI. Persons Disqualified or Excused from Jury Service (§ 40.013, Fla. Stat.)

(1) No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.

(2)(a) Neither the Governor, nor Lieutenant Governor, nor any Cabinet officer, nor clerk of court, or judge shall be qualified to be a juror.

(b) Any full-time federal, state, or local law enforcement officer or such entities' investigative personnel shall be excused from jury service unless such persons choose to serve.

(3) No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state or such county or municipal corporation.

(4) Any expectant mother and any parent who is not employed full time and who has custody of a child under 6 years of age, upon request, shall be excused from jury service.

(5) A presiding judge may, in his or her discretion, excuse a practicing attorney, a practicing physician, or a person who is physically infirm from jury service, except that no person shall be excused from service on a civil trial jury solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence to be presented requires auditory discrimination or that the timely

progression of the trial will be considerably affected thereby. However, nothing in this subsection shall affect a litigant's right to exercise a peremptory challenge.

(6) A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity.

(7) A person who was summoned and who reported as a prospective juror in any court in that person's county of residence within 1 year before the first day for which the person is being considered for jury service is exempt from jury service for 1 year from the last day of service.

(8) A person 70 years of age or older shall be excused from jury service upon request. A person 70 years of age or older may also be permanently excused from jury service upon written request. A person who is permanently excused from jury service may subsequently request, in writing, to be included in future jury lists provided such person meets the qualifications required by this chapter.

(9) Any person who, because of mental illness, intellectual disability, senility, or other physical or mental incapacity, is permanently incapable of caring for himself or herself may be permanently excused from jury service upon request if the request is accompanied by a written statement to that effect from a physician licensed pursuant to chapter 458 or chapter 459.

(10) Any person who is responsible for the care of a person who, because of mental illness, mental retardation, senility, or other physical or mental incapacity, is incapable of caring for himself or herself shall be excused from jury service upon request.

VII. Grounds for Challenge to Individual Jurors for Cause (§ 913.03, Fla. Stat.)

A challenge for cause to an individual juror may be made only on the following grounds:

(1) The juror does not have the qualifications required by law;

(2) The juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror;

(3) The juror has conscientious beliefs that would preclude him or her from finding the defendant guilty;

(4) The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;

(5) The juror served on a jury formerly sworn to try the defendant for the same offense;

(6) The juror served on a jury that tried another person for the offense

charged in the indictment, information, or affidavit;

(7) The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;

(8) The juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;

(9) The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;

(10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence;

(11) The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;

(12) The juror is a surety on defendant's bail bond in the case.

VIII. Special Jurors (§ 913.15, Fla. Stat.)

The court may summon jurors in addition to the regular panel.

IX. Limitations on Questions

A. Time Constraints

1. There is no bright line rule to determine the time limits that a trial court may impose during voir dire. *Mendez v. State*, 898 So. 2d 1141 (Fla. 5th DCA 2005).

2. Considerable discretion is given to the trial court in controlling the time for voir dire and placing reasonable limits on questioning. *Fredrick v. State*, 832 So. 2d 245 (Fla. 5th DCA 2002).

3. "Although the trial judge certainly has the discretion to limit repetitive and argumentative voir dire, a trial judge must allow counsel opportunity to ascertain latent or concealed prejudgments by prospective jurors." *Roberts v. State*, 937 So. 2d 781, 784 (Fla. 2d DCA 2006).

4. Judge must give parties reasonable notice of time constraints in order for counsel to be able to pace the timing of their questions. *Id.*

5. If the judge does not give any advance notice of time constraint to parties and then imposes such a restraint, this constitutes reversible error. *Id.*

6. A judge's imposition of a 10-minute time limit while defendant was questioning potential jurors without the judge giving advance notice of time constraint was reversible error. *Id.*

7. Allowing plaintiff's counsel a total of 45 minutes to examine 19 potential jurors, and failure to give advance notice of time constraint, constituted reversible error, as the time limit was arbitrary and counsel was given little more than two to three minutes for each juror. *Carver v. Niedermayer*, 920 So. 2d 123 (Fla. 4th DCA 2006).

8. The fact that the trial judge conducted an examination of jurors before allowing counsel to question does not, by itself, justify time limits on counsel's voir dire. *Id.*

9. The plaintiff was denied a fair trial when the trial judge rushed to pick a jury and denied the plaintiff four juror challenges for cause, forcing the plaintiff to take the fourth juror. *Somerville v. Ahuja*, 902 So. 2d 930 (Fla. 5th DCA 2005).

B. Scope

1. The scope of voir dire questioning rests in the sound discretion of the trial court and will not be interfered with unless that discretion is clearly abused. *Sisto v. Aetna Cas. and Sur. Co.*, 689 So. 2d 438 (Fla. 4th DCA 1997).

2. The length and extensiveness of voir dire "should be controlled by the circumstances surrounding the juror's attitude in order to assure a fair and impartial trial." *Barker v. Randolph*, 239 So. 2d 110, 112 (Fla. 1st DCA 1970).

3. It is improper to mislead a jury to play on the sympathies or perceived sympathies of the jurors. *Hollenbeck v. Hooks*, 993 So. 2d 50 (Fla. 1st DCA 2008).

4. While parties do not have "an absolute right to ask any questions they want on voir dire concerning a potential juror's possible bias for or against insurance companies," jurors may be questioned on "whether they felt there could be a relationship between the decision they would have to render and the amount of premiums they would have to pay." *Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So. 2d 1325, 1330–1331 (Fla. 1981). The court has discretion to determine what is a reasonable examination on voir dire.

5. "While the trial court certainly has the discretion to limit repetitive and argumentative voir dire, to prohibit counsel from asking improper questions or questions that elicit answers on legal issues the jurors have not been instructed on, and to preclude attorneys from pre-trying their cases or in obtaining a commitment on ultimate issues to be decided after hearing all of the evidence, a trial judge must allow counsel to ascertain latent or concealed prejudgments by prospective jurors." *Figueroa v. State*, 952 So. 2d 1238, 1239 (Fla. 3d DCA 2007).

C. Hypothetical Questions

1. Although hypothetical questions may not be used on voir dire to determine how a juror would decide under a given set of facts, they may be used "to determine whether prospective jurors could correctly apply the law." *Williams v. State*, 931 So. 2d 999, 1000 (Fla. 3d DCA 2006).

2. A trial court may permit hypothetical questions during voir dire if the questions make a "correct reference to the law of the case that aid[s] in determining whether challenges for cause, or peremptory are proper." *Moore v. State*, 939 So. 2d 1116, 1117–1118 (Fla. 3d DCA 2006), quoting *Pope v. State*, 94 So. 865, 869 (Fla. 1923).

D. Leading Questions

1. "[A] juror who is being asked leading questions [by the judge] is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions." *Price v. State*, 538 So. 2d 486, 489 (Fla. 3d DCA 1989).

2. In *Hagerman v. State*, 613 So. 2d 552, 553 (Fla. 4th DCA 1993), a

juror had stated during voir dire that she did not think she could be impartial. The trial judge rehabilitated her through leading questions. The appellate court reversed, stating that "where a potential juror is asked leading questions by the trial judge, the answers to those leading questions should not be the sole factor in rehabilitating that potential juror," as was the situation in this case.

E. Misrepresentations and Nondisclosure by Jurors

1. A new trial is warranted because of a juror's nondisclosure of information when (1) the facts are material; (2) the facts were concealed by the juror upon voir dire examination; and (3) the failure to discover the concealed facts was not due to the lack of diligence of the complaining party. *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995); *McCauslin v. O'Conner*, 985 So. 2d 558 (Fla. 5th DCA 2008); *Tripp v. State*, 874 So. 2d 732 (Fla. 4th DCA 2004); *Industrial Fire & Cas. Ins. Co. v. Wilson*, 537 So. 2d 1100 (Fla. 3d DCA 1989). *See also* 38 FLA. JUR. 2d *New Trial* §§ 24–27; 33 FLA. JUR. 2d *Juries* §§ 121–126.

2. Nondisclosure is considered material when the omission of the information "prevented counsel from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge." *Hampton v. State*, 103 So. 3d 98, 112 (Fla. 2012); *Bernal v. Lipp*, 580 So. 2d 315, 316–317 (Fla. 3d DCA 1991).

3. Information is considered concealed if it was "'squarely asked for' and not provided." *Taylor v. Magana*, 911 So. 2d 1263, 1267 (Fla. 4th DCA 2005); *Birch ex rel. Birch v. Albert*, 761 So. 2d 355, 358 (Fla. 3d DCA 2000). *See also R.J. Reynolds Tobacco Company v. Allen for Estate of Allen*, 228 So. 3d 684 (Fla. 1st DCA 2017) (not error for trial court to refuse to dismiss juror who allegedly failed to disclose bias when asked his opinion of lawsuits against tobacco company; questionnaire did not ask unequivocal questions regarding bias, and juror did not provide unequivocal answers).

4. A juror who falsely misrepresents the juror's interest or situation or conceals a relevant, material fact is guilty of misconduct that is prejudicial to the party, because it impairs the party's right to challenge. *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995); *Taylor v. Magana*, 911 So. 2d 1263 (Fla. 4th DCA 2005).

5. "[A] juror's nondisclosure need not be intentional to constitute concealment," because the effect is the same. *Roberts ex rel. Estate of Roberts v. Tejada*, 814 So. 2d 334, 343 (Fla. 2002); *Hillsboro Management, LLC v. Pagono*, 112 So. 3d 620, 624 (Fla. 4th DCA 2013); *see also State Farm Mut. Auto. Ins. Co. v. Lawrence*, 65 So. 3d 52 (Fla. 2d DCA 2011).

6. To establish concealment, the moving party must demonstrate, among other things, that the voir dire question was "straightforward and not reasonably susceptible to misinterpretation." *Hillsboro Management, LLC v. Pagono*, 112 So. 3d 620, 624 (Fla. 4th DCA 2013).

7. In a product liability action, a new trial was not warranted by a juror's failure to disclose that he had been involved in a divorce, foreclosure actions, and collection cases. His failure to disclose "was attributable to the plaintiff's lack of diligence" because jurors were asked on voir dire whether they had "ever been sued"; the plaintiff's attorney "did not make any effort whatsoever to explain the types of legal actions that were encompassed" by the question. *Tricam Industries, Inc. v. Coba*, 100 So. 3d 105, 112–113 (Fla. 3d DCA 2012), *quashed on other grounds*, *Coba v. Tricam Industries, Inc.*, 164 So. 3d 637 (Fla. 2015) (in products liability cases, there is *not* "fundamental nature" exception to general rule that party is not required to immediately object to inconsistent verdict (i.e., where jury finds defendant was negligent in design of product but also finds product did not contain design defect)).

8. A juror's response about litigation history cannot constitute concealment when the response "is ambiguous, and counsel does not inquire further to clarify that ambiguity." *Birch ex rel. Birch v. Albert*, 761 So. 2d 355, 358 (Fla. 3d DCA 2000); *see also Hillsboro Management, LLC v. Pagono*, 112 So. 3d 620 (Fla. 4th DCA 2013). "[A] juror's answer to an ambiguous question cannot constitute juror misconduct necessitating a new trial." *Ottley v. Kirchharr*, 917 So. 2d 913, 918 (Fla. 1st DCA 2006).

9. Insurance Services Organization claims history reports that tended to show that three jurors had made several insurance claims that they failed to disclosed warranted a new trial. *State Farm Mut. Auto. Ins. Co. v. Lawrence*, 65 So. 3d 52 (Fla. 2d DCA 2011).

10. It was not abuse of discretion for the trial court to find that the failure of a juror in a medical malpractice case to disclose that she had been a party to five lawsuits, as none of those lawsuits involved medical malpractice or any personal injury, several were decades earlier, and the defendant failed to challenge or strike another juror who had admitted attempting to steal money from a store. *Hoang Dinh Duong v. Ziadie*, 125 So. 3d 225 (Fla. 4th DCA 2013).

11. In a crashworthiness case, the juror's failure to disclose her husband's prior workers' compensation claims was not material, as potential jurors who had disclosed prior litigation were not questioned about the litigation. *Ford Motor Co. v. D'Amario*, 732 So. 2d 1143 (Fla. 2d DCA 1999), *quashed on other grounds*, *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2002).

12. A juror's false statement that she had never been involved in litigation did not require reversal and a new trial in an action by a motorist against a defendant for personal injuries from a motor vehicle accident. Because the defendant "failed to exercise peremptory challenges to strike two other members of the venire who had disclosed involvement in litigation activities," the court found that it was unlikely that this juror would have been peremptorily challenged had she not answered falsely. *Morgan v. Milton*, 105 So. 3d 545 (Fla. 1st DCA 2012).

13. Trial counsel is not required to conduct public records investigations of the venire to satisfy the due diligence prong of the test as to whether juror nondisclosure warrants a new trial. *Roberts ex rel. Estate of Roberts v. Tejeda*, 814 So. 2d 334 (Fla. 2002).

14. The plaintiff in a premises liability action was entitled to a new trial because a juror had failed to disclose past litigation involvement, even though a record check as to the juror's litigation history was not completed until after the verdict was rendered. In light of *Roberts ex rel. Estate of Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002), the court noted that "due diligence . . . does not require a lawsuit index search prior to the conclusion of jury selection." *Vanderbilt Inn on the Gulf v. Pfenninger*, 834 So. 2d 202, 203 (Fla. 2d DCA 2002).

15. Defendants in a wrongful death action arising from a motor vehicle accident were entitled to a new trial because a juror had failed to

disclose that he had been the plaintiff in a previous accident lawsuit in which the attorney of one of the plaintiffs in the subject case had represented him, and the attorney of one of the defendants had represented the defendant. *Davis v. Cohen*, 816 So. 2d 671 (Fla. 3d DCA 2002).

16. A party is not required to complete venire investigations during trial and may submit post-verdict evidence of juror nondisclosure. *State Farm Fire and Cas. Co. v. Levine*, 837 So. 2d 363 (Fla. 2002).

17. A party's failure to timely challenge a juror when the party was aware of a disqualifying factor may result in waiver. *Willacy v. State*, 640 So. 2d 1079 (Fla. 1994); *Companioni v. City of Tampa*, 958 So. 2d 404 (Fla. 2d DCA 2007).

X. Challenges for Cause (Quick Reference)

A. How and When Exercised

1. Judge cannot restrict or prevent "backstriking." *Tedder v. Video Electronics, Inc.*, 491 So. 2d 533 (Fla. 1986).

2. It is error to require parties to exercise all peremptory challenges simultaneously in writing — challenges should be allowed singularly, alternately, and orally. *Ter Keurst v. Miami Elevator Co.*, 486 So. 2d 547 (Fla. 1986).

3. Challenge for cause must be ruled upon when made — error to defer until after peremptory challenge is made. *Peek v. State*, 413 So. 2d 1225 (Fla. 3d DCA 1982).

B. What Constitutes Cause

1. Court is given broad discretion on challenge for cause and will be reversed only on a showing of manifest error. *Cook v. State*, 542 So. 2d 964 (Fla. 1989); *General Foods Corp. (Maxwell House Div.) v. Brown*, 419 So. 2d 393 (Fla. 1st DCA 1982).

2. Test is whether there is a basis for reasonable doubt as to a juror possessing the state of mind which will enable him or her to render an impartial verdict based solely on the evidence submitted and the law

announced at trial. *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007), citing *Singer v. State*, 109 So. 2d 7 (Fla. 1959).

3. Close cases should be resolved in favor of excusing the juror. *Reid v. State*, 972 So. 2d 298 (Fla. 4th DCA 2008); *Imbimbo v. State*, 555 So. 2d 954 (Fla. 4th DCA 1990); *Levy v. Hawk's Cay, Inc.*, 543 So. 2d 1299 (Fla. 3d DCA 1989); *Sydleman v. Benson*, 463 So. 2d 533 (Fla. 4th DCA 1985).

4. Juror must unequivocally assert an ability to be fair and impartial – error not to excuse one who will "try to be fair." *Sikes v. Seaboard Coast Line R. Co.*, 487 So. 2d 1118, 1121 (Fla. 1st DCA 1986); *see also Club West, Inc. v. Tropigas of Florida, Inc.*, 514 So. 2d 426 (Fla. 3d DCA 1987); *Robinson v. State*, 506 So. 2d 1070 (Fla. 5th DCA 1987).

5. Juror should be excused for cause if there is a reasonable doubt as to juror's ability to render an impartial verdict. *Overton v. State*, 801 So. 2d 877 (Fla. 2001); *Leon v. State*, 396 So. 2d 203 (Fla. 3d DCA 1981).

6. A juror's assurance that he or she can put aside a bias and render an impartial verdict is not determinative of whether the juror should have been excused for cause. *Price v. State*, 538 So. 2d 486 (Fla. 3d DCA 1989).

7. "If it appears that the juror does not stand indifferent to the action . . . , another must be called in that juror's place." Fla. R. Civ. P. 1.431(c)(1).

C. Cumulative Effects

1. Even if a juror's individual comments may not constitute independent admissions of "direct bias," the cumulative effect of the juror's comments may "raise a reasonable doubt concerning his ability to be impartial" sufficient to support a challenge for cause. *James v. State*, 731 So. 2d 781, 783 (Fla. 3d DCA 1999).

2. A juror's statement that the juror can and will return a verdict according to the evidence and the law is not determinative of the juror's competence, if it appears otherwise from other evidence or other of the juror's statements. *Singer v. State*, 109 So. 2d 7 (Fla. 1950); *Segura v. State*, 921 So. 2d 765 (Fla. 3d DCA 2006).

D. Rehabilitation

1. Although Florida law permits "the rehabilitation of jurors whose responses in voir dire raise concerns about their impartiality," a juror's later statement that he or she could be impartial does not necessarily determine whether the juror should be excused for cause, if the juror previously demonstrated a bias. *Rimes v. State*, 993 So. 2d 1132, 1133–1134 (Fla. 5 DCA 2008) (court should have excused juror who, after judge questioned him, said "he still thought that a law enforcement officer's testimony 'carries more weight'" than lay witness). *See also Price v. State*, 538 So. 2d 486, 489 (Fla. 3d DCA 1989) ("juror who is being asked leading questions [by the judge] is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions").

2. "A juror who initially expresses bias may be rehabilitated during the course of questioning. Nevertheless, doubts raised by initial statements are not necessarily dispelled simply because a juror later acquiesces and states that he can be fair." *Lewis v. State*, 931 So. 2d 1034, 1039 (Fla. 4th DCA 2006); *see also Singer v. State*, 109 So. 2d 7 (Fla. 1959).

3. "[I]t is necessary for courts to distinguish between those biases and beliefs that define a prospective juror—and thus produce little if any actual change in him or her from intensive questioning—and those in which information and explanation may provide a prospective juror with the 'requisite familiarity' and insight into the judicial process that will render him or her competent to serve." *Matarranz v. State*, 133 So. 3d 473, 486–487 (Fla. 2013).

4. "Efforts at rehabilitating a prospective juror should always be considered in light of what the juror had freely said before the salvage efforts began." *Montozzi v. State*, 633 So. 2d 563, 565 (Fla. 4th DCA 1994).

5. A trial court's "structured questions causing the juror to respond affirmatively" that he could be fair and impartial, after declaring that he could not, did not qualify to rehabilitate the juror. The juror should have been struck for cause. *Straw v. Associated Doctors Health and Life*, 728 So. 2d 354 (Fla. 5th DCA 1999).

6. "A trial court's failure to excuse a juror for cause is manifest error 'when the juror responds with equivocal or conditional answers, thus raising a reasonable doubt as to whether the [juror] possesses the requisite state of mind necessary to render an impartial decision.'" *Freeman v. State*, 50 So. 3d 1163, 1166 (Fla. 2d DCA 2010), quoting *Salgado v. State*, 829 So. 2d 342, 344 (Fla. 3d DCA 2002).

7. "[C]lose cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality." *Williams v. State*, 638 So. 2d 976, 978 (Fla. 4th DCA 1994).

E. Examples of Challenges for Cause

1. The trial court should have excused for cause a juror who expressed a bias toward the state because of personal experiences, but who was embarrassed and pressured into recanting her expression of bias. The supreme court stated: "It was only after skillful lawyering and questioning that the process produced a contradiction from the Juror. Which statements do we trust?" *Matarranz v. State*, 133 So. 3d 473, 490 (Fla. 2013).

