PART I

Introduction to Civil Litigation for the Paralegal

CHAPTER 1

Litigation and The Paralegal

KEY POINTS

- Civil Litigation in the Florida State Courts is regulated by:
  - The Florida Rules of Civil Procedure.
  - The Florida Supreme Court, having jurisdiction over the courts in Florida as mandated by the Florida State Constitution, Article V.
  - Florida Supreme Court in conjunction with the Judicial Management Council and the Florida Bar, Florida Rules of Judicial Administration is charged with the responsibility of examining issues of rules of court and the rule-making process. See Florida Rules of Judicial Administration, Rules 2.125 and 2.130.
  - Local Rules of Court.
  - Florida Case Law.

WHAT CIVIL LITIGATION IS IN FLORIDA

Fla. R. Civ. P. 1.010, provides that:

...These rules shall be construed to secure the just, speedy, and inexpensive determination of every [civil] action...

As your instructor has told you, federal and state court systems are similar. Because of the very nature of the dual court system, and the purpose of federalism as a political concept, there are many differences as to how the states, through delegation of power by their citizens, chose to carry out the procedures of civil judicial procedure. Remember, however, that whatever the differences, the process of the state judiciaries must be rooted in and fully compatible with the mandate of the 5th and 14th Amendments in conjunction with other Amendments of the United States Constitution, to insure due process of law. Fair and appropriate notice and hearing of judicial action to the parties of a lawsuit, as determined by the Common Law of the United States Constitution, is the standard of review. Regardless of the differences between the federal and state court systems, each rule of civil procedure must meet this standard. If you, as a student of civil procedure, keep the fundamental ideals of civil procedure in mind, you will find the differences and nuances of the state system less confusing. The Florida Rules of Civil Procedure (hereafter Fla. R. Civ. P.) have been developed as the state of Florida has tried to find its way toward fulfilling the requirements of the United States Constitution, the Florida Constitution, and the desires of Floridians for orderly and just civil judicial action.
DIFFERENT TYPES OF CIVIL LAWSUITS

Fla. R. Civ. P. 1.010, On the Scope and Title of the Rules, states that:

These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply . . .

As the Florida Rules of Civil Procedure states, cases concerning the probate of wills and family law causes of action such as dissolution, child custody, and adoption, and cases concerning relatively minimal monetary value are primarily governed by their separate sets of rules. If those rules are silent on a particular procedural issue, the Florida Rules of Civil Procedure would be consulted.

TO LEARN MORE, GO TO THE INTERNET
Go to www.leg.state.fl.us and www.flabar.org to find these other rules of procedure.

ALTERNATIVE DISPUTE RESOLUTION

Florida has enacted some methods so its citizens can more peacefully and inexpensively resolve disputes than formerly available in the traditional litigation or preparation for trial model of justice. In some cases, Alternative Dispute Resolution (ADR) may not provide the highest level of justice, but is seen by the courts, some lawyers, and parties as less time-consuming and expensive in terms of money and emotional and intellectual resources.

The Florida Rules of Civil Procedure include the following rules regarding ADR procedures:

Rule 1.700 Rules Common to Mediation and Arbitration
Rule 1.710 Mediation Rules
Rule 1.720 Mediation Procedures
Rule 1.730 Completion of Mediation
Rule 1.750 County Court Actions
Rule 1.800 Exclusions from Arbitration
Rule 1.810 Selection and Completion of Arbitrators
Rule 1.820 Hearing Procedures for Non-Binding Arbitration
Rule 1.830 Voluntary Binding Arbitration

This list is not necessarily all-inclusive. Remember, you must always do your own research to be ethically accurate. This list is included here in order to demonstrate the attention now paid to ADR in Florida. This list, of course, does not include specific provisions in the Florida Family Law Rules of Procedure, the Florida Probate Rules, or any other specific body of rules that are beyond the scope of this supplement. Mandates or rules encouraging ADR do exist in other sets of rules.

TO LEARN MORE, GO TO THE INTERNET
Go to www.leg.state.fl.us and search the key words “alternative dispute resolution,” “mediation arbitration,” “conciliation.”

LIMITATIONS TO ACCESS TO THE COURTS AND LITIGATION

In recent years, the political trend has been to limit court access to some litigants. This political movement is called Tort Reform. This trend has been extremely controversial and has raged in the Florida Legislature, as well as state legislatures around the nation and in Congress. Many of the changes brought about by this movement can be found in the Florida Statutes, others are imbedded in the Florida Rules of Civil Procedure. One rule that may be more obvious than others is Fla. R. Civ. P. 1.650, Medical Malpractice Prenupt Screening Rule.

TO LEARN MORE, GO TO THE INTERNET
To learn more about this controversy in Florida and in the nation, go to the National Association of Trial Lawyers website and the Associated Industries of Florida website. These organizations face off squarely on opposite sides of this issue.

SOURCES OF LAW

Florida’s laws governing civil litigation procedure are found in the Florida Constitution, case law, statutes, the rules of civil procedure, and the local rules of each court.

The Florida Bar publishes many standard civil procedure forms both in print and on disk. There are many other secondary forms sources.
Other sources from the Florida Bar that you should consult to complete your knowledge of civil litigation are:

- Florida Ethics Guide for Legal Assistants
- The Florida Bar Journal

CHAPTER 2 The Courts and Jurisdiction

KEY POINT

- The Florida court system is patterned after the federal court system.

STATE COURT SYSTEMS

TRIAL COURTS

The trial court in Florida is called the Circuit Court. There are 22 circuit courts in Florida. These courts are considered courts of general jurisdiction. Both civil and criminal actions may be heard in these courts.

The circuit courts are both the highest trial court and lowest appellate court in Florida. They operate as appeals courts to the county courts.

COUNTY COURTS

These courts have jurisdiction over matters involving relatively small amounts of money. The jurisdiction of the county courts is established by the Florida Legislature. The county judge will hear traffic disputes, citizen disputes, and criminal misdemeanor actions.
COURTS OF APPEAL

There are five District Courts of Appeal in Florida:
- The First District Court of Appeal is the appellate court for the 1st, 2nd, 3rd, 4th, 8th, and 14th Circuits.
- The Second District Court of Appeal is the appellate court for the 6th, 10th, 12th, 13th, and 20th Circuits.
- The Third District Court of Appeal is the appellate court for the 11th and 16th Circuits.
- The Fourth District Court of Appeal is the appellate court for the 15th, 17th, and 19th Circuits.
- The Fifth District Court of Appeals is the appellate court for the 5th, 7th, 9th, and 18th Circuits.

These courts hear the majority of the cases appealed. Three judge panels review the decisions of the circuit courts.

The district courts also have been granted the power to most actions taken by state agencies.

STATE SUPREME COURT

The Supreme Court of Florida has seven justices. At least five Justices must participate in every case and at least four must agree for a decision to be reached disposing of a case. The Supreme Court is housed in Tallahassee, Florida.

JURISDICTION OF THE SUPREME COURT

The jurisdiction of the Supreme Court of Florida is set out in the state constitution in Title V, Chapter 25. The Court’s jurisdiction is somewhat flexible. The state legislature may add or remove certain categories of cases. The Court must review final orders imposing death sentences, district court decisions declaring a state statute or Constitutional provision invalid, bond validations, and certain orders of the Public Service Commission on utility rates and services.

The Court has the discretionary authority to review categories of judgments, decisions, and questions of law certified by the District Courts of Appeal and federal appellate courts.

