Appeals 101:
Tips to Avoid Traps for the Unwary

FLORIDA FAMILY LAW AMERICAN INN OF COURT
JANUARY 21, 2021

Exciting Changes to the Appellate Rules?!

PREPARED AND PRESENTED BY
DEBORAH GREENE

Question:

Which font style/type face is acceptable to use in a motion filed with the DCA?

A. Times New Roman;

B. Courier New;

C. Bookman Old Style; or

D. There are no font requirements for motions.

Out with the old…
(Courier New & Times New Roman)

In with the new…

Arial

Created as a knock-off Helvetica in the 1990s

& the really old!

Bookman Old Style

Derived from a font created in the 1850s

"Maybe it's a bold, ahem, new direction in appellate brief typography. Or maybe all those Latin legal phrases are just too hard in (Times New) Roman . . . Whatever the font of inspiration . . ." the Florida Supreme Court has amended the appellate rules to provide for new fonts in appellate filings, and for word limitations, instead of page limits.

In Font-astic Decision, Committee Prefers Bookman Old Style Over Times New Roman, Gary Blakenship, The Florida Bar News (Aug. 9, 2019).

The District Court of Appeal Judges were polled by the Appellate Rules Committee and they overwhelmingly approved of Arial and Bookman Old Style.

In Font-astic Decision, Committee Prefers Bookman Old Style Over Times New Roman, Gary Blakenship, The Florida Bar News (Aug. 9, 2019).

As a result, we now have a BRAND-NEW RULE regarding font sizes and amendments to the existing rules regarding length limitations for appellate filings.

Say hello to Rule 9.045, Florida Rules of Appellate Procedure.

The new Rule 9.045 is sandwiched between Rules 9.040 (General Provisions) and 9.050 (Maintaining Privacy of Personal Data).

Rule 9.045 provides that all documents filed with the Court:

- Use the fonts Arial or Bookman Old Style (if a computer- generated document)
- Use 14-point, black type (if a computer-generated document)
- Be double spaced
- Have headings and subheadings that are at least as large as the text in the rest of the document (but these may be single spaced)
- Have footnotes and quotations in the same size type and with the same spacing between characters as the text in the body of the document (but these may also be single-spaced)
- Must comply with Rule 2.520, Florida Rules of Judicial Administration

The new rule incorporates the definition of “document” from Rule 2.520, Florida Rules of Judicial Administration.

Rule 2.520(a) provides: “‘Documents’ means pleadings, motions, petitions, memoranda, briefs, notices, exhibits, declarations, affidavits, orders, judgments, decrees, writs, opinions, and any paper or writing submitted to a court.”

The new rule incorporates the definition of "document" from Rule 2.520, Florida Rules of Judicial Administration.

Under the prior rules, only certain filings were subject to font size and type requirements, which were found within the various rules related to certain types of filings (like briefs, for example). Also, under the prior rules, documents like motions and notices did not need to comply with font size or type requirements.

Based on the incorporation of the definition of a "document," all filings in the appellate courts must now comply with the font type and font size requirements under Rule 9.045.

As to the length of documents, the Florida Supreme Court explained:

"Because the new fonts take up more space on a page, page limits for computer-generated documents throughout the Florida Rules of Appellate Procedure are replaced with word counts. Page limits for handwritten and typewritten documents are unchanged."

In Re Amendments to Florida Rules of Appellate Procedure,
No. SC20-597 (Dec. 3, 2020).

Rule 9.045 also requires that "[a]ll computer-generated documents subject to a word count limit are required . . . to contain a certificate of compliance certifying that the document is in conformity with all font and word count requirements."

In Re Amendments to Florida Rules of Appellate Procedure, No. SC20-597 (Dec. 3, 2020).

Regarding the word count limitations, those are found within the various appellate rules related to specific types of filings. For example:

- Rule 9.210 (Briefs): The cover sheet, table of contents, certificates of service and compliance and signature blocks are excluded from the word count limits
- Briefs on Jurisdiction – 2,500 words
- Initial & Answer Briefs – 13,000 words
- Reply Briefs – 4,000 words
- Answer/Cross-Initial Briefs – 22,000 words
- Reply/Cross Answer Briefs – 13,000 words
  - (but only 4,000 words may be devoted to argument replying to the answer portion of the Answer/Cross-Initial Brief)
- Cross-Reply Briefs – 4,000 words

Rule 9.210

- Rule 9.210 also removed the language regarding the number of pages that should be used for the summary of the argument and the conclusion in initial briefs.
- The Rule used to provide that the summary of the argument in initial briefs should "seldom exceed 2 pages and never 5 pages." Now, there is no space limitation.
- The Rule used to provide that conclusions in initial briefs should not exceed 1 page. Now, the Rule states that the initial brief should include a "short conclusion."
- Be sure to check other specific rules related to other types of appellate cases for the applicable word limitations.