2. A juror whose daughter was employed by the defendant corporation, and who knew the corporation's owner personally, should have been excused for cause. *Longshore v. Fronrath Chevrolet, Inc.*, 527 So. 2d 922 (Fla. 4th DCA 1988).

3. Challenge for cause of a juror who owned stock in a defendant corporation should not have been denied. *Club West, Inc. v. Tropigas of Florida, Inc.*, 514 So. 2d 426 (Fla. 3d DCA 1987).

4. A juror should be excused for cause if the juror is related to a party or attorney in the case within the third degree or has a friendly relationship with one of the attorneys. *Sikes v. Seaboard Coastline RR Co.*, 487 So. 2d 1118 (Fla. 1st DCA 1986), citing Fla. R. Civ. P. 1.431(c) and *Johnson v. Reynolds*, 121 So. 793 (Fla. 1929).

5. A juror who is employed by one of the parties may be challenged for cause. *Boca Teeca Corp. v. Palm Beach County*, 291 So. 2d 110 (Fla. 4th DCA 1974); *see also* Fla. R. Civ. P. 1.431(c)(1).

6. It was not error to dismiss for cause two venire members who said

they would give more weight to the testimony of a medical doctor than to that of a chiropractor but would not reject, out of hand, testimony by a chiropractor. *Nowling v. Williams*, 316 So. 2d 547 (Fla. 1975).

7. A juror whose father was a surgeon who had been sued for malpractice many times, and who strongly expressed a bias against individuals who sought damages for relatively minor injuries, should have been excused for cause. *Goldenberg v. Regional Import and Export Trucking Co., Inc.*, 674 So. 2d 761 (Fla. 4th DCA 1996). Her statement that she was "a fair person" was not sufficient rehabilitation.

8. In a real property breach-of-contract action, a juror who had been involved in a real property lawsuit had expressed negative feelings about "people defaulting." She should have been excused for cause, as it had been unclear whether her own lawsuit would cause her to be biased. As the trial court noted, "there is a difference between 'I don't think it should' and 'it won't.'" *Four Wood Consulting, LLC v. Fyne*, 981 So. 2d 2, 5 (Fla. 4th DCA 2007).

9. It was reversible error for the trial court to deny a challenge for cause after a juror was asked whether he could overcome his "unequivocal bias in favor of the state" and had responded with "I'd try not to" be prejudiced and "I would give it my best shot." *Bell v. State*, 870 So. 2d 893, 894 (Fla. 4th DCA 2004).

10. A juror who stated that his car insurance doubled because his wife "just touched" another vehicle but that he would "be in the middle" when deciding a verdict, and another juror who said he believed there should be a cap on damages to keep insurance rates from going up but doubted his opinion would affect his verdict, should have been dismissed for cause. *Rodriguez v. Lagomasino*, 972 So. 2d 1050, 1051 (Fla. 3d DCA 2008).

XI. Peremptory Challenges (Quick Reference)

1. "Backstriking" is a party's right to retract acceptance of a juror and object to the juror at any time before that juror is sworn. *Hayes v. State*, 94 So. 3d 452 (Fla. 2012). It is "an abuse of discretion for a trial

court to employ a jury selection procedure in which some but not all prospective jurors are sworn for the purpose of prohibiting the exercise of peremptory challenges to backstrike such jurors" *Tedder v. Video Electronics, Inc.*, 491 So. 2d 533, 534 (Fla. 1986).

2. "When a trial court denies or grants a peremptory challenge, the objecting party must renew and reserve the objection before the jury is sworn" or the objection is waived. *State v. Ivey*, 285 So. 3d 281 (Fla. 2019); *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007).

3. It is error to require parties to exercise all peremptory challenges simultaneously in writing – challenges should be allowed singularly, alternately, and orally. *Ter Keurst v. Miami Elevator Co.*, 486 So. 2d 547 (Fla. 1986).

4. "[I]t is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause," if the party later exhausts all peremptory challenges and another challenge is sought and denied. *Hill v. State*, 477 So. 2d 553 (Fla. 1985). The error cannot be harmless because it curtails the party's right to use peremptory challenges by reducing the number available.

5. However, to preserve the denial for review, the party must "expressly or impliedly request an additional peremptory challenge after exhausting . . . peremptory challenges." *Connors v. Sears, Roebuck & Co.*, 721 So. 2d 418, 419 (Fla. 4th DCA 1998).

6. To preserve the denial of a challenge for cause, the party must also identify a specific objectionable juror the party otherwise would have struck if peremptory challenges had not been exhausted. *Trotter v. State*, 576 So. 2d 691 (Fla. 1991); *Griefer v. DePietro*, 625 So. 2d 1226 (Fla. 4th DCA 1993).

7. Because jurors may be peremptorily challenged until sworn, "and the trial court may not swear jurors piecemeal," it was error for the court to make the plaintiff either accept piecemeal swearing or agree not to backstrike. *Szymanski v. Cardiovascular Associates of Lake County, P.A.*, 62 So. 3d 649, 655 (Fla. 5th DCA 2011).

XII. Discriminatory Challenges (Quick Reference)

Racially based peremptory challenges are impermissible. The court should supply the following test procedure from *State v. Neil*, 457 So. 2d 481 (Fla. 1984):

- The initial presumption is that peremptories will be exercised in a non-discriminatory manner.

- A party that is concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race.

- If a party meets this burden, "then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories." *Neil* at 486.

- "[I]f the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race." *Neil* at 486–487.

- "The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause." *Neil* at 487.

- "If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue." *Neil* at 487.

- "[I]f the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool." *Neil* at 487.

The presence of one or more of the following factors will tend to show that a challenge was racially motivated:

- The alleged group bias is not shown to be shared by the juror in question.

- The challenging party failed to examine the juror or the examination was perfunctory (assuming neither the trial court nor opposing counsel

questioned the juror).

- The juror was singled out for special questions designed to invoke a specific response.
- The challenging party's reason is unrelated to the facts of the case.
- The challenge is based on reasons equally applicable to jurors who are not being challenged.

State v. Slappy, 522 So. 2d 18 (Fla. 1988).

A challenging party must establish that it was forced to accept an objectionable juror to show reversible error. *Penn v. State*, 574 So. 2d 1079 (Fla. 1991).

Counsel must provide a clear and reasonably specific racially neutral explanation for the use of the peremptory challenges. *Mitchell v. CAC-Ramsey Health Plans, Inc.*, 719 So. 2d 930 (Fla. 3d DCA 1998); *American Sec. Ins. Co. v. Hettel*, 572 So. 2d 1020 (Fla. 2d DCA 1991).

A party has standing to challenge the race-based exclusion of a juror of a different race. *Kibler v. State*, 546 So. 2d 710 (Fla. 1989); *Cook v. State*, 553 So. 2d 1359 (Fla. 2d DCA 1989).

The *Neil* rule applies to civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *American Sec. Insurance Co.*, *supra*; *Johnson v. Florida Farm Bureau Cas. Ins. Co.*, 542 So. 2d 367 (Fla. 4th DCA 1989).

The remedy for a *Neil* violation may be seating the improperly challenged juror rather than striking the entire panel. *Joiner v. State*, 618 So. 2d 174 (Fla. 1993).

It was not abuse of discretion to deny a challenge to the only black juror that was based on the fact that he, like the plaintiff, had been struck in a rear-end accident, when other seated jurors had been involved in car accidents. *Harrison v. Emanuel*, 694 So. 2d 759 (Fla. 4th DCA 1997).

The *Neil/Slappy* analysis also applies to challenges based on gender. *Abshire v. State*, 642 So. 2d 542 (Fla. 1994).

The objecting party must:

- Make a timely objection.

- Show that the venire person is a member of a distinct racial group.
- Request that the court ask the striking party its reason for the strike. The proponent of the strike has the burden to come forward with a race-neutral explanation.

The court, if it finds the explanation to be facially race neutral and believes the explanation, should sustain the strike. *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996).

In *State v. Johnson*, __ So. 3d __, 2020 WL 2563481 (Fla. May 21, 2020), the Florida Supreme Court resolved a certified conflict among districts and held that to preserve "a challenge to the trial court's determination that the facially race-neutral reason proffered by the proponent of a peremptory strike was genuine under step 3 of *Melbourne* . . . the party opposing a peremptory strike must make a specific objection to the proponent's proffered race-neutral reason for the strike."

Chapter Four

Preliminary Instructions

I. Preliminary Instructions, SJI (Civil) 202.1–202.2 (Former 1.1)
(After Jury Selection)

202.1 INTRODUCTION

Administer oath:

You have now taken an oath to serve as jurors in this trial. Before we begin, I am going to tell you about the rules of law that apply to this case and let you know what you can expect as the trial proceeds.

It is my intention to give you [all] [most] of the rules of law but it might be that I will not know for sure all of the law that will apply in this case until all of the evidence is presented. However, I can anticipate most of the law and give it to you at the beginning of the trial so that you will better understand what to be looking for while the evidence is presented. If I later decide that different or additional law applies to the case, I will tell you. In any event, at the end of the evidence I will give you the final instructions on which you must base your verdict. At that time, you will have a complete written set of the instructions so you do not have to memorize what I am about to tell you.

(Continue with the Substantive law, Damages, and General instructions from the applicable sections of this book, followed by the applicable parts of 202.2 through 202.5)

NOTE ON USE FOR 202.1

The committee recommends giving the jury at the beginning of the trial a complete as possible set of instructions on the Substantive law, Damages, and General Instructions.

202.2 EXPLANATION OF THE TRIAL PROCEDURE

Now that you have heard the law, I want to let you know what you can expect as the trial proceeds.

Opening Statements: **In a few moments, the attorneys will each have a chance to make what are called opening statements. In an opening statement, an attorney is allowed to give you [his] [her] views about what the evidence will be in the trial and what you are likely to see and hear in the testimony.**

Evidentiary Phase: **After the attorneys' opening statements the plaintiffs will bring their witnesses and evidence to you.**

Evidence: **Evidence is the information that the law allows you to see or hear in deciding this case. Evidence includes the testimony of the witnesses, documents, and anything else that I instruct you to consider.**

Witnesses: **A witness is a person who takes an oath to tell the truth and then answers attorneys' questions for the jury. The answering of attorneys' questions by witnesses is called "giving testimony." Testimony means statements that are made when someone has sworn an oath to tell the truth.**

The plaintiff's lawyer will normally ask a witness the questions first. That is called direct examination. Then the defense lawyer may ask the same witness additional questions about whatever the witness has testified to. That is called cross-examination. Certain documents or other evidence may also be shown to you during direct or cross-examination. After the plaintiff's witnesses have testified, the defendant will have the opportunity to put witnesses on the stand and go through the same process. Then the plaintiff's lawyer gets to do cross-examination. The process is designed to be fair to both sides.

It is important that you remember that testimony comes from witnesses. The attorneys do not give testimony and they are not themselves witnesses.

Objections: **Sometimes the attorneys will disagree about the rules for trial procedure when a question is asked of a witness. When that happens, one of the lawyers may make what is called an "objection." The rules for a trial can be complicated, and there are many reasons for attorneys to object. You should simply wait for me to decide how to proceed. If I say that an objection is sustained," that means the witness may not answer the question. If I say that the objection is "overruled," that means the witness may answer the question.**

When there is an objection and I make a decision, you must not assume from that decision that I have any particular opinion other than that the rules for conducting a trial are being correctly followed. If I say a question may not be asked or answered, you must not try to guess what the answer would have been. That is against the rules, too.

Side Bar Conferences: **Sometimes I will need to speak to the attorneys**

about legal elements of the case that are not appropriate for the jury to hear. The attorneys and I will try to have as few of these conferences as possible while you are giving us your valuable time in the courtroom. But, if we do have to have such a conference during testimony, we will try to hold the conference at the side of my desk so that we do not have to take a break and ask you to leave the courtroom.

Recesses: **Breaks in an ongoing trial are usually called "recesses." During a recess you still have your duties as a juror and must follow the rules, even while having coffee, at lunch, or at home.**

Instructions Before Closing Arguments: **After all the evidence has been presented to you, I will instruct you in the law that you must follow. It is important that you remember these instructions to assist you in evaluating the final attorney presentations, which come next, and, later, during your deliberations, to help you correctly sort through the evidence to reach your decision.**

Closing Arguments: **The attorneys will then have the opportunity to make their final presentations to you, which are called closing arguments.**

Final Instructions: **After you have heard the closing arguments, I will instruct you further in the law as well as explain to you the procedures you must follow to decide the case.**

Deliberations: **After you hear the final jury instructions, you will go to the jury room and discuss and decide the questions I have put on your verdict form. [You will have a copy of the jury instructions to use during your discussions.] The discussions you have and the decisions you make are usually called "jury deliberations." Your deliberations are absolutely private and neither I nor anyone else will be with you in the jury room.**

Verdict: **When you have finished answering the questions, you will give the verdict form to the bailiff, and we will all return to the courtroom where your verdict will be read. When that is completed, you will be released from your assignment as a juror.**

What are the rules?

Finally, before we begin the trial, I want to give you just a brief explanation of rules you must follow as the case proceeds.

Keeping an Open Mind: **You must pay close attention to the testimony and other evidence as it comes into the trial. However, you must avoid forming any final opinion or telling anyone else your views on the case until you begin your deliberations. This rule requires you to keep an open mind until you have heard all of the evidence and is designed to prevent you from influencing how your fellow jurors think until they have heard all of the evidence and had an opportunity to form their own opinions. The time and place for coming to your final opinions and speaking about them with your fellow jurors is during deliberations in the jury room, after all of the evidence has been presented, closing arguments have been made, and I have instructed you on the law. It is important that you hear all of the facts and that you hear the law and how to apply it before you start deciding anything.**

Consider Only the Evidence: **It is the things you hear and see in this courtroom that matter in this trial. The law tells us that a juror can consider only the testimony and other evidence that all the other jurors have also heard and seen in the presence of the judge and the lawyers. Doing anything else is wrong and is against the law. That means that you must not do any work or investigation of your own about the case. You must not obtain on your own any information about the case or about anyone involved in the case, from any source whatsoever. This includes reading newspapers, watching television or using a computer, cell phone, the internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else. You must not visit places mentioned in the trial or use the internet to look at maps or pictures to see any place discussed during trial.**

Do not provide any information about this case to anyone, including friends or family members. Do not let anyone, including the closest family members, make comments to you or ask questions about the trial. Jurors must not have discussions of any sort with friends or family members about the case or the people and places involved. So, do not let even the closest family members make comments to you or ask questions about the trial. In this age of electronic communication, I want to stress again that just as you must not talk about this case face-to-face, you must not talk about this case by using an electronic device. You must not use phones, computers or other electronic devices to communicate. Do not send or accept any messages related to this case or your jury service. Do not discuss this case or ask for advice by any means at all, including posting information on an internet website, chat room or blog.

No Mid-Trial Discussions: **When we are in a recess, do not discuss anything about the trial or the case with each other or with anyone else. If attorneys approach you, don't speak with them. The law says they are to avoid contact with you. If an attorney will not look at you or speak to you, do not be offended or form a conclusion about that behavior. The attorney is not supposed to interact with jurors outside of the courtroom and is only following the rules. The attorney is not being impolite. If an attorney or anyone else does try to speak with you or says something about the case in your presence, please inform the bailiff immediately.**

Only the Jury Decides: **Only you get to deliberate and answer the verdict questions at the end of the trial. I will not intrude into your deliberations at all. I am required to be neutral. You should not assume that I prefer one decision over another. You should not try to guess what my opinion is about any part of the case. It would be wrong for you to conclude that anything I say or do means that I am for one side or another in the trial. Discussing and deciding the facts is your job alone.**

Use of Cell Phones and Electronic Devices in the Courtroom and Jury Room:*

**The trial judge should select one of the following two alternative instructions explaining the rules governing jurors' use of electronic devices, as explained in Note on Use 3.*

Alternative A: **[All cell phones or other types of electronic devices must be turned off while you are in the courtroom. Turned off means that the phone or other electronic device is actually off and not in a silent or vibrating mode. You may use these devices during recesses, but even then you may not use your phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings or audio recordings of the proceedings or your fellow jurors. After each recess, please double check to make sure your device is turned off. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. You cannot have in the jury room any cell phones, computers, or other electronic devices. If there are breaks in the deliberations, I may allow you to communicate with your family or friends, but do not communicate about the case or your deliberations. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. The court's phone number will be provided to you.]**

Alternative B: **[You cannot have any cell phones, computers, or other electronic devices in the courtroom. You may use these devices during recesses, but even then you may not use your phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings or audio recordings of the proceedings or your fellow jurors. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. If there are breaks in the deliberations, I may allow you to communicate with your family or friends, but do not communicate about the case or your deliberations. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. The court's phone number will be provided to you.]**

NOTES ON USE FOR 202.2

1. This instruction is intended for situations in which at the end of the case the jury is going to be instructed before closing argument. The committee strongly recommends instructing the jury before closing argument. If, however, the court is going to instruct the jury after closing argument, this instruction will have to be amended.

2. The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of delivery. It may be useful in cataloging the subjects to be covered in an introductory instruction.

3. Florida Rule of Judicial Administration 2.451 directs trial judges to instruct jurors on the use of cell phones and other electronic devices. During the trial, the trial judge may remove the jurors' cell phones or other electronic devices. The trial judge also has the option to allow the jurors to keep the cell phones and electronic devices during trial until the jurors begin deliberations. Rule 2.451 prohibits jurors from using the cell phones or electronic devices to find out information about the case or to communicate with others about the case. The jurors also cannot use the electronic devices to record, photograph, or videotape the proceedings. In recognition of the discretion rule 2.451 gives trial judges, this instruction provides two alternatives. The trial judge should give the jurors one of the following alternative instructions: (A) requiring jurors to turn off electronic devices during court proceedings and removing their phones and electronic devices during deliberations; or (B) removing the cell phones and electronic devices during all proceedings and deliberations. These instructions may be modified to fit the practices of a trial judge in a particular courtroom. These instructions are not intended to limit the discretion of the trial court to control the proceedings.

4. The portion of this instruction dealing with communication with others and outside research may be modified to include other specified means of communication or research as technology develops.

II. Modified Instruction

You have now been sworn as the jury to try this case. By your verdict(s) you will decide the disputed issues of fact. The court will decide the questions of law that arise during the trial, and before you retire to deliberate at the close of the trial, the court will instruct you on the law that you are to follow and apply in reaching your verdict(s).

You should give careful attention to the testimony and evidence as it is received and presented for your consideration, but you should not form or express any opinion about the case until you have retired to the jury room to consider your verdict(s), after having heard all of the evidence, the closing arguments of the attorneys, and the charge of the court.

During the trial you must not discuss the case among yourselves or with anyone else, nor permit anyone to discuss it in your presence. You must avoid reading newspaper headlines and articles relating to the trial. You must also avoid seeing or hearing television and radio comments or accounts of the trial while it is in progress. You must not visit the scene of the occurrence that is the subject of the trial unless the court directs the jury to view the scene.

From time to time during the trial I may be called on to make rulings of law on objections or motions by the attorneys. You should not infer from any such ruling that I have any opinions on the merits of the case favoring one side or the other. If I sustain an objection to a question asked of a witness and do not permit it to be answered, you should not speculate on what answer might have been given or draw any inference from the question itself.

During the trial it may be necessary for me to confer with the attorneys out of the hearing of the jury with respect to matters of law and other matters that require consideration by the court alone. It is impossible to predict when such a conference may be required or how long it will last. When such conferences occur, they will be conducted so as to consume as little of the jury's time as is consistent with an orderly and fair disposition of the case. During the trial you must not talk to the parties, the witnesses, or the attorneys. The attorneys operate under a code of conduct which prohibits their talking to you at all about any subject during the course of the trial. Should they meet you about the building or in any location, they

will not speak to you or even acknowledge your presence. Please do not hold this against them, but recognize the restrictions under which they must function.

You will be given paper and pencils or pens for the purpose of note taking. For those of you who are note-takers, this will be a great relief. For those of you who are not, please don't feel you must now become note-takers merely because the pads are before you. Your memory skills have served you well in your life and will continue to serve you well in this trial.

When we recess you may leave your notes in the jury deliberation room or in your seat here in the courtroom. Leave your pads face down when you leave at each recess. Do not take the notes with you at the end of the day. Be sure to put your name on the notes. The bailiff will collect them and the clerk will secure them for you. No one will read them.