In addition, the court has discretionary review over decisions of appeal that expressly declare a state statute valid, or construes a state or federal Constitutional provision. Cases affecting a class of Constitutional officers may also be reviewed by the Florida Supreme Court. Conflicting district court opinions may also be reviewed.

The Supreme Court also promulgates the rules governing practice and procedure in all Florida courts.

The Supreme Court has exclusive jurisdiction to regulate the admission and discipline of lawyers in Florida.

TO LEARN MORE, GO TO THE INTERNET

Go to www.leg.state.fl.us and www.flabar.org to find other rules of procedure.

www.flabar.org/newflabar/lgresearch.htm will give you the instructions you need to use the FLABAR ONLINE most effectively for your research. The Law Practice Regulation site is where you will find the rules regulating the Florida Bar. Chapter 4, Rules of Professional Conduct, is the chapter you must consult to keep the attorney you work for, and yourself, within the ethical standards of the Florida Bar.

www.leg.state.fl.us/Statutes/index.cfm?Mode=Search%20Statutes&Submenu=2&Tab=statutes is a wonderful site to research any Florida Statute; it will give you the full text of the Florida Statutes. A disclaimer on the site informs researchers that the site is provisional, and that print research is the most accurate place to do your legal research at this time.
PART II
Initiating Litigation

CHAPTER 3
Preliminary Considerations

KEY POINTS

- Statutes of Limitations are found in the Florida Statutes.
- Ethical Standards for Florida attorneys are established and enforced by the Florida Bar in The Rules Regulating the Florida Bar.

DETERMINING THE EXISTENCE OF A CAUSE OF ACTION

Fla. R. Civ. P. 1.050, When Action Commenced, states:

Every action of a civil nature shall be deemed commenced when the complaint or petition is filed, except that ancillary proceedings shall be deemed commenced when the writ is issued, or the pleading setting forth the claim of the party initiating the action is filed.

When a forum non conveniens dismissal has been moved for, the defendants will be deemed by the court to stipulate that the original filing is the date on which the court will hold that the case was filed.

A further explanation of the rule can be found in Fla. R. Civ. P. 1.061(c), Choice of Forum.

TIME LIMITATIONS

Time limitations on which to file a complaint or other cause of action are listed throughout the Florida Statutes. To establish the statute of limitations of a cause of action the law firm you are working for is seeking to file, or to defend, the best procedure is to do the research. It is good, ethical practice to check time limitations on filing, before any case is accepted.

TO LEARN MORE, GO TO THE INTERNET

www.leg.state.fl.us/Statutes/index.cfm?Mode=Search%20Statutes&Submenu=2&Tab=statutes is a wonderful site to research any Florida Statute; it will give you the full text of the Florida Statutes. A disclaimer on the site informs researchers that the site is provisional, and that print research is the most accurate place to do your legal research at this time.

STATUTE OF LIMITATIONS DEFENSE

Fla. R. Civ. P. Form 1.965, provides a form for attorneys to use to state a defense that the time limitation for bringing a cause of action to court has run out:

Each cause of action, claim, and item of damages did not accrue within the time prescribed by law for them before this action was brought.

As an aside, the forms included in the Florida Rules of Civil Procedure are suggested forms approved by the Florida Supreme Court, by virtue of being included in the rules themselves. The forms are sufficient for the purposes stated in the rules. However, they are not mandatory.

Fla. R. Civ. P. 1.900(b), Forms, states:

. . . So long as the substance is expressed without prolixity, the forms may be varied to meet the facts of a particular case.
ETHICAL CONSIDERATIONS IN ACCEPTING A CASE

TO LEARN MORE, GO TO THE INTERNET

www.flabar.org/newflabar/lgresearch.htm will give you the instructions you need to use the FLABAR ONLINE most effectively for your research. The Law Practice Regulation site is where you will find the rules regulating the Florida Bar. Chapter 4, “Rules of Professional Conduct,” is the chapter you must consult to keep the attorney you work for, and yourself, within the ethical standards of the Florida Bar.

Specifically, the rules for written fee agreements, billing, fee sharing and fee disputes are included in Chapter 4.

CHAPTER 4
Investigation and Evidence

KEY POINTS

- Interview techniques do not vary from one jurisdiction to another.
- Corporate agents for service can be located through the Secretary of State.

TECHNIQUES FOR INTERVIEWING FACT WITNESSES

The skills necessary for conducting efficient, ethical, and productive interviews are almost universal.

Attention should be paid to the custom of the area and the culture of the firm for the finer points of law office interviews to be successful. Keep your eyes and ears open in the law office where you work, so you can conduct an interview that is up to its standards.

It is especially important to review the ethics rules listed in the Florida Bar Rules of Professional Conduct and the interview procedures of the firm.

EVIDENCE

EVIDENCE CODE NUMBERS

The Florida Evidence Code is provided in the Florida Statutes. The Florida rules of evidence are similar to the federal rules of evidence in many of its provisions. The following is a list of significant provisions of Florida evidence:

§ 90.104 Rulings on Evidence
§ 90.107 Limited Admissibility
§ 90.108 Introduction of Related Writings or Recorded Statements

§ 90.301 Presumption Defined; Inferences
§ 90.401 Definition of Relevant Evidence
§ 90.402 Admissibility of Relevant Evidence
§ 90.403 Exclusion on Grounds of Prejudice or Confusion
§ 90.404 Character Evidence; When Admissible
§ 90.408 Compromise and Offers to Compromise
§ 90.5015 Journalist’s Privilege
§ 90.502 Lawyer-Client Privilege
§ 90.503 Psychotherapist-Patient Privilege
§ 90.5035 Sexual Assault Counselor-Victim Privilege
Take special note of the privilege statutes. Florida has a variety of different privilege statutes. There is a significant difference between the federal evidence code and Florida’s.

TO LEARN MORE, GO TO THE INTERNET

For current statutes and for the text of the statute sections go to www.leg.state.fl.us/statutes or www.leg.state.fl.us and click on the “Statutes and Constitution” button.

CHAPTER 5
The Initial Pleadings

KEY POINTS

• Complaints in state court must include a statement of facts that constitute a cause of action.
• The Florida Rules of Civil Procedure provides for Supreme Court approved complaint forms.
• Service of Process is governed by various rules of the Florida Rules of Civil Procedure.
• Amendments to Complaints are governed by Fla. R. Civ. P. 1.190.

INITIAL PLEADINGS

PLEADINGS IN GENERAL

Fla. R. Civ. P. 1.100, governs pleadings and motions in general. Section (a) of this rule sets out the kinds of pleadings and the responses to the pleadings, as pleadings, that are allowed. Complaints and petitions are to have answers.

Answers to counterclaims are to be specifically labeled as such. Third party complaints and crossclaims also are defined, and answers to each are listed as the allowable pleadings.

Rule 1.100, in its section (c), describes in detail what is to be included in the caption of a pleading. The following
items are required to be included in the caption:

1. The name of the court.
2. The file number.
3. The name of the first party on each side.
4. An appropriate indication if there are other parties.
5. A designation of the party filing the pleading, motion, order, judgment, or other paper.
6. The nature of the party or the nature of the order.
7. The subject matter of the paper.
8. The party requesting relief, or the party obtaining the relief.

