# Preserving the Record for Appeal

*IF IT'S NOT IN THE RECORD, IT DIDN'T HAPPEN*

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The Florida Family Law American Inn of Court
January 15, 2026

# Agenda

- Introduction
- The Concept of Preservation
- Pre-Trial Issues
- Challenges During Trial
- Drafting Judgments & Orders
- Post-Trial Motions
- Ensuring the Record is Complete

# Introduction

BY MICHAEL KORN

# The Concept of Preservation

Understanding the Judicial Perspective

Presented by Judge Ashley Cox

Identifying Types of Errors in Family Law Cases and Applicable Appellate Standards of Review

Presented by Julia McLaughlin

# The Concept of Preservation

Understanding the Judicial Perspective

# MAKE A RECORD!

HIRE A COURT REPORTER. If there is no transcript, you have little to no chance of winning unless there was fundamental error!

- **"Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supportive by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial court so misconceived the law as to require reversal. *Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979).***
- 9.200(a)&(b) options for stipulated statements or a statement approved by trial court – not a good option.

# MAKE A RECORD!

## "DON'T BE AFRAID"

## MAKE LEGAL OBJECTIONS

- Objections for "just because" or "I don't like it" or "it's prejudicial" are not going to be sustained.
- If you don't make your objection, the issue is final, done, you won't win later.
- Wait for a ruling.
- Ask to proffer testimony if the objection was sustained.
- Ask to have documents marked for identification purposes if excluded.

# MAKE A RECORD!

ACTUALLY HAVE EVIDENCE

- Appraisals
- Mortgage statements for principal pay downs.

PROVIDE THE LAW

- Cases
  - Florida Supreme Court
  - Fifth District Court of Appeal
- Statutes
- Legal Memorandum
- PROVIDE THEM BEFORE THE HEARING
- Motions in Limine

# Standards of Review on Appeal

1. Error of Law
2. Abuse of Discretion
3. Lack of Competent Substantial Evidence
4. Mixed Question of Law and Fact

# De Novo Review

Defined:

The Appellate Court need not defer to the trial court when ruling on pure issues of law. The Appellate Court is equally as capable as the trial court to resolve issues of law.

# Examples of De Novo Review in Family Law

A trial court's determination of waiver of personal jurisdiction is reviewed de novo. Fradera v. Fradera, 350 So.3d 796, 797 (Fla. 5th DCA 2022). (Appellate court applied de novo review and held trial court erred as a matter of law by holding that a non-resident husband's use of *in rem* jurisdiction to partition Florida entireties property did not waive personal jurisdiction by seeking affirmative relief, but rather moved the *in rem* proceedings forward).

A trial court's award of permanent alimony in a case pending at the time permanent alimony was eliminated by the legislature is reviewed de novo. Edman v. Edman, 407 So.3d 452, 455, 453 (Fla. 4th DCA 2025) (Appellate Court applied de novo standard of review and held trial court erred by awarding permanent alimony because it was no longer an authorized award under the statute).

# Abuse of Discretion Review

Defined:

The abuse of discretion standard has been articulated in many appellate opinions relating to the review of discretionary decisions. Mercer v. Raine, 443 So. 2d 944 (Fla. 1983). If reasonable persons can disagree, the discretionary ruling should be upheld.

A mere disagreement from an appellate perspective with the reasoning or opinion of the lower tribunal is not enough to justify the reversal of a discretionary decision. The judge or judicial officer presiding over the trial is in a better position to resolve discretionary issues, and it would be improper to overturn a discretionary decision simply because a panel of appellate judges might have resolved the issue in a different fashion had they been on the trial bench. The reasonableness test is explained in Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

# Examples of Abuse of Discretion Review in Family Law

A trial court's determination of forum *non conveniens* is reviewed for abuse of discretion. Kusayer v. Kusayer, 317 So.3d 132 (Fla. 4th DCA 2021).

The assessment of the credibility of witness testimony is within the trial court's unique purview. Meyers v. Meyers, 295 So.3d 1207 (Fla. 2nd DCA 2020).