You may take your notes into the jury room at the close of the trial and use them during your deliberations. However, I would give you one caution about the use of the notes. Notes are for the benefit of the note-taker. If, when you are deliberating, you find that you have a clear memory about a fact or a piece of evidence, and another juror who took notes wrote it down differently, please don't concede that your memory is faulty merely because someone else's notes are different. Note-takers are not magically accurate. If you have a clear memory about a fact, please rely on your memory. Do not elevate another juror's written recollection to a position higher than that of your own memory. Neither is necessarily more reliable than the other.

After you have completed your deliberations and reached your verdict, the bailiff will collect all of your notes and deliver them to me, and they will be destroyed. No one other than you will ever read your notes.

You will notice that during the trial I too am taking notes. If I sit up and begin to write notes, that is not a signal to you that what is being said is important or more important than the other evidence you are hearing. In fact I am not sending you any signals at all about anything. Because our tasks are quite different, what I am listening for is different from what you are listening for. Do not conclude from anything I do during the trial that some parts of the trial are important and some are not. You should listen to all the evidence. Then, after you have heard it all, you should decide, as best you can, what evidence was important and what was not.

In this trial you will be permitted to ask questions of witnesses or the court. This process may help you clear up areas of confusion or conflict. By making this

opportunity available to you we are neither encouraging you to ask nor discouraging you from asking questions. The option is merely made available to you to help you do your job as a juror.

A few rules apply to your questioning. First, the rules of evidence that govern and control the lawyer's questions govern and control yours as well. I am aware that you do not have a formal legal education and are not familiar with the rules of evidence. Nevertheless, they apply to your questions just as they apply to those of the lawyers. If I do not allow a question of yours to be asked, it does not mean that the question was unimportant or in some way wrong, but rather that the rules of evidence do not allow it. Do not attach any significance to my failure to ask a question.

There is a procedure we must follow in this matter and it is this: after the lawyers have completed their direct and cross and re-direct and re-cross examination of a witness, and before I let the witness stand down, I will look to you and ask if any of you have questions for this witness. If you do, please raise your hand, then write out the question on a piece of paper. Do not sign the paper. Hand it to the bailiff. I will give counsel an opportunity to read it at the bench and to comment, but the ultimate decision to allow it to be asked or not is mine alone, and is made based on my interpretation of the rules.

If I find it proper, I will put your question to the witness or allow one of the lawyers to ask it, or the lawyers may be able to agree on the answer and simply tell you. After the answer, I will ask if you have a follow-up question or if any other jurors have questions. When that is complete, I will allow counsel to have the last word by asking any follow-up questions they may have that may have been suggested by your questions. If a question submitted by a juror is not asked for any reason, you must not discuss the question with the other jurors and must not hold it against either party that the question was not asked.

If you have a question, it should be asked before the witness has been released. No questions about testimony may be asked of counsel or of me, but I may be able to answer some questions on law or procedure. Questions for the court should be asked in the same manner as questions for the witnesses. Do you all understand this procedure?

(if notebooks are provided:)

To help you better understand the case as it is presented, notebooks have been prepared for each of you. The bailiff will hand those out to you now. These

notebooks contain paper for you to use in taking your notes and printed material which I will go over with you at this time.

(briefly review material in notebooks)

From time to time during the trial we may be adding documents to your notebooks, and at the end of the testimony the court may change some of the instructions contained in your notebook. This is often necessary, not because the law has changed or the court has changed its mind, but because trials are dynamic exercises, and rulings made by the court during the trial or unexpected developments in the evidence may change what law applies to the case.

You will be allowed to take the notebooks with you when you go into the jury room to deliberate your verdict. When you complete your service in this case you should return the notebooks to the bailiff.

III. Eminent Domain Preliminary Instructions

(first give Modified Instruction; then:)

This case is one in eminent domain, which means the power of the government to take private property for a public purpose, for which it is required to pay full compensation to the owners for the property taken. The procedure by which the power of eminent domain is exercised is called "condemnation." The terms "condemnation" and "eminent domain" sometimes are used interchangeably.

By your verdict you will decide the disputed issues of fact, which in this case confirm the amount to be paid to the owners for the property and improvements taken in the proceeding, together with certain special damages and expenses caused by the taking, if applicable.

The propriety of the taking itself is not a matter to be considered by you. Neither is the location or the decision to construct the project a matter of your concern. The court has already determined that the petitioner is entitled to condemn the property involved in this action. The sole question to be decided by you is the amount of money to be paid to the owners as full compensation.

You must not visit or view the property that is the subject matter of this trial until the court directs you to do so. You will make a personal inspection of the property involved in the action. Transportation to the site will be provided and you will view the property under the supervision of the court. The purpose of the view is to enable you to better apply the evidence and testimony to the property in

question.

In conclusion, observe closely each witness as he or she testifies, and consider carefully all the evidence that is offered, for it is you who must determine from this evidence where the truth lies.

Keep an open mind. Refrain from forming or expressing opinions concerning the case until it is concluded and the court has directed you to retire and deliberate your verdict.

IV. Note-Taking by Jurors, SJI (Civil) 202.3 (Former 1.8)

If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually.

You will be provided with a note pad and a pen for use if you wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom. During recesses, the bailiff will take possession of your notes and will return them to you when we reconvene. After you have completed your deliberations, the bailiff will collect your notes, which will be immediately destroyed. No one will ever read your notes.

If you take notes, do not get so involved in note-taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory.

Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.

NOTES ON USE FOR 202.3

1. The court should furnish all jurors with the necessary pads and pens for taking notes. Additionally, it may be desirable for jurors to be furnished with envelopes to place the notes for additional privacy.

2. Florida Rule of Judicial Administration 2.430(k) provides that at the conclusion of the trial, the court shall collect and immediately destroy all juror notes.

3. Florida Rule of Civil Procedure 1.455 provides that the trial court may, in its discretion, authorize the use of juror notebooks to contain documents and exhibits as an aid to the jurors in performing their duties.

4. When it is impractical to take exhibits into the jury room, this instruction should be modified to describe how the jury will have access to the exhibits.

V. Questions by Jurors (Fla. R. Civ. P. 1.452)

(a) Questions Permitted. The court shall permit jurors to submit to the court written questions directed to witnesses or to the court. Such questions will be submitted after all counsel have concluded their questioning of a witness.

(b) Procedure. Any juror who has a question directed to a witness or the court shall prepare an unsigned, written question and give the question to the bailiff, who will give the question to the judge.

(c) Objections. Out of the presence of the jury, the judge will read the question to all counsel, allow counsel to see the written question, and give counsel and opportunity to object to the question.

VI. Juror Questions, SJI (Civil) 202.4 (Former 1.13)

Questions for the court or courtroom personnel:

During the trial, you may have a question about these proceedings. If so, please write it down and hand it to the bailiff, who will then hand it to me. I will review your question with the parties [and their attorneys] before responding.

Questions for witnesses:

You also may have a question you think should be asked of a witness. If so, there is a way for you to request that I ask the witness a question. After all the attorneys have completed their questioning of the witness, you should raise your hand if you have a question. I will then give you sufficient time to write the question on a piece of paper, fold it, and give it to the bailiff, who will pass it to me. Do not put your name on the question, show it to anyone or discuss it with anyone.

It is important to know that if you have a question you believe should be

asked of a witness, you must raise your hand and request that I ask the witness the question before the witness leaves the witness stand. You will not have an opportunity to ask the witness a question once the witness leaves the courtroom. I will then review the question with the attorneys. Under our law, only certain evidence may be considered by a jury in determining a verdict. You are bound by the same rules of evidence that control the attorneys' questions. If I decide that the question may not be asked under our rules of evidence, I will tell you. Otherwise, I will direct the question to the witness. The attorneys may then ask follow-up questions if they wish. If there are additional questions from jurors, we will follow the same procedure again.

By providing this procedure, I do not mean to suggest that you must or should submit written questions for witnesses. In most cases, the lawyers will have asked the necessary questions.

NOTE ON USE FOR 202.4

1. Florida Rule of Civil Procedure 1.431(i)(3) requires an instruction that jurors' questions must be submitted in writing to the court, which will review them with the parties and counsel before responding. Rule 1.431 does not prevent jurors from asking the bailiff about routine matters affecting comfort and safety. The committee notes to rule 1.431 recognize that this instruction may need to be modified to reflect that individual trial judges may have reasonable differences regarding the type of communications considered routine.

2. Florida Rule of Civil Procedure 1.452 mandates that jurors be permitted to submit written questions directed to witnesses or the court.

VII. Jury to Be Guided by Official English Translation/Interpretation, SJI (Civil) 202.5

[A] [Some] witness[es] may testify in (language to be used) **which will be interpreted in English.**

The evidence you are to consider is only that provided through the official court interpreters. Although some of you may know (language used)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English interpretation. You must disregard any different meaning.**

If, however, during the testimony there is a question as to the accuracy of the English interpretation, you should bring this matter to my attention

immediately by raising your hand. You should not ask your question or make any comment about the interpretation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

NOTE ON USE FOR 202.5

When instructing the jury at the beginning of the trial, this instruction should be used in lieu of 601.3. See *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995). For an example, see Model Instruction No. 1.

VIII. Juror Notebooks (Fla. R. Crim. P. 3.372)

In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties.

IX. Instructions to Jury (Fla. R. Civ. P. 1.470(b))

(b) Instructions to Jury. The Florida Standard Jury Instructions appearing on the court's website at https://jury.flcourts.org may be used, as provided in Florida Rule of Judicial Administration 2.580, by the trial judges in instructing the jury in civil actions. Not later than at the close of the evidence, the parties shall file written requests that the court instruct the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the instructions to be given. At such conference, all objections shall be made and ruled upon and the court shall inform counsel of such instructions as it will give. No party may assign as error the giving of any instruction unless that party objects thereto at such time, or the failure to give any instruction unless that party requested the same. The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations. The court shall provide each juror with a written set of the instructions for his or her use in deliberations. The court shall file a copy of such instructions.

[Effective April 1, 2020, the Florida Supreme Court adopted new Florida Rules of Judicial Administration 2.270 and 2.580, amended Florida Rule of Civil Procedure 1.470(b) (Instructions to Jury) and Florida Rule of Criminal Procedure 3.390 (Jury Instructions), and deleted Florida Rule of Criminal Procedure 3.985 (Standard Jury Instructions). It changed the procedure for the adoption of model jury instructions for use in civil and criminal cases, having determined that:

> the current process for developing and authorizing standard jury instructions is more cumbersome than necessary, and that despite the caveat routinely included in the Court's opinions, some wrongly believe that by authorizing for publication and use standard instructions prepared by the committees, the Court has ruled on the legal correctness of those instructions. Moreover, because of this Court's authorizing of the standard instructions, trial judges are sometimes reluctant to modify standard jury instructions or to give other instructions requested by a party that may be more appropriate.
>
> Therefore, in order to put in place a more efficient process for providing standard jury instructions to be used in civil and criminal cases and to avoid any misconception that this Court has "adopted," "approved," or otherwise ruled on the legal correctness of the standard jury instructions prepared by the committees, the Court has determined that it should no longer be involved in the development and authorization for use of Florida's standard jury instructions. Rather, the three committees the Court has created to prepare standard jury instructions should be authorized to develop and approve . . . new and amended standard jury instructions.

In re Amendments to the Florida Rules of Judicial Administration, the Florida Rules of Civil Procedure, and the Florida Rules of Criminal Procedure—Standard Jury Instruction, __ So. 3d __, 2020 WL 1593030 (Fla. March 5, 2020)]

Chapter Five

Opening Statement

I. Jury Instruction

At this time, the attorneys will have an opportunity to make their opening statements in which they may explain to you the issues in the case and give you a summary of the evidence they expect to be received.

II. Alternate Jury Instruction

At this time the attorneys for the parties will have an opportunity to make opening statements, in which they may explain to you the issues in the case and summarize the facts that they expect the evidence will show. After all the evidence has been received, the attorneys will again have an opportunity to address you and to make their final arguments. The statements that the attorneys now make and the arguments that they later make are not to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you properly understand the issues, the evidence, and applicable law, and so you should give them your close attention.

III. Opening Statement (Quick Reference)

A. Time for Opening Statement

1. Allowing counsel only five minutes for opening statement is reversible error. *Quarrel v. Minervini*, 510 So. 2d 977 (Fla. 3d DCA 1987); *Bullock v. Mount Sinai Hosp. of Greater Miami, Inc.*, 501 So. 2d 738 (Fla. 3d DCA 1987); *Maleh v. Florida East Coast Properties, Inc.*, 491 So. 2d 290 (Fla. 3d DCA 1986).

2. Allowing two plaintiffs ten minutes for opening is reversible error. *Knapp v. Shores*, 550 So. 2d 1155 (Fla. 3d DCA 1989), *disapproved on other grounds*, *Bulldog Leasing Co., Inc. v. Curtis*, 630 So. 2d 1060 (Fla. 1994).

B. Preserving Opening Until Defendant's Case

It is not abuse of discretion to refuse to allow the defendant to wait until after the plaintiff has rested before making opening. If the defendant intends to put on one witness or no case, opening should not be delayed. If the defendant has a lengthy case, opening may be deferred. *Allen v. Hooper*, 171 So. 513 (Fla. 1937);

Montana v. State, 223 So. 2d 771 (Fla. 3d DCA 1969).

C. Improper Conduct or Comment

1. There was no reversible error where "counsel's comments during his opening statement were relevant to the reason for appellee leaving the scene of the accident, were invited by appellants and were not made to prejudice the jury." *Wigley by and through Wigley v. Cochran*, 684 So. 2d 340, 341 (Fla. 4th DCA 1996).

2. Remarks concerning the motivation for the action were improper but cured by a proper cautionary instruction. *Garcia v. American Income Life Ins. Co.*, 664 So. 2d 301 (Fla. 3d DCA 1995).

3. The trial court erred in denying a motion for mistrial after defense counsel disclosed in opening statement how little income the defendant earned. Interjection of wealth or poverty has consistently been held irrelevant, highly prejudicial, and a basis for reversal. *Samuels v. Torres*, 29 So. 3d 1193 (Fla. 5th DCA 2010).

(Note: Cases on improper closing argument can probably be used by analogy.)

D. Use of Exhibits

There appear to be no instructive Florida cases, but courts generally allow the use of exhibits unless the opposing party can demonstrate prejudice.

Chapter Six

Special Instructions

(given during trial if requested)

XVI. Instruction to Disregard Stricken Matter

XVII. Jury to Be Guided by Official English Translation/Interpretation, SJI (Civil) 301.6 (Former 1.10)

XVIII. Jury to Be Guided by Official English Transcript of Recording in Foreign Language (Accuracy Not in Dispute), SJI (Civil) 301.7 (Former 1.11)

XIX. Jury to Be Guided by Official English Transcript of Recording in Foreign Language (Accuracy in Dispute), SJI (Civil) 301.8 (Former 1.13)

XX. Failure to Maintain Evidence or Keep a Record, SJI (Civil) 301.11

I. Invoking the Rule of Sequestration

The court has invoked a rule of procedure which requires your exclusion from the courtroom at all times except during the time when you testify in this case. You are directed to remain out of the courtroom except when you are called to testify. While you are waiting to testify, and after you have done so, you are not to discuss this case or your testimony among yourselves or with anyone else. You may, however, discuss your testimony with counsel for either party in this cause.

Any violation of this direction may not only subject you to contempt of court, but may also disqualify you as a witness in this case. You will now retire from the courtroom until you are called.

Counsel for each of the parties are instructed to advise their respective witnesses who are not present at this time of the direction I have just given, and each of them shall be governed thereby.

II. Recess Instruction

301.10 INSTRUCTION BEFORE RECESS

We are about to take [our first] [a] recess. Remember that all of the rules I have given you apply even when you are outside the courtroom, such as at recess.

Remember the basic rule: Do not talk to anyone, including your fellow jurors, friends, family or co-workers about anything having to do with this trial, except to speak to court staff. This means no e-mailing, text messaging, tweeting, blogging, or any other form of communication. You cannot do any research about the case or look up any information about the case. Remember to observe during our recess the other rules I gave you. If you become aware of any violation of any of these rules at all, notify court personnel of the violation.

After each recess, please double check to make sure [that your cell phone or other electronic device is turned off completely] [that you do not bring your cell phone or other electronic device into the courtroom or jury room].

NOTE ON USE FOR 301.10

1. This instruction should be given before the first recess. Before later recesses, the court has the discretion to give an abbreviated version of this instruction.

2. The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of delivery. Instead, this instruction is intended to remind jurors throughout the proceedings of the importance of the rules limiting their use of cell phones and other electronic devices.

III. Instruction When Evidence Is Admitted, SJI (Civil) 301.2 (Former 1.5)

301.2 INSTRUCTION WHEN FIRST ITEM OF DOCUMENTARY, PHOTOGRAPHIC, OR PHYSICAL EVIDENCE IS ADMITTED

The (describe item of evidence) **has now been received in evidence. Witnesses may testify about or refer to this or any other item of evidence during the remainder of the trial. This and all other items received in evidence will be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE FOR 301.2

This instruction should be given when the first item of evidence is received in evidence. It may be appropriate to repeat this instruction when items received in evidence are not published to the jury. It may be combined with 301.5 in appropriate circumstances. It may also be given in conjunction with 301.4 if a witness has used exhibits which have been admitted in evidence and demonstrative aids which have not.

IV. Instruction When Evidence Is First Published to Jurors, SJI (Civil) 301.3 (Former 1.6)

The (describe item of evidence) **has been received in evidence. It is being shown to you now to help you understand the testimony of this witness and other witnesses in the case, as well as the evidence as a whole. You may examine** (describe item of evidence) **briefly now. It will also be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE FOR 301.3

This instruction may be given when an item received in evidence is handed to the jurors. It may be combined with 301.5 in appropriate circumstances.

V. Reading Deposition Testimony, SJI (Civil) 301.1(a) (Former 1.3(a))

301.1 DEPOSITION TESTIMONY, INTERROGATORIES, STIPULATED TESTIMONY, STIPULATIONS, AND ADMISSIONS (From 1.[3](a))

a. Deposition or prior testimony:

Members of the jury, the sworn testimony of (name)**, given before trial, will now be presented. You are to consider and weigh this testimony as you would any other evidence in the case.**

VI. Reading Interrogatories, SJI (Civil) 301.1(b) (Former 1.3(b))

b. Interrogatories:

Members of the jury, answers to interrogatories will now be read to you. Interrogatories are written questions that have been presented before trial by one party to another. They are answered under oath. You are to consider and weigh these questions and answers as you would any other evidence in the case.

VII. Video Deposition Testimony

(Judge to lawyers — Do you want the court reporter to report the video?)

Members of the jury, the sworn testimony of _____ will be presented to you by videotape. You are to consider and weigh this testimony as though the witness had testified here in person.

VIII. Stipulated Testimony and Stipulations, SJI (Civil) 301.1(c) and (d) (Former 1.3(c) and (d))

c. Stipulated testimony:

Members of the jury, the parties have agreed that if (name of witness) **were called as a witness, [he] [she] would testify** (read or describe the testimony)**. You are to consider and weigh this testimony as you would any**

other evidence in the case.

d. Stipulations:

Members of the jury, the parties have agreed to certain facts. You must accept these facts as true. (Read the agreed facts).

IX. Admissions, SJI (Civil) 301.1(e) (Former 1.3(e))

e. Admissions:

1. Applicable to all parties:

Members of the jury, (identify the party or parties that have admitted the facts**) [has] [have] admitted certain facts. You must accept these facts as true.** (Read the admissions).

2. Applicable to fewer than all parties:

Members of the jury, (identify the party or parties that have admitted the facts) **[has] [have] admitted certain facts. You must accept these facts as true in deciding the issues between** (identify the affected parties)**, but these facts should not be used in deciding the issues between** (identify the unaffected parties)**.** (Read the admissions)**.**

NOTE ON USE FOR 301.1

The committee recommends that the appropriate explanation be read immediately before a deposition, or an interrogatory and answer, stipulated testimony, a stipulation, or an admission are read in evidence, and that no instruction on the subject be repeated at the conclusion of the trial.

X. Visual or Demonstrative Aids, SJI (Civil) 301.4 (Former 1.7)

a. Generally:

This witness will be using (identify demonstrative or visual aid(s)) **to assist in explaining or illustrating [his] [her] testimony. The testimony of the witness is evidence; however, [this] [these]** (identify demonstrative or visual aid(s)) **[is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

b. Specially created visual or demonstrative aids based on disputed assumptions:

This witness will be using (identify demonstrative aid(s)) **to assist in explaining or illustrating [his] [her] testimony. [This] [These] item[s] [has] [have] been prepared to assist this witness in explaining [his] [her] testimony. [It] [They] may be based on assumptions which you are free to accept or reject. The testimony of the witness is evidence; however, [this] [these]** (identify demonstrative or visual aid(s)) **[is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

NOTES ON USE FOR 301.4

1. Instruction 301.4a should be given at the time a witness first uses a demonstrative or visual aid which has not been specially created for use in the case, such as a skeletal model.

2. Instruction 301.4b is designed for use when a witness intends to use demonstrative or visual aids which are based on disputed assumptions, such as a computer-generated model. This instruction should be given at the time the witness first uses these demonstrative or visual aids. This instruction should be used in conjunction with 301.3 if a witness uses exhibits during testimony, some of which are received in evidence, and some of which are not.

XI. Evidence Admitted for a Limited Purpose, SJI (Civil) 301.5

The (describe item of evidence) **has now been received into evidence. It has been admitted only [for the purpose of** (describe purpose)**] [as to** (name party)**]. You may consider it only [for that purpose] [as it might affect** (name party)**]. You may not consider that evidence [for any other purpose] [as to [any other party] [**(name other party(s)**].**

XII. Instruction About Relevancy
(given before ruling on the first relevancy objection in the trial)

You have just heard an objection made on the basis of relevancy. Relevant evidence is evidence which proves or tends to prove or disprove a material fact or issue. When a lawyer makes a "relevancy" objection, counsel is suggesting that the information called for by the question does not prove or tend to prove or disprove

one of the material or important facts or issues in this case. If I agree, I will sustain the objection. If I disagree, I will overrule the objection.

XIII. Instruction About Hearsay
(given before ruling on the first hearsay objection at trial)

You have just heard an objection made on the basis of hearsay. Hearsay evidence has some complexities to it but the short version is that it is an out of court statement, offered in court, usually by someone other than the person who made the statement, and offered to prove that what was said was true. Generally, hearsay is not admissible but there are a number of exceptions to this rule. This [is] [is not] one of those exceptions and, therefore, I will [sustain] [overrule] the objection.

XIV. Adverse Party Instruction

A party is permitted to call an adverse party to the stand and examine the adverse party by leading questions. If any testimony received from the adverse party is contradicted by other evidence, then the party calling [him] [her] to the stand is not bound by that portion of [his] [her] testimony.

(*See* § 90.108, Fla. Stat.)

XV. Instruction on Impeachment by Inconsistent Statement

A prior unsworn statement of [Mr.] [Ms.] _____ (the witness) is going to be placed before you. This is offered because the party offering it feels it is inconsistent with the witness's testimony which you heard earlier. This statement is not to be considered by you as evidence on the factual issues that are before you, but is to be considered by you only in deciding what credibility or weight to give the statement the witness made in [his] [her] testimony before you.

XVI. Instruction to Disregard Stricken Matter

The jury should disregard the last question [and answer] and not consider or discuss [it] [them] in your deliberation of your verdict.

(Fla. Std. Jury Inst. (Civ.) 301.9 (former 1.2) provides as follows:)

301.9 DISREGARD STRICKEN MATTER

NOTE ON USE FOR 301.9

No standard instruction is provided. The court should give an instruction that is appropriate to the circumstances. In drafting a curative instruction, the court must decide on a measured response that will do more good than harm, going no further than necessary. The language of curative instructions should be carefully selected so as not to punish a party or attorney.

XVII. Jury to Be Guided by Official English Translation/Interpretation, SJI (Civil) 301.6 (Former 1.10)

Introduction:

The law requires that the court appoint a qualified interpreter to assist a witness who does not readily speak or understand the English language in testifying. The interpreter does not work for either side in this case. [He] [She] is completely neutral in the matter and is here solely to assist us in communicating with the witness. [He] [She] will repeat only what is said and will not add, omit, or summarize anything. The interpreter in this case is (name of interpreter)**. The oath will now be administered to the interpreter.**

Oath to Interpreter:

Do you solemnly swear or affirm that you will make a true interpretation to the witness of all questions or statements made to [him] [her] in a language which that person understands, and interpret the witness's statements into the English language, to the best of your abilities [so help you God]?

Foreign Language Testimony:

You are about to hear testimony of a witness who will be testifying in (language used)**. This witness will testify through the official court interpreter. Although some of you may know** (language used)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation of the witness's testimony. You must disregard any different meaning.**

If, however, during the testimony there is a question as to the accuracy of the English interpretation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the interpretation in the presence of the other jurors, or

otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

NOTE ON USE FOR 301.6

This instruction should be given to the jury immediately before the testimony of a witness who will be testifying through the services of an official court interpreter. Compare *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (jury properly instructed that it must accept translation of foreign-language tape-recording when accuracy of translation is not in issue); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995).

XVIII.Jury to Be Guided by Official English Transcript of Recording in Foreign Language (Accuracy Not in Dispute), SJI (Civil) 301.7 (Former 1.11)

You are about to listen to a tape recording in (language used)**. Each of you has been given a transcript of the recording which has been admitted into evidence. The transcript is a translation of the foreign language tape recording.**

Although some of you may know (language used)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript and disregard any different meaning.**

If, however, during the testimony there is a question as to the accuracy of the English translation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the translation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English translation as provided by the court interpreter and disregard any other contrary translation.

NOTE ON USE FOR 301.7

This instruction is appropriate immediately prior to the jury hearing a tape-recorded conversation in a foreign language if the accuracy of the translation is not

an issue. See, *e.g.*, *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995).

XIX. Jury to Be Guided by Official English Transcript of Recording in Foreign Language (Accuracy in Dispute), SJI (Civil) 301.8 (Former 1.13)

You are about to listen to a tape recording in (language used)**. Each of you has been given a transcript of the recording. The transcripts were provided to you by [the plaintiff] [the defendant] so that you could consider the content of the recordings. The transcript is an English translation of the foreign language tape recording.**

Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript accurately describes the meaning of a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case. You should not rely in any way on any knowledge you may have of the language spoken on the recording; your consideration of the transcripts should be based on the evidence introduced in the trial.

NOTE ON USE FOR 301.8

This instruction is appropriate immediately prior to the jury hearing a tape-recorded conversation in a foreign language if the accuracy of the translation is an issue. See, *e.g.*, *United States v. Jordan*, 223 F.3d 676, 689 (7th Cir. 2000). See also Seventh Circuit Federal Criminal Jury Instructions § 3.18.

XX. Failure to Maintain Evidence or Keep a Record, SJI (Civil) 301.11

a. Adverse inference.

If you find that:

(Name of party) **[lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the** (describe evidence) **to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the** (describe evidence) **would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been**

unfavorable to (name of party)**. You may consider this, together with the other evidence, in determining the issues of the case.**

NOTES ON USE FOR 301.11a

1. This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment, or other disposition of evidence material to a case. See, *e.g.*, *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 780 (Fla. 4th DCA 2006); *Am. Hosp. Mgmt. Co. of Minnesota v. Hettiger*, 904 So. 2d 547 (Fla. 4th DCA 2005); *Jost v Lakeland Reg. Med. Ctr.*, 844 So. 2d 656 (Fla. 2d DCA 2003); *Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000); and *Sponco Mfg, Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995).

2. The inference addressed in this instruction does not rise to the level of a presumption. *Pub. Health Tr. of Dade Cty. v. Valcin*, 507 So. 2d 596 (Fla. 1987), and Instruction 301.11b.

3. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

b. Burden shifting presumption.

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)**] [keep a record of** (describe subject matter as to which party had record keeping duty)**].** (Name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had recordkeeping duty)**].**

Because (name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had a record keeping duty)**], you should find that** (name of invoking party) **established [his] [her]** (describe applicable claim or defense) **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

NOTES ON USE FOR 301.11b

1. This instruction applies only when the court has determined that there was a duty to maintain or preserve the missing evidence at issue and the party

invoking the presumption has established to the satisfaction of the court that the absence of the missing evidence hinders the other party's ability to establish its claim or defense. See *Pub. Health Tr. of Dade Cty. v. Valcin*, 507 So. 2d 596 (Fla. 1987).

2. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

Chapter Seven

Witnesses

I. Oath of Witness, SJI (Civil) 101.3

101.3 OATH OF A WITNESS

Do you solemnly swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth [so help you God]?

II. Testing Child for Competency

What is your name?

Who are your parents?

How old are you?

Where do you live?

Do you go to school?

Where?

What grade are you in?

Do you go to Sunday school?

Do you go to a house of worship?

You held up your hand just now — what does that mean?

What does it mean to tell the truth?

Suppose you didn't tell the truth, what would happen?

(*See Crenshaw v. State*, 87 So. 328 (Ala. 1921).)

III. Admonition to Witness
(given if requested)

Mr./Ms. _____, you should listen carefully to the question asked and answer it specifically. Don't volunteer other information beyond what is asked for, don't attempt to argue with the attorney, and don't be concerned with why the

question is being asked or what the attorney is trying to prove. Your responsibility is simply to truthfully answer the question asked and to do nothing further.

IV. Tender of Expert Witness (Quick Reference)

Attorneys habitually elicit the witness's education and background and tender the witness to the court (within the hearing of the jury) as an expert. There is no legal authority for this, and the judge who accepts the witness as an expert within the hearing of the jury probably makes an improper comment on the evidence. "[I]t is questionable whether it is proper procedure for a court to expressly declare a witness an 'expert.'" *Chambliss v. White Motor Corp.*, 481 So. 2d 6 (Fla. 1st DCA 1986). In *Osorio v State*, 186 So. 3d 601 (Fla. 4th DCA 2016), the appellate court reversed the defendant's conviction, based on, among other things, "the trial court's declaration to the jury that the State's testifying forensic chemist was 'an expert in the field, and [could] give opinion testimony, and hypotheticals in the field of being a forensic chemist.' . . . [T]he suggested procedure is for a trial court to refrain from openly declaring that a witness is an expert." It cited *Tengbergen v. State*, 9 So. 3d 729 (Fla. 4th DCA 2009), reiterating that a trial court should refrain from openly declaring that a witness is an expert "*because that may be tantamount to the court commenting on the credibility of a witness.*" *See also Mitchell v. State*, 207 So. 3d 369 (Fla. 5th DCA 2016) (court agreed with *Osorio* that better practice is for court to avoid declaring witness an expert in jury's presence, but disagreed that such declaration is error; did not certify conflict because holding in *Mitchell* was limited to absence of fundamental error).

"Although it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court." *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988).

The "key question is not the expert's qualifications in some field. But whether the precise question on which he will be asked to opine is within his field of expertise." *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), quoting *United States v. Kozminski*, 821 F.2d 1186, 1220 (6th Cir. 1987), *aff'd*, 487 U.S. 931.

"The court should not, in the presence of the jury, declare that a witness is

qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so." *Standard 14, Civil Trial Practice Standards of the Section of Litigation of the American Bar Association* (2007).

V. Use of Depositions in Court Proceedings (Fla. R. Civ. P. 1.330)

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice of it so far as admissible under the rules of evidence applied as though the witness were then present and testifying in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness or for any purpose permitted by Florida Evidence Code.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a public or private corporation, a partnership or association, or a governmental agency that is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts.

(5) Substitution of parties pursuant to rule 1.260 does not affect the right to use depositions previously taken and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken for it.

(6) If a civil action is afterward brought, all depositions lawfully taken in a medical liability mediation proceeding may be used in the civil action as if originally taken for it.

(b) Objections to Admissibility. Subject to the provisions of rule 1.300(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part of it for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. A party does not make a person the party's own witness for any purpose by taking the person's deposition. The introduction in evidence of the deposition or any part of it for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by that party or by any other party.

(d) Effect of Errors and Irregularities.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency relevancy, or materiality of testimony are not waived by failure to

make them before or during the taking of the deposition unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind that might be obviated, removed, or cured if promptly presented are waived unless timely objection to them is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under rule 1.320 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 10 days after service of the last questions authorized.

(4) As to Completion and Return. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, or otherwise dealt with by the officer under rules 1.310 and 1.320 are waived unless a motion to suppress the deposition or some part of it is made with reasonable promptness after the defect is, or with due diligence might have been, discovered.

VI. Depositions of Expert Witnesses (Fla. R. Civ. P. 1.390)

(a) Definition. The term "expert witness" as used herein applies exclusively to a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.

(b) Procedure. The testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions and may be used at trial, regardless of the place of residence of the witness or whether the witness is within the distance prescribed by rule 1.330(a)(3). No special form of notice need be given that the deposition will be used for trial.

(c) Fee. An expert or skilled witness whose deposition is taken shall be allowed a witness fee in such reasonable amount as the court may determine. The court shall also determine a reasonable time within which payment must be made, if the deponent and party cannot agree. All parties and the deponent shall be served with notice of any hearing to determine the fee. Any reasonable fee paid to an

expert or skilled witness may be taxed as costs.

(d) Applicability. Nothing in this rule shall prevent the taking of any deposition as otherwise provided by law.

VII. Interrogatories to Parties (Fla. R. Civ. P. 1.340)

(a) Procedure for Use. Without leave of court, any party may serve on any other party written interrogatories to be answered (1) by the party to whom the interrogatories are directed, or (2) if that party is a public or private corporation or partnership or association or governmental agency, by any officer or agent, who must furnish the information available to that party. Interrogatories may be served on the plaintiff after commencement of the action and on any other party with or after service of the process and initial pleading on that party. The interrogatories must not exceed 30, including all subparts, unless the court permits a larger number on motion and notice and for good cause. If the supreme court has approved a form of interrogatories for the type of action, the initial interrogatories on a subject included within must be from the form approved by the court. A party may serve fewer than all of the approved interrogatories within a form. Other interrogatories may be added to the approved forms without leave of court, so long as the total of approved and additional interrogatories does not exceed 30. Each interrogatory must be answered separately and fully in writing under oath unless it is objected to, in which event the grounds for objection must be stated and signed by the attorney making it. The party to whom the interrogatories are directed must serve the answers and any objections within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the process and initial pleading on that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under rule 1.380(a) on any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters that can be inquired into under rule 1.280(b), and the answers may be used to the extent permitted by the rules of evidence except as otherwise provided in this subdivision. An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or calls for a conclusion or asks for information not within the personal knowledge of the party. A party must respond to such an interrogatory by giving the information the party has and the source on which the information is based. Such a qualified answer may not be used as direct evidence for or impeachment against the party

giving the answer unless the court finds it otherwise admissible under the rules of evidence. If a party introduces an answer to an interrogatory, any other party may require that party to introduce any other interrogatory and answer that in fairness ought to be considered with it.

(c) Option to Produce Records. When the answer to an interrogatory may be derived or ascertained from the records (including electronically stored information) of the party to whom the interrogatory is directed or from an examination, audit, or inspection of the records or from a compilation, abstract, or summary based on the records and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party to whom it is directed, an answer to the interrogatory specifying the records from which the answer may be derived or ascertained and offering to give the party serving the interrogatory a reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries is a sufficient answer. An answer must be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party interrogated, the records from which the answer may be derived or ascertained, or must identify a person or persons representing the interrogated party who will be available to assist the interrogating party in locating and identifying the records at the time they are produced. If the records to be produced consist of electronically stored information, the records must be produced in a form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.

(d) Effect on Co-Party. Answers made by a party shall not be binding on a co-party.

(e) Service and Filing. Interrogatories must be arranged so that a blank space is provided after each separately numbered interrogatory. The space must be reasonably sufficient to enable the answering party to insert the answer within the space. If sufficient space is not provided, the answering party may attach additional documents with answers and refer to them in the space provided in the interrogatories. The interrogatories must be served on the party to whom the interrogatories are directed and copies must be served on all other parties. A certificate of service of the interrogatories must be filed, giving the date of service and the name of the party to whom they were directed. The answers to the interrogatories must be served upon the party originally propounding the interrogatories and a copy must be served on all other parties by the answering party. The original or any copy of the answers to interrogatories may be filed in compliance with Florida Rule of Judicial Administration 2.425 and rule 1.280(g)

by any party when the court should consider the answers to interrogatories in determining any matter pending before the court. The court may order a copy of the answers to interrogatories filed at any time when the court determines that examination of the answers to interrogatories is necessary to determine any matter pending before the court.

VIII. Taking Testimony (Fla. R. Civ. P. 1.451)

(a) Testimony at Hearing or Trial. When testifying at a hearing or trial, a witness must be physically present unless otherwise provided by law or rule of procedure.

(b) Communication Equipment. The court may permit a witness to testify at a hearing or trial by contemporaneous audio or video communication equipment (1) by agreement of the parties or (2) for good cause shown upon written request of a party upon reasonable notice to all other parties. The request and notice must contain the substance of the proposed testimony and an estimate of the length of the proposed testimony. In considering sufficient good cause, the court shall weigh and address in its order the reasons stated for testimony by communication equipment against the potential for prejudice to the objecting party.

(c) Required Equipment. Communication equipment as used in this rule means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other simultaneously and permits all conversations of all parties to be audible to all persons present. Contemporaneous video communications equipment must make the witness visible to all participants during the testimony. For testimony by any of the foregoing means, there must be appropriate safeguards for the court to maintain sufficient control over the equipment and the transmission of the testimony so the court may stop the communication to accommodate objection or prevent prejudice.

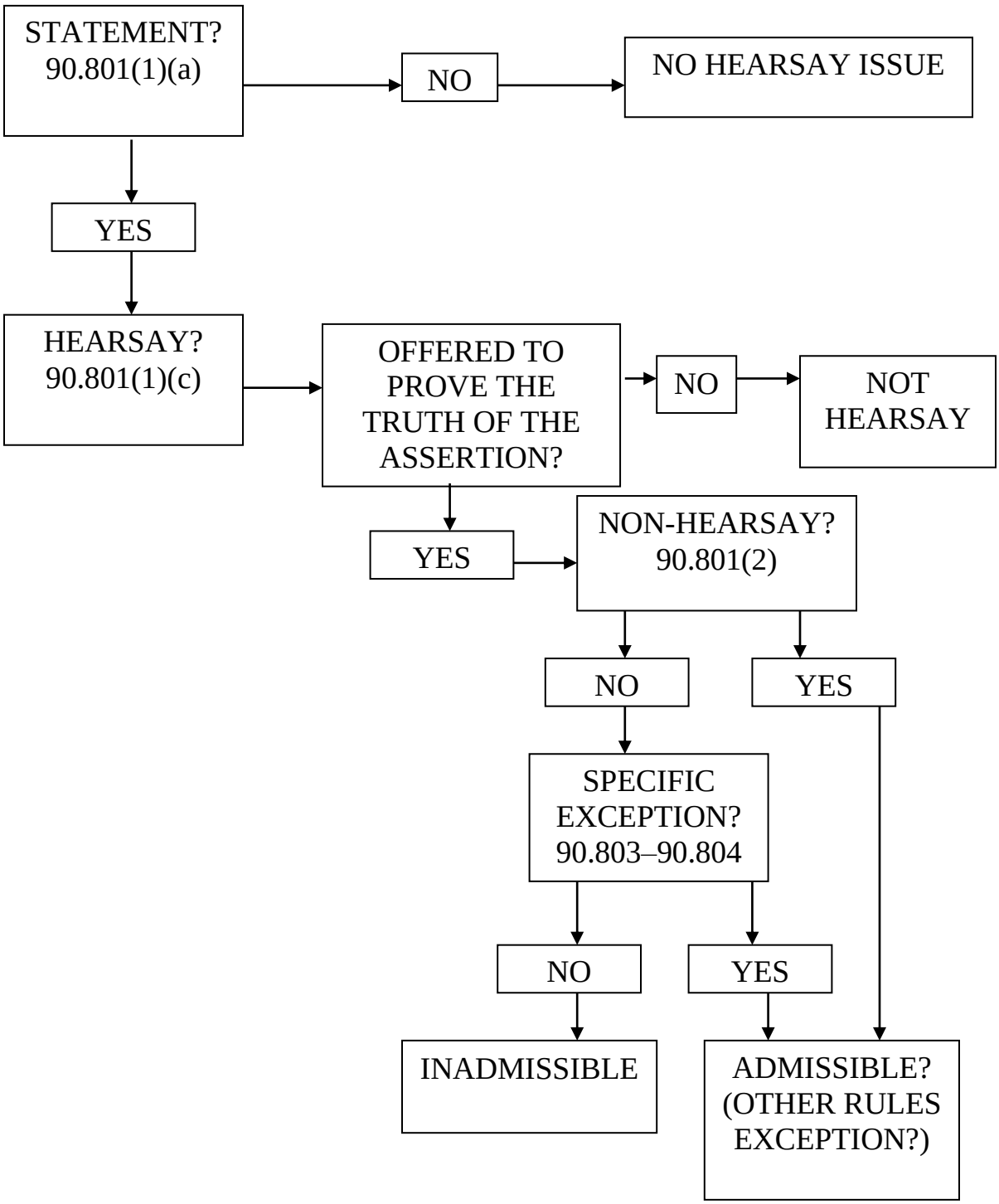
(d) Oath. Testimony may be taken through communication equipment only if a notary public or other person authorized to administer oaths in the witness's jurisdiction is present with the witness and administers the oath consistent with the laws of the jurisdiction.

