DISCOVERY AND EXPERT WITNESSES

"Discovery and experts, the best thing since sliced bread, or a waste of time?"

1. Fla. Prob. R. 5.080 adopts Fla. R. Civ. P. 1.280 through 1.410 which are all of the major discovery provisions in the Florida Rules of Civil Procedure including depositions, interrogatories, production of documents, 351 subpoenas, RFA's, sanctions, depositions of expert witnesses and subpoenas.

2. Fla. Prob. R. 5.080 stresses the fact that these rules are available even though the proceeding has not been declared adversarial and that any interested person may utilize the rules, i.e., they are not limited to a personal representative. See also Estate of Shaw, 340 So.2d 491 (Fla. 3d DCA 1976) and Estate of Posner, 492 So.2d 1093 (Fla. 3d DCA 1986).

3. The adversary proceeding rule, Fla. Prob. R. 5.025(d)(2) provides that the Florida Rules of Civil Procedure govern all adversary proceedings, except for Fla. R. Civ. P. 1.525.

4. The Florida Probate Rules allow for informal discovery in probate through Fla. Prob. R. 5.341 which provides that on reasonable request in writing the PR shall provide an interested person with information about the estate and its administration.

5. The scope of discovery is not limited to evidence admissible at trial but is subject to the more liberal test of Fla. R. Civ. P. 1.280(b)(1), "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." See Fla. Prob. R. 5.080(a)(1).

6. A common issue in Will contest discovery is the temporal scope of permitted inquiry, particularly how many years before and after the date of execution of the Will is permissible. Although there is no case law in a discovery context, there are conflicting opinions as to admissibility at trial. See, e.g., Hopkins v. McClure, 45 So.2d 656 (Fla. 1950); Estate of Wieke, 275 So.2d 244 (Fla. 1973); Estate of Zimmerman, 84 So.2d 560 (Fla. 1956); Newman v. Brecher, 887 So.2d 384 (Fla. 4th DCA 2004); Clark v. Grimsley, 270 so.2d 53 (Fla. 1st DCA 1972); American Red Cross v. Haynsworth, 708 So.2d 602 (Fla. 3d DCA 1998); Blinn v. Carlman, 159 So.3d 390 (Fla. 4th DCA 2015).

7. A closely related issue involves discoverability/admissibility of non-testamentary documents procured by the alleged undue influencer. See, Estate of Dalton, 246 So.2d 612 (Fla. 3d DCA 1971); Raimi v. Furlong, 702 So.2d 1273 (Fla. 3d DCA 1997).

8. There are special rules with regard to discovery of documents prepared in anticipation of litigation or for trial by opposing counsel requiring the party seeking discovery to show that

the party has need of the materials and is unable without undue hardship to obtain the materials by other means. See Fla. R. Civ. P. 1.280(b)(4).

9. Depositions of witnesses in other states require appointment by the Florida court of a commissioner in the foreign state to serve the subpoena and take the testimony. A Florida court subpoena is not valid when served in another state.

10. Common practice involves extensive definitions and directions accompanying interrogatories that seek to inject disclosures not required by the Florida Rules of Civil Procedure. For example, it is commonplace for the covering sheet of directions to require the party to supplement the interrogatory answers if later information is acquired which is expressly contrary to Fla. R. Civ. P. 1.280(f).

11. In the area of Will and Trust contests, the scope of discovery beyond the immediate time frame of the execution of the documents is controversial. (Need to get a copy of one of the last things I filed in the Applebaum case which was a memorandum that I roughed out and sent to Steve Zack. It was just at the time the transition was starting and it cited a bunch of cases about how far before and after evidence is admissible for undue influence.)

12. In compensation disputes involving the fiduciary and the fiduciary's counsel, there are issues with regard to work product contained in billing records.

13. Florida courts recognize a distinction between fact work product and opinion work product. Opinion work product is virtually undiscoverable. See State v. Rabin, 495 So.2d 257 (Fla. 3d DCA 1986). In contrast, fact work product can be discovered if the party seeking it shows need for the materials to prepare the party's case and that the party is unable to obtain the materials by any other means without undue hardship. See Fla. R. Civ. P. 1.280(b)(4). With regard to the test for Fla. R. Civ. P. 1.280, compare Southern Bell v. Deason, 632 So.2d 1377, 1385 (Fla. 1994) with Carnival Cruise Lines v. Doe, 868 So.2d 1219, 1221 (Fla. 3d DCA 2004).

14. Waiver of the attorney-client privilege does not automatically waive work product. See State of Rabin, 495 So.2d 257, *supra*.

15. The longstanding battle over the applicability of the attorney-client privilege between fiduciary and lawyer has been resolved by §90.5021, Fla. Stat. The crime fraud exception, however, still applies. First Union v. Turney, 824 So.2d 172 (Fla. 1st DCA 2001).

16. An often overlooked rule is that in Florida a lay witness can give opinion testimony as long as the opinions and inferences do not require a special knowledge, skill, experience, or training. See §90.701, Fla. Stat. See In Re: Hammermann's Estate, 387 So.2d 409, 411 (Fla. 4th DCA 1980); compare Connell v. Green, 330 So.2d 473, 475 (1st DCA 1976) with Beck v. Gross, 499 So.2d 886, 888 (Fla. 2d DCA 1986).

17. A potential expert witness should first be retained as a consultant and then converted to an expert witness after having an opportunity to formulate an opinion. Designating a witness as a party's expert witness before an opinion has been formulated can be dangerous.

18. Fla. R. Civ. P. 1.280(b)(4) and (5) address the protection of work product in the context of the expert witness. While the expert's billing records may be discoverable in part by the opponent, work product will shield those portions of the expert's billing records that contain the retaining attorney's mental impressions, conclusions, opinions, or legal theories. See Anderson Columbia v. Brown, 902 So.2d 838 (Fla. 1st DCA 2005); Old Holdings, Ltd. v. Taplin, Howard, Shaw & Miller, P.A., 584 So.2d 1128 (Fla. 4th DCA 1991).

19. In probate litigation it is common for there to be multiple petitioners or multiple respondents. Answers by one party to discovery requests are not binding on a co-party. See Fla. R. Civ. P. 1.340(d).

20. Fla. R. Civ. P. 1.351 mail in subpoenas have virtually eliminated the need for records custodian depos.

21. The common practice of attaching several pages of definitions and requirements to interrogatories and notices to produce can be burdensome and courts will sustain objections when they are burdensome. See, e.g. Caribbean Security v. Security Control, 486 So.2d 654 (3rd DCA 1986); Grenelle Corp. v. Palms 21, 924 So.2d 887 (Fla. 4th DCA 2006) (requiring supplemental answers is contrary to Fla. R. Civ. P. 1.280(f)).

22. There are special rules with regard to expert witness discovery, requiring disclosure of the expert, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify with a summary of the grounds for each opinion. After the identity of the expert has been disclosed, the expert's deposition may be taken without the requirement of a court order. The party taking the deposition of the expert must pay the expert a reasonable fee for the expert's time in responding to discovery and giving the deposition. See Fla. R. Civ. P. 1.280(5).

23. The deposition of an expert witness may be used at trial under circumstances where the deposition of a witness would not otherwise be admissible. For example, even if the expert witness is within 100 miles and available to testify live, his/her deposition is nevertheless admissible when it would not be for an ordinary fact witness. See Fla. R. Civ. P. 1.330(a)(3)(F).

24. Florida has adopted the Frye standard for admissibility of expert testimony. The current controversy involving the Frye standard versus Daubert is not of particular significance in most probate cases which are non-jury and involve well-defined areas of expert admissibility.

25. Recent articles have pointed out the dangers in cross examining the opponent's expert and inadvertently inviting answers that would not have been admissible on direct examination.

26. Focus of expert testimony so as not to invade the province of the trial judge: Under the Florida Probate Code, expert testimony is not necessary for proving entitlement to fiduciary fees and counsel fees. The most useful expert testimony is medical testimony in Will/Trust contest cases.

27. The Frye v. Daubert debate is played out in §90.702, Fla. Stat. which was amended in 2013 to reflect that Daubert v. Merrell Dow, 509 US 579 replaced Frye v. U.S., 293 F. 1013 (App. DC 1923). §90.702, reflecting Daubert, provides that "expert testimony must be based upon sufficient facts or data; be the product of reliable principles and methods; and the expert must apply the principles and methods reliably to the facts of the case." The issue is whether by adopting the Daubert standard the legislature usurped the Florida Supreme Court's exclusive authority to regulate procedural vs. substantive issues. The board of governors of the Florida Bar on 12/4/15 recommended that the Supreme Court not adopt §90.702 (adopting Daubert) on the grounds that the 2013 amendment is in fact procedural and that it should not be applied in Florida because the Daubert "mini trial" proceedings are needlessly expensive and dilatory. (Interestingly The Florida Bar Code and Rules of Evidence Committee voted 16-14 to adopt Frye over Daubert but the board of governors vote in favor of Frye was 33-9). See The Florida Bar News, November 15, 2015 ed.

28. The old concept that the expert must first be qualified and then his/her testimony tendered has been changed. See Smith v. State, 7 So.3d 473, 496 (Fla. 2009); *Ehrhardt's Florida Evidence* 2015 Edition, page 795.

29. An expert witness may testify in a Florida court even if not licensed by the State of Florida as a general rule. (See Martuccio v. Dept. of Professional Regulation, 622 So.2d 607, 609 (Fla. 1st DCA 1993); see §766.102(12), Fla. Stat.)

30. It is axiomatic that one expert may not express an opinion about the credibility of another expert or the validity of another expert's opinion. See Caban v. State, 9 So.3d 50, 53 (Fla. 5th DCA 2009); Carver v. Orange County, 444 So.2d 452, 454 (Fla. 5th DCA 1983).

31. Cross examination of an expert witness is more important as a result of the current procedure allowing experts to testify as to their opinion without setting out in detail the basis for the opinion. See *Ehrhardt's Florida Evidence* 2015 Edition, page 848.

32. With regard to the admissibility of expert testimony, §90.704, Fla. Stat. explicitly provides that the expert may rely on facts and data not admissible in evidence.

33. When you are cross examining an expert, your choice is to conduct a voir dire examination of the witness attempting to establish prima facie evidence that the expert does not have

sufficient basis for the opinion, or alternatively, exposing the lack of sound basis for the opinion on cross examination. See §90.705(1) and (2), Fla. Stat.

34. An important strategic consideration is that a party may not use expert testimony to present evidence that would otherwise be admissible but if the opponent of the testimony on cross examination elicits the testimony, it may be damaging but will be heard by the trier of fact. See §90.705, Fla. Stat.

35. Use of a published article on cross examination may be required in response to an interrogatory. See Northup v. Acken, 865 So.2d 1267 (Fla. 2004).

36. Opinion testimony can be in the form of answers to hypothetical questions.

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