In addition to the above listed requirements, Fla. R. Civ. P. 1.100(c)(2) requires that a civil cover sheet, the form for which is provided in Form 1.997, shall be included. The rule states that if the civil cover sheet is not included, the action will be deemed by the court to be filed, but all action in the case will be halted until the cover sheet is provided.

Fla. R. Civ. P. 1.110 sets out the general rules for pleading. This rule includes the following sections:

(a) Forms for Pleadings
(b) Claims for Relief
(c) The Answer
(d) Affirmative Defenses
(e) Effect of Failure to Deny
(f) Separate Statements
(g) Joinder of Causes of Action, Consistency
(h) Subsequent Pleadings

Fla. R. Civ. P. 1.120 provides for pleading special matters. The following situations are specifically covered by the rule:

(a) Capacity
(b) Fraud, Mistake, Conditions of the Mind
(c) Conditions Precedent
(d) Official Document or Act
(e) Judgment or Decree
(f) Time and Place
(g) Special Damage

Fla. R. Civ. P. 1.130 gives instructions for the proper and acceptable method for attaching copy of cause of action and exhibits. If an action is brought or a defense made that depends on a specific document, that document must be incorporated into the pleading or attached to it. This rule states that the rule specifically does not allow for unnecessary recitals of deeds, contracts, or documents. The courts only need to review those documents that are in controversy.

Fla. R. Civ. P. 1.140 provides for approved defenses. This rules sets out a time period of 20 days for the defendant’s answer to be served, from the date of the service of the initial pleading on the defendant. The date of publication is the tolling date for service, if not personally served.

This rule also states the way defenses are to be presented. The following is a list of the type of defenses provided for in the rule:

1. Any defense in law or in fact to a claim for relief.
2. Lack of jurisdiction over the subject matter.
3. Lack of jurisdiction over the parties.
4. Improper venue.
5. Insufficiency of service of process.
6. Failure to state a cause of action.
7. Failure to join indispensable parties.

Defenses 2 through 7 must be made before pleading any other defense. The motion must state specifically the ground on which defenses 2 through 7 are based. Any grounds not stated will be waived.

Fla. R. Civ. P. 1.150 sets out the sanctions and procedures for sham pleadings. Pleadings that lack merit or have been filed for a purpose other than because in good faith a true cause of action is anticipated. Default, summary judgment, or motion to strike any part of or all of a pleading are the procedures with which to deal with the other parties’ sham pleading.

The motion to strike must be verified and must fully set forth the facts on which the motion is based.

Fla. R. Civ. P. 1.170 sets out the rules for counterclaims and crossclaims.

This rule states the specifics for the following:

1. Compulsory Counterclaims.
2. Permissive Counterclaims.
3. Counterclaims Exceeding Opposing Claim.
4. Counterclaim against the State.
5. Counterclaim Maturing or Acquired after the Pleading.
6. Omitted Counterclaim or Crossclaim.
7. Crossclaim against a Co-party.
8. How Additional Parties May Be Brought into the Lawsuit.
10. Demand Exceeding Jurisdiction and Transfer of Actions.

THE COMPLAINT

Fla. R. Civ. P. 1.050 provides for the complaint that:

Every action of a civil nature shall be deemed commenced when the complaint or petition is filed . . .
Prior to filing a complaint to commence litigation alleged medical malpractice suits, the Florida Rules of Civil Procedure, through Rule 1.650, provide for medical malpractice presuit screening.

This rule is extensive. It applies only to prospective malpractice lawsuits, which also are governed by Florida Statutes § 768.57. No other section of the rules exists to parallel the specificity and extent of this section, devoted to medical malpractice suits.

PARTIES TO THE LAWSUIT

PARTIES IN GENERAL
Fla. R. Civ. P. 1.210(a) sets out the requirements of who may prosecute a civil action. Every action may be prosecuted in the name of the real party in interest. This is a very liberal rule that allows that all persons having an interest in the subject of the action and the relief demanded may join as plaintiffs. In addition, all persons may be a defendant who have a claim adverse to the plaintiff.

MINORS AND INCOMPETENTS
Fla. R. Civ. P. 1.210(b) defines the procedures to be used for parties who are minors or incompetents. Guardians, or other kinds of fiduciaries, may stand for the minor or incompetent person as a party. In addition, the court may appoint a guardian ad litem. A next friend may also be the minor or incompetent’s representative.

JOINDER OF MULTIPLE PARTIES
Fla. R. Civ. P. 1.170(h) allows and sets out the procedure for when additional parties may be brought in to a lawsuit.

Fla. R. Civ. P. 1.180 is the rule on third party practice. A defendant may sue a party that may be liable for all of or part of the plaintiff's claim against the defendant. The defendant may file the third party complaint, without leave of court, within 20 days after the defendant serves the original answer. If the filing is made after the 20 days, leave of court must be obtained before filing.

CLASS ACTIONS
Fla. R. Civ. P. 1.220 sets out the rules for class action lawsuits.

There are also special rules for condominium associations in Rule 1.221, and mobile homeowners associations in Rule 1.222.

SPECIAL PROBLEMS WITH PARTIES
Fla. R. Civ. P. 1.250 regulates the misjoinder and nonjoinder of parties.

The misjoinder of parties is not fatal to an action. The misjoinder may be severed and handled separately. Florida is liberal in its allowance of dropping and adding parties.

Fla. R. Civ. P. 1.260 sets forth the procedures for survivors and the substitution of parties.

In the event of the death or incompetency of a party, the court may order, or upon motion, substitute the proper parties or a representative.

INTERVENTIONS
Fla. R. Civ. P. 1.230 provides for interventions. This rule allows anyone claiming an interest in pending litigation to assert a right by intervention. This rule clearly states that the intervention is in subordination to the main proceeding.

INTERPLEADER
Fla. R. Civ. P. 1.240 defines who has standing to interplead in a lawsuit and the procedures for so doing. The rule provides that:

Persons having claims against the plaintiff may be joined as defendants by the plaintiff and required to interplead when the plaintiff may be exposed to multiple liability.

PLEADING JURISDICTION AND VENUE
The pleader must include a statement in the pleadings of jurisdiction as is required by Fla. R. Civ. P. 1.110(b).

The allowance and procedure for a motion for lack of jurisdiction is found in Fla. R. Civ. P. 1.140(b). This rule was also discussed in the section of this chapter called “Pleadings in General.”
PLEADING THE CLAIM OR CAUSE OF ACTION

Fla. R. Civ. P. 1.110(a) abolishes forms of action and technical forms of seeking relief. This rule must be read in conjunction with Rule 1.040, providing for one form of action. This allows for good faith, creative pleading. The rule does not support the old common law pleading forms and cause of action that were restrictive in nature. If a client’s fact scenario could not fit under the umbrella of certain, specific, and limited causes of action, the action could not be brought to court.

The primary rule outlining the requirements for claims for relief is Fla. R. Civ. P. 1.110(b), which requires that in order for a pleading to be sufficient to be heard by the court to determine a claim for relief, the following elements must be present in the pleading:

1. A short and plain statement of jurisdiction.
2. A short and plain statement of the ultimate facts showing that the pleader is entitled to relief.
3. A demand for judgment for the relief to which the pleader deems himself or herself entitled.

DEMAND FOR RELIEF

Fla. R. Civ. P. 1.110(b) allows for relief in the alternative of several different types. It also provides that:

Every complaint shall be considered to demand general relief.

MONEY DAMAGES

The procedures for Pleading Special Damages can be found in Fla. R. Civ. P. 1.120(g).

