Appeals 101: Tips for Avoiding Traps for the Unwary

Presented by January Pupilage Group (Appeals)
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Presentations & Presenters:

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Prepared and presented by Deborah Greene

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Prepared and presented by Nancy C. Harrison and Debra Treece

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Exciting Changes to the Appellate Rules?!

Prepared by Deborah Greene

Outwith the old . . .(Courier New and Times New Roman)

In with the new . . . Arial – created as a knock-off of 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 that "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."

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 (for example briefs). 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 the term "documents" from the RJA rules, all filings in the appellate courts must now comply with the font type and font size requirements under 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): <u>The cover sheet, table of contents, certificates of service and compliance and signature blocks are excluded from the word count limits</u>.
  - 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 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.

MOTIONS FOR REHEARING

Nancy C. Harrison and Debra Treece

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

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).

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. *See Owens v.* Owens, 973 So. 2d 1169, 1169 (Fla. 1st DCA 2007); *Mathieu v. Mathieu*, 877 So. 2d 740, 741 (Fla. 5th DCA 2004); *see also Broadfoot v. Broadfoot*, 791 So. 2d 584, 585 (Fla. 3d DCA 2001) (declining to reverse for lack of statutory findings, absent a request for findings in the trial court, "where the basis for the award is reasonably clear and supported by the record"; however, the Third District reserved the right to reverse for lack of findings—whether or not raised in the trial court—"if the absence of the statutory findings frustrates this court's appellate review"). 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).

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); *accord Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 325 (Fla. 1st DCA 2011).

This doctrine applies only to <u>issues</u> which appear for the first time in a final judgment—<u>not</u> 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. *See generally Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 324 (Fla. 1st DCA 2011). This gives the trial court the opportunity to correct its error in the first instance. *See, e.g.*, *Eaton v. Eaton*, 293 So. 3d 567, 567-68 (Fla. 1st DCA 2020) (refusing to consider alleged inconsistencies between trial court's written final judgment and its oral pronouncement, where appellant did not bring the issue to the trial court's attention in 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).

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) ("An order is rendered when a signed, written order is filed with the clerk of the lower tribunal"; motions tolling rendition include motions for rehearing).

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
Prepared by Rebecca Bowen Creed and David Merritt

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, *Demont*, 24 So. 3d at 699-700;
>
> the "final" order of dissolution reserved jurisdiction to consider a reduction in value of an asset subject to equitable distribution, *Thomas v. Thomas*, 902 So. 2d 881 (Fla. 1st DCA 2005);
>
> the "final" order of dissolution contained a reservation of jurisdiction to decide a factual dispute related to investment and bank accounts, *Newman v. Newman*, 858 So. 2d 1273 (Fla. 1st DCA 2003);
>
> the trial court retained jurisdiction to equitably distribute the marital assets and liabilities, *Hoffman v. O'Connor*, 802 So. 2d 1197 (Fla. 1st DCA 2002);
>
> the trial court reserved jurisdiction to determine the disposition of the marital home should the former wife "be unable to refinance the mortgage," *Fisher v. Fisher*, 224 So. 3d 919 (Fla. 1st DCA 2017); and

the trial court reserved jurisdiction as to issues of child custody, child support, and alimony, *see Klein v. Klein*, 551 So. 2d 1235 (Fla. 3d DCA 1989).

But note: a judgment on the merits that reserves jurisdiction only to award attorney's fees is final and appealable. *See Ulrich v. Eaton Vance Distributors, Inc.*, 764 So. 2d 731, 733 (Fla. 2d DCA 2000); *accord Citizens Prop. Ins. Corp. v. Scylla Props., LLC*, 946 So. 2d 1179, 1183, n.4 (Fla. 1st DCA 2006). "Issues regarding attorney's fees are considered collateral to the main dispute." *Ulrich*, 764 So. 2d at 733.

What is the effect of dismissal? If an "indeterminate amount of judicial labor, possible requiring another hearing, remains" before a final order can be entered, the appellate court will likely dismiss—rather than abate—the appeal. *Demont*, 24 So. 3d at 700; *see Benton v. Moore*, 655 So. 2d 1272, 1273 (Fla. 1st DCA 1995). Dismissal is without prejudice to the party's right to file a timely notice of appeal once the trial court renders a final order. *Demont*, 24 So. 3d at 700.

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. *See Demont*, 24 So. 3d at 700 (citing *Gaines*).

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. *See DeGale v. Krongold, Bass & Todd*, 773 So. 2d 630, 632-33 (Fla. 3d DCA 2000). Only if a judgment is amended in a *material* respect does the time for appeal run from the date of the amendment. *See id*. at 631. 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.

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, *see BDO Seidman LLP v. British Car Auctions, Inc.*, 789 So. 2d 1019, 1020 (Fla. 4th DCA 2001);
>
> post-judgment orders granting entitlement to attorney's fees *and* determining the amount of fees or costs, *cf. SP Healthcare Holdings, LLC v. Surgery Ctr. Holdings, LLC*, 208 So. 3d 775 (Fla. 2d DCA 2016); *Dania Beach Boat Club Condo. Ass'n, Inc. v. Forcier*, 290 So. 3d 99, 102 (Fla. 4th DCA 2020);

orders awarding sanctions, *see Sotomayor v. Batmasian*, 230 So. 3d 42, n.1 (Fla. 4th DCA 2017); *accord Orban v. Rorrer*, 279 So. 3d 234, 236 (Fla. 3d DCA 2019);

orders on supplemental petitions for modification, *see Roshkind v. Roshkind*, 717 So. 2d 544, 544-45 (Fla. 4th DCA 1997); *accord Tisdale v. Tisdale*, 264 So. 3d 1105, 1106 n.* (Fla. 1st DCA 2019); and

orders on the enforcement of final judgments, such as an order on contempt, *see Kyle v. Carter*, 290 So. 3d 640, 641 (Fla. 1st DCA 2020); *Orban v. Rorrer*, 279 So. 3d 234, 236 (Fla. 3d DCA 2019).

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. *See Keck v. Eminisor*, 104 So. 3d 359, 363-64 (Fla. 2012); *see also Cotton States Mut. Ins. v. D'Alto*, 79 So. 2d 67, 69 (Fla. 1st DCA 2004) ("Jurisdiction to hear an appeal from a nonfinal order is limited to the kinds of orders referred to" in Rule 9.130). 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.)

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 of that order?

No. *See Vinsand v. Vinsand*, 179 So. 3d 366 (Fla. 2d DCA 2015).

> We note that an 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.

179 So. 3d at 368-69 (citations omitted); *see also* Fla. R. App. P. 9.130(h) (stating that the rule allowing review of specific non-final orders "shall not preclude initial review of a non-final order on appeal from the final order in the cause").

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. *See* Fla. R. App. P. 9.110(b); Fla. R. App. P. 9.130(b). However, the initial brief in a non-final appeal must be served within 15 days of filing the notice. Fla. R. App. P. 9.130(e). 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. *See* Fla. R. App. P. 9.130(d). Instead, the appellant is responsible for preparing and filing an appendix under Rule 9.220. *See* Fla. R. App. P. 9.130(e) (noting that the initial brief, accompanied by an appendix, shall be served within 15 days).

WHEN ALL ELSE FAILS:
Potential Alternatives to Rule 9.130 Review
Prepared by William S. Graessle

- **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 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.

RULE 9.600: JURISDICTION OF THE LOWER TRIBUNAL PENDING REVIEW

Prepared by Andrea Jevic

Rule 9.600(a) of the Florida Rules of Appellate Procedure provides:

> 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.

- *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).

Rule 9.600(b) of the Florida Rules of Appellate Procedure states:

> 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.

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).

Rule 9.600(c) of the Florida Rules of Appellate Procedure governs "Family Law Matters," as follows:

> (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.

Relevant case law includes:

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

> The trial court's final judgment granted lump sum alimony to the wife via a greater portion of the equitable distribution. The judgment was appealed and the equitable distribution distribution stayed. The trial court then ordered the former husband to pay temporary alimony pending the payment of the equitable distribution and the appellate court affirmed that Fla. R. App. P. 9.600(c)(1) granted the trial court such jurisdiction.

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

> The trial court's final judgment granted lump sum alimony to the wife via a greater portion of the equitable distribution. The judgment was appealed and the determination of equitable distribution was stayed. The trial court then ordered the former husband to pay temporary alimony pending the payment of the equitable distribution and the appellate court affirmed that Fla. R. App. P. 9.600(c)(1) granted the trial court such jurisdiction.

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

Trial court ordered former husband to pay higher child support amount following former wife's request for modification of the final judgment with respect to such support. Following the denial of the former husband's motion for rehearing, he appealed the decision. 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 that was being 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.

Also, **note Florida Rule of Appellate Procedure 9.600(D), for criminal cases, which states:**

The lower tribunal shall retain jurisdiction to consider motions pursuant to Florida Rules of Criminal Procedure 3.800 (b)(2) and in conjunction with post-trial release pursuant to rule 9.140(h).

PRESERVING THE RECORD

Prepared by A. Russell Smith and Madelyn Pittman

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) (emphasis added).

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, and affirming final judgment); *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.").

- **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.** *Aills v. Boemi*, 29 So. 3d 1105 (Fla. 2010); *Spann v. State*, 857 So. 2d 845 (Fla. 2003); *Magnolia Fla. Certificates, Ltd. Liab. Co. v. Fla. Dep't of Revenue*, 266 So. 3d 1190 (Fla. 1st DCA 2018).

B. **Appellant can't raise different grounds/arguments on appeal than those raised at trial.** *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925 (Fla. 2005); *Wright v. State*, 857 So. 2d 861 (Fla. 2003); *Penaranda v. Fla. Dep't of Revenue ex rel. Santiago*, 34 So. 3d 204 (Fla. 1st DCA 2010).

C. **Section 90.104(1)(a) requires that the specific ground for objection must be stated unless that ground is apparent from the 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); *accord Filan v. State*, 768 So. 2d 1100, 1101 (Fla. 4th DCA 2000). According to Professor Ehrhardt, a specific ground of objection is usually *not* apparent from the context. 1 Fla. Prac., Charles W. Ehrhardt, *Evidence* § 104.2 (2020 ed.).

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); *accord Occhicone v. State*, 570 So. 2d 902 (Fla. 1990). 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.

E. **After objection and argument, you must get a ruling.** "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).

F. **Renewal of motions.** 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 DCA 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"? *See Philip Morris USA, Inc. v. Tullo*, 121 So. 3d 595, 601 (Fla. 4th DCA 2013); *Williams v. Lowe's Home Ctrs., Inc.*, 973 So. 2d 1180, 1185 (Fla. 5th DCA 2008). Or, what if the objectionable testimony doesn't fit within the same category of evidence or testimony excluded in the pre-trial order? *Cf. Boyles v. A&G Concrete Pools, Inc.*, 140 So. 3d 39, 44 (Fla. 4th DCA 2014) (noting that "[e]videntiary issues often depend upon the context in which they are raised or the other evidence which is admitted or developed through discovery").

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.

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. *Thomas v. State*, 599 So. 2d 158 (Fla. 1st DCA 1992). 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. *Burdeshaw v. Bank of N.Y. Mellon*, 148 So. 3d 819 (Fla. 1st DCA 2014); *cf. State v. Ivey*, 285 So. 3d 281 (Fla. 2019).

H. **The Tipsy Coachman can be a dangerous driver.** "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. *See, e.g.*, *Buck v. Buck*, No. 2D19-2824, 2020 WL 6855028, at *1, n.1 (Fla. 2d DCA Nov. 20, 2020) (explaining the Second District's "difficulty with accepting the Former Husband's [Tipsy Coachman] argument," which sought to explain the circuit court's possible mathematical calculations; "it would be completely speculative . . . to assume that the circuit court contemplated any of his proffered calculations when none of them were ever discussed, much less accepted").

The doctrine is invoked when the appellate court can sustain the trial court "only if 'there is any theory or principle of law *in the record* which would support the ruling.'" *Buck*, 2020 WL 6855028, at *1, n.1 (quoting *Robertson*, 829 So. 2d at 906).

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.

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) (quoting *Ray v. State*, 403 So. 2d 956 (Fla. 1981)).

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. *See Brooks v. State*, 762 So. 2d 879, 892 n.16 (Fla. 2000); *accord Bradley v. State*, 214 So. 3d 648, 654 (Fla. 2017). However, object as soon as possible. *Roban v. State*, 384 So. 2d 683 (Fla. 4th DCA 1980).

C. **What if your objection is untimely - what do you do?** 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) (quoting *Fehringer v. State*, 976 So. 2d 1218, 1220 (Fla. 4th DCA 2008)).

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 speaking proffer in a Q & A format.) If the trial court requires a proffer later, object. Otherwise, how can the trial court 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, and be sure to make a complete proffer! It is your opportunity to show prejudice.

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).