A trial court's determination of forum *non conveniens* is reviewed for abuse of discretion. Steckler v. Steckler, 921 So.2d 740, 744 (Fla. 5th DCA 2006).

The credibility of a witness' testimony is within the trial court's exclusive purview and the appellate court will not reweigh evidence. Disston v. Hanson, 116 So.3d 612 (Fla. 5th DCA 2013).

# Competent Substantial Evidence

This test is applied in abuse of discretion to be sure the discretionary rulings are supported by the underlying factual findings. This way the trial court's discretion is not unbridled but is supported by logic and founded on competent and substantial evidence (CSE).

## Defined:

Competent substantial evidence is defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." Manassa v. Manassa, 738 So.2d 997 (Fla. 1st DCA 1999). Legal sufficiency, not weight of evidence, is the appropriate appellate concern. Brilhart v. Brilhart ex rel. S.L.B., 116 So3d 617 (Fla. 2nd DCA 2013).

# Examples of "CSE" Review of Trial Court's Discretion

A trial court's determination to allow a witness to testify as an expert is reviewed for CSE and trial court determination reversed for lack of evidence to establish the expert's knowledge, skill, expertise, or training. Brilhart v. Brilhart ex rel. S.L.B., 116 So.3d 617 (Fla. 2nd DCA 2013).

Trial court's denial of Wife's request for retroactive child support constituted an abuse of discretion, and was reversed because the ruling was supported by CSE. Johnson v. Johnson, 371 So.3d 944 (Fla. 5th DCA 2022).

A trial court's determination of whether a person is in imminent danger must be objectively reasonable. Robinson v. Robinson, 257 So.3d 1187, 1188 (Fla. 5th DCA 2018).