(Play to :59) https://www.youtube.com/watch?v=i3k5oY9AHHM

Motions for Rehearing

PREPARED AND PRESENTED BY
NANCY C. HARRISON AND DEBRA TREECE

Question:

TRUE OR FALSE?

An order on a motion for rehearing is independently reviewable and appealable.

Trial counsel must understand the basics to preserve the right to appeal. This makes the work of an appellate lawyer much easier.

THE BASICS. Motions for rehearing are governed by Fla. R. Civ. P. 1.530 and Fla. Fam. L.R.P. 12.530.

A. **Time for Filing.** Motions for rehearing shall be served not later than 15 days after the return of the verdict in jury action or the date of filing of the judgment in a non-jury action. Fla. R. Civ. P. 1.530.

B. **"The date of the filing of the judgment."** This is not the date the trial judge enters or signs the final order or judgment, but the date the order or final judgment is filed in the clerk's office.

C. **Be sure the motion for rehearing is properly and timely *served*.** *See* Fla. R. Civ. P. 1.530(b); *Migliore v. Migliore*, 717 So. 2d 1077, 1079 (Fla. 4th DCA 1998) (noting that the service date—not the filing date—is critical for determining whether the motion is timely).

Should you file a motion for rehearing?

- It may be easier to consider first when you do not need to file a motion.
- Rule 1.530 specifically states that in a non-jury trial, "the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment." Fla. R. Civ. P. 1.530(e); *accord* Fla. Fam. L.R.P. 12.530(e).
- For instance, if the trial court abused its discretion in making findings not supported by competent, substantial evidence, a motion for rehearing is not required to preserve the issue for appeal. *See, e.g., Rhoads v. Rhoads*, 213 So. 3d 968, 969 n.1 (Fla. 1st DCA 2015).

Should you file a motion for rehearing?

A. What if the trial court's judgment omits statutorily-required findings? That's a slam dunk for appeal, right?

   Not if you don't file a motion for rehearing. The First, Third, and Fifth DCAs impose an almost absolute requirement for the filing of a motion for rehearing in that instance. Absent a motion for rehearing, the issue will not be preserved for appeal.

   However, this is not the rule in every district. *See Engle v. Engle*, 277 So. 3d 697, 704 (Fla. 2d DCA 2019) (finding the trial court's failure to make specific factual findings, as required by statute, to be reversible error "regardless of whether the error was first raised in the trial court by means of a motion for rehearing"); *accord Fox v. Fox*, 267 So. 3d 789, 793-95 (Fla. 4th DCA 2018) (en banc).

Should you file a motion for rehearing?

B. How about if the trial court makes an error that appears for the first time on the face of the final judgment? Another slam dunk for appeal, right?

No—not if you haven't pointed that out to the trial court in a timely motion for rehearing. *See Smith v. Smith*, 273 So. 3d 1158, 1171 (Fla. 1st DCA 2019) ("[W]here an error by the court appears for the first time on the face of a final order, a party must alert the court of the error via motion for rehearing or some other appropriate motion in order to preserve it for appeal.") (internal quotations omitted).

This doctrine applies only to issues which appear for the first time in a final judgment—not errors on issues which are pled, tried, and decided; for instance, when the claim concerns a misapplication of law or the sufficiency of the evidence.

The First DCA suggests that when there is a concern about a judgment, a motion for rehearing, for new trial, or to alter or amend the judgment should be filed. This gives the trial court the opportunity to correct its error in the first instance.

Should you file a motion for rehearing?

C. When in doubt, file.

If you are not sure whether to file a motion for rehearing, file it! Otherwise, you may waive your argument on appeal. Plus, so long as the order or judgment is truly "final," a timely and authorized motion for rehearing tolls the time for filing a notice of appeal. See Fla. R. App. P. 9.020(h)(1). If a notice of appeal is filed before an order on the pending motion for rehearing, the appeal will be held in abeyance until the motion is either withdrawn or resolved by rendition of the order. Fla. R. App. P. 9.020(h)(2)(C).

Should you file a motion for rehearing?

D. One additional suggestion:

Consider filing a proposed final judgment to protect issues for appeal. Likewise, consider filing an objection to opposing counsel's proposed final judgment to point out defects.

Is an Order on a Motion for Rehearing Appealable?

Yes, but with an important caveat. The order is reviewable, *but not independently appealable*. An order on rehearing, then, can be reviewed only if appealed together with a timely appeal of the underlying order. See Fla. R. App. P. 9.130(a)(4).

The 2014 Committee Notes explain that the rule "has been amended to clarify that an order disposing of a motion that suspends rendition is reviewable, but only in conjunction with, and as a part of, the review of the final order." Fla. R. App. P. 9.130, notes to 2014 Amendment; *see also* Fla. R. App. P. 9.020(h)(1) (defining "rendition").

Accordingly, Rule 9.130(a)(4) now provides that "[o]rders disposing of motions for rehearing or motions that suspend rendition are not reviewable separately from a review of the final order."

Final vs. Non-Final Orders

REBECCA BOWEN CREED AND DAVID MERRITT

Question:

TRUE OR FALSE?

Failure to immediately appeal a non-final order listed within Florida Rule of Appellate Procedure 9.130 is fatal to your right to seek appellate review of that ruling.

Is the Order Truly “Final”?

The Test for Finality: What makes an order “final” for purposes of appeal? Is a “final judgment of dissolution” truly final? Not always. The language of the order itself matters more than its title.

“A final judgment is one which ends the litigation between the parties and disposes of all issues involved such that no further action by the court will be necessary.” *Caufield v. Cantele*, 837 So. 2d 371, 375 (Fla. 2002); *accord Demont v. Demont*, 24 So. 3d 699, 699 (Fla. 1st DCA 2009).

For instance, appeals have been dismissed where:

- the trial court retained jurisdiction to consider the division of the parties' marital personal property;
- the "final" order of dissolution reserved jurisdiction to consider a reduction in value of an asset subject to equitable distribution;
- the "final" order of dissolution contained a reservation of jurisdiction to decide a factual dispute related to investment and bank accounts;
- the trial court retained jurisdiction to equitably distribute the marital assets and liabilities;

For instance, appeals have been dismissed where:

- the trial court reserved jurisdiction to determine the disposition of the marital home should the former wife "be unable to refinance the mortgage"; and
- the trial court reserved jurisdiction as to issues of child custody, child support, and alimony.

But note: a judgment on the merits that reserves jurisdiction only to award attorney's fees is final and appealable. Issues regarding attorney's fees are considered collateral to the main dispute.

What is the effect of dismissal? If an indeterminate amount of judicial labor, possibly requiring another hearing, remains before a final order can be entered, the appellate court will likely dismiss—rather than abate—the appeal. Dismissal is without prejudice to the party's right to file a timely notice of appeal once the trial court renders a final order.

NOTE: "Rendition" occurs when a signed, written order is filed with the clerk of the lower tribunal. Fla. R. App. P. 9.020(h).

Does the lack of the order's finality affect its enforceability? Not usually. "[P]rocedural rules established to determine finality for the purpose of seeking rehearing or appeal do not necessarily affect the efficacy of a validly entered decree." *Gaines v. Sayne*, 764 So. 2d 578, 585 (Fla. 2000). For instance, a trial court's adjudication of dissolution effectively ends the marriage—even if the order itself is technically not "final" for purposes of appeal.

What if the trial court sua sponte amends its judgment?

Rule 1.530(d) allows the trial court, "perceiving error," to "act on its own motion to correct it." *See* Fla. R. Civ. P. 1.530(d); Fla. Fam. L.R.P. 12.530; *accord Bucsit v. Bucsit*, 229 So. 3d 430 (Fla. 1st DCA 2017).

But when does the time for appeal begin to run? In an abundance of caution, file the notice of appeal within 30 days of the initial judgment. Otherwise, you run the risk that the appeal will be dismissed as untimely.

Only if a judgment is amended in a *material* respect does the time for appeal run from the date of the amendment. Absent a substantive change between the initial and amended judgments, or resolution of a genuine ambiguity, the 30-day time limit begins upon rendition of the original judgment.

Filing a Cross Appeal

Do you really need to? In deciding whether to file a cross-appeal, consider the relief that you're seeking. Are you asking for affirmative relief from the judgment, or one aspect of the trial judge's ruling? If you didn't get everything you wanted, you may consider filing a notice of cross-appeal.

But, if you intend to rely on the trial judge's ruling—or if you can argue that the judge reached the right result, even if for the wrong reason (the "Tipsy Coachman" doctrine)—you need not cross-appeal.

Filing a Cross Appeal

Timing. File the notice of cross-appeal within 15 days of service of the appellant's timely-filed notice of appeal, or within the time prescribed for filing a notice of appeal (within 30 days of rendition of the order), whichever is later. Fla. R. App. P. 9.110(g).

Separate filing fees apply. *See* Fla. R. App. P. 9.110(g).

The time for filing a notice of cross-appeal is not jurisdictional. *See, e.g.*, *County Sanitation v. Ross*, 389 So. 2d 1247, 1249 (Fla. 1st DCA 1980).

What does that mean? So long as the appellate court has proper jurisdiction of the appeal, even an appellee's answer brief raising an issue can be deemed sufficient notice of a cross-appeal from the trial court's ruling. *See City of Hialeah v. Martinez*, 402 So. 2d 602, 603 n.4 (Fla. 3d DCA 1981) (noting that appellant did not claim prejudice).

Appealability of Post-Judgment Orders

Orders entered after the final judgment may be independently appealable.

Appealable final orders include:

- post-judgment orders *denying* a claim for entitlement to attorney's fees;
- post-judgment orders granting entitlement to attorney's fees *and* determining the amount of fees or costs;

Appealability of Post-Judgment Orders

- orders awarding sanctions;
- orders on supplemental petitions for modification; and
- orders on the enforcement of final judgments, such as an order on contempt.

Non-Final Orders

If the order is not "final," is it appealable as a non-final order? Maybe, or maybe not.

Only the categories of orders specifically listed in Florida Rule of Appellate Procedure 9.130 are appealable as non-final orders.

You may also consider whether to seek relief in an original proceeding (like a petition for writ of certiorari) under Florida Rule of Appellate Procedure 9.100. *See generally* Fla. R. App. P. 9.100.

Important provisions within Rule 9.130:

Under Rule 9.130, orders that

- concern venue;
- grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions;
- determine the jurisdiction of the person; or
- determine, in family law matters:
  - the right to immediate monetary relief;
  - the rights or obligations of a party regarding child custody or time-sharing under a parenting plan; or
  - that a marital agreement is invalid in its entirety.

may be appealed. (This is not an exhaustive list.)

Practical distinctions between final and non-final appeals:

Timing: In both final and non-final appeals, the notice of appeal must be filed within 30 days of the underlying order.

However, the initial brief in a non-final appeal must be served within 15 days of filing the notice. In the First DCA, extensions of time are not available, absent an emergency, for "child-related" appeals. Otherwise, though, the First DCA allows for the filing of agreed notices of extension in both final and non-final appeals.

Record: Generally, in a non-final appeal, no record is prepared and transmitted by the clerk of the lower tribunal. Fla. R. App. P. 9.130(d). Instead, the appellant is responsible for preparing and filing an appendix under Rule 9.220.

What happens if you do not file a timely appeal of an order otherwise reviewable under Rule 9.130? Do you forever lose the right to appellate review? No. *See Vinsand v. Vinsand*, 179 So. 3d 366 (Fla. 2d DCA 2015); *see* Fla. R. App. P. 9.130(h).

[A]n order denying a change of venue is one of the enumerated nonfinal orders reviewable on interlocutory appeal. But such an appeal is not mandatory, and failure to pursue an interlocutory appeal on venue does not bar review of the venue issue on appeal after final disposition of the case.

Vinsand, 179 So. 3d at 368-69 (citations omitted).

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When All Else Fails

Potential Alternatives to Rule 9.130 Review

PREPARED AND PRESENTED BY
WILLIAM S. GRAESSLE

Question:

Which of the following could be considered the easiest to obtain and the least likely to benefit your client?

A. Petition for Writ of Certiorari
B. Petition for Writ of Prohibition
C. Petition for Writ of Habeas Corpus
D. Petition for Writ of Mandamus

Petition for Writ of Certiorari

Certiorari is available to review a non-final order if it departs from the essential requirements of law, causing material injury throughout the remainder of the proceedings, and leaving no adequate remedy on appeal. *See Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987); *Rayhall v. Cheaib-Rayhall*, 937 So. 2d 1223 (Fla. 2d DCA 2006).

Examples include the forced disclosure of privileged/confidential financial information (or other confidential information which is not relevant to the case), the disclosure of which may reasonably cause material injury of an irreparable nature. This includes "cat out of the bag" material that could be used to injure another person or party outside the context of the litigation. *Allstate Insurance Co. v. Langston*, 65 So. 2d 91 (Fla. 1995).

In rare cases, an order prohibiting discovery—if it would prevent a party from making a record for appellate review—can be reached via this writ.

Petition for Writ of Prohibition

Available for two distinct types of orders which can arise in family law cases:

1. **Disqualification of the trial judge.** Once a party has filed a motion for disqualification, which will invariably be denied, the remedy is a petition for writ of prohibition. The legal test for the sufficiency of the motion to disqualify is whether the movant has demonstrated an objectively reasonable fear that he or she will not receive a fair hearing. The district court of appeal will review a petition for writ of prohibition for the legal sufficiency of the motion.

2. **When the trial judge has no subject matter jurisdiction or exceeds its jurisdiction.** *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957); *see also Snider v. Snider*, 686 So. 2d 802 (Fla. 4th DCA 1997) (prohibition is normally the process used to prevent a court from exceeding its jurisdiction).

   This can arise in UCCJEA cases addressing which state has jurisdiction to make decisions concerning a child. *E.g.*, *S.S. v. Dep't of Children & Families*, 851 So. 2d 306 (Fla. 4th DCA 2003); *Snider v. Snider*, 686 So.2d 802 (Fla. 4th DCA 1997) (if the jurisdictional requirements of the UCCJEA are not met, the court has no subject matter jurisdiction).

Petition for Writ of Habeas Corpus

This is an available remedy when a party in a family law case has been held in contempt for non-payment of ordered support or other monetary obligation and is incarcerated with a purge amount set. When there is insufficient evidence that this party has the present ability to pay the support amount or the purge, this writ will issue and order the immediate release of the party who has been illegally incarcerated. *Bowen v. Bowen*, 471 So. 2d 1274, 1276 (Fla. 1985)

Petition for Writ of Mandamus

Petitioner must show a clear legal right, an indisputable legal duty of a public official to perform an act or duty, and a lack of any other adequate remedy. *See Huffman v. State*, 813 So. 2d 10 (Fla. 2000).

This writ may be used in a family law case in which a judge has issued an order from the bench, but refused to enter a written order that would allow resort to another appellate remedy. For example, a judge's refusal to enter a written order prohibiting a party from moving with a child within 50 miles of the other parent can be reached via this writ. Another example is when a judge fails or refuses to rule on outstanding discovery issues and to rule on a motion for continuance because of the lack of discovery.

Jurisdiction of Lower Tribunal Pending Review

Fla. R. App. P. 9.600

PREPARED AND PRESENTED BY ANDREA JEVIC

QUESTION:

TRUE OR FALSE?

The trial court has the authority to waive the deadline for filing a motion for rehearing.

(a) Concurrent Jurisdiction

Only the court may grant an extension of time for any act required by these rules. Before the record is docketed, the lower tribunal shall have concurrent jurisdiction with the court to render orders on any other procedural matter relating to the cause, subject to the control of the court, provided that clerical mistakes in judgments, decrees, or other parts of the record arising from oversight or omission may be corrected by the lower tribunal on its own initiative after notice or on motion of any party before the record is docketed in the court, and, thereafter with leave of court.

Fla. R. App. P. 9.600(a).

- *Jones v. Jones*, 845 So. 2d 1012 (Fla. 5th DCA 2003): The former husband never received a copy of the final judgment. Upon learning of its entry, he filed a motion for rehearing, three days late. The trial court excused the motion's tardiness. The appellate court found, however, that the trial court had no authority to waive the deadline.
- A trial court cannot grant an extension to file a motion for rehearing beyond the fifteen days prescribed by the rule. *See Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013).

(b) Further Proceedings

If the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal.

Fla. R. App. P 9.600(b).

Absent a stay, the trial court may proceed with “all matters” (including trial or final hearing) during the pendency of review of a **non-final order**, except that “the lower tribunal may not render a final order disposing of the cause pending such review absent leave of the court.” Fla. R. App. P. 9.130(f).

(c) Family Law Matters

1. The lower tribunal shall retain jurisdiction to enter and enforce orders awarding separate maintenance, child support, alimony, attorneys' fees and costs for services rendered in the lower tribunal, temporary attorneys' fees and costs reasonably necessary to prosecute or defend an appeal, or other awards necessary to protect the welfare and rights of any party pending appeal.
2. The receipt, payment, or transfer of funds or property under an order in a family law matter shall not prejudice the rights of appeal of any party. The lower tribunal shall have the jurisdiction to impose, modify, or dissolve conditions upon the receipt or payment of such awards in order to protect the interests of the parties during the appeal.
3. Review of orders entered pursuant to this subdivision shall be by motion filed in the court within 30 days of rendition.

Markin v. Markin, 896 So. 2d 814 (Fla 4th DCA 2005)

The trial court's final judgment granted lump sum alimony to the wife by means of a greater portion of the equitable distribution. The judgment was appealed and the equitable distribution ruling stayed. The trial court then ordered the former husband to pay temporary alimony, pending the payment of the equitable distribution. The appellate court affirmed, finding that Rule 9.600(c)(1) granted the trial court such jurisdiction.

Carneal v. Carneal, 873 So. 2d 562 (Fla. 5th DCA 2004)

Following a notice of appeal of the final judgment, the former wife filed a motion to enforce the judgment to refinance the home. The trial court indicated the hearing would take place, even though counsel informed the court that the hearing pertained to matters on appeal.

The former husband petitioned for a writ of prohibition to prevent the trial court from conducting a hearing. The appellate court denied the petition, noting it was premature. No order had yet been rendered, and the appellate court would not speculate as to what future action the trial court might take.

Hernandez v. Hernandez, 924 So. 2d 853 (Fla. 2d DCA 2006)

The trial court ordered the former husband to pay a higher child support amount upon the former wife's request for modification of the final judgment. The former husband's motion for rehearing was denied, and he appealed.

The appellate court subsequently relinquished jurisdiction to the trial court for the limited purpose of establishing **temporary** child support. In that proceeding, the trial court realized the error made when originally determining child support (the exact error raised on appeal) and reversed itself.

Instead of setting temporary child support, the trial court established **permanent** child support. The appellate court found that the trial court acted outside the jurisdiction it had been granted, rendering the later order void.

Preserving the Record

PREPARED AND PRESENTED BY
A. RUSSELL SMITH AND MADELYN PITTMAN

Question:

You are not permitted to proffer:

A. Testimony;

B. Documents;

C. Argument;

D. YouTube Videos; or

E. You may proffer any of the above.

As any experienced appellate lawyer knows, you start to win the appeal at trial. Don’t forget: the tools most frequently used to dismantle an appeal are failure to preserve the record and harmless error.

You should *always* follow these basic rules:

Bring a Court Reporter!

"We regret that the parties below did not elect to have the proceedings reported so that the record could be examined on appeal. We think that **if a matter is important enough to the parties to necessitate the expense of litigation, it should also be important enough to expend funds for the presence of a court reporter**. Such a record would prove valuable upon appeal." *Lea v. Suhl*, 417 So. 2d 1179, 1180-81 (Fla. 2d DCA 1982).

The absence of a transcript of the proceedings—or a proper substitute, like a settled and approved statement of the evidence or proceedings under Florida Rule of Appellate Procedure 9.200(b)(5)—may be fatal to the appeal. *See Waites v. Middleton*, 302 So. 3d 1082, 1083-84 (Fla. 1st DCA 2020) (rejecting appellant's statement of the evidence, which was never approved by the trial court); *see also Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) ("Without a record of the trial proceedings, the appellate court . . . cannot properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory.").

Basic Rules

- **Be clear and concise**
- **Always be courteous, professional, and knowledgeable.**
- **Cite the specific statute or rule if you can.**
- **Let picayune matters go – avoid trivial objections.**

An objection just to disrupt the other side is unethical and usually counterproductive.

Therefore, your core philosophy is a simple one, which can be summed up in four concepts:

- **Object without fear.**
- **Make yourself understood.**
- **Know the legal basis for your objection.**
- **Pick your battles.**

More is More -- "When in Doubt, Spit it Out"

It is better to state several grounds, even if the grounds are not ultimately raised on appeal. On appeal, grounds can be subtracted, but not added.

