# DISCOVERY AND EXPERT WITNESS ISSUES IN GUARDIANSHIPS, TRUSTS AND ESTATES

## ACTEC FLORIDA FELLOWS INSTITUTE
## Class V, Session II, Program 4
## February 24, 2022

**A Collaboration among James G. Pressly, Jr., Edward Downey and Amy B. Beller**

"*No great discovery was ever made without a bold guess.*"
Isaac Newton

## I. Scope of Discovery and Applicability of Rules of Civil Procedure

a. Fla. Prob. Rule 5.080 adopts Fla. R. Civ. P. 1.280 through 1.410: allows use of "the usual" discovery devices (see Tools of the Trade, below).

b. Applicable even if there is no adversarial proceeding. Fla. Prob. Rule 5.080(c).

c. Fla. Prob. Rule 5.025 provides that Rules of Civil Procedure apply to except for Fla. R. Civ. P. 1.525 (motions for attorneys' fees required to be made within 30 days).

d. Discovery devices may be used by interested parties other than the Personal Representative. Fla. Prob. Rule 5.080(c).

   i. Must be an interested party. *See Estate of Shaw*, 340 So.2d 491 (Fla. 3d DCA 1976)(contingent creditor of estate was not entitled to discovery about estate assets); *Estate of Posner*, 492 So.2d 1093 (Fla. 3d DCA 1986)(same).

e. Informal discovery – beneficiaries are entitled to information about estate and trust administrations. *See* Fla. Prob. Rule 5.341.

f. Scope – Fla. R. Civ. P. 1.280(b)(1): reasonably calculated to lead to the discovery of admissible evidence. *See* Fla. Prob. R. 5.080(a)(1).

   i. Time frame for discovery and admissible evidence. *See Hopkins v. McClure*, 45 So.2d 656 (Fla. 1950); *Estate of Wiehe*, 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). (Compare NY law setting applicable time frame for discovery at 3 years before execution and 2 years after execution.)

ii. Discovery/admissibility of collateral documents: *Estate of Dalton*, 246 So.2d 612 (Fla. 3d DCA 1998); *Raimi v. Furlong*, 702 So.2d 1273 (Fla. 3d DCA 1997).

g. Discovery of documents prepared in anticipation of litigation or for trial – party seeking discovery must show need and inability to obtain the materials by other means without undue hardship. Fla. R. Civ. P. 1.280(b)(4).

h. Calculating Response Dates: Fla. R. Jud. Admin. 2.514

i. Rule Changes effective October 15, 2021:

i. Rule 1.280 now requires a party responding to discovery to re-state the question in full and then provide the answer, objection or other response.

ii. Rule 1.340 was amended to eliminate the requirement that each interrogatory be followed by a blank space for the response.

j. Spoliation and Rule 1.380:

i. Traditionally prohibited intentional destruction or concealment of evidence and applied a three-part test. *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777 (Fla. 4th DCA 2006)((1) whether evidence existed at one time, (2) whether there was a duty to preserve, and (3) whether evidence was critical to prima facie case or defense).

ii. Per amendment to Rule 1.380(e) effective January 1, 2020, one may face sanctions for failing to take reasonable steps to preserve ESI evidence.

k. Pre-Action Discovery

i. Florida Statutes §§ 732.518 and 736.0207 prohibit pre-death will or trust contests.

ii. Challenge to validity of trust may be brought by a guardian if the court finds that the action appears to be in the ward's best interests in his or her probable lifetime. Fla. Stat. § 744.441(11); s*ee also* Fla. Stat. § 736.0207

(stating that section does not prohibit a trust contest by a guardian of the property of an incapacitated settlor).

iii. Privacy interests: *Compton v. West Volusia Hosp. Auth.*, 727 So. 2d 379, 382 (Fla. 5th DCA 1999): "A person's ultimate plans for disposition of such properties as that person may have when he or she dies, is an extremely private matter and … there are no counter-balancing considerations which might outweigh and overcome the privacy interest."

iv. Pure Bill of Discovery: permits a plaintiff to seek otherwise unavailable information to enable plaintiff to continue in the prosecution of or to institute a suit for relief under a cognizable theory. *First Nat'l Bank of Miami v. Dade-Broward Co.*, 171 So. 510 (Fla. 1936).

1. *Publix Supermarkets, Inc. v. Frazier*, 696 So. 2d 1369 (Fla. 4th DCA 1997): pure bill of discovery should not be used as a fishing expedition, listed the requirements to sustain a pure bill of discovery application:
    a. The matters concerning which the discovery asked for is sought.
    b. The interests of the several parties in the subject of the inquiry.
    c. The complainant's right to have the relief prayed.
    d. The complainant's title and interest and what the relationship of same is to the discovery claimed.
    e. Discovery so attempted is material to litigation brought on the common law side of the court so as to entitle the complainant to disclosure of what is necessary to maintain its own claim in that litigation.
2. *Adventist Health System/Sunbelt, Inc. v. Hegwood*, 569 So. 2d 1295 (Fla. 5th DCA 1990): pure bill of discovery allowed deposition of medical witnesses regarding the care and treatment of a patient to satisfy the statutory prerequisites to filing a

malpractice suit. The requested discovery was to preserve an action, not to determine whether one existed.

v. Depositions Before Action: Florida Rule of Civil Procedure 1.290

1. Similar to Fed. R. Civ. P. 27 (reproduced at the end of these materials) – the lack of Florida cases on Rule 1.290 lead us to consider federal cases under Rule 27. Rule 27 is not itself a discovery device, but rather serves the limited purpose of preserving evidence either through oral and written depositions, production of documents or inspection, or physical and mental examination. *See In re Boland*, 79 F.R.D 665, 668 (D.D.C. 1978).
2. The purpose of the rule "is not the determination of substantive rights, but merely the providing of aid for the eventual adjudication of such rights in a suit later to be begun." *Mosseller v. United States*, 158 F. 2d 380, 382 (2d Cir. 1946).
3. "…[T]he best interpretation of the rule is that the testimony to be perpetuated must be relevant, not simply cumulative, and likely to provide material distinctly useful to a finder of fact. A determination that the evidence is absolutely unique is not necessary. There must, of course, be a reasonable showing of the need to perpetuate the testimony lest it be lost because of the commencement of litigation." *In re Bay City Middlegrounds Landfill Site v. Kuhlman Electric Corp.*, 171 F. 3d 1044, 1047 (6th Cir. 1999) (allowing General Motors, a potential defendant, to preserve the testimony of a landfill employee in connection with a possible claim for contributory negligence for pollution at a municipal landfill, if the EPA were to bring suit).

## II. Tools of the Trade

a. Discovery Plan and Strategy
b. Interrogatories – Fla. R. Civ. P. 1.340
c. Request for Admissions – Fla. R. Civ. P. 1.370
d. Request for Production – Fla. R. Civ. P. 1.350(a)(1)

e. Depositions-- Fla. R. Civ. P. 1.310
    i. Location of deposition of non-party – Fla. R. Civ. P. 1.410(e)2)
    ii. Out of State Depositions – Fla. R. Civ. P. 1.410(g) and use of commissions.
        1. Check Uniform Interstate Depositions and Discovery Act, whether the State where the witness is located has adopted the Act, and that State's particular requirements. (For example, New York Civil Practice Law and Rules § 3119(3) allows a New York lawyer to sign a subpoena for a witness to appear in NY, or a Florida attorney can submit the subpoena to the County Clerk in NY for issuance.)
        2. Witnesses in Florida for out-of-state case: *See* Fla. Stat. § 92.251
    iii. Depositions on Written Questions – Fla. R. Civ. P. 1.320
f. Production Without Deposition -- Fla. R. Civ. P. 1.351
    a. Objections can be addressed by the Court without having to resort to a deposition. *See Lyons v. Lyons*, 162 So.3d 212 (Fla. 4th DCA 2015); *Nevin v. Palm Beach County Sch. Bd.*, 958 So.2d 1003 (Fla. 1st DCA 2007).
g. Inspection – Fla. R. Civ. P. 1.350(a)(2) and (3)
h. Drafting considerations – definitions and instructions
    a. When instructions are burdensome, they may be the proper subject of objections. *See Caribbean Security Systems v. Security Control Systems*, 486 So.2d 654 (Fla. 3d DCA 1986); *Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So.2d 887 (Fla. 4th DCA 2006) (requiring supplemental answers is contrary to Fla. R. Civ. P. 1.280(f)).
i. Discovery Objections and Responses
    a. General objections
    b. Specific objections and privilege logs
    c. Motion for protective order
    d. Responses of one party are not binding on others. Fla. R. Civ. P. 1.340(d).
j. Use of Discovery at Trial
    iv. Depositions

v. Documents

## III. Privilege Issues

a. Attorney-Client Privilege – Fla. Stat. § 90.502
   i. Work Product
      1. Opinion work product is virtually undiscoverable. *See State v. Rabin*, 495 So.2d 257 (Fla. 3d DCA 1986).
      2. Fact work product may be discoverable if the party seeking production shows need for the materials and inability to obtain the materials without undue hardship. *See* Fla. R. Civ. P. 1.280(b)(4); *Southern Bell v. Deason,* 632 So.2d 1377 (Fla. 1994); *Carnival Cruise Lines, Inc. v. Doe*, 868 So.2d 1219 (Fla. 3d DCA 2004).
      3. Recent case: notes of witness made to prepare for deposition are protected work product even though counsel was not involved. *Cowan v. Gray,* Case No. 05-2020-CA-019603 (Fla. 5th DCA January 21, 2022).
   ii. Exceptions, e.g. crime-fraud exception. *See First Union Nat'l Bank v. Turney*, 824 So.2d 172 (Fla. 1st DCA 2001)

b. Fiduciary Lawyer-Client Privilege – Fla. Stat. § 90.5021
   i. Although in 2014, the Florida Supreme Court declined to adopt § 90.5021 to the extent it is procedural, in January 2018, after a recommendation by the Florida Bar's Probate Rules Committee, the Florida Supreme Court reversed itself and did adopt the fiduciary lawyer-client privilege. S*ee also Bivins v. Rogers*, 207 F. Supp. 3d 1321 (S.D. Fla. 2016).

c. Psychotherapist-Patient Privilege – Fla. Stat. § 90.503

d. Husband-Wife Privilege – Fla. Stat. § 90.504

e. Clergy – Fla. Stat. § 90.505

f. Accountant-Client Privilege – Fla. Stat. § 90.506

g. Waiver – Fla. Stat. § 90.507
   i. Waiver of attorney-client privilege may not extend to work product. *See State v. Rabin*, 495 So.2d 257 (Fla. 3d DCA 1986).

h. In camera review of documents – *see Paskoski v. Johnson*, 626 So.2d 338 (Fla. 4th DCA 1993)

**IV. <u>Confidentiality of Estate Planning Documents</u>**

a. Fl. Eth. Op. 10-3 (Feb. 1, 2011) (attached) – generally the estate planning lawyer should not "voluntarily" disclose confidential information.

b. Spivey, Barry F., "Post-Death Confidentiality of Estate Planning Communications Between Attorney and Client", 77 Fla. Bar J. (Apr. 2003) (attached)

**V. <u>Special Issues in Incapacity/Guardianship Proceedings</u>**

a. Examining Committee Reports are hearsay - not admissible. *See Shen v. Parkes*, 100 So.3d 1189 (4th DCA 2012); Fla. Stat. § 744.331(3)(i).

b. If a timely objection is received, you will need to take deposition of Examining Committee Members who will not be available for trial in advance to authenticate their report.

c. AIP/Ward has the right to refuse to testify. Fla. Stat. § 744.1095.

d. HIPAA considerations for AIP/Ward

e. Guardian steps into the Ward's shoes for assertion of privilege. Fla. Stat. § 90.502

f. Ward retains the right to privacy after adjudication of incompetency. Fla. Stat. § 744.3215

g. Psychotherapist-Patient Privilege exception in Fla. Stat. § 90.503: no privilege for communications in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

**VI. <u>Expert Witnesses</u>**

a. Generally allowed if it will assist the trier of fact. See Fla. Stat. §§ 90.702 – 90.706.

   i. Standard of care/breach of duty

   ii. Esoteric trust and estate principals – *see Estate of Lenahan*, 511 So.2d 365 (Fla. 4th DCA 1987)

   iii. Reasonableness of attorneys' fees. *See Tutor Time Merger Corp. v. Mecabe*, 763 So.2d 505 (Fla. 4th DCA 2000)

b. Consulting expert versus testifying expert

c. Applicable Standard (Daubert vs. Frye) (HINT: THE ANSWER IS FRYE!)

i. Daubert standard (*Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579) vs. Frye standard (*Frye v. U.S.*, 293 F. 1013).

ii. Frye was the applicable standard in Florida.

iii. 2013 -- adoption of the Daubert standard with amendments to Evidence Code. Fla. Stat. § 90.702: expert testimony must be based on 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.

iv. In *Crane Co. v. DeLisle*, 206 So.3d 94 (Fla. 4th DCA 2016), the Fourth District Court of Appeal applied the Daubert standard in finding that the opinions of three expert witnesses on disease causation were insufficiently supported under Fla. Stat. § 90.702. The Court reversed the trial court's denial of motions notwithstanding the verdict, thus setting aside a jury verdict of $8 million.

v. On February 16, 2017, the Supreme Court of Florida declined to adopt the changes to 90.702 and 90.704 to the extent they are procedural, effectively rejecting the Daubert standard. *In re Amendments to Fla. Evidence Code*, 210 So. 3d 1231 (Fla. 2017).

vi. By decision issued on October 15, 2018, the Florida Supreme Court reversed the decision of the Fourth District in *Crane Co. v. DeLisle*, finding that the Florida Legislature's attempted adoption of the Daubert standard impinged on the power of the Court:

> "In *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), a short opinion, the Court of Appeals for the District of Columbia pronounced that the line between when a scientific discovery or principle crosses from experimental to demonstrable is indiscernible so that courts would do better 'admitting expert testimony deduced from a well-recognized scientific principle or discover.' *Id*. at 1014. Further, the Court explained, 'the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' *Id*. This rule – that expert testimony should be deduced from generally accepted scientific principles –

> has been the standard in Florida cases and, today, we reaffirm that it is still the standard. [Citations omitted.]"
>
> *DeLisle v. Crane Co.*, 2018 Fla. LEXIS 2390 (Fla. Dec. 6, 2018) (copy attached).

d. Expert testimony on legal fees:
    i. Expert testimony is necessary on reasonableness of legal fees, whether the party who contracted for the fees is to pay them, or whether there is an attempt at fee-shifting. *Robin Roshkind, P.A. v. Machiela*, 45 So. 3d 480 (Fla. 4th DCA 2010) (copy attached). In the *Robin Roshkind* case, the Fourth DCA asked the Florida Supreme Court to accept jurisdiction to determine whether such requirement should continue. The Florida Supreme Court initially accepted jurisdiction, but then changed its mind. *See Robin Roshkind, P.A. v. Machiela*, 64 So. 3d 1245 (Fla. Sup. Ct. 2011).
    ii. BUT no expert testimony is needed for a determination regarding legal fees for the attorney for a Personal Representative. Fla. Stat. § 733.6175(4).
    iii. AND if a party is seeking to recover, as damages, fees paid to any professional including their attorney, for example under the wrongful conduct doctrine, then no expert witness testimony is required. *Schwartz v. Bloch*, 88 So. 3d 1068 (Fla. 4th DCA 2012); *Sea World of Fla., Inc. v. Ace Am. Ins. Cos.*, 28 So. 3d 158 (Fla. 5th DCA 2010).
e. New Case: *Buzby v. Turtle Rock Community Ass'n, Inc.*, 47 Fla. L. Weekly D99a (Fla. 2d DCA January 5, 2022): former attorney for plaintiffs who testified in support of plaintiffs' claim for prevailing party legal fees was not an expert witness entitled to his hourly rate per Fla. R. Civ. P. 1.390. Like a treating physician, a fact witness is distinguished from an expert witness: an expert witness evaluates and opines on the skilled performance of another.
f. 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, 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).

g. Fla. R. Civ. P. 1.280(5) provides rules with regard to expert witness discovery
    i. Requires disclosure of the expert, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions and a summary of the grounds for each opinion.
    ii. The opposing party is entitled to the expert's deposition but must pay the expert a reasonable fee for the expert's time.
    iii. The expert's deposition may be used liberally at trial. Fla. R. Civ. P. 1.330(a)(3)(F).
h. A judge does not have to determine an expert to be "qualified" before an opinion is elicited at trial. *See Smith v. State*, 7 So.3d 473 (Fla. 2009); Ehrhardt's Florida Evidence, 2015 ed., p. 795.
i. An expert need not be licensed in Florida. *See Martuccio v. Dept. of Professional Regulation, Bd. of Optometry*, 622 So.2d 607 (Fla. 1st DCA 1993).
j. One expert may not express an opinion about the credibility of another expert or the validity of another expert's opinion. *Caban v. State*, 9 So.3d 50 (Fla. 5th DCA 2009); *Carver v. Orange County*, 444 So.2d 454 (Fla. 5th DCA 1983).
k. Fla Stat. § 90.704 provides that an expert may rely on facts and data not admitted into evidence.
l. Careful consideration must be made with respect to cross-examination of an expert witness, so as to not elicit testimony about matters that would otherwise not be admissible.
m. Opinion testimony by lay persons: a lay witness can give opinion testimony as long as the opinions are inferences do not require special knowledge, skill, experience, or training. See Fla. Stat. § 90.701; *In re Estate of Hammermann*, 387 So.2d 409 (Fla. 4th DCA 1980); *Connell v. Green*, 330 So.2d 473 (Fla. 1st DCA 1976); *Beck v. Gross*, 499 So.2d 886 (Fla. 2d DCA 1986).

Bonus Tips for the Thorough Readers:

- The Florida Bar Trial Law Section has a great Discovery Handbook which is free and available for download on their website: https://floridatls.org
- Sending out a "Spoliation Letter" at the commencement of the case puts the other side on notice of their obligation to preserve evidence, particularly ESI. Form is attached.
- Zoom Depositions:
    - Witness needs to provide photo ID in advance for swearing in.
    - Make sure your witness is able to see the documents on the screen share or provide a hard copy set in advance. (The disadvantage to providing a hard copy in advance is that the witness will know what documents s/he will be questioned on.)
    - Get witness to state on the record whether anyone else is in the room or within hearing distance.
    - Consider video recording of Zoom deposition (not Zoom recording).
- In an undue influence case, the timing of the undue influencer's deposition is critical. You want enough background evidence to be effective at deposition but not so much as to allow the U/I witness to fabricate a story that comports with all evidence.
- Requests for Admissions are a fantastic tool in litigation – you should always consider how they can be used to narrow issues and/or trap the opposing party.