# Mixed Abuse of Discretion and Error of Law

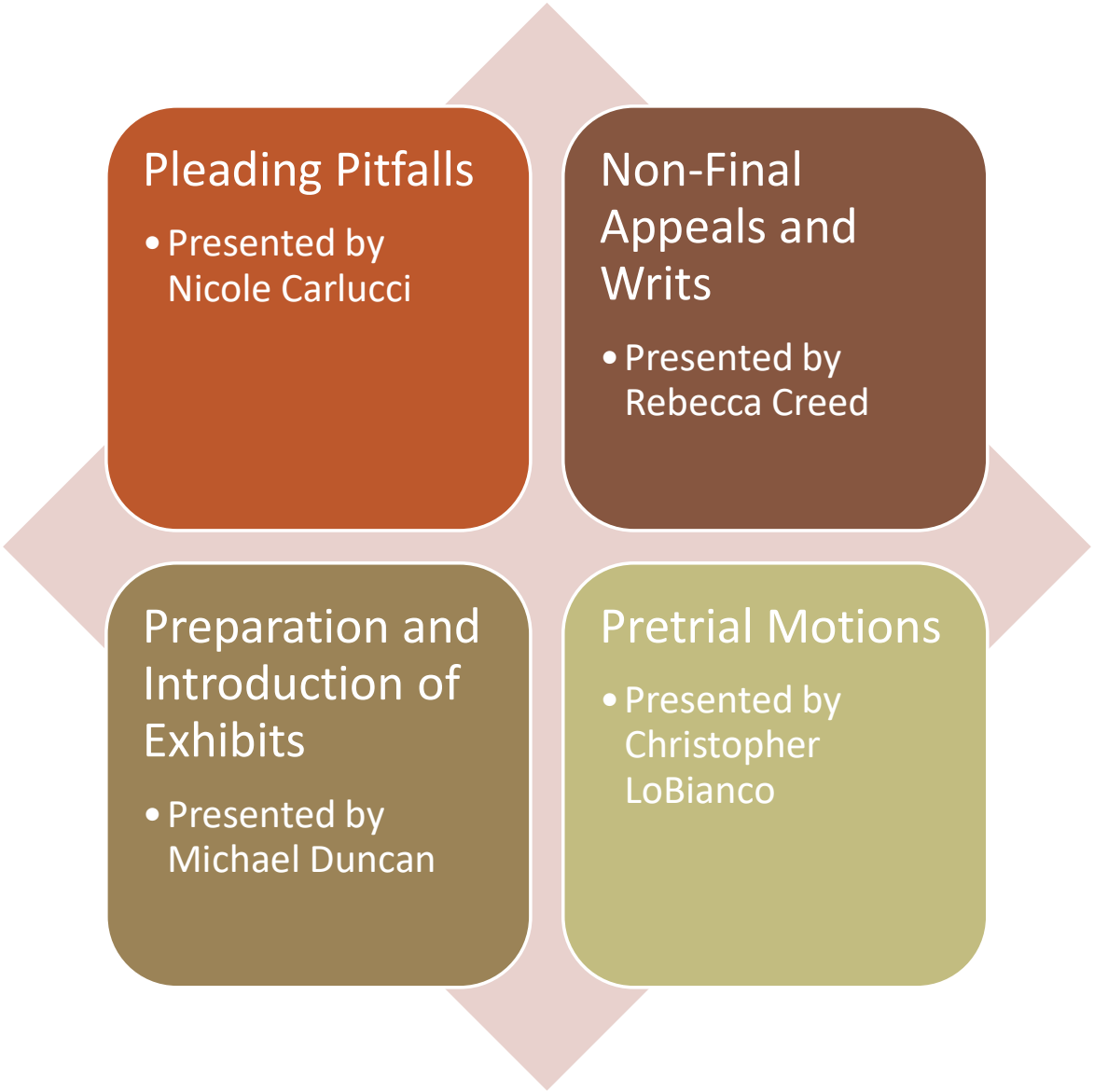
## Mixed Question of Law and Fact

There are situations where mixed standards of review are involved. For instance, in cases seeking modification of an existing alimony obligation under Fla. Stat. Section 61.14(1)(b). Appellate Courts review factual findings to determine whether they are supported by competent substantial evidence. However, the trial court's interpretation and application of the law is reviewed de novo. Proveaux v. Proveaux, 358 So.3d. 488 (Fla. 1st DCA 2223).

Where the recipient spouse is alleged to be in a "supportive relationship," the trial court's factual findings are reviewed to determine if they are supported by competent substantial evidence but the appellate court reviews the trial court's conclusion about whether a "supportive relationship" exists under the de novo standard. Buxton v. Buxton, 963 So.2d 950, 953 (Fla. 2nd DCA 2007). See also: Klokow v. Klokow, 323 So.3d 817, 821 (Fla. 5th DCA 2021) (supportive relationship appeal), citing Gregory v. Gregory, 128 So.3d 926, 927 (Fla. 5th DCA 2013).

# Why are these Distinctions Important?

As you identify issues and evidence, consider how to survive appeal. Rule 9.210(b)(f), Fla. R. App. P., requires the parties to state the applicable standard of review, as to each issue, in the body of the Initial and Answer Briefs.




# Pre-Trial Issues

# Basic Principle of Appellate Practice

**Issues or arguments must be raised at the trial court level to be considered for appeal.**

Keech v. Yousef, 815 So. 2d 718 (Fla. 5th DCA 2002) (issues not preserved for review by timely motion or objection at trial will not be considered on appeal)

Kissimmee Utility Auth. v. Batter Plastics, Inc., 526 So. 2d 46 (Fla. 1988) (failure to plead statute of limitations as defense before hearing on motion for summary judgment is waiver of right to argue defense on appeal)

Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981) (failure to challenge affirmative defense in lower court is waiver of right to argue issue on appeal)

Danford v. City of Rockledge, 387 So. 2d 968 (Fla. 5th DCA 1980) (failure to plead affirmative defense of res judicata constitutes waiver on appeal)