A. **Appellate court will consider only specific issues/arguments raised at trial**.

B. **Appellant can't raise different grounds/arguments on appeal than those raised at trial**.

More is More -- "When in Doubt, Spit it Out"

C. **Section 90.104(1)(a) requires that the specific ground for objection must be stated unless ground is apparent from context.** The "objection 'lack of foundation,' like its first cousin 'improper predicate,' is not a 'specific ground of objection' within the meaning of section 90.104(1)(a)." *Jackson v. State*, 738 So. 2d 382, 386 (Fla. 4th DCA 1999). According to Professor Ehrhardt, a specific ground of objection is usually *not* apparent from the context.

D. **An adequate objection requires specific grounds *and* argument.** "In order to preserve an issue for appellate review there must be an objection in the trial court which raises the specific grounds and legal argument upon which the objection is based." *Thomas v. State*, 645 So.2d 185 (Fla. 3d DCA 1994). This requirement of specific legal *argument* is a powerful tool, especially with a judge who tries to order you to state just a legal ground without legal argument.

More is More -- "When in Doubt, Spit it Out"

E. **<u>After objection and argument, you must get a ruling</u>.** "These objectives [preserving objections for the record] are accomplished when the record shows clearly and unambiguously that a request was made for a specific instruction and that *the trial court clearly understood the request and just as clearly denied the request*." *Starks v. State*, 627 So. 2d 1194 (Fla. 3d DCA 1993) (emphasis added).

More is More -- "When in Doubt, Spit it Out"

F. **<u>Renewal of motions</u>.** If your pre-trial motion in limine to exclude evidence has been denied, you should renew the objection at the time the evidence is offered at trial. *See Horne v. Hudson*, 772 So. 2d 556 (Fla. 1st Dist. Ct. App. 2000). Section 90.104, Florida Statutes, has been amended since *Horne*, and now provides that "[i]f the court has made a definitive ruling on the record admitting or excluding evidence before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

But the "new" statute (amended in 2003) may not provide sufficient protection on appeal. For instance, what if the pretrial ruling wasn't "definitive"? Or, what if the objectionable testimony doesn't fit within the same category of evidence or testimony excluded in the pre-trial order?

Absent a timely, contemporaneous objection (on the same legal ground) at trial, you may face an uphill battle on preservation. The better practice, then, is to use the "belt and suspenders" approach.

More is More -- "When in Doubt, Spit it Out"

G. **Doctrine of futility and standing or continuing objections.** You may *not* have to continue to object if the trial court's ruling is clear and objections would be futile. However, be careful. Make sure the ruling is clear and your objection unambiguously covers subsequent testimony/argument. If you can't get a sufficiently specific standing objection, continue to object. Be precise. Ask the court to agree that your objection would cover all similar evidence after your objection.

More is More -- "When in Doubt, Spit it Out"

H. **<u>The Tipsy Coachman can be a dangerous driver</u>.** "This long-standing principle of appellate law,…referred as to the 'tipsy coachman' doctrine, allows an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'" *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) (quoting *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999)).

The doctrine still exists. *See, e.g.*, *Fla. Dep't of Transp. v. Tropical Trailer Leasing, LLC*, No. 1D18-4984, 2020 WL 7021445, at *5, n.* (Fla. 1st DCA Nov. 30, 2020); *Kustom US, Inc. v. Herry, LLC*, 303 So. 3d 1281, 1283 (Fla. 1st DCA 2020). Although frequently argued by appellees, it is not always adopted. The doctrine is invoked when the appellate court can sustain the trial court if there is any theory or legal principle **in the record** that would support the ruling.

What the trial court wants and what you want are often two different things. Remember, if the trial court had done what you wanted, you would not have appealed.

More is More -- "When in Doubt, Spit it Out"

I. **Fundamental Error is the "unicorn" of appellate law.** "[T]here are only a limited category of errors that 'courts universally allow to be raised for the first time on appeal because of the very nature of the error' including subject matter jurisdiction and judgments entered without notice that deny due process." *Yau v. IWDWarriors Corp.*, 144 So. 3d 557, 560 (Fla. 1st DCA 2014) (quoting *O'Brien v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 710 So. 2d 51, 52 (Fla. 4th DCA 1998)). "[F]or error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process." *B.T. v. Dep't of Children & Families*, 300 So. 3d 1273, 1281 (Fla. 1st DCA 2020) (citation omitted).

Contemporaneous Objections

A. **When is an objection contemporaneous**? The objection doesn't necessarily have to be made simultaneously with the improper question/evidence. "Contemporaneous" means at or about the time of the error. *See, e.g.*, *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 185 (Fla. 3d DCA 2005) (considering objection and request for sidebar made four or five questions later).

B. **Timely objections, several questions later.** An objection need not always be made at the moment an examination enters impermissible areas of inquiry. *See Jackson v.* State, 451 So. 2d 458, 461 (Fla. 1984); *accord Franqui v. State*, 804 So. 2d 1185, 1192 (Fla. 2001) (noting that an objection is contemporaneous if it allows the court to correct an error at an early stage of the proceeding). The objection is timely if made during the impermissible line of questioning. However, object as soon as possible.

Contemporaneous Objections

C. **<u>What if your objection is untimely - what do you do?</u>** Object anyway. Move to/strike/disregard testimony or evidence. Explain why the objection is late:

   a. answer is unresponsive.

   b. couldn't anticipate the context.

   c. meaning of error unclear at that time.

   d. "I just missed it."

Proffer! Proffer! Proffer!

A. **Purpose of the proffer.** A proffer is used to place excluded evidence in the record so that there can be full and effective appellate review. "Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result." *Baker v. State*, 71 So. 3d 802, 816 (Fla. 2011).

B. **Prejudice is the real reason for a proffer.** An appellate court will not speculate on the effect of excluded evidence/questions/arguments. The proffer should show prejudice; i.e., did the error affect the outcome/deny a fair trial? *E.g.*, *Morrison v. State*, 818 So. 2d 432 (Fla. 2002).

C. **The trial court should allow a proffer.** "The rule is clear that a trial court errs in denying a request to proffer testimony that is reasonably related to the issues at trial." *Winbush v. State*, 937 So. 2d 768, 771 (Fla. 1st DCA 2006). "Denying the request to proffer is error because the refusal 'precludes full and effective appellate review.'" *Mosley v. State*, 91 So. 3d 928, 930 (Fla. 1st DCA 2012) (citation omitted).

Proffer! Proffer! Proffer!

D. **Failure to proffer is a failure to preserve the error.** *E.g.*, *Powers v. State*, 224 So. 2d 411, 412 (Fla. 3d DCA 1969); *see also Hood v. State*, 808 So. 2d 1257, 1259 (Fla. 3d DCA 2002) (Sorondo, J., specially concurring) (considering counsel's failure to ask to reopen case-in-chief).

E. **You can proffer anything.** You're making the proffer to establish context and prejudice—to permit full and meaningful appellate review. You don't want the appellate court to speculate about the harm and effect of the excluded evidence/argument.

F. **Methods and Timing of Proffer.** Proffer can be by testimony, transcripts, documents, exhibits or a speaking proffer by attorney. (If the trial court won't allow testimony, try to do a speaking proffer in a Q & A format.) If the trial court requires a proffer later, object. Otherwise, how can the trial court understand *context and prejudice?* However, the trial court probably has discretion to require proffer at a later point in the trial. Just don't forget it. Be sure to make a complete proffer! It is your opportunity to show prejudice.

Proffer! Proffer! Proffer!

G. **Be specific.** Proffer as specifically as possible. Do a written proffer if possible. If questions are involved, give expected answers, and include additional matters based upon contingent answers/other proof.

H. **Beware of relying on Section 90.104(1)(b).** This rule of evidence provides that the exclusion of evidence may be appealed if "the substance of the evidence was made known to the court by offer of proof *or was apparent from the context within which the questions were asked*." § 90.104(1)(b), Fla. Stat. (2020) (emphasis added). The best practice is to proffer. The only time a proffer is unnecessary is when "the offer would be a useless ceremony, or the evidence is rejected as a class, or where the court indicates such an offer would be unavailing." *O'Shea v. O'Shea*, 585 So. 2d 405, 407 (Fla. 1st DCA 1991) (citation omitted).

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Appeals 101:
Tips to Avoid Traps for the Unwary

FLORIDA FAMILY LAW AMERICAN INN OF COURT
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