(e) Burden of Expense. The cost for the use of the communication equipment is the responsibility of the requesting party unless otherwise ordered by the court.

Chapter Eight

Evidence

I. Hearsay Decision Chart



II. Impeachment by Prior Conviction (Checklist)

- Is there a conviction, not merely an arrest or accusation, *Fulton v. State*, 335 So. 2d 280 (Fla. 1976); a withheld adjudication, *State v. McFadden*, 772 So. 2d 1209 (Fla. 2000); or a juvenile adjudication, *Laffman by and through Jacques v. Sherrod*, 565 So. 2d 760 (Fla. 3d DCA 1990)?

- Does the attorney have knowledge of a conviction and a certified copy of the judgment? Counsel may not ask any questions of the witness unless he or she has knowledge that the witness has in fact been convicted of the crime or crimes. *Cummings v. State*, 412 So. 2d 436 (Fla. 4th DCA 1982), *limited on other grounds*, 647 So. 2d 881.

- Does the probative value outweigh the prejudicial effect under section 90.403, Florida Statutes? *State v. Page*, 449 So. 2d 813 (Fla. 1984).

- Was the conviction too remotely connected to the issues in the case, *New England Oyster House of North Miami, Inc. v. Yuhas*, 294 So. 2d 99 (Fla. 3d DCA), *cert. denied*, 303 So. 2d 333 (Fla. 1974), or too remote in time, section 90.610(1)(a), Florida Statutes?

- What was the punishment prescribed by law at the place of conviction, section 90.610(1), Florida Statutes?

- Is the question asked correctly? That is, "Have you ever been convicted of a felony?" or "Have you ever been convicted of a crime involving dishonesty or false statement?" *Jackson v. State*, 570 So. 2d 1388, 1390 (Fla. 1st DCA 1990).

- Follow up:

  - Conviction admitted – no follow up; the nature of the crime or sentence is not admissible, *Reeser v. Boats Unlimited, Inc.*, 432 So. 2d 1346 (Fla. 4th DCA 1983); details of the crime are not admissible, *Hill v. Sadler*, 186 So. 2d 52 (Fla. 2d DCA), *cert. denied*, 192 So. 2d 487 (Fla. 1966).

  - Conviction denied – only a record of the conviction is admissible, *Parks v. Zitnik*, 453 So. 2d 434 (Fla. 2d DCA 1984).

- Rehabilitation on redirect may show:

- how long ago the conviction was;
- that the conviction is on appeal; and
- a pardon for the conviction.

See Lawhorne v. State, 500 So. 2d 519 (Fla. 1986); *McArthur v. Cook*, 99 So. 2d 565 (Fla. 1957).

III. Definition of a Leading Question

A question which suggests only "yes" as an answer or only "no" as an answer is leading. A question which may be answered either "yes" or "no" and suggests neither answer as correct is not leading. *Porter v. State*, 386 So. 2d 1209 (Fla. 3d DCA 1980).

Examples of leading questions:

"Isn't it true that..."
"Isn't it fair to say…"
"Isn't that a fair statement?"
"Didn't you…"
"Don't you…"
"Haven't you…"
"There is no doubt…, is there?"
"You don't have any doubt…"
"There is really no question that…, is there?"

IV. Record of Excluded Evidence (Fla. R. Civ. P. 1.450)

(a) Record of Excluded Evidence. In an action tried by a jury if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what the attorney expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed except that the court upon request shall take and report the evidence in full unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(b) Filing. When documentary evidence is introduced in an action, the clerk or the judge shall endorse an identifying number or symbol on it and when proffered or admitted in evidence, it shall be filed by the clerk or judge and considered in the custody of the court and not withdrawn except with written leave of court.

V. Exceptions Unnecessary (Fla. R. Civ. P. 1.470(a))

(a) Adverse Ruling. For appellate purposes no exception shall be necessary to any adverse ruling, order, instruction, or thing whatsoever said or done at the trial or prior thereto or after verdict, which was said or done after objection made and considered by the trial court and which affected the substantial rights of the party complaining and which is assigned as error.

VI. Florida Evidence Code (Ch. 90, Fla. Stat.)

90.101	Short title.
90.102	Construction.
90.103	Scope; applicability.
90.104	Rulings on evidence.
90.105	Preliminary questions.
90.106	Summing up and comment by judge.
90.107	Limited admissibility.
90.108	Introduction of related writings or recorded statements.
90.201	Matters which must be judicially noticed.
90.202	Matters which may be judicially noticed.
90.203	Compulsory judicial notice upon request.
90.204	Determination of propriety of judicial notice and nature of matter noticed.
90.205	Denial of a request for judicial notice.
90.206	Instructing jury on judicial notice.
90.207	Judicial notice by trial court in subsequent proceedings.
90.301	Presumption defined; inferences.
90.302	Classification of rebuttable presumptions.
90.303	Presumption affecting the burden of producing evidence defined.
90.304	Presumption affecting the burden of proof defined.
90.401	Definition of relevant evidence.
90.402	Admissibility of relevant evidence.
90.4025	Admissibility of paternity determination in certain criminal prosecutions.

90.4026 Statements expressing sympathy; admissibility; definitions.
90.403 Exclusion on grounds of prejudice or confusion.
90.404 Character evidence; when admissible.
90.405 Methods of proving character.
90.406 Routine practice.
90.407 Subsequent remedial measures.
90.408 Compromise and offers to compromise.
90.409 Payment of medical and similar expenses.
90.410 Offer to plead guilty; nolo contendere; withdrawn pleas of guilty.
90.501 Privileges recognized only as provided.
90.5015 Journalist's privilege.
90.502 Lawyer-client privilege.
90.5021 Fiduciary lawyer-client privilege.
90.503 Psychotherapist-patient privilege.
90.5035 Sexual assault counselor-victim privilege.
90.5036 Domestic violence advocate-victim privilege.
90.504 Husband-wife privilege.
90.505 Privilege with respect to communications to clergy.
90.5055 Accountant-client privilege.
90.506 Privilege with respect to trade secrets.
90.507 Waiver of privilege by voluntary disclosure.
90.508 Privileged matter disclosed under compulsion or without opportunity to claim privilege.
90.509 Application of privileged communication.
90.510 Privileged communication necessary to adverse party.
90.601 General rule of competency.
90.603 Disqualification of witness.
90.604 Lack of personal knowledge.
90.605 Oath or affirmation of witness.
90.606 Interpreters and translators.
90.6063 Interpreter services for deaf persons.
90.607 Competency of certain persons as witnesses.
90.608 Who may impeach.
90.609 Character of witness as impeachment.
90.610 Conviction of certain crimes as impeachment.
90.611 Religious beliefs or opinions.
90.612 Mode and order of interrogation and presentation.
90.613 Refreshing the memory of a witness.
90.614 Prior statements of witnesses.
90.615 Calling witnesses by the court.

90.616 Exclusion of witnesses.
90.701 Opinion testimony of lay witnesses.
90.702 Testimony by experts.
90.703 Opinion on ultimate issue.
90.704 Basis of opinion testimony by experts.
90.705 Disclosure of facts or data underlying expert opinion.
90.706 Authoritativeness of literature for use in cross-examination.
90.801 Hearsay; definitions; exceptions.
90.802 Hearsay rule.
90.803 Hearsay exceptions; availability of declarant immaterial.
90.804 Hearsay exceptions; declarant unavailable.
90.805 Hearsay within hearsay.
90.806 Attacking and supporting credibility of declarant.
90.901 Requirement of authentication or identification.
90.902 Self-authentication.
90.903 Testimony of subscribing witness unnecessary.
90.91 Photographs of property wrongfully taken; use in prosecution, procedure; return of property to owner.
90.951 Definitions.
90.952 Requirement of originals.
90.953 Admissibility of duplicates.
90.954 Admissibility of other evidence of contents.
90.955 Public records.
90.956 Summaries.
90.957 Testimony or written admissions of a party.
90.958 Functions of court and jury.

VII. Witnesses, Records, and Documents (Ch. 92, Fla. Stat.)

92.05 Final judgments and decrees of courts of record.
92.06 Judgments and decrees of United States District Courts.
92.07 Judgments and decrees of this state.
92.08 Deeds and powers of attorney of record for 20 years or more.
92.09 Effect of reversal, etc., of judgment or successful attack on deed.
92.13 Certified copies of records of certified copies.
92.14 United States deeds and patents and copies thereof.
92.141 Law enforcement employees; travel expenses; compensation as witness.
92.142 Witnesses; pay.
92.143 Compensation to traffic court witnesses.

92.15 Receipts in cases involving title from United States.
92.151 Witness compensation; payment; overcharges.
92.153 Production of documents by witnesses; reimbursement of costs.
92.16 Certificates of Board of Trustees of the Internal Improvement Trust Fund respecting the ownership, conveyance of, and other facts in connection with public lands.
92.17 Effect of seal of Board of Trustees of the Internal Improvement Trust Fund.
92.18 Certificate of state officer.
92.19 Portions of records.
92.20 Certificates issued under authority of Congress.
92.21 Certificate as to sanitary condition of buildings.
92.23 Rule of evidence in suits on fire policies for loss or damage to building.
92.231 Expert witnesses; fee.
92.233 Compensation of witness summoned in two or more criminal cases.
92.24 Certain tax deeds prima facie evidence of title.
92.25 Records destroyed by fire; use of abstracts.
92.251 Uniform Interstate Depositions and Discovery Act.
92.26 Records destroyed by fire; use of sworn copies.
92.27 Records destroyed by fire; effect of abstracts in evidence.
92.28 Records destroyed by fire; land title suits; what may be received in evidence.
92.29 Photographic or electronic copies.
92.295 Copies of voter registration records.
92.30 Presumption of death; official findings.
92.31 Missing persons and persons imprisoned or interned in foreign countries; official reports.
92.32 Official findings and reports; presumption of authority to issue or execute.
92.33 Written statement concerning injury to person or property; furnishing copies; admission as evidence.
92.351 Prohibition against prisoners submitting nondocumentary physical evidence without authorization of court; prisoner mailings to courts.
92.38 Comparison of disputed writings.
92.39 Evidence of individual's claim against the state in suits between them.
92.40 Reports of building, housing, or health code violations; admissibility.
92.50 Oaths, affidavits, and acknowledgments; who may take or administer; requirements.
92.51 Oaths, affidavits, and acknowledgments; taken or administered by

commissioned officer of United States Armed Forces.

92.52 Affirmation equivalent to oath.

92.525 Verification of documents; perjury by false written declaration, penalty.

92.53 Videotaping the testimony of a victim or witness under age 16 or who has an intellectual disability.

92.54 Use of closed circuit television in proceedings involving a victim or witness under the age of 16 or who has an intellectual disability.

92.55 Judicial or other proceedings involving victim or witness under the age of 16 or person who has an intellectual disability; special protections; use of registered service or therapy animals.

92.56 Judicial proceedings and court records involving sexual offenses.

92.561 Prohibition on reproduction of child pornography.

92.565 Admissibility of confession in sexual abuse cases.

92.57 Termination of employment of witness prohibited.

92.60 Foreign records of regularly conducted business activity.

92.605 Production of certain records by Florida businesses and out-of-state corporations.

92.70 Eyewitness identification.

Chapter Nine

Discovery Violations

I. Discovery Violations (Quick Reference)

- It is improper to call an unlisted expert witness in rebuttal or to impeach the opposing side's expert. *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981); *Gustafson v. Jensen*, 515 So. 2d 1298 (Fla. 3d DCA 1987). Before excluding the witness, the court should consider:
  - whether there is actual surprise on the part of the objecting party;
  - the objecting party's ability to cure the (prejudice) surprise;
  - whether the calling party acted in bad faith or intentionally failed to comply with the pretrial order;
  - the possible disruption of the orderly and efficient trial of the case; and
  - whether or not the use of the witness will substantially endanger the fairness of the proceeding.
- If an expert forms an opinion as to causation of an accident only after being deposed (but before trial), the court may exclude the testimony as to causation but not the entire testimony of the expert. *Keller Industries v. Volk*, 657 So. 2d 1200 (Fla. 4th DCA 1995).
- When a treating physician reexamines the plaintiff during the course of the trial and comes up with new findings, the court should allow the defendant an opportunity to review the doctor's new findings or reexamine the plaintiff even if a continuance is required. *Semmer v. Johnson*, 634 So. 2d 1123 (Fla. 2d DCA 1994).
- In a case where the plaintiff was examined by two of his experts for the first time during trial, and the trial court found that "the plaintiff's tactics were intentional tricks," the experts' testimony should have been excluded. *Grau v. Branham*, 626 So. 2d 1059, 1061 (Fla. 4th DCA 1993).
- In the case of late-listed experts, failure to list the address of an expert, or listing a witness in a misleading manner, the court may strike the witness ("unfair advantage" should not be allowed). *Florida Marine Enterprises v. Bailey*, 632 So. 2d 649, 652 (Fla. 4th DCA 1996); *Sayad v. Alley*, 508 So. 2d 485 (Fla. 3d DCA 1987).

- Even when no explicit duty to supplement discovery exists under the rules of civil procedure, "litigation should no longer proceed as a game of 'blind man's bluff.'" *Scipio v. State*, 928 So. 2d 1138, 1144 (Fla. 2006); *Jones v. Seaboard Coast Line R. Co.*, 297 So. 2d 861, 863 (Fla. 2d DCA 1974).

- "[T]rial courts must be permitted to exercise sanctions as a means to discourage stonewalling between opposing counsel and assure compliance with court orders. However, dismissal of an action is unwarranted . . . where more appropriate sanctions were available. [A] failure to file a formal witness list may [be] adequately addressed by the trial court by precluding . . . any surprise undisclosed witness. . . . [D]ismissal is far too extreme as a sanction in those cases where discovery violations have absolutely no prejudice to the opposing party." *Ham v. Dunmire*, 891 So. 2d 492, 499 (Fla. 2004).

- While sanctions are within a trial court's discretion, striking a pleading or dismissing an action for failure to comply with orders compelling discovery "is the most severe of all sanctions which should be employed only in extreme circumstances. . . . A deliberate and contumacious disregard of the court's authority will justify [dismissal], as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness." *Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1984); *see also Ham v. Dunmire*, 891 So. 2d 492, 495 (Fla. 2004).

- Before a court may dismiss a cause as a sanction, it must first consider the six factors delineated in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1994) (see following paragraph), and set forth explicit findings of fact in the order that imposes the sanction of dismissal. *Buroz-Henriquez v. De Buroz*, 19 So. 3d 1140 (Fla. 3d DCA 2009) (citing *Alvarado v. Snow White and Seven Dwarfs, Inc.*, 8 So. 3d 388 (Fla. 3d DCA 2009)).

- Where counsel is "involved in the conduct to be sanctioned, a *Kozel* analysis is required before dismissal is used as a sanction." *Bennett by and through Bennett v. Tenet St. Mary's, Inc.*, 67 So. 3d 422, 428 (Fla. 4th DCA 2011); *Pixton v. Williams Scotsman, Inc.*, 924 So. 2d 37, 40 (Fla. 5th DCA 2006). Pursuant to *Kozel*, the trial court must consider the following:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of

> disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration.

Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1994).

- "Express findings are required to ensure that the trial judge has consciously determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation." *Ham v. Dunmire*, 891 So. 2d 492, 496 (Fla. 2004). There are no required "magic words," but the court must find "that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard." *Id.* (quoting *Commonwealth Federal Sav. & Loan Ass'n v. Tubero*, 569 So. 2d 1271 (Fla. 1990)).

Chapter Ten

Close of Plaintiff's Case

I. Dialogue at Close of Plaintiff's Case

(when plaintiff's counsel announces rest:)

Would counsel approach the bench?

(at sidebar:)

Are there any motions at this time? If so, are they brief or should I give the jury a recess?

Chapter Eleven

Trial Motions

I. Dismissal of Actions (Fla. R. Civ. P. 1.420)

(a) Voluntary Dismissal.

(1) By Parties. Except in actions in which property has been seized or is in the custody of the court, an action, a claim, or any part of an action or claim may be dismissed by plaintiff without order of court (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served or if the motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision, or (B) by filing a stipulation of dismissal signed by all current parties to the action. Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim.

(2) By Order Of Court; If Counterclaim. Except as provided in subdivision (a)(1) of this rule, an action shall not be dismissed at a party's instance except on order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been served by a defendant prior to the service upon the defendant of the plaintiff's notice of dismissal, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal. Any party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court. Notice of hearing on the motion shall be served as required under rule 1.090(d). After a party seeking affirmative relief in an action tried by the court without a jury has completed the presentation of evidence, any other party may move for a dismissal on the ground that on the facts and the law the party seeking affirmative relief has shown no right to relief, without waiving the right to offer evidence if the motion is not granted. The court as trier of the facts may then determine them and render judgment against the party seeking affirmative relief or may decline to render judgment until the close of all the evidence. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits.

(c) Dismissal of Counterclaim, Crossclaim, or Third-Party Claim.

The provisions of this rule apply to the dismissal of any counterclaim, crossclaim or third-party claim.

(d) Costs. Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs. When one or more other claims remain pending following dismissal of any claim under this rule, taxable costs attributable solely to the dismissed claim may be assessed and judgment for costs in that claim entered in the action, but only when all claims are resolved at the trial court level as to the party seeking taxation of costs. If a party who has once dismissed a claim in any court of this state commences an action based upon or including the same claim against the same adverse party, the court shall make such order for the payment of costs of the claim previously dismissed as it may deem proper and shall stay the proceedings in the action until the party seeking affirmative relief has complied with the order.

(e) Failure to Prosecute. In all actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of court may serve notice to all parties that no such activity has occurred. If no such record activity has occurred within the 10 months immediately preceding the service of such notice, and no record activity occurs within the 60 days immediately following the service of such notice, and if no stay was issued or approved prior to the expiration of such 60-day period, the action shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.

(f) Effect on Lis Pendens. If a notice of lis pendens has been filed in connection with a claim for affirmative relief that is dismissed under this rule, the notice of lis pendens connected with the dismissed claim is automatically dissolved at the same time. The notice, stipulation, or order shall be recorded.

II. Motion for Directed Verdict (Fla. R. Civ. P. 1.480)

(a) Effect. A party who moves for a directed verdict at the close of the evidence offered by the adverse party may offer evidence in the event the motion is

denied without having reserved the right to do so and to the same extent as if the motion had not been made. The denial of a motion for a directed verdict shall not operate to discharge the jury. A motion for a directed verdict shall state the specific grounds therefor. The order directing a verdict is effective without any assent of the jury.

(b) Reservation of Decision on Motion. When a motion for a directed verdict is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 15 days after the return of a verdict, a party who has timely moved for a directed verdict may serve a motion to set aside the verdict and any judgment entered thereon and to enter judgment in accordance with the motion for a directed verdict. If a verdict was not returned, a party who has timely moved for a directed verdict may serve a motion for judgment in accordance with the motion for a directed verdict within 15 days after discharge of the jury.

(c) Joined with Motion for New Trial. A motion for a new trial may be joined with this motion or a new trial may be requested in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

III. Mistrial
(Quick Reference)

There appears to be no rule, no statute, and little case law with respect to granting a mistrial in a civil case. However, in *Walton v. Robert E. Haas Const. Corp.*, 259 So. 2d 731 (Fla. 3d DCA 1972), the Third District Court of Appeal reversed the trial court for failing to grant a motion for mistrial after a prejudicial remark by an attorney. *Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So. 2d 580 (Fla. 2d DCA 1996), indicates that the motion for mistrial must be made before the jury retires to deliberate. *See also Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000), holding that "abuse of discretion" standard applies to review of trial court's grant or denial of a motion for new trial based on unobjected-to closing argument in a civil case, disapproving *Hagan* on that ground.

Most cases which discuss mistrial do so in terms of what results flow from a party's failure to make a mistrial motion.

See 55A Fla.Jur.2d *Trial* §§ 284–291.

IV. Juror Misconduct (Quick Reference)

Frequently, attorneys or others advise the court of perceived misconduct by jurors during the course of a trial. It is essential that parties raise these matters as soon as they are aware of them to preserve the issue. *Hampton v. Kennard*, 633 So. 2d 535 (Fla. 2d DCA 1994); *Nissan Motor Corp. in U.S.A. v. Padilla*, 545 So. 2d 274 (Fla. 3d DCA 1989).

Although there is no rule or statute to control this situation, the general practice is for the judge, on the record and in the presence of the attorneys and parties, to voir dire the jurors separately to determine if anything has occurred which would influence their decision in the case. This procedure has been recognized without criticism by the appellate courts. *Policari v. Cerbasi*, 625 So. 2d 998 (Fla. 5th DCA 1993); *International Union of Operating Engineers, Local 675 v. Kinder*, 573 So. 2d 385 (Fla. 4th DCA 1991). And in at least one case, a judge was reversed for failing to conduct such a jury interview. *Henderson v. Dade County School Bd.*, 734 So. 2d 549 (Fla. 3d DCA 1999).

The interview of jurors may, under certain circumstances, be closed to the public. *Sentinel Star Co. v. Edwards*, 387 So. 2d 367 (Fla. 5th DCA 1980). However, if the court is considering closing the hearing, it should consider *Times Pub. Co. v. Penick*, 433 So. 2d 1281 (Fla. 2d DCA 1983), which required, citing *Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982), that at least one representative of the news media be noticed and given an opportunity to be heard on whether there should be a closure of the proceedings. There is a stronger argument for closure of the proceeding when it occurs during the course of the trial than when a post-judgment interview of jurors is held. *Sentinel Communications Co. v. Watson*, 615 So. 2d 768 (Fla. 5th DCA 1993).

Certain types of misconduct, if proven, may require that a juror be dismissed or a mistrial declared whether or not the jurors maintain that their verdict will not be influenced. These include racist remarks made by a juror to other jurors, *Powell v. Allstate Ins. Co.*, 652 So. 2d 354 (Fla. 1995), and derogatory remarks about an ethnic group of which one party is a member, *Sanchez v. International Park Condominium Ass'n, Inc.*, 563 So. 2d 197 (Fla. 3d DCA 1990), *Wright v. CTL Distribution, Inc.*, 679 So. 2d 1233 (Fla. 2d DCA 1996). They may also include cases in which jurors conduct their own investigation or experiment. *Bickel v. State Farm Mut. Auto. Ins. Co.*, 557 So. 2d 674 (Fla. 2d DCA 1990). Concealing or

denying a previous litigation history during voir dire may also require the removal of the juror. *McCauslin v. O'Conner*, 985 So. 2d 558 (Fla. 5th DCA 2008) (setting forth three-pronged test to determine whether nondisclosure warrants new trial, citing *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995)); *Birch by and through Birch v. Albert*, 761 So. 2d 355 (Fla. 3d DCA 2000) (undisclosed lawsuit not material); *Wilcox v. Dulcom*, 690 So. 2d 1365 (Fla. 3d DCA 1997) (required new trial when discovered later).

In *Tapanes v. State*, 43 So. 3d 159, 163 (Fla. 4th DCA 2010), a juror used a smartphone to look up the definition of "prudence," which he then shared with the other jurors. Although the trial court determined that there was juror misconduct because a dictionary was not one of the materials permitted to be taken into the jury room, it concluded that it was harmless. However, the appellate court reversed, holding that "[t]he concept of 'prudence' is one that could be key to the jury's deliberations."

V. Amendments to Conform with the Evidence (Fla. R. Civ. P. 1.190(b))

(b) Amendments to Conform with the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend shall not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits.

VI. Motion for Sanctions for Spoliation of Evidence

A. Quick Reference

If it is proven that one of the parties or its agent either intentionally or unintentionally lost, destroyed, or altered evidence, Florida law offers (in addition to a separate cause of action) a choice of sanctions including:

- Precluding testimony by the expert who lost the evidence. *Federal Insurance Co. v. Allister Mfg. Co.*, 622 So. 2d 1348 (Fla. 4th DCA 1993). However,

this may not be appropriate if the opposing party's expert had some chance to see the evidence and there is no showing that the party is unable to present a case.

- Striking a defendant's answer and entering a default. *DePuy, Inc. v. Eckes*, 427 So. 2d 306 (Fla. 3d DCA 1983); *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677 (Fla. 3d DCA 1990); *see also U.S. Fire Ins. Co. v. C & C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d DCA 1996) (withholding accountant's report despite six court orders). The same principles apply to plaintiffs. *Grand Hall Enterprise Co. v. Mackoul*, 780 So. 2d 275 (Fla. 3d DCA 2001).

- Entry of default. *Sponco Mfg., Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995).

- Striking a defense or excluding a witness. *Metropolitan Dade County v. Bermudez*, 648 So. 2d 197 (Fla. 1st DCA 1995).

- Imposing a rebuttable presumption that shifts the burden of proof (per section 90.302(2), Florida Statutes) and giving an appropriate jury instruction. *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987); *but see King v. National Sec. Fire & Cas. Co.*, 656 So. 2d 1335 (Fla. 4th DCA 1995) (party must show lack of records hinders ability to establish prima facie case), *disapproved on other grounds*, *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000).

- Excluding the testimony of the defendant's expert who examined the defendant's vehicle, which was then sold before the plaintiff could examine it. *Metropolitian Dade County v. Bermudez*, 648 So. 2d 197 (Fla. 1st DCA 1995).

- When evidence is intentionally lost, misplaced, or destroyed by one party, trial courts are to rely on sanctions found in rule 1.380(b)(2), Florida Rules of Civil Procedure, and a jury can infer from a finding that evidence was intentionally lost, misplaced, or destroyed by one party that it "would have contained indications of negligence." *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 346 (Fla. 2005).

- An independent cause of action does not exist for first-party spoliation of evidence. "First-party spoliation claims are claims in which the defendant who allegedly lost, misplaced, or destroyed the evidence was also a tortfeasor in causing the plaintiff's injuries or damages. These actions are

contrasted with third-party spoliation claims, which occur when a person or an entity, though not a party to the underlying action causing the plaintiff's injuries or damages, lost, misplaced, or destroyed evidence critical to that action." *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 346 n.2 (Fla. 2005).

- "[W]here a defendant has evidence within its control, it can 'be charged with a duty to preserve evidence where it could reasonably have foreseen the [plaintiff's] claim.' . . . In the absence of a written request to preserve such evidence, as long as a plaintiff's claim is reasonably foreseeable, a formal request to preserve the evidence is not required in order for a plaintiff to be entitled to a jury instruction on spoliation." *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389, 393 (Fla. 2d DCA 2012), quoting *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005).

B. Jury Instruction

During the course of this trial, you heard evidence concerning certain _____ (records, documents, physical objects, etc.) that were (lost, destroyed, etc.) by (party).

When considering such evidence while reaching your verdict, you shall presume that the (lost/destroyed) (records, documents, physical objects, etc.) would have revealed information (or evidence) positive for the (opposing party)'s (claim/defense) against (party) and negative as to (party)'s (defense/claim).

[This instruction has been used but has not yet been approved by any appellate court.]

Chapter Twelve

Charge Conference

I. Instructions to Jury (Fla. R. Civ. P. 1.470(b))

(b) Instructions to Jury. The Florida Standard Jury Instructions appearing on the court's website at https://jury.flcourts.org may be used, as provided in Florida Rule of Judicial Administration 2.580, by the trial judges in instructing the jury in civil actions. Not later than at the close of the evidence, the parties shall file written requests that the court instruct the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the instructions to be given. At such conference, all objections shall be made and ruled upon and the court shall inform counsel of such instructions as it will give. No party may assign as error the giving of any instruct;;;;ion unless that party objects thereto at such time, or the failure to give any instruction unless that party requested the same. The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations. The court shall provide each juror with a written set of the instructions for his or her use in deliberations. The court shall file a copy of such instructions.

II. Jury Instructions
(Quick Reference)

- Language in a court opinion or statute may be modified for clarity and used for jury instruction if the modifications do not distort the original meaning. *Lithgow Funeral Centers v. Loftin*, 60 So. 2d 745 (Fla. 1952); *Van Engers v. Hickory House, Inc.*, 118 So. 2d 657 (Fla. 3d DCA 1960).

- Instructions must be accurate and complete statements of the law that applies to the evidence received and should not be argumentative, misleading, confusing or tending to unduly emphasize issues or theories in favor of a particular party. *Florida East Coast Ry. Co. v. Welch*, 44 So. 250 (Fla. 1907); *Gross v. Lyons*, 721 So. 2d 304 (Fla. 4th DCA 1998).

III. Verdicts (Punitive Damages)

A. Fla. R. Civ. P. 1.481

In all actions when punitive damages are sought, the verdict shall state the

amount of punitive damages separately from the amounts of other damages awarded.

B. Model Verdict Forms 3(a) and 3(b)

Form 3(a) – Model Form of Verdict for Bifurcated Punitive Damage Cases – states that Form 3(a) "*should be used in the first stage of the bifurcated trial prescribed by W.R. Grace & Co. v. Waters, 638 So. 2d 502 (Fla. 1994)*," and that Form 3(B) – Model Form of Verdict for Non-Bifurcated Punitive Damage Cases – "*is used only if the jury determined in the first stage that punitive damages are warranted, and after the jury has received any additional evidence relevant to the amount of punitive damages in the second stage and has received the appropriate second stage instructions.*"

Chapter Thirteen

Attorney Conduct

I. Jury Instruction After Admonition of Counsel

The court has the duty of maintaining order and reprimanding counsel for any improper conduct. In the heat of advocacy, counsel may be carried away. The action of the court should not be interpreted as favoring or disfavoring either party.

II. Code of Judicial Conduct (Canon 3B)

B. Adjudicative Responsibilities.

* * *

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

* * *

COMMENTARY

CANON 3B(4). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.

CANON 3B(5). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control. A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

* * *

III. Trial Lawyers Section of The Florida Bar, Guidelines for Professional Conduct (L. Trial Conduct and Courtroom Decorum)

L. Trial Conduct and Courtroom Decorum

1. A lawyer always should interact with parties, counsel, witnesses, jurors or prospective jurors, court personnel, and judges with courtesy and civility, and should avoid undignified or discourteous conduct that is degrading to the court or the proceedings.

2. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses or at any other time, absolutely are prohibited.

3. During trials and evidentiary hearings, the lawyers mutually should agree to disclose the identities and duration of witnesses anticipated to be called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual aid equipment.

4. A lawyer should abstain from conduct calculated to detract or divert the fact finder's attention from the relevant facts or otherwise cause the fact finder to reach a decision on an impermissible basis.

5. A lawyer should not knowingly misstate, distort, or improperly

exaggerate any fact or opinion nor permit the lawyer's silence or inaction to mislead anyone.

6. In appearing in his or her professional capacity before a tribunal, a lawyer should not

   a. state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;

   b. ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;

   c. assert a personal knowledge or opinions concerning the facts in issue, except when testifying as a witness;

   d. assert a personal opinion concerning the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused, but may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters at issue.

7. A question should not be interrupted by an objection unless the question is patently objectionable or there is a reasonable ground to believe that information is being included that should not be disclosed to the jury.

8. When a judge already has made a ruling about the inadmissibility of certain evidence, a lawyer should not seek to circumvent the effect of that ruling and get the evidence before the jury by repeated questions relating to the evidence in question, although the lawyer may make a record for later proceedings of the ground for urging the admissibility of the evidence in question. This does not preclude efforts by the lawyer to have the evidence admitted through other, proper means.

9. A lawyer scrupulously should abstain from all acts, comments, and attitudes calculated to curry favor with any juror, by fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like.

10. A lawyer never should attempt to place before a tribunal or jury

evidence known to be clearly inadmissible, nor make any remarks or statements intended improperly to influence the outcome of any case.

11. A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not affected adversely.

Chapter Fourteen

Final Argument

I. Concluding Instruction (Before Final Argument), SJI (Civil) 601.5 (Former 7.0)

That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

NOTE ON USE FOR 601.5

Instruction 601.5 is for use when instructing the jury before final argument. If the court's instruction is to be given after final argument, skip to instruction 700 and omit the bracketed sentence in the first paragraph.

II. Final Argument Instruction (Alternate)

The attorneys will now have an opportunity to address you and make their final arguments. The arguments are not to be considered by you as either evidence in the case or your instruction on the law. Nevertheless, these arguments are intended to help you properly understand the issues, the evidence, and the applicable law, so you should give them your close attention.

The attorneys, in making their argument, will be referring to the testimony as they recall it. They will not knowingly misstate the testimony, but if their recollection differs from yours, you should rely upon your own recollection of the testimony.

Counsel for the plaintiff will speak first, followed by counsel for the defense. Counsel for the plaintiff will then have an opportunity to address you again to rebut the arguments of the defense. The court has given the lawyers an equal amount of time. The time is adequate, but it is limited. Therefore, the lawyers will be attempting to make the best use possible of it and will require your undivided attention.

III. Closing Instructions, SJI (Civil) 700 (Former 7.1 and 7.2)

Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. [Before you do so, I have a few last instructions for you.]

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, or any other reference materials. Do not investigate the case or conduct any experiments. Do not visit or view the scene of any event involved in this case or look at maps or pictures on the Internet. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, twitter, e-mail, text message, or any other means. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. These communications rules apply until I discharge you at the end of the case.

If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors. Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect your notes, which will be immediately destroyed. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party to influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I

prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as a foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

[**I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. I will now read the form to you:** (read form of verdict)]

[**You will be given** (state number) **forms of verdict, which I shall now read to you:** (read form of verdict(s))]

[**If you find for** (claimant(s))**, your verdict will be in the following form:** (read form of verdict)]

[**If you find for** (defendant(s))**, your verdict will be in the following form:** (read form of verdict)]

Your verdict[s] must be unanimous, that is, your verdict must be agreed to by each of you. When you have [agreed on your verdict[s]] [finished filling

out the form[s]], your foreperson must write the date and sign it at the bottom and return the verdict[s] to the bailiff.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication.

You may now retire to decide your verdict[s].

NOTES ON USE FOR 700

1. When final instructions are read to the jury before the attorney's closing arguments, this instruction should not be given at that time. It should be given following closing arguments, just before the jury retires to deliberate. If, however, the entire instruction is given after final arguments, omit the bracketed sentence in the first paragraph.

2. Florida Rule of Judicial Administration 2.451 governs jurors' use of electronic devices. Rule 2.451(b)(1) requires the trial court to remove cell phones and other electronic devices from jurors during their deliberations. This instruction may need to be modified to reflect the practices of a particular trial court when removing jurors' cell phones. The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specific means of communication or research as technology develops.

3. Florida Rule of Judicial Administration 2.430(k) provides that at the conclusion of the trial, the court shall collect and immediately destroy all juror notes.

4. *Quotient verdict.* The committee recommends that no instruction generally be given to admonish the jury against returning a "quotient verdict."

5. When it is impracticable to take all of the evidence into the jury room, this instruction should be modified accordingly.

IV. Sending the Jury to Deliberate (Dialogue)

(at the close of instructions, but before the jury retires, call counsel to the bench and inquire:)

Has the court given the instructions it advised counsel it would give?

Are there any objections to the instructions as given by the court which are not already of record?

Thank you, you may step back.

(to the jury:)

At this time, Mr./Ms. (alternate), it is the duty of the court to release you from further service on this jury. Because of the order in which your names were drawn, you have been seated as an alternate juror. It was necessary that we have you serve in case one of the other jurors was unable to complete his service. Fortunately, they have all been able to complete the trial, and it will not be necessary for you to serve with us any longer. Although I cannot let you go into the jury room with the jury, you are welcome to remain here in the courtroom, if you wish, to hear the verdict. If not, you may return to the jury pool room and tell the deputy clerk you have been released. On behalf of all of us, I thank you for your service.

The deputy clerk will be sure that all of the items in evidence are together along with the verdict form, and the bailiff will deliver those to the jury room as soon as they are assembled.

As soon as the verdict form is signed, knock on the door and advise the bailiff that you have a verdict. He/She will see to it that all court personnel are present before he/she returns you to the courtroom.

The jury may now retire to deliberate.

(after the jury retires:)

Are there any other matters which require our attention at this time? If not, we will stand in recess and await the call of the jury.

V. Improper Argument (Quick Reference)

Rule 4-3.4(e) of the Rules Regulating The Florida Bar provides that a lawyer must not:

in trial, state a personal opinion about the credibility of a witness

> unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused.

The comment to the rule states:

> Previously, subdivision (e) also proscribed statements about the credibility of witnesses. However, in 2000, the Supreme Court of Florida entered an opinion in *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000), in which the court allowed counsel in closing argument to call a witness a "liar" or to state that the witness "lied."
>
> There the court stated: "First, it is not improper for counsel to state during closing argument that a witness 'lied' or is a 'liar,' provided such characterizations are supported by the record." *Murphy*, id., at 1028. Members of the bar are advised to check the status of the law in this area.

Courts have ruled that it is improper for a lawyer to argue based on the following:

- Sympathy for a party
    - That the verdict should be motivated in part by the effect a finding of liability might have on a doctor's professional reputation. *Klose v. Coastal Emergency Services of Ft. Lauderdale, Inc.*, 673 So. 2d 81 (Fla. 4th DCA 1996).
    - Plaintiff's lack of ability to compete monetarily with defendant. *Pierce v. Smith*, 301 So. 2d 805 (Fla. 2d DCA 1974).
    - The financial burden or impact a verdict for the plaintiff would have on the defendant. *Padrino v. Resnick*, 615 So. 2d 698 (Fla. 3d DCA 1992); *Hickling v. Moore*, 529 So. 2d 1270 (Fla. 4th DCA 1988).
    - "Currying sympathy from the jury for a favorable verdict and asking a jury to consider the economic status of either party or the potential impact a substantial verdict would have on a defendant." *Cascanet v. Allen*, 83 So. 3d 759, 764 (Fla. 5th DCA 2011).

- "The new American dream." *Fowler v. N. Goldring Corp.*, 582 So. 2d 802, 803 (Fla. 1st DCA 1991).

- "[T]hat the jury did not see 'one bit of remorse of any of the officers who testified in trial. Not one of them looked over at mom during the trial and said sorry for your loss.' This argument is improper because it suggests the city is doing something wrong by either vigorously defending itself or not showing proper sympathy or empathy." *City of Orlando v. Pineiro*, 66 So. 3d 1064, 1073 n.10 (Fla. 5th DCA 2011).

- Prejudice against a party

  - "You are going to say, *Borden you know with all your resources and all of your assets and everything that you got — you have tried to destroy this family, you have put resources behind him in cases that are slightly unreal. They have done things that you can't possibly imagine and Eddie is supposed to be able to go in and counteract this type of resources. It's absolutely and totally impossible*." *Borden, Inc. v. Young*, 479 So. 2d 850 n.4 (Fla. 3d DCA 1985).

  - "[T]he railroad hired not one, but three brilliant lawyers 'to try to keep from paying any money' [and had] complete disregard for human life in its pursuit of the 'Almighty dollar'." *Tyus v. Apalachicola Northern R. Co.*, 130 So. 2d 580, 594 (Fla. 1961), *receded from on other grounds by Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000).

  - Comparing the defendant to "'some nickel and dime carnival' throwing 'pixie dust' to delude the jurors." *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1158 (Fla. 5th DCA 1994).

  - Calling the defendants despicable and stating that they and their lawyers are liars. *Kendall Skating Centers, Inc. v. Martin*, 448 So. 2d 1137 (Fla. 3d DCA 1984).

  - "[*C*]*orporate America. You know, the folks that brought you the gas tank that explodes, and Agent Orange and silicone breast implants.*" *Bellsouth Human Resources Admin., Inc. v. Colatarci*, 641 So. 2d 427, 428 (Fla. 4th DCA 1994).

- Prejudice against opposing counsel

- Referring to the defense attorney as "the man from Tampa" who was playing "hide-the-ball" and objected to every item of evidence. *Ryan v. State*, 457 So. 2d 1084, 1087, 1090 (Fla. 4th DCA 1984).

- Stating that counsel for the defendant "lied to the jury" and "committed a fraud." *Sun Supermarkets, Inc. v. Fields*, 568 So. 2d 480, 481 (Fla. 3d DCA 1990).

- Accusing opposing counsel "of 'fraud', hiding evidence, putting up roadblocks to the discovery of relevant evidence, and picking and choosing the evidence it would produce in response to discovery demands." *Emerson Elec. Co. v. Garcia*, 623 So. 2d 523, 525 (Fla. 3d DCA 1993).

- "Remember as you sit in the jury room that [plaintiff's attorney] wants to try and keep these pictures out" (photos had been objected to). *Sanchez v. Bengochea*, 573 So. 2d 992, 993 n.3 (Fla. 3d DCA 1991).

- "[P]laintiffs' attorneys routinely ask eight to ten times 'what a case is worth.'" *Laberge v. Vancleave*, 534 So. 2d 1176, 1177 (Fla. 5th DCA 1988).

- Defense attorney's statement that "I'm here to tell you the truth" and that the plaintiff's attorney "would do 'anything to advance the cause.'" *Schubert v. Allstate Ins. Co.*, 603 So. 2d 554, 555 (Fla. 5th DCA 1992).

- "[A]ll claimants' lawyers ask for more than they expect to receive" or "defense lawyers always say their clients are innocent or that the damages are minor." *Hartford Acc. and Indem. Co. v. Ocha*, 472 So. 2d 1338, 1343 (Fla. 4th DCA 1985).

- Speaking objections during defendant's closing, claiming that defense counsel fabricated and misrepresented the evidence. *Owens-Corning Fiberglas Corp. v. Crane*, 683 So. 2d 552 (Fla. 3d DCA 1996).

- Disparaging an opposing party's defense of a case or suggesting that a party should be punished for contesting a claim. *Carnival Corp. v. Pajares*, 972 So. 2d 973 (Fla. 3d DCA 2008).

- Plaintiff's counsel's comments that denigrated the appellants, suggested that they needed to be punished, and served no purpose other than to inflame and prejudice the jury. *Fasani v. Kowalski*, 43 So. 3d 805 (Fla.

3d DCA 2010).

- Unfounded attacks on the credibility of a party or witness (or bolstering credibility)
  - "Chiropractors will give a permanent impairment rating much quicker than any other physicians." *Silva v. Nightingale*, 619 So. 2d 4, 5 (Fla. 5th DCA 1993).
  - "[P]laintiff's doctor, "as he usually does, has found a permanency." *Schubert v. Allstate Ins. Co.*, 603 So. 2d 554, 555 (Fla. 5th DCA 1992).
  - Defendants are "liars." *Pier 66 Co. v. Poulos*, 542 So. 2d 377 (Fla. 4th DCA 1989); *but see Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000).
  - "[P]laintiff's medical expert was 'nothing more than an unqualified doctor who prostitutes himself . . . for the benefit of lawyers'" giving "magic testimony" because of a "special relationship" with the lawyer that allowed the lawyer to present "a work of fiction." *Venning v. Roe*, 616 So. 2d 604 (Fla. 2d DCA 1993).
  - Plaintiff's injury is a "lawsuit pain" and the plaintiff is "perpetuating a fraud upon the court." *George v. Mann*, 622 So. 2d 151, 152 (Fla. 3d DCA 1993).
  - Suggestions of perjury and collusion on the part of parties or witnesses without evidence. *State v. Castillo*, 486 So. 2d 565 (Fla. 1986); *Griffith v. Shamrock Village Inc.*, 94 So. 2d 854 (Fla. 1957); *Venning v. Roe*, 616 So. 2d 604 (Fla. 2d DCA 1993).
  - Calling a witness or party a liar with no factual basis. *King v. National Sec. Fire and Cas. Co.*, 656 So. 2d 1338 (Fla. 4th DCA 1995); *Kaas v. Atlas Chemical Co.*, 623 So. 2d 525 (Fla. 3d DCA 1993). However, it is permissible to call a party or witness a liar if there is an ample evidentiary basis to dispute his or her credibility. *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000); *Brown v. State*, 678 So. 2d 910 (Fla. 4th DCA 1996); *Forman v. Wallshein*, 671 So. 2d 872 (Fla. 3d DCA 1996).
  - Police officer was "not the type of man to come" into a courtroom and violate a "sacred oath." *Cisneros v. State of Florida*, 678 So. 2d 888, 889

(Fla. 4th DCA 1996).

- Golden Rule
  - "[P]laintiffs' attorney asked the jurors . . . to place themselves in plaintiffs' position . . . and award an amount of money they would desire if they had been the victims." *Coral Gables Hosp., Inc. v. Zabala*, 520 So. 2d 653 (Fla. 3d DCA 1988); *see also SDG Dadeland Associates, Inc. v. Anthony*, 979 So. 2d 997 (Fla. 3d DCA 2008); *Magid v. Mozo*, 135 So. 2d 772 (Fla. 1st DCA 1962).
  - "Asking the jury to imagine the injured party's anguish and frustration." *Cohen v. Pollack*, 674 So. 2d 805, 807 (Fla. 3d DCA 1996).
  - "If the shoe is on the other foot, would you wear it?" *National Car Rental System, Inc. v. Bostic*, 423 So. 2d 915 (Fla. 3d DCA 1983).
  - "Now, I ask you, if you had been the unfortunate person who had slid into the rear end of that car, how would you want to be judged? All I ask you to do is bring back your verdict as you would want some jury to bring back a verdict for you." *Miku v. Olmen*, 193 So. 2d 17, 18 (Fla. 4th DCA 1966), *cert. denied*, 201 So. 2d 232 (Fla. 1967); *but see Cleveland Clinic Florida v. Wilson*, 685 So. 2d 15 (Fla. 4th DCA 1997) (harmless error, rather than per se reversible error, test applies).
  - Asking jurors in a nuisance case "to envision themselves pulling rats out of their pools, bails of pine straw starting fires in their yards, and thousands of mosquitoes and other vermin flying in their neighborhood." *Tremblay v. Santa Rosa County*, 688 So. 2d 985, 988 (Fla. 1st DCA 1997), *disapproved on other grounds by Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000).
- Attorney's opinion
  - Attorney's personal belief in the justness of the cause, the credibility of witnesses, or his personal knowledge of the facts in issue. *Hillson v. Deeson*, 383 So. 2d 732 (Fla. 3d DCA 1980) (but see rule 4-3.4(e), Rules Regulating The Florida Bar, regarding comments on credibility of witness).
  - Personal belief in one's client or in the justice of the client's cause. *Albertson's, Inc. v. Brady*, 475 So. 2d 986 (Fla. 2d DCA 1985); *Seguin v.*

Hauser Motor Co., 350 So. 2d 1089 (Fla. 4th DCA 1977); *Miami Coin-O-Wash, Inc. v. McGough*, 195 So. 2d 227 (Fla. 3d DCA 1967).

- Personal feelings as to how events really happened and the veracity of witnesses. *Riley v. Willis*, 585 So. 2d 1024 (Fla. 5th DCA 1991).
- Personal opinion that the hospital's decision "was the most ridiculous decision that anybody has ever made in history." *Baptist Hosp., Inc. v. Rawson*, 674 So. 2d 777, 778 (Fla. 1st DCA 1996).
- "[T]he defense's theory of fault was 'ridiculous,' that [the defendant] presented 'ridiculous' testimony, and that [counsel] thought the logging truck driver did an exceptional job in avoiding fatalities." *Sacred Heart Hosp. of Pensacola v. Stone*, 650 So. 2d 676, 680 (Fla. 1st DCA 1995).

- Facts outside the record
  - Suggesting that a party has or has not been charged with a traffic violation. *Moore v. Taylor Concrete & Supply Co., Inc.*, 553 So. 2d 787 (Fla. 1st DCA 1989).
  - Implying that the attorney's client was not charged with causing the auto accident at issue, particularly when he was, and an order in limine had been entered. *Elsass v. Hankey*, 662 So. 2d 392 (Fla. 5th DCA 1995).
  - Defense counsel stating that the three-year-old plaintiff's mother is so attractive that the plaintiff will inevitably have a new father at some time in the future. *Tito v. Potashnick*, 488 So. 2d 100 (Fla. 4th DCA 1986).
  - Suggesting that the defendant would have apologized for being at fault "*but his lawyers are keeping him from it*." *Riley v. Willis*, 585 So. 2d 1024, 1028 (Fla. 5th DCA 1991).
  - "Walking out of court yesterday, [the plaintiff] wants to know what are they going to do to [the defense expert]. For what? Well, he didn't tell the truth." *Sacred Heart Hosp. of Pensacola v. Stone*, 650 So. 2d 676, 679 (Fla. 1st DCA 1995).
  - Testifying (in the guise of argument) as to the substance of a telephone conversation the attorney had with the opponent's expert witness. *Bloch v. Addis*, 493 So. 2d 539 (Fla. 3d DCA 1986).

- Reference to the specific amount of the insured's policy limit. *Auto-Owners Ins. Co. v. Dewberry*, 383 So. 2d 1109 (Fla. 1st DCA 1980).
- Challenging an opponent to explain matters in closing argument which are outside the evidence and the issues. *Riggins v. Mariner Boat Works, Inc.*, 545 So. 2d 430 (Fla. 2d DCA 1989).
- Instructing the jury "not to worry whether the defendant will contribute a dime of money" (as a reference to insurance). *Nicaise v. Gagnon*, 597 So. 2d 305, 306 (Fla. 4th DCA 1992).
- Suggesting that insurance coverage is available to pay the judgment. *Stecher v. Pomeroy*, 253 So. 2d 421 (Fla. 1971); *Peppe v. Clow*, 307 So. 2d 886 (Fla. 3d DCA 1975).
- Challenging the plaintiff's attorney to explain in his closing why he used depositions of three eyewitnesses and didn't bring the witnesses to the trial so that they could be subjected to cross-examination. *Riggins v. Mariner Boat Works, Inc.*, 545 So. 2d 430 (Fla. 2d DCA 1989).
- Placing "a monetary value on the life of the . . . decedent, just as a monetary value is placed on an eighteen million dollar Boeing 747 or an eight million dollar SCUD missile." *Public Health Trust of Dade County v. Geter*, 613 So. 2d 126, 127 (Fla. 3d DCA 1993).
- Displaying excluded evidence. *Maercks v. Birchansky*, 549 So. 2d 199 (Fla. 3d DCA 1989).
- Commenting on what a missing witness would have said. *Carnival Cruise Lines v. Rosania*, 546 So. 2d 736 (Fla. 3d DCA 1984).
- Stating that future medical treatment will be free at the V.A. hospital. *Goff v. 392208 Ontario Ltd.*, 539 So. 2d 1158 (Fla. 3d DCA 1989).

- Effect on the community
  - "A verdict for [the plaintiff] is going to bring an immediate halt to hog hunting in Okeechobee." *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016, 1021 (Fla. 4th DCA 1996).
  - "The opportunity that you have is to speak with a voice so loud and so strong and so firm that it will be heard from here to Miami" and beyond.

S.H. Inv. and Development Corp. v. Kincaid, 495 So. 2d 768, 771 (Fla. 5th DCA 1986).

- "If you let them get away with irresponsible medicine, then you breed irresponsible medicine." *Baptist Hosp., Inc. v. Rawson*, 674 So. 2d 777, 779 (Fla. 1st DCA 1996).

- Telling the jury that as the "conscience of the community" it should "send a message with its verdict." *Maercks v. Birchansky*, 549 So. 2d 199 (Fla. 3d DCA 1989); *see also Superior Industries Intern., Inc. v. Faulk*, 695 So. 2d 376 (Fla. 5th DCA 1997). However, a new trial was not warranted when "conscience of the community" comments were not accompanied by a request to punish the defendant. *Florida Crushed Stone Co. v. Johnson*, 546 So. 2d 1102 (Fla. 5th DCA 1989).

- "[I]t's going to happen to other people. You've got to stop [medical malpractice] right here and now." *Brumage v. Plummer*, 502 So. 2d 966, 968 (Fla. 3d DCA 1987) (improper, but not fundamental error so as to require new trial).

- Suggesting that bringing frivolous lawsuits is one of the major ills of society. *Bellsouth Human Resources Admin., Inc. v. Colatarci*, 641 So. 2d 427 (Fla. 4th DCA 1994).

- "[I]t is absolutely ridiculous. This is why we're here. This is why our courtrooms are crowded and this is why we read articles in the newspaper, because of things like that." *Stokes v. Wet 'N Wild, Inc.*, 523 So. 2d 181, 182 (Fla. 5th DCA 1988).

- Referring to the "insurance crisis." *Davidoff v. Segert*, 551 So. 2d 1274, 1275 (Fla. 4th DCA 1989).

- Discussing the possible relationship between verdicts in auto collision cases and rising insurance premiums. *Russell v. Guider*, 362 So. 2d 55 (Fla. 4th DCA 1978).

- Suggesting that "the plaintiff and her family would become public charges unless a verdict favorable to the plaintiff was returned." *Rogers v. Myers*, 240 So. 2d 516, 518 (Fla. 1st DCA 1970).

- Asking the jury to make an example of the expert witness by returning a verdict against the side calling him. *Bloch v. Addis*, 493 So. 2d 539 (Fla.

3d DCA 1986).

- "[I]f the jury should find the defendants' defenses not credible, it should deal 'very, very harshly' with defendants." *Sacred Heart Hosp. of Pensacola v. Stone*, 650 So. 2d 676, 679 (Fla. 1st DCA 1995).

- "I want you to send a message to Erie, Pennsylvania." *Erie Ins. Co. v. Bushy*, 394 So. 2d 228, 229 (Fla. 5th DCA 1981).

- Pretrial or post-trial procedures

  - Telling the jury not to worry about the amount of damages because if the award is too high, the court can reduce it through remittitur. *City Provisioners, Inc. v. Anderson*, 578 So. 2d 855 (Fla. 5th DCA 1991).

  - Stating that if the jury makes a mistake in the verdict, another court would correct it. *Blackwell v. State*, 79 So. 731 (Fla. 1918).

  - Making comments to the effect that "the defendants should not have defended against the . . . action but should have put $6,000,000.00 on the table" to settle. *Fayden v. Guerrero*, 474 So. 2d 320, 321 (Fla. 3d DCA 1985).

  - Accusing opposing counsel "of 'fraud', hiding evidence, putting up roadblocks to the discovery of relevant evidence, and picking and choosing the evidence it would produce in response to discovery demands." *Emerson Elec. Co. v. Garcia*, 623 So. 2d 523, 525 (Fla. 3d DCA 1993).

- Highly emotional argument

  - Stating, on the issue of damages, "*I know last night I did not sleep. I know that last night was probably the first time in a long time that I told my wife that I loved her. I know that I was in fear last night, not fear of dying but fear of living if someone I loved died.*" *Metropolitan Dade County v. Cifuentes*, 473 So. 2d 297, 298 (Fla. 3d DCA 1985).

  - Mentioning the plaintiff's experience of "having his son brought before him and seeing him shot to death," which was prejudicial and immaterial to the issues in the lawsuit. *Eastern S. S. Lines, Inc. v. Martial*, 380 So. 2d 1070, 1072 n.2 (Fla. 3d DCA 1980)..

- Currying favor with the jury
    - Addressing jurors by name. *Cummins Alabama, Inc. v. Allbritten*, 548 So. 2d 258 (Fla. 1st DCA 1989).
    - Telling jurors that "he liked the jury when he picked them and he liked them now." *Kelley v. Mutnich*, 481 So. 2d 999, 1000 (Fla. 4th DCA 1986).

Chapter Fifteen

Jury Instructions

I. Written Jury Instructions
(Monologue)

To assist you in following the law as I instruct you, the instructions have been reduced to writing. We have a copy of the written instructions for each of you. Also, you may take these instructions with you to the jury room for use during your deliberations. After you deliberate and return your verdict, I will need all [6] [12] of your jury instruction packets back.

II. Sequestration of the Jury
(Monologue)

During the jury's deliberation you must be sequestered. That is, you must not communicate with or consult any person or source of information other than your communications with me through our bailiff. To be sure there is no chance of this rule being violated, even unintentionally, our bailiff will now be collecting all cell phones, smartphones, tablets, laptops, and other communication devices. We have a secure cabinet here in the courtroom where the bailiff will store these. They will be returned to you when you have rendered your verdict.

III. Sending the Jury to Deliberate
(Monologue)

(at the close of instructions, but before the jury retires, call counsel to the bench and inquire:)

Has the court omitted any instructions that the court advised counsel in the instruction conference it would give in this case?

Are there any objections to the instructions as given by the court?

(to jury:)

When you have reached a verdict, knock on the door and inform the bailiff.

You may retire now to deliberate your verdict.

IV. Instructions to Jury (Fla. R. Civ. P. 1.470(b))

(b) Instructions to Jury. The Florida Standard Jury Instructions

appearing on the court's website at https://jury.flcourts.org may be used, as provided in Florida Rule of Judicial Administration 2.580 by the trial judges in instructing the jury in civil actions. Not later than at the close of the evidence, the parties shall file written requests that the court instruct the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the instructions to be given. At such conference, all objections shall be made and ruled upon and the court shall inform counsel of such instructions as it will give. No party may assign as error the giving of any instruction unless that party objects thereto at such time, or the failure to give any instruction unless that party requested the same. The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations. The court shall provide each juror with a written set of the instructions for his or her use in deliberations. The court shall file a copy of such instructions.

V. Summing up and Comment by Judge (§ 90.106, Fla. Stat.)

A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.

Chapter Sixteen

Jury Deliberations

I. Juror Questions During Deliberations, SJI (Civil) 801.1 (Former 7.3(a))

Members of the jury, I have discussed your [note] [question] with the attorneys. You have [asked the following question] [made the following request]:

(read juror's note):

If I have not read your [note] [question] correctly, please raise your hand.

(clarify question as needed):

1. The answer is:

(respond to question):

OR

2. **I am not able to [answer] [respond to] this [question] [request] because it [calls for information that is not in evidence] [is not proper to be considered in this case] [**(other reason why question or request is improper**)]. Your decision must be based only on the evidence presented in the trial and the law that I have given you. [If you have any other specific questions, please send another note, and I will see if I can answer it.] [**(other appropriate response)**].**

NOTES ON USE FOR 801.1

1. The procedure contained in 801.1 assumes that a juror question or request will be in writing. Oral questions from jurors are discouraged.

2. In responding to a juror's question or request, the court should answer as specifically as possible. To avoid inadvertent error, it is a good practice to prepare a written answer with the assistance of the attorneys and then read this answer to the jury.

3. All written questions and answers should be preserved and placed in the court file.

(Unofficial comment: The best practice is to send in a written response, but only if the jury has written copies of all instructions.)

II. Read-Back of Testimony, SJI (Civil) 801.2 (Former 7.3(b))

a. Read-back granted as requested:

Members of the jury, you have asked that the following testimony be read back to you: *(describe testimony)*

The court reporter will now read the testimony, which you have requested.

OR

b. Read-back deferred:

Members of the jury, I have discussed with the attorneys your request to have certain testimony read back to you. It will take approximately (amount of time) **to have the court reporter prepare and read back the requested testimony.**

I now direct you to return to the jury room and discuss your request further. If you are not able to resolve your question about the requested testimony by relying on your collective memory, then you should write down a more specific description of the part of the witness(es)' testimony which you want to hear again. Make your request for reading back testimony as specific as possible.

c. Read-back denied:

Members of the jury, you have asked that the following testimony be read back to you: *(describe testimony)*

I am not able to grant your request because (give reason(s) for denying request).

NOTE ON USE FOR 801.2

1. In civil cases, the decision to allow read-back of testimony lies within the sound discretion of the trial court. *Broward County School Bd. v. Ruiz*, 493 So.2d 474, 479–480 (Fla. 4th DCA 1986). However, the trial court must not tell jurors that they are prohibited from requesting a read-back of testimony. *Johnson v. State*, 53 So.3d 1003 (Fla. 2010).

2. Any read-back of testimony must take place in open court. Transcripts

or tapes of testimony must not be sent back to the jury room.

III. Jury Questions
(Quick Reference)

A jury has a right to ask questions calculated to shed light on the controversy or which will assist the jury in arriving at a just result. *Sutton v. State*, 51 So. 2d 725 (Fla. 1951).

When a question from a deliberating jury indicates confusion about the law, a trial court abuses its discretion when its response fails to ameliorate the confusion. *Morgan Intern. Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.*, 571 So. 2d 52 (Fla. 3d DCA 1991).

If the court responds to a jury question in an unrecorded ex parte communication without providing the parties an opportunity to be heard on the suggested response, prejudice is presumed and the burden is on the party seeking to uphold the jury's verdict to demonstrate the ex parte communication was actually harmless. *Hatin v. Mitjans*, 578 So. 2d 289 (Fla. 3d DCA 1991). Ex parte communication between the court or bailiff and a deliberating jury are strongly disapproved. *Sears Roebuck and Co. v. Polchinski*, 636 So. 2d 1369 (Fla. 4th DCA 1994); *Blender v. Malecki*, 606 So. 2d 498 (Fla. 4th DCA 1992).

If the court responds to a jury question by sending the jury a written copy of one of the instructions previously read by the court, all of the instructions must be sent in the same form. *All Bank Repos, Inc. v. Underwriters of Lloyds of London*, 582 So. 2d 692 (Fla. 4th DCA 1991).

IV. Jury Deadlocked Instruction, SJI (Civil) 801.3 (Former 7.3(c)) (Former 7.3(c))

801.3 JURY DEADLOCKED

Members of the jury, we understand you are having difficulty reaching a verdict. This case is important to the parties, and we appreciate your efforts. But I am going to ask you to go back to try again to reach a verdict if you reasonably can.

Please carefully consider the views of all the jurors, including those you disagree with. Keep an open mind and feel free to change your view if you conclude it is wrong.

You should not, however, give up your own conscientiously held views simply to end the case or avoid further discussion. Each of you must decide the case for yourself and not merely go along with the conclusions of other jurors.

If you cannot agree on what a witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, your request should be as specific as possible.

You may now return to the jury room for further deliberations.

NOTES ON USE FOR 801.3

1. This instruction should not be given unless the jury indicates it is deadlocked. *Moore v. State*, 635 So.2d 998 (Fla. 4th DCA 1994); *Armstrong v. State*, 364 So.2d 1238 (Fla. 1st DCA 1978).

2. This instruction should be given only once. If after having received this instruction, the jury announces again that it is deadlocked, the jury cannot be sent back for further deliberations. *Tomlinson v. State*, 584 So.2d 43 (Fla. 4th DCA 1991).

V. Unanimous Verdict Not Possible
(Monologue)

It being apparent that you are unable to reach a verdict, this court has no alternative but to declare a mistrial of this cause.

This case shall be reset for trial by written order of the court.

Chapter Seventeen

Receiving the Verdict

I. Receiving the Verdict
(Dialogue)

Has the jury selected a foreperson?

Mr./Ms._____, has the jury reached a verdict?

Please hand your verdict to the bailiff.

(examine verdict – if no obvious problems exist, hand to deputy clerk. If problems appear, call counsel to the bench)

Madam/Mr. Clerk, please publish the verdict.

(after verdict published:)

Does counsel for either party wish to have the jury polled?

II. Polling the Jury
(Monologue)

Ladies and gentlemen, at this time the deputy clerk will poll the jury. That simply means he/she will ask each of you individually if the verdict he/she has read is your verdict. If it is, you should only answer "yes." If it is not, of course, you should answer "no" and nothing further.

Madam/Mr. Clerk, please poll the jury.

[NOTE: If one juror answers "NO," stop the polling at once and direct the jury to continue its deliberations. Brutton v. State, *632 So. 2d 1080 (Fla. 4th DCA 1994); but see* Horvath v. Anderson, Moss, Parks & Sherouse, P.A., *728 So. 2d 315 (Fla. 3d DCA 1999).]*

A juror should not have to respond to questions as to why she changed her mind and joined in the verdict. *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So. 2d 547, 549 (Fla. 4th DCA 2004); *Brutton v. State*, 632 So. 2d 1080 (Fla. 4th DCA 1994).

III. Polled Juror Answering in the Negative
(Quick Reference)

If one juror answers "NO," stop the polling at once and direct the jury to

continue its deliberations. *Brutton v. State*, 632 So. 2d 1080 (Fla. 4th DCA 1994); *but see Horvath v. Anderson, Moss, Parks & Sherouse, P.A.*, 728 So. 2d 315 (Fla. 3d DCA 1999).

There appears to be no approved standard instruction for this situation but giving a definition of "unanimous verdict" has been sustained. *Alicot v. Dade County*, 132 So. 2d 302 (Fla. 3d DCA 1961). Some modified version of the Jury Deadlocked instruction would probably be approved.

Chapter Eighteen

Discharge of Jury

I. Instruction upon Discharge of Jury, SJI (Civil) 801.4

Ladies and gentlemen, on behalf of the parties, lawyers and the people of the State of Florida, I wish to thank you for your time and consideration of this case.

I also wish to advise you of some very special privileges enjoyed by jurors.

No juror can be required to talk about the discussions that occurred in the jury room, except by court order. For many centuries, our society has relied upon juries for consideration of difficult cases. We have recognized for hundreds of years that a jury's deliberations, discussions and votes should remain their private affair as long as they wish it. Therefore, the law gives you a unique privilege not to speak about the jury's work.

The lawyers and their representatives are not permitted to initiate any communication with you about the trial. However, you may speak to the lawyers or anyone else about the trial. You also have the right to refuse to speak with anyone. A request may come from those who are simply curious, or from those who might seek to find fault with you. It will be up to you to decide whether to preserve your privacy as a juror.

(In discharging the jury, the court should advise them of their further responsibilities, if any.)

NOTE ON USE FOR 801.4

After this instruction, the jury should be discharged and no further discussion should be had between the judge and the jurors, or between the attorneys and jurors, except in accordance with applicable law. See *Fla.R.Civ.P.* 1.431(h); Rule Reg. Fla. Bar 4-3.5(d)(4).

II. Release of Jury
(Monologue)

I thank you for your service in this case. For our legal system to work, it is essential that citizens such as you be willing to sacrifice their time and perform the service you have just rendered. I hope you have not found this duty to be burdensome or unpleasant and that you will be willing to serve again if the call

comes. At this time, I am going to release you. You do not need to return to the jury pool room and advise the clerk that you have completed your service in this trial. Again, thank you. You may step down.

III. Court Not to Comment on Verdict (Fla. Code Jud. Conduct, Canon 3B(11))

A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

IV. Destruction of Jury Notes (Fla. R. Jud. Admin. 2.430(k))

(k) Destruction of Jury Notes. At the conclusion of the trial and promptly following discharge of the jury, the court shall collect all juror notes and immediately destroy the juror notes.

Chapter Nineteen

Close of Court

I. Entering Judgment
(Dialogue)

Are there any other matters which need to be determined before judgment is entered?

(if not:)

Counsel for (prevailing party) should prepare a judgment based on the verdict and forward it to the court with a copy to opposing counsel.

(if yes:)

You may set those matters on the court's calendar.

II. Adjournment
(Monologue)

Is there any other business to come before the court at this time?

If not, this court will stand adjourned.

APPENDICES

Appendix A

Oaths

I. Oath of Jurors Before Voir Dire, SJI (Civil) 101.1

Do you solemnly swear or affirm that you will answer truthfully all questions asked of you as prospective jurors [so help you God]?

II. Oath of Jurors After Voir Dire, SJI (Civil) 101.2

Do you solemnly swear or affirm that you will well and truly try this case between the [plaintiff(s)] [petitioner(s)] and [defendant(s)] [respondent(s)], and a true verdict render according to the law and evidence [so help you God]?

III. Oath of Jurors in Eminent Domain Cases (Condemnation)

Do you and each of you solemnly swear or affirm that you will well and truly try this issue, wherein _____ is petitioner and _____ and others are defendants, and will determine what compensation shall be made to the defendants for the property which has been appropriated, which amount shall be a full compensation therefore of condemnation, or appropriation?

IV. Oath of a Witness, SJI (Civil) 101.3

Do you solemnly swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth [so help you God]?

V. Oath of an Interpreter, SJI (Civil) 101.4

Do you solemnly swear or affirm that you will make a true interpretation to the witness of all questions or statements made to [him] [her] in a language which that person understands, and a true interpretation of the witness' statements into the English language [so help you God]?

VI. Oath of a Court Reporter

Do you solemnly swear or affirm that you will make a true and accurate record of all proceedings and testimony in this case, transcribe into writing such record, if necessary, and otherwise perform the duties of a court reporter as required by law?

Appendix B

Conversion Chart of Jury Instructions*

[The Florida Standard Jury Instructions in Civil Cases were reorganized and renumbered in *In re Standard Jury Instructions In Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666 (Fla. 2010)]

OLD NO.	TITLE	NEW NO.
I	**INSTRUCTIONS BEFORE AND DURING TRIAL**	
1.0	Preliminary Instruction [Prior to Voir Dire]	201.1, 201.3
1.1	Preliminary Instruction [After Jury Selection]	202.1–202.2
1.2	Improper Remarks Regarding Insurance And Other Matters	301.9
1.3	Deposition Testimony, Interrogatories, Stipulated Testimony, Stipulations, And Admissions	301.1
1.4	Dead Person's Statute (Failure To Testify)	Deleted
1.5	Instruction When First Item Of Documentary, Photographic Or Physical Evidence Is Admitted	301.2
1.6	Instruction When Evidence Is First Published To Jurors	301.3
1.7	Instruction Regarding Visual Or Demonstrative Aids	301.4
1.8	Note-Taking By Jurors	202.3
1.9	Jury To Be Guided By Official English Translation/Interpretation — Preliminary Instructions	202.5
1.10	Jury To Be Guided By Official English Translation/Interpretation — Instructions During Trial	301.6
1.11	Jury To Be Guided By Official English Translation/Interpretation — Transcript Of Recording In Foreign Language (Accuracy Not In Dispute)	301.7, 301.8
1.12	Jury To Be Guided By Official English Translation/Interpretation — Closing Instructions	601.3
1.13	Questions By Jurors	202.4
II	**GENERAL INSTRUCTIONS**	
2.1	Introductory Instruction	601.1
2.2	Believability Of Witnesses	601.2
2.3	Failure To Produce Witness	601.2, n. # 3
2.4	Multiple Claims, Numerous Parties, Consolidated Cases	601.4
III	**ISSUES**	
3.1	Preemptive Charges: Issues Arising On Claim	401.13, 402.8
3.2	Issues As To Claimant's Status Or Defendant's Duty	
a.	Invitee or invited licensee	401.16a

OLD NO.	TITLE	NEW NO.
b.	Passenger of common carrier	401.15
c.	Discovered trespasser [or licensee (uninvited) whose presence is foreseeable]	401.16b
d.	Attractive nuisance	401.16c
e.	Automobile passenger (not a guest)	Deleted
3.3	Issues As To Vicarious Liability	401.14, 402.9
3.4	Greater Weight (Preponderance) Of Evidence And Burden Of Proof On Preliminary Issues	401.17, 402.10
3.5	Negligence Issues	401.17, 401.18, 402.11, 402.12
3.5, Page 1	Integrated Charge On Claim And Counterclaim In Comparative Negligence Cases	401.24
3.5, Page 2	Issues On Claim And Counterclaim	401.24
3.5, Page 3	Conventional Charges On Claim Or Counterclaim	401.18
a.	Negligence, generally	401.18a
b.	Driver's negligence	401.18a
c.	Two drivers' negligence	401.18b
d.	Drivers' gross negligence (guest statute)	Deleted
e.	Railroad, airline or bus line negligence	401.18d
f.	Landowner or possessor's negligence (toward invitee and invited licensee)	401.20a
g.	Landowner or possessor's negligence (toward discovered trespasser or foreseeable licensee)	401.20b
h.	Attractive nuisance	401.20c
i.	Landlord's negligence (toward tenant)	401.20d
j.	Municipality's negligence in maintenance of sidewalks and streets	401.20e
k.	Negligence of parent (damage caused by child)	401.18c
l.	Negligence of physician or hospital, generally	402.11a
m.	Negligence of physician, osteopath, chiropractor, podiatrist or dentist in treatment without informed consent (ch. 75-9, §11, Fla. Laws)	402.11c
3.6a, b, and c	Issues As To Legal (Proximate) Cause And Damage	401.18, 401.19, 401.20, 402.11, 402.12
3.7	Greater Weight (Preponderance) Of Evidence And Burden Of Proof	401.21, 402.13
3.8	Defense Issues	401.22a–f,

OLD NO.	TITLE	NEW NO.
		402.14
a.	Comparative negligence generally	401.22a, 402.14b
b.	Driver's comparative negligence (when owner sues third party)	401.22b
c.	Joint enterprise (driver's negligence)	401.22.c
d.	Comparative negligence of father predicated on mother's negligence (claim for death of child)	401.22d, 402.14c
e.	Comparative negligence of custodian of child other than mother	401.22e, 402.14d
f.	Apportionment of fault	401.22f, 402.14e
g.	Statute of limitations medical malpractice	402.14a
3.8, Page 4	Greater Weight Of Evidence And Burden Of Proof On Defense Issues	401.23, 402.15
3.9	Greater Weight (Preponderance) Of Evidence Defined	401.3, 402.3, 404.3, 405.3, 406.3, 407.3, 408.3, 409.3, 410.3, 412.5, 413.3
IV	**NEGLIGENCE**	
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4.2	Professional Negligence	402.4, 402.5
a.	Negligence (physician, hospital or other health provider)	402.4a
b.	Negligence (treatment without informed consent)	402.4b
c.	Negligence of lawyer, architect, other professional	402.5
4.3	Comparative Negligence	401.22, n. # 1
4.4	Negligence Of A Child	401.5
4.5	Negligence Of A Common Carrier (Passenger Case)	401.6
4.6	Res Ipsa Loquitur	401.7, 402.4e
4.7	Right To Assume Others Will Exercise Reasonable Care	401.4, n. # 3
4.8	Sudden Emergency	401.4, n. # 4
4.9	Violation Of Nontraffic Penal Statute Or Ordinance As Negligent	401.8
4.10	Equal And Reciprocal Rights And Duties Of Motorists And Pedestrians	401.10

OLD NO.	TITLE	NEW NO.
4.11	Violations Of Statute, Ordinance Or Regulation Evidence Of Negligence	401.9
4.12	Duty Of Motorist Toward Children	401.11
4.13	Traffic	401.4, n. # 5
4.14	Railroads	401.4, n. # 6
PL 1–5	Product Liability	
V	**CAUSATION**	
5.1	Legal Cause (Proximate, Concurring, Intervening Cause)	401.12, 402.6, 404.6, 405.6, 406.7, 407.5, 408.4, 409.6, 410.6, 411.4
5.3	Legal Cause (Tr[e]atment Without Informed Consent)	402.7
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b.	When there is no issue of comparative negligence	501.1b
(1)	When a Fabre issue is not involved	501.3
(2)	When a Fabre issue is involved	501.3
c.	When there is an issue of comparative negligence	501.3
(1)	When a Fabre issue is not involved	501.3
(2)	When a Fabre issue is involved	501.3
d.	Motor vehicle no fault threshold instruction	501.4
e.	Unmarried dependent's claim under Fla. Stat. § 768.0415	501.2g
6.2	Personal Injury And Property Damages: Elements	
a.	Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life	501.2a
b.	Medical expenses	501.2b
c.	Lost earnings, lost time, lost earning capacity	501.2c
d.	Spouse's loss of consortium and services	501.2d
e.	Parental loss of filial consortium; care and treatment of claimant's minor child; child's services, earnings, earning capacity; loss of filial consortium as a result of significant injury resulting in child's permanent disability	501.2e, 501.2f
f.	Unmarried dependent's damages under Fla. Stat. § 768.0415	501.2g
g.	Other contributing causes of damage	501.5
h.	Property damage	501.2h

OLD NO.	TITLE	NEW NO.
6.3	Wrongful Death Damages Recoverable For Estate When There Are No Survivors: Introduction	502.1
a.	When directed verdict is given on liability (3.1d)	502.1a
b.	When there is no issue of comparative negligence	502.1b
c.	When there is an issue of comparative negligence	502.1c
6.4	Wrongful Death Damages Recoverable For Estate When There Are No Survivors: Elements	502.4
6.5	Wrongful Death Damages Recoverable For Estate And Survivors: Introduction	502.1, 502.2
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b.	When there is no issue of comparative negligence	502.1b
c.	When there is an issue of comparative negligence	502.1c
6.6	Wrongful Death Damages Recoverable For Estate And Survivors: Elements	502.2
a.	Lost earnings	502.2a
b.	Lost accumulations	502.2b
c.	Medical or funeral expenses	502.2c
d.	Lost support and services	502.2g
e.	Medical and funeral expenses paid by survivor	502.2h
f.	Damages of surviving spouse	502.2d
g.	Damages by surviving child	502.2e
h.	Damages by surviving parent of child	502.2f
6.7	Wrongful Death Damages Of Estate And Survivors: Separate Findings For Estate And Survivors	502.3
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a.	Claimant permanently injured	501.6
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c.	Personal representative claiming damages for loss to survivor (6.5, 6.6)	502.6b
6.10	Reduction Of Damages To Present Value	502.7 and 501.7
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PD	**PUNITIVE DAMAGES**	
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OLD NO.	TITLE	NEW NO.
		Appendix C
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1.3	Contribution sought by cross-claims between defendant tortfeasors in injured party's original action against them	412.1
1.4	Contribution sought by third party claim in injured party's action against third party claimant only	412.2
1.5	Defense issues and burden of proof of intentional (willful or wanton) conduct	412.9
MI 3	Insurer's Bad Faith	404
3.1	Insurer's Bad Faith Failure To Settle	404.4
a.	Issue	404.7
b.	Burden of proof	404.8
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d.	Punitive damages	404.13
MI 4	Defamation	405
4.1	Defamation: Public Official Or Public Figure Claimant	405.7, 405.4
4.2	Defamation: Private Claimant, Media Defendant	405.8
4.3	Defamation: Private Claimant, Nonmedia Defendant With Or Without Qualified Privilege	405.9
a.	Issue whether a defamatory publication concerning claimant was made as claimed	405.9a
b.	Defense issues of truth and good motives	405.9b
c.	Defense issue whether defendant had qualified privilege	405.9c
d.	Issue whether defendant abused qualified privilege	405.9d
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4.4	Defamation: Causation And Damages	503.10
MI 5.1	Malicious Prosecution (Issues And Elements)	406
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OLD NO.	TITLE	NEW NO.
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e.	Burden of proof on claim	406.9
f.	Advice of counsel as defense	406.10
g.	Burden of proof on defense	406.11
h.	"Greater weight of the evidence" defined	406.3
MI 5.2	Malicious Prosecution (Issues And Elements)	
a.	Injury to reputation or health; shame, humiliation, mental anguish, hurt feelings	406.12, 501.1a
b.	Aggravation or activation of disease or defect	501.5
c.	Legal expense	406.12
d.	Medical expenses, care and treatment of claimant	501.2b
e.	Lost earnings, lost time, lost earning capacity	501.2c
f.	Reduction to present value	501.7
MI 6.1	False Imprisonment	407
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h.	Burden of proof on defense	407.9
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MI 7	Tortious Interference With Business Relationships	408
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OLD NO.	TITLE	NEW NO.
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c.	Comparative negligence defense; burden of proof on defense	409.11
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e.	Negligence	409.4
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MI 9	Emergency Medical Treatment	402.16
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a.	Issues on claim	410.7
b.	Extreme and outrageous conduct	410.4
c.	Severe emotional distress	410.5
d.	Burden of proof on claim	410.8
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MI 11	Civil Theft (Fla. Stat. § 772.11)	411
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d.	Burden of proof on claim	411.6
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7.3(b)2.	Read-Back deferred	801.2b
7.3(b)3.	Read-Back denied	801.2c
7.3(c)	Jury Deadlocked	801.3
7.4	Instruction Upon Discharge Of Jury	801.4

*This chart is taken from the Florida Supreme Court website:
https://jury.flcourts.org/civil-jury-instructions-home/former-civil-instructions/
(click on “Book Conversion Table (rtf)”)