# Why Must You Raise Issues or Arguments You Wish to Appeal at the Trial Court Level First?

**Trial judge must be given notice of error and opportunity to correct error at early stage of proceedings.**

- City of Orlando v. Birmingham, 539 So. 2d 1133 (Fla. 1989)

**5th DCA Cases Standing for this Basic Principle Include:**

- Eggers v. Eggers, 776 So. 2d 1096 (Fla. 5th DCA 2001) (husband's improper venue claim waived when raised for first time on appeal)
- Reddick v. Reddick, 728 So. 2d 374 (Fla. 5th DCA 1999) (declining to consider unpreserved error that trial court relied upon unsworn child support guidelines worksheet)
- Sparta State Bank v. Pape, 477 So. 2d 3 (Fla. 5th DCA 1985) (defenses never raised below cannot be argued on appeal)

**Additional Cases:**

- Utterback v. Utterback, 861 So. 2d 465 (Fla. 3rd DCA 2003) (issue of gross up taxes not presented to trial court and therefore, not preserved for appeal)
- Ross v. Ross, 695 So. 2d 866 (Fla. 4th DCA 1997) (because wife failed to raise absence of psychological or other professional evaluations regarding custodial parent's fitness at trial, appellate court would not consider it for first time on appeal)
- Eagle v. Eagle, 632 So. 2d 122 (Fla. 1st DCA 1994) (whether trial court abused its discretion in not imputing income in child support proceeding not preserved where no evidence or proffer warranting imputation was made)

# Exception for Fundamental Error

**Exception to general preservation rule is where "fundamental" error exists.**

- Fundamental error is defined as an error "which goes to the foundation of the case or goes to the merits of the cause of action."
- Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970)

**Cases with examples of Fundamental Error**

- Tabb ex rel Tabb v. Florida Birth-Related Neurological Injury Compensation Ass'n, 880 So. 2d 1253 (Fla. 1st DCA 2004) (subject matter jurisdiction cannot be waived and can be asserted any time) ***SUBJECT MATTER JURISDICTION CAN BE ASSERTED ANY TIME**
- Belmont v. Belmont, 761 So. 2d 406 (Fla. 2nd DCA 2000) (permissible to challenge determination of whether home purchased by husband before marriage was non-marital asset even when issue was first raised at oral argument)
- In re Estate of Norem, 561 So. 2d 434 (Fla. 4th DCA 1990) (fundamental error to find wife was pretermitted spouse when she did not meet statutory definition)
- Florio v. State ex rel Epperson, 119 So. 2d 305 (Fla. 2nd DCA 1960) (judgment is void and challengeable as fundamental error when entered without proper notice, resulting in denial of due process)

# Non-Final Appeals and Writs

Fla. R. App. P. 9.130 governs non-final appeals.

Fla. R. App. P. 9.100 governs original proceedings, like petitions for writ of certiorari and prohibition.

**REMEMBER: The scope of Fla. R. App. P. 9.130 is intentionally narrow. Not all non-final (or interlocutory) orders are appealable.**

# Rule 9.130

Appeals to the district courts of appeal of nonfinal orders are limited to those that determine (among others):

(i) the jurisdiction of the person;

(ii) the right to immediate possession of property;

(iii) in family law matters:

a. the right to immediate monetary relief;

b. the rights or obligations of a party regarding child custody or timesharing under a parenting plan; or

c. that a marital agreement is invalid in its entirety.

Fla. R. App. P. 9.130(a)(3)(C).

# Examples of Appealable, Non-Final Orders in the Family Law Context

*Breton v. Raud*, No. 3D24-0890, 2025 WL 2656075 (Fla. 3d DCA 2025):

- The Third District reviewed the trial court's award of temporary attorney's fees as an order determining "the right to immediate monetary relief." *See* Fla. R. App. P. 9.130(3)(C)(iii)a.

*Schauer v. Mitchell*, 401 So. 3d 627 (Fla. 1st DCA 2025):

- The First District found that an order determining paternity—and denying the mother's motion for a child pick-up order—was appealable under Rule 9.130(a)(3)(C)(iii)b, because the order determined the right to immediate child custody.