DRAFTING THE COMPLAINT

VERIFICATION

A verification is a statement under penalty of perjury that the contents of a document are true and correct. Fla. R. Civ. P. 1.030 provides that:

Except when otherwise specifically provided by these rules or an applicable statute, every written pleading or other paper of a party represented by an attorney need not be verified or accompanied by an affidavit.

In a 1976 amendment to this rule, added the requirement that the filing party’s telephone number be included on all pleadings and papers filed.

FLORIDA RULES OF CIVIL PROCEDURE FORMS

USING THE FORMS. The forms included in the Florida Rules of Civil Procedure are, of course, sufficient, but the rules also make it clear that the forms are not exclusive; they may be varied to meet the facts of a particular case. Also, the forms, as stated in Fla. R. Civ. P. 1.900(c), omit captions and signature lines. The first form in the form section of the rules sets out how the caption is to appear. There are many forms included in the rules. The following are examples of a few:

Form 1.902 Summons
Form 1.904 Third Party Summons
Form 1.907 Garnishment
Form 1.910 Subpoena for Trial
Form 1.940 Ejectment
Form 1.944 Mortgage Foreclosure
Form 1.945 Motor Vehicle Negligence
Form 1.951 Fall-Down Negligence Complaint
Form 1.965 Defense, Statute of Limitations
Form 1.996 Final Judgment of Foreclosure

SERVING THE COMPLAINT

Fla. R. Civ. P. 1.070, specifies the procedures for the process of serving the defendant with notice that they are the subject of a lawsuit, and that the judge has taken jurisdiction over the case and the parties.

Fla. R. Civ. P. 1.080, Service of Pleadings and Papers, covers the service of papers and pleadings subsequent to the initial pleadings. Rule 1.080(f), Certificate of Service, provides that the attorney must certify that copies of the pleadings and papers subject to this rule were sent to the other parties by delivery, mail, or fax.

PUNITIVE DAMAGES

There is no special provision for pleading for punitive damages, other than that in the broad provision of Fla. R. Civ. P. 1.110, as well as 1.120(g), which states that:

When items of special damage are claimed, they shall be specifically stated.
AMENDING THE COMPLAINT

Fla. R. Civ. P. 1.190 governs amended and supplemental pleadings.

CHAPTER 6
Responses to the Initial Pleading

KEY POINTS

- A response to a general civil complaint is due 20 days from the date service is completed.
- The Florida Rules of Civil Procedure include forms for some kinds of answers.

RESPONDING TO THE INITIAL PLEADING

TIME LIMITS

The time required within which a defendant shall serve an answer is within 20 days after service of original process and the initial pleading. If process was by constructive notice in a publication, the defendant has 20 days from the date of the notice.

The plaintiff also has 20 days from the date of service of a counterclaim within which to serve an answer on the counterclaim.

THE ANSWER

DEFENSES

Fla. R. Civ. P. 1.140(b) provides for approved defenses. The following is a list of the type of defenses provided for in the rule:

1. Any defense in law or in fact to a claim for relief.
2. Lack of jurisdiction over the subject matter.
3. Lack of jurisdiction over the parties.
4. Improper venue.
5. Insufficiency of service of process.
6. Failure to state a cause of action.
7. Failure to join indispensable parties.

Defenses 2 through 7 must be made before pleading any other defense. The motion must specifically state the ground on which defenses 2 through 7 are based. Any grounds not stated will be waived.

The exception to the waiver of defenses rule is found in Fla. R. Civ. P. 1.140(h)(2), Defenses. This rule states that “the defense of lack of jurisdiction of the subject matter can be raised at any time.”

DRAFTING THE ANSWER

Fla. R. Civ. P. 1.110(c), The Answer, states that the answer must contain:

1. A short and plain statement of the pleader’s defenses to each claim asserted.
2. Statements that admit or deny the allegations or state that the pleader is without knowledge of the allegations upon which the adverse party relies.
3. Denials that are in good faith.
4. Denials of parts of the adverse parties that are not true and specific statements as to what part of an allegation is true. (In other words, it is not in good faith to deny a whole statement that is partly true and partly false.)

The above rule also allows for a general denial. The answer is subject to the same requirement as other pleadings for the caption as stated in Fla. R. Civ. P. 1.100(c)(1).

FLORIDA RULES OF CIVIL PROCEDURE FORMS

The following defensive forms are included in the Florida Rules:
- Form 1.967 Accord and Satisfaction
- Form 1.972 Assumption of the Risk
- Form 1.966 Payment
- Form 1.970 Release
- Form 1.969 Statute of Frauds
- Form 1.965 Statute of Limitations

AMENDING THE ANSWER

Fla. R. Civ. P. 1.190, Amended and Supplemental Pleadings, sets out the specific rules for changing pleadings once they are filed or served. Rule 1.190(e), Amendments Generally, sets the tone for liberal allowance to amend with the following:

At any time in furtherance of justice, upon such terms as may be just, the court may permit any process, proceeding, pleading, or record to be amended or material supplemental matter set forth in an amended or supplemental pleading.

FAILURE TO ANSWER

Fla. R. Civ. P. Form 1.980, Default, appears as follows:

MOTION FOR DEFAULT

Plaintiff moves for entry of a default by the clerk against defendant______________ for failure to serve any paper on the undersigned or file any paper as required by law.

______________________________
Attorney for Plaintiff

The default itself can be filed with the clerk of court to be entered. This form is as follows:

DEFAULT

A default is entered in this action against the defendant named in the foregoing motion for failure to serve or file any paper as required by law.

CHAPTER 7

Motion Practice

KEY POINTS

- Motion Practice in Florida is primarily regulated by the Florida Rules of Civil Procedure.

MOTIONS GENERALLY

Fla. R. Civ. P. 1.100(b), Pleadings and Motions, requires that to apply to the court for an order, a motion for that order must be filed, unless it is made during a hearing or trial.

All motions have two requirements:
1. The motion must state the grounds for the motion with particularity.
2. The motion must state the relief or order sought from the court.

These requirements may be satisfied by a simple statement in the notice of hearing. If multiple orders or relief is sought by the motion, the notice of hearing must state each and the requirements stated above must be met for each.
Fla. R. Civ. P. 1.160, Motions, allows the clerk of the court to grant certain motions that do not require a court order.

Fla. R. Civ. P. 1.120, Pleading of Special Matters, sets out specific instances where special allegations or averments are necessary. The following is a list of those special instances:

a. Capacity of a party.
b. Fraud, mistake or condition of the mind.
c. Conditions precedent.
d. Official document or act.
e. Judgment or decree.
f. Time and place.
g. Special damages.

CHAPTER 7 Motion Practice

PREPARING, SERVING, RESPONDING

NOTICE OF HEARING
Fla. R. Civ. P. 1.090(d), Time for Motions, states that a copy of written motions and a copy of a notice of hearing must be served on the adverse party a reasonable time before the time of the hearing. The rule does not specify the number of days.

CERTIFICATE OF SERVICE
Fla. R. Civ. P. 1.080(f), applies to motions as well as to initial pleadings.

SERVICE AND FILING
Fla. R. Civ. P. 1.080a and b, Service of Pleadings and Papers, requires that:

1. Unless the court orders otherwise, every motion, except for those for witness subpoenas be served on each party.
2. If an attorney is representing a party, service shall be made on the party’s attorney.
3. Service may be made by delivery or mailing.
4. If the pleader does not know the address or cannot ascertain the address of the attorney, service may be made by leaving a copy of the motion with the clerk of court.
5. Service may be made by fax, but if this method is used, another copy must be sent by mail or delivery. Service by fax is deemed complete when transmission is complete.

Rule 1.080 also requires that originals or certified copies of motions be filed with the court either before or immediately after service on the parties.

Filing is defined as getting the motion to the clerk of court, or the judge, and the date placed on the face of the document. A motion will be deemed filed by the date shown on the face of the motion by the clerk’s date stamp or the judge’s notation, whichever is earlier.

RESPONDING TO MOTIONS
Fla. R. Civ. P. 1.140 sets out the time for responsive motions.

Fla. R. Civ. P. 1.090(b) allows for enlargement of time. The court, in its discretion, may order the time periods in the rules to be enlarged. The court may do this if the request is made before the time period concerned has expired. In some cases, the court may permit the act that was required within a specified time period to be done, if the omission of the act was a result of excusable neglect. There are specific motions for which the court may not extend the time.

SPECIFIC MOTIONS
There are many specific motions listed in the Florida Rules of Civil Procedure. The following lists includes a few of them.

- Fla. R. Civ. P. 1.140(c), Motion for a More Definite Statement
- Fla. R. Civ. P. 1.510, Motion for Summary Judgment

AN EXAMPLE OF A MOTION FORM
Form 1.982, Contempt Notice, appears in Exhibit 7-1

NOTE: The particular violation must be inserted in the motion and notice. A separate motion is unnecessary.

EXAMPLE OF A DISCOVERY MOTION
Fla. R. Civ. P. 1.310(d) allows for a motion to terminate or limit the taking of a deposition, if the deposition is being conducted in bad faith, to harass, embarrass, or oppress a party. In addition, if objection or instruction to the deponent not to answer is in bad faith or does not comply otherwise with the rules, a motion also may be brought to compel the answer.

EXAMPLE OF A TRIAL MOTION
Fla. R. Civ. P. 1.480, Motion for a Directed Verdict, requires that specific grounds be stated in the motion.
EXAMPLE OF A POSTTRIAL MOTION
Fla. R. Civ. P. 1.530, Motions for New Trial and Rehearing and Amendments of Judgments, sets out specific procedures for requesting a new trial or asking for alteration of a judgment. In general, the time for such motion is 10 days after the return of a verdict in a jury trial or a judgment in a nonjury trial.

Motions for new trials must specifically state the grounds for the motion.

Exhibit 7-1 Motion of Notice of Hearing

MOTION OF NOTICE OF HEARING

TO: (name of the attorney for the party, or party if not represented)

YOU ARE NOTIFIED that plaintiff will apply to the Honorable_______________, Circuit Judge, on ________, 2______, at ________, in the _______________County Courthouse at___________________, Florida, for an order adjudging (defendant’s name) in contempt of court for violation of the terms of the order or judgment entered by this court on __________, 2______, by failing to pay child support awarded to (plaintiff’s name) that was due on ______________, 2______. I certify that a copy has been furnished to __________ by mail on ________, 2______. 
PART III
Discovery

CHAPTER 8
Overview of the Discovery Process

KEY POINTS
• Florida Rules of Civil Procedure regulates civil discovery procedures in the state.
• Florida does not require supplementary responses to discovery.
• Discovery may also be made in aid of the execution of a judgment.

THE NATURE OF DISCOVERY
Fla. R. Civ. P. 1.280(b)(1), In General, provides that parties may discover any matter not covered by a privilege, that is relevant to the subject of the cause of action. It is not ground for objections to any discovery inquiry that information that is the subject of the question or inquiry would not be admissible at trial. The requirement for allowable discovery inquiries is that they appear to lead reasonably to discovery of admissible evidence. This is a liberal standard.

In addition, Rule 1.280(b)(3), Trial Preparation: Materials, and (b)(4), Trial Preparation: Experts, allows for an even more liberal standard of what is discoverable in preparation for trial.

CHOICE OF DISCOVERY METHODS
Fla. R. Civ. P. 1.280(a), Discovery Methods, lists the following:
1. Depositions upon oral examination.

THE EXTENT OF DISCOVERY

LIMITS ON DISCOVERY
Fla. R. Civ. P. 1.280(c), Protective Orders, provides that upon motion by a party or by motion from the person of whom discovery is to be made, and if good reason is shown, the court may make an order protecting a party from annoyance, embarrassment, oppression, undue burden, or expense. The court may order the following to protect the party or person:
1. Discovery be disallowed.
2. Discovery may only be conducted under specified conditions or terms.

STANDARD FORMS
There are many standard forms for the various forms of discovery included in the rules. Some examples are included in the Forms Appendix.
PART III Discovery

3. Only a specific method of discovery be used.
4. Only specific persons may be present at discovery.
5. Depositions be sealed.
6. Trade secrets, confidential research, development, and commercial information may not be disclosed or disclosed in a specified way.
7. Simultaneously filed, sealed documents only opened by the court.

DISCOVERY IN AID OF EXECUTION

Fla. R. Civ. P. 1.560, Discovery in Aid of execution, states that the rules of discovery apply to after judgment attempts to obtain the subject of interest of the order or decree.

COOPERATING WITH DISCOVERY

MOTIONS TO COMPEL DISCOVERY

Discovery may also be compelled by the court. Fla. R. Civ. P. 1.380, Failure to Make Discovery; Sanctions, provides that reasonable notice is required to all parties for a motion to compel discovery. The appropriate court for such a motion may be the court in the county where the deposition is being taken. Evasive or incomplete answers are treated as failure to answer. The party who was compelled by the court to answer discovery that they otherwise refused to answer may be ordered to pay for the costs of the motion.

The court may order further sanctions if the party compelled by order to answer discovery continues to fail to comply. This failure can be considered a contempt of court.

WHERE DEPOSITIONS MAY BE HELD

Fla. R. Civ. P. 1.410(2), Subpoena, states that a deponent is required to attend a deposition only in the county where the person lives, works, or transacts business, unless by order of court in another place convenient to the deponent.

CHAPTER 9
Depositions

KEY POINTS

- Depositions may be taken of any person or entity with information reasonably expected to lead to admissible evidence.
- Depositions may be taken by telephone or videotape.
- Depositions may be taken of persons who are not parties to the action.
- Associations, public and private corporations, and government entities may all be deposed through a designated officer or agent.

THE NATURE OF THE DEPOSITION

The deposition is a liberal form of discovery. It is able to be used to obtain information from persons who may not be parties to the action. Examination and cross-examination may proceed as permitted at trial. The deponent must be put under oath by the officer before whom the deposition is taken. The testimony must be recorded by some means. If the deposition is videotaped, it must be transcribed, unless agreed otherwise by the parties.

DEPOSITION BEFORE ACTION OR PENDING APPEAL TO PERPETUATE TESTIMONY

Fla. R. Civ. P. 1.290 provides for depositions to be taken to save and record or perpetuate testimony of persons including themselves. The person interested in perpetuating the testimony may file a verified petition in the circuit court.
court of the county of the residence of any of the expected adverse parties.

The petition must include the following:
1. The name of the petitioner.
2. A statement that the petitioner expects to be a party to an action that would be recognized in Florida.
3. The subject matter of the expected action.
4. The party’s expected interest in the action.
5. The information that the petitioner expects to record and the reasons for the necessity of the information in the anticipated action.
6. The names and addresses of all those persons the petitioner expects to be adverse parties.
7. The names and addresses of the persons to be deposed, and substance of the testimony which the petitioner expects to elicit from each.
8. A request for an order authorizing the deposition.


The use of a deposition taken in this manner and by this rule can be used in any action involving the same subject manner as any other deposition.

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

Fla. R. Civ. P. 1.300a and d, authorizes the following to take acknowledgment of depositions:
1. Notary publics.
2. Judicial officers.
3. If the parties stipulate, any person at any time or place upon any notice and in any manner.

Parties before whom deposition may not, unless stipulated to by the parties, be taken are the following:
1. Relatives.
2. Employees.
3. Attorney or counsel of one of the parties.
4. Anyone financially interested in the action at issue.

DEPOSITION UPON ORAL EXAMINATION

Fla. R. Civ. P. 1.310 provides that after the action is begun, any party may take the deposition of any person. The only time leave of court is necessary is when a party wants to take a deposition before 30 days after the initial service of process.

Any deposition may be videotaped without permission of the court or stipulation of the parties. A court order is required for a telephone deposition.

A deposition may be taken of a corporation, association, or governmental entity, when the matters the deposer desires to ascertain is stated with enough specificity to allow the entity to designate officers or agents to answer the deposition questions posed.

THE DEPOSITION UPON WRITTEN QUESTIONS

Fla. R. Civ. P. 1.320 allows for written deposition questions to be served on any person once the action has commenced. A deposition on written questions may be served on corporations, partnerships, association, or governmental agencies.

ORAL DEPOSITIONS IN A FOREIGN NATION

Fla. R. Civ. P. 1.300(b), persons before whom depositions may be taken, provides that depositions may be taken before any person authorized by the law of Florida or of the foreign country to administer oaths. Additionally, a person may be commissioned by the court or the subject of a letter rogatory. A letter rogatory may read as follows:
“...To the Appropriate Authority in ____________ (the name of the country). . . .”

USE OF DEPOSITION IN COURT PROCEEDINGS

Fla. R. Civ. P. 1.330 allows depositions to be used against any party who was present or who had reasonable notice of the deposition, if the testimony to be used is otherwise admissible as evidence. Depositions may be used by any party for the purpose of impeaching or discrediting the testimony of the witness or for any other purpose allowed by the Florida Evidence Code.

DEPOSITION OF EXPERT WITNESSES

Fla. R. Civ. P. 1.390 defines an expert witness as one who holds a professional degree from a college or university and has professional training and experience, or is regularly engaged in the profession, or has special knowledge and skill about the subject upon which called to testify. The deposition may be used at trial without special notice.
CHAPTER 10
Interrogatories

KEY POINTS

• Interrogatories in Florida are primarily regulated by the Florida Rules of Civil Procedure.

• Interrogatories may be served upon any party, but not on nonparties.

INTERROGATORIES

Fla. R. Civ. P. 1.340(a) provides that any party may serve interrogatories on any party. A party may be served interrogatories if they are an association, corporation, or government agency, by an agent or officer.

4. Medical Malpractice: Interrogatories to Defendant
5. Automobile Negligence: Interrogatories to Plaintiff
6. Automobile Negligence: Interrogatories to Defendant

FORMS

There are specific standard interrogatory forms included in the Florida Rules of Civil Procedure Appendix that are as follows:

1. General Personal Injury Negligence: Interrogatories to Plaintiff
2. General Personal Injury Negligence: Interrogatories to Defendant
3. Medical Malpractice: Interrogatories to Plaintiff

SERVICE OF INTERROGATORIES

Fla. R. Civ. P. 1.340(e) requires that interrogatories be served on the party to answer the interrogatories and copies to all other parties. A certificate of service that includes the service date and the name of the party to whom the interrogatories are directed must be filed with the court.

DRAFTING OF INTERROGATORIES

FORMAT AND CONTENT OF THE INTERROGATORIES

Fla. R. Civ. P. 1.340(a) allows only 30 interrogatories, including all subparts, to be served. The party propounding the first set of interrogatories may motion the court to serve more. Notice and ground for the second set must be filed and served.

If a Supreme Court–approved set of standard interrogatories exists, they must be used. The interrogatories are required by Fla. R. Civ. P. 1.340(e) to be arranged with a blank space following each separately numbered question. The space must be large enough to reasonably accommodate the anticipated answer.

MOTION TO COMPEL

Fla. R. Civ. P. 1.340(a) specifically states that the party propounding the interrogatories may motion the court for an order to compel any failure to answer any interrogatory.

DRAFTING RESPONSES TO INTERROGATORIES

TIME LIMITS

Fla. R. Civ. P. 1.340(a) states that the time for answering interrogatories is 30 days.

ANSWERING INTERROGATORIES

Fla. R. Civ. P. 1.340(d) provides that the answers given to interrogatories by one party are not binding on any other parties.

Fla. R. Civ. P. 1.340(e) requires that answers to interrogatories be served on the party who propounded them and all other parties. The answers need to be filed only if there is a matter pending before the court to be determined using the answers. The court may also order that the answers be filed. The answers shall be treated separately and fully and under oath.
USING RECORDS INSTEAD OF A WRITTEN RESPONSE

Fla. R. Civ. P. 1.340(c) allows the party answering interrogatories to provide written records from which the information sought by the interrogatories may be adequately derived. The burden of ascertaining the information from the records must be similar for both the propounding and answering parties.

OBJECTING TO INTERROGATORIES

Fla. R. Civ. P. 1.340(a) states that if a question is objected to, the grounds for the objection must be stated. The attorney making the objection needs to sign the objection.

CHAPTER 11
Physical and Mental Examinations

KEY POINTS

- Fla. R. Civ. P. 1.360 regulates the use of mental and physical exams.
- The party requesting the exam has the burden of showing good cause as to the reasons for the exam.

PHYSICAL AND MENTAL EXAMINATIONS

In Florida, Fla. R. Civ. P. 1.360, Examination of Persons, regulates the medical and physical exams of discovery. This rule is similar to the federal rule.

THE SCOPE (FLA. R. CIV. P. 1.360(A)(1))

The scope of the rule is broad as stated below:

A party may request any other party to submit to, or to produce a person in that other person’s custody or legal control for, examination by a qualified expert when the condition that is the subject of the requested examination is in controversy.

THE REQUEST FOR PHYSICAL EXAM

The requirements for requesting a physical exam of a party whose physical condition is in controversy are as follows:

1. The request must be served on the plaintiff after the action begins and may be served without permission from the court.
2. The request must specify a reasonable place, time, and manner, and the conditions under which the exam will take place.
3. The scope of the exam will also be specified.
4. The persons or person who will make the exam must be specified.

THE RESPONSE TO THE REQUEST FOR PHYSICAL EXAM

The party of whom the request is required by the rule to:

1. Serve a response within 30 days after service of the response, unless 45 days has not passed since the initial pleading and process were served.
2. The response shall state that the exam is to be permitted.
3. State objections and the reasons for the objections if the exam is objected to.

NONPHYSICAL EXAM

If the controversial condition of the party to be examined is not a physical one, the same procedures as for physical exams are required by Fla. R. Civ. P. 1.360(a)(1)(B).

AUTHORIZATION OF THE EXAM

Under Fla. R. Civ. P. 1.360(2), the court must find good cause for authorizing the exam.

BURDEN OF PROOF

The party requesting the exam has the burden of showing good cause for the exam at any hearing concerning the exam.
PROTECTIVE RULES

If the court authorizes the exam, it may set protections and conditions under which the exam may be accomplished.

THE EXAMINER

THE REPORT

The report of the examiner shall be delivered to the examined party by the requesting party. The report must include a detailed written report setting out the conclusions, findings, diagnosis, and results of tests. Any results of similar and earlier exams must also be included.

If the examiner refuses or fails to make such a report, the examiner’s testimony may be excluded by the court, if offered at trial. See Fla. R. Civ. P. 1.360(3)(b).

CHAPTER 12
Request for Documents

KEY POINTS

- Fla. R. Civ. P. 1.350 regulates the demand for production of documents and things, and entry upon land for inspection and other purposes.
- The rule does not preclude an independent action against a person, not a party.
- Remember documents can sometimes be discovered through the other discovery devices, as covered in the other chapters.

THE SCOPE OF THE RULE

Any party may request any other party to produce and permit the party making the request. The party may have an agent examine, inspect, and copy designated documents, writings, drawings, graphs, charts, photographs, and any other data compilations. The general scope of discovery is applicable to this rule, which is that any information reasonably calculated to lead to admissible evidence may be discovered.

THE REQUEST

The party making a demand of an adverse party to produce documents or things, or to enter upon land shall serve the request on the adverse party. This may be done without the permission of the court. The request shall set forth the items to be inspected. This may be accomplished either by naming the item or describing, by category, and with specificity, the types of documents or things to be produced.

THE RESPONSE

The party to which the request was made has 30 days to respond to the request. The court may allow the time period to be shorter or longer. In the response, each separate item will be specifically stated to be permitted or objected to, and each objection must have supporting reasons. If an objection is to be part of a request, the part must be specified.

The response may be made by answering each request separately, or the documents, as they are kept in the usual course of business, may be offered as answers.

The rules require that the documents not be filed with the court unless specifically required by the court.
CHAPTER 13 Request for Admissions

KEY POINTS

- Matters admitted are deemed proven for trial.
- Fla. R. Civ. P. 1.370 regulates requests for admissions.
- The Florida Rule was originally patterned after the federal rule governing requests for admissions.

THE REQUEST FOR ADMISSIONS

Written requests for admissions may be served by any party on any other party to an action. The admission made under this rule is for the pending action only, and is not an admission for any other purpose. The responses to admissions also may not be used against the responder in any other proceeding.

TIME AND SERVICE

Service by any party on any other party may be made without leave of court, after the commencement of the action. Copies of documents made subject to the request for admissions shall be served by the requesting party.

Exhibit 12-1 Notice of Production

NOTICE OF PRODUCTION

To _______________________

YOU ARE NOTIFIED that after 10 days from the date of service of this notice, if service is by delivery, or 15 days from the date of service, if service is by mail, and if no objection is received from any party, the undersigned will issue or apply to the clerk of this court for issuance of the attached subpoena directed to _____________________, who is not a party and whose address is ___________________, to produce the items listed at the time and place specified in the subpoena.

DATED on __________________, 2_____

Attorney for ____________________

Florida Bar No __________________
USE OF THE REQUEST FOR ADMISSIONS

The purpose of requests for admissions is to narrow the issues of fact and law for trial. The genuineness of documents may also be ascertained for trial.

FAILURE TO ADMIT OR DENY

Any matter included in the request for admissions is deemed to be admitted unless the party to whom the request was served responds, and serves the requesting party with answers that object or deny the truthfulness of the matter.

DRAFTING THE REQUEST FOR ADMISSIONS

FORM AND CONTENT OF THE REQUEST FOR ADMISSIONS

Each request must specifically and particularly state a fact or issue to be admitted or denied.

RESPONDING TO THE REQUEST FOR ADMISSIONS

The responding party must serve the requesting party objections or answers to the requests within 30 days of service of the requests for admissions. The responding party may have at least 45 days from the date of initial service and process.

OBJECTIONS TO THE REQUEST FOR ADMISSIONS

If objections are made, the reasons must be stated. If denials are made, the answer must specifically deny the matter. If the party cannot truthfully admit or deny a request, that party must explain, in detail, the reasons this is so.

AMENDMENT OF ADMISSIONS

A motion may be filed with the court seeking to withdraw or amend an answer. The court may permit the withdrawal or amendment of an answer when the merits of the action will be served by such an order.

MOTION TO DETERMINE SUFFICIENCY OF ANSWERS AND OBJECTIONS

The party requesting the admissions may motion the court to determine the sufficiency of the admissions.
CHAPTER 14
Settlements, Dismissals, and Alternative Dispute Resolution

KEY POINTS

- Alternative Dispute Resolution (ADR) is encouraged in Florida.
- Motions and orders for failure to prosecute may be had one year after the last filing of a pleading.

THE SETTLEMENT

Settlement proposals are regulated by Fla. R. Civ. P. 1.442. As stated in the rule in part a:

This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule.

TIME REQUIREMENTS

Proposals for settlement shall not be served any earlier than 90 days after service of process on the defendant. Proposals to the plaintiff shall not be served any earlier than 90 days after the action is commenced. Proposals shall not be served later than 45 days before the date set for trial, or the first date of the trial docket, whichever is earlier.

FORM AND CONTENT OF PROPOSALS FOR SETTLEMENT

Fla. R. Civ. P. 1.442(c)(2) requires that proposals shall:

1. Be in writing.
2. Identify the applicable Florida law under which it is being made.
3. Name the party or parties making the proposal.
4. Identifying the claim or claims that the proposal is attempting to settle.
5. State with particularity the relevant conditions of the settlement terms.
6. State the total amount of the proposal.
7. State with particularity all terms that are nonmonetary.
8. State the amount to settle a punitive damages claim, if there was one in the action.
9. State whether attorneys fees are to be a part of the proposals.
10. Include a certificate of service.

An offer for settlement may be withdrawn in writing before acceptance is made in writing. If the proposal for settlement is withdrawn, it is deemed to not have legal existence.
DISMISSAL OF ACTIONS

Fla. R. Civ. P. 1.420, Dismissal of Actions, covers voluntary dismissals, dismissals by order of court, involuntary dismissals, dismissals of counterclaim, crossclaims or thirdparty claims, and failure to prosecute motions.

Stipulated Dismissals are dismissals by the parties, and are governed by Rule 1.420(a)(1). These dismissals may occur before trial by serving, or during trial by stating on the record, or by filing a stipulation of dismissal with the court, signed by all the parties to the action. Unless stated in the stipulation, the dismissal is without prejudice.

A notice of dismissal operates as an adjudication on the merits, when served by the plaintiff, if the plaintiff has dismissed, in any court, the same action or the same claim.

COURT ORDERED INVOLUNTARY DISMISSAL

Fla. R. Civ. P. 1.420(b) provides that any party may make a motion to the court to dismiss an action or any claim against them by an adverse party, if the adverse party has failed to comply with the Florida Rules of Civil Procedure, or any order of court.

Any party may move for dismissal after evidence has been presented to the court in a nonjury trial, if the adverse party has failed to show a claim for relief, based on the law and on the facts. Such a dismissal operates as a judgment on the merits of the case.

Fla. R. Civ. P. 1.420(e) provides for the procedures for dismissal of an action for failure to prosecute or to continue pursuing an action. If no activity has occurred in an action, such as the filing of pleadings, for a period of one year, the court may dismiss, or a party upon motion may request the court for dismissal. Dismissal is not automatic, but must be made on motion, or by affirmative action of the court.

ALTERNATIVE DISPUTE RESOLUTION

The Florida Rules of Civil Procedure contain many rules pertaining to alternatives to trial and litigation. The following is a list of those rules:

| Rule 1.700 | Rules Common to Mediation and Arbitration |
| Rule 1.710 | Mediation Rules |
| Rule 1.720 | Mediation Procedures |
| Rule 1.730 | Completion of Mediation |
| Rule 1.750 | County Court Actions |
| Rule 1.800 | Exclusions from Arbitration |
| Rule 1.810 | Selection and Compensation of Arbitrators |
| Rule 1.820 | Hearing Procedures for Nonbinding Arbitration |
| Rule 1.830 | Voluntary Binding Arbitration |

The number and breadth of the rules points to the trend in Florida and the nation, in encouraging alternative dispute resolution (ADR).

CHAPTER 15

Trial Techniques

KEY POINTS

- A jury trial, in cases for which a trial by jury is allowed, must be requested, or else it is waived.
- Challenges for cause by a party requires the court to examine the juror under oath, to determine whether the challenge is valid.
- In general, there are three peremptory challenges allowed each of the parties.

PRELIMINARY PREPARATION FOR TRIAL

Fla. R. Civ. P. 1.430, Demand for Jury Trials, declares that the right of trial by jury is preserved inviolate. Any party may demand a trial by jury, for any issue able to be tried by a jury, as provided statute or Constitution. The demand must be served on the other party at any time after commencement of the action, but no later than 10 days after the last pleading on the issue.
If the party only desires to have certain issues tried by jury, the party must state specifically which issues are to be tried by jury. If the issues are not specified in this way, the demand for trial by jury will be deemed to be made for all such issues able to be tried by a jury.

A failure to demand a trial by jury waives the right to trial by jury.

Fla. R. Civ. P. 1.431, Trial Jury, governs the right of parties to examine jurors. The court may also examine the jurors, but the right of the parties to examine the jurors shall be preserved.

CHALLENGES FOR CAUSE

Fla. R. Civ. P. 1.431(c) covers such challenges. The court, upon motion of any party, shall examine any prospective juror on oath, to determine whether that person is:

1. Related to any party within the third degree.
2. Related to the attorney of any party within the third degree.
3. Related to any person alleged to have been wronged by the same action alleged at trial.
4. Related to any person who has an interest in the action.
5. A person who has formed or expressed any opinion concerning the action.
6. A person who has a bias or prejudice concerning the action.
7. An employee of a party within 30 days before trial.
8. Who does not possess arithmetic, reading or writing skill necessary to understand the evidence that will be presented.

A party objecting to the juror may introduce any relevant evidence on the above matters.

PEREMPTORY CHALLENGES

In general, each party is entitled to three peremptory challenges. All peremptory challenges shall be addressed to the court outside the hearing of the jury. See Fla. R. Civ. P. 1.431(d).

SWEARING OF JURORS

No jurors shall be sworn in until all challenges have been exhausted. See Fla. R. Civ. P. 1.431(f).

SETTING ACTION FOR TRIAL

Fla. R. Civ. P. 1.440, governs when an action is at issue, when notice for trial is served, and the procedure for setting the action for trial.

WHEN AT ISSUE

An action is ready for trial 20 days after the service of the last pleading. See Fla. R. Civ. P. §1.440(a).

NOTICE FOR TRIAL

The notice for trial shall be served and shall include an estimate of the time required for trial, whether the trial is to be heard before a jury, and whether the trial is on the original action or a subsequent proceeding. See Fla. R. Civ. P. §1.440(b).

SETTING FOR TRIAL

If the court finds that the action is ready for trial, the court shall enter an order fixing a date for trial. At least 30 days shall pass from service of the notice to set for trial to the date set for trial by order of the court. See Fla. R. Civ. P. §1.440(c).

Fla. R. Civ. P. 1.450(b). Evidence, provides for the following:

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 witnesses. The court may require the offer to be made out of the hearing of the jury.

Fla. R. Civ. P. 1.480, Motion for a Directed Verdict, provides that a motion for a directed verdict shall specifically state the grounds for the motion. An order directing a verdict is effective without any assent of the jury.

CHAPTER 16
Posttrial Practice

KEY POINTS

- The rules in Florida allow for a court to order corrections in orders, judgments and decree, if justice so requires, under many circumstances.
- There are many forms included in the Florida Rules of Civil Procedure available for posttrial practice.
TRIAL AND POSTTRIAL MOTIONS

Motion for a New Trial and Rehearing, Amendments of Judgments are regulated by Fla. R. Civ. P. 1.530, a through d, as follows:

a. Jury and Nonjury Actions
A new trial may be granted to any or all of the parties on any or all of the issues. On matters heard without a jury, the court may open judgment if one has been entered, take additional testimony, and enter a new judgment.

b. Time for Motion
A motion for a new trial shall be served not later than 10 days after return of the verdict in a jury action, or the date of the filing of the judgment in a nonjury action....

c. Time for Serving Affidavits
When the motion for a new trial is based on affidavits, the affidavits shall be served with the motion. . . .

d. On Initiative of Court
The court on its own initiative may order a rehearing or a new trial for any reason for which it might have granted a rehearing or a new trial on motion of a party.

FLA. R. CIV. P. 1.540, RELIEF FROM JUDGMENT, DECREES OF ORDERS

CLERICAL MISTAKES. Any clerical mistake in judgments, decrees, or other parts of the record may be corrected by the court by order, at any time, on its own initiative or on the motion of a party.

MISTAKES; INADVERTENCE; EXCUSABLE NEGLIGENCE; NEWLY DISCOVERED EVIDENCE; FRAUD; ETC. On motion by a party, the court may relieve the party from terms of a final judgment, decree, order, or proceedings to avoid injustice. The motion to obtain such relief must be made within a reasonable time and not more than one year from the time the judgment, decree, or order was entered.

FLA. R. CIV. P. 1.570, ENFORCEMENT OF FINAL JUDGMENTS

a. Money Judgments
Final process to enforce a money judgment shall be by execution, writ of garnishment, or other appropriate process or pleadings.

b. Property Recovery
Writ of possession, writ of replevin, distress writ, writ of garnishment, or other appropriate process are the procedures for final process to recover property that has been awarded in a judgment.

c. Performance of an Act
The court may hold in contempt any party who has refused or otherwise failed to perform the act ordered by a court in judgment.

The court may also appoint some person, not a party to the action, to perform the act, if it is practical.

d. Vesting Title
If the judgment is for a conveyance, transfer, release, or acquittance of real or personal property, the judgment shall have the effect of a duly executed conveyance, transfer, release or acquittance that is recorded in the county where the judgment is recorded. A judgment under this subdivision shall be effective notwithstanding any disability of a party.

FORMS APPROPRIATE FOR THE POSTTRIAL PRACTICE

Rule 1.982 Contempt Motion and Notice of Hearing
Rule 1.988 Default Judgment
Rule 1.980 Motion for Default Judgment
Rule 1.909 Distress Writ
Rule 1.914 Execution
Rule 1.907 Garnishment Writ
Rule 1.991 Jury Verdict for Damages, Defendant
Rule 1.990 Jury Verdict for Plaintiff

There are many more forms included in the Florida Rules of Civil Procedure appropriate for posttrial practice.