*Chan v. Addison*, 386 So. 3d 1033 (Fla. 6th DCA 2024):

- The Sixth District considered a trial court's order striking the parenting plan in its entirety to be appealable under Rule 9.130(a)(3)(C)(iii)b. The order terminated both parties' timesharing obligations altogether. 386 So. 3d at 1034; *but see id*. at 1035-36 (Nardella, J., concurring) (noting that prohibition was instead the appropriate relief, as had been originally requested by petitioner).

# Rule 9.130

Other non-final appeals that may arise in the family law context include orders determining that:

(ix) as a matter of law, that "a settlement agreement is enforceable, is set aside, or never existed," or

(x) "a permanent guardianship is established for a dependent child under section 39.6221, Florida Statutes."

Fla. R. App. P. 9.130(a)(3)(C)(ix),(x).

# Non-Final Appeals and Writs

Orders on authorized and timely motions for relief from judgment under Rule 12.540 are also appealable as non-final orders. Fla. R. App. P. 9.130(a)(5); *see* Fla. Fam. L.R.P. 12.540.

**REMEMBER:** A motion for rehearing directed to a non-final order is not "authorized" and will *not* toll the time for filing a notice of appeal under Rule 9.130, even if timely filed. *E.g.*, *Deal v. Deal*, 783 So. 2d 319, 321 (Fla. 5th DCA 2001)

# Practice Tip

Rule 9.130 “will not preclude review of a nonfinal order on appeal from the final order in the cause.” Fla. R. App. P. 9.130(h).

As a practical matter, simply because there may be a right to appeal a non-final order does not mean that you are *required* to pursue that appeal.

In most instances, you can wait until a final order is entered and then appeal. The appeal of a final order encompasses all prior trial court rulings.

# Practice Tip

If you intend to seek review of multiple non-final orders, a single notice of appeal may be filed, so long as the notice of appeal is timely as to each order. Fla. R. App. P. 9.130(i).

**NOTE:** If an order contains one ruling subject to appeal under Rule 9.130, other rulings within the same order may "tag along" for appeal only if they likewise fit within the Rule's categories of appealable non-final orders. *See, e.g.*, *Stalnaker v. Stalnaker*, 892 So. 2d 561, 562 n.1 (Fla. 1st DCA 2005) (determining only issues that concerned a right to immediate monetary relief, without deciding retroactive support issues over which the trial court reserved jurisdiction) (citing *RD & G Leasing, Inc. v. Stebnicki*, 626 So. 2d 1002, 1003 (Fla. 3d DCA 1993)).

# Examples of non-final, *non*-appealable orders:

- a non-final order entered *after* the filing of a supplemental petition for modification, but *before* a ruling on the merits of the supplemental petition (which results in a final order). *See Gaskins v. Bahour*, 398 So. 3d 560 (Fla. 2d DCA 2024) (finding that orders did not contain language of finality or dismiss the former wife's amended supplemental petition with prejudice; instead, in Gaskins the trial court had denied former wife's motion for a case management conference and found she had not pled a count for child support).

- a non-final order that does not expressly determine, "as a matter of law," that a settlement agreement was not enforceable, never existed, or was set aside. *See Duchateau v. Duchateau*, 361 So. 3d 951, 952 (Fla. 5th DCA 2023) (dismissing appeal from order denying former husband's motion to ratify and enforce settlement agreement).

# Fla. R. App. P. 9.100

Rule 9.100 governs original proceedings for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, and habeas corpus.

Rule 9.100 is most often relied on to seek certiorari or prohibition.

# Writs of Certiorari

- For instance, a petition for writ of certiorari may be filed to seek review of an order denying a non-party's motion for protective order or compelling the disclosure of privileged, "cat-out-of-the-bag" discovery. *E.g.*, *Gay v. Gay*, 367 So. 3d 1273, 1274 (Fla. 5th DCA 2023).

- The petition, along with an appendix, must be filed within 30 days of rendition of the order to be reviewed. Fla. R. App. P. 9.100(c)(1). The petition must include a description of the relevant facts and legal authority and be served on all parties *and* the trial judge. Fla. R. App. P. 9.100(c)(2).

# Writs of Certiorari

- Certiorari requires a showing that: "(1) the trial court departed from the essential requirements of the law, (2) the petitioner will suffer a material injury, and (3) there is no other adequate remedy." *Gay*, 367 So. 3d at 1274.
- "The last two requirements are often combined into the concept of 'irreparable harm," which must be found before an appellate court may even consider whether there has been a departure from the essential requirements of the law." *Id*. at 1274-75 (cleaned up); *accord Holmes Reg'l Med. Ctr., Inc. v. Dumigan*, 151 So. 3d 1282, 1284 (Fla. 5th DCA 2014).

# Writs of Prohibition

- A petition for writ of prohibition is "an appropriate, if extraordinary, remedy that lies when a court is without jurisdiction or is attempting to act in excess of its jurisdiction." *Durham v. Butler*, 89 So. 3d 1023, 1025 (Fla. 3d DCA (relying on prohibition to review order denying motion to dismiss father's paternity complaint; father had filed the complaint in Florida, despite Missouri court's original jurisdiction).
- Significantly, a petition for writ of prohibition is the appropriate method to seek appellate review of an order denying a motion to disqualify a trial judge. *E.g.*, *Franklin v. Franklin*, 419 So. 3d 1251, 1251-52 (Fla. 1st DCA 2025); *Higgins v. Higgins*, 275 So. 3d 204, 206 (Fla. 5th DCA 2019).
- While there is no jurisdictional 30-day deadline (like with certiorari), prohibition relief should be pursued expeditiously. Philip J. Padovano, 2 Fla. Appellate Prac. § 30:9 (2025 ed.)

# Important Notes:

- When a non-final order is appealable under Rule 9.130, "neither a writ of prohibition nor a writ of certiorari is available." *Chan v. Addison*, 386 So. 3d 1033, 1034 (Fla. 6th DCA 2024).

- Keep in mind, though, that "[i]f a party seeks an improper remedy, the cause must be treated as if the proper remedy had been sought . . . ." Fla. R. App. P. 9.040(c).

# Exhibits

EXHIBIT ORGANIZATION

PREPARE AND FILE AN EXHIBIT LIST

# Pre-Trial Motions

Daubert

Motion in Limine

Presented by Christopher LoBianco

# Daubert Rules in Florida

"Daubert Standard" adopted in Florida in 2019.

***IN RE: AMENDMENTS TO the FLORIDA EVIDENCE CODE***. 278 So.3d 551 (Fla. 2019)

Accordingly, in accordance with this Court's exclusive rule-making authority[6] and longstanding practice of adopting provisions of the Florida Evidence Code as they are enacted or amended by the Legislature,[7] we adopt the amendments to sections 90.702 and 90.704 of the Florida Evidence Code made by chapter2013-107, sections 1 and 2. Effective immediately upon the release of this opinion, we adopt the amendments to section 90.702 as procedural rules of evidence and adopt the amendment to section 90.704 to the extent it is procedural.

# Daubert Rules in Florida

**90.702 Testimony by experts.**—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

# Daubert Rules in Florida

**90.704 Basis of opinion testimony by experts.**—The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

# *VITIELLO v. STATE*, 281 So.3d 554 (5th DCA 2019)

Section 90.702, Florida Statutes (2016), codifies the Daubert standard found in Federal Rule of Evidence 702 and governs the admissibility of expert testimony. That section provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

The relevance inquiry goes to whether the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Id. at 591, 113 S.Ct.2786 (citing Fed. R. Evid. 702).[8] To satisfy this requirement, the proffered testimony must be "tied to the facts of the case [so] that it will aid the jury in resolving a factual dispute." Id. (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)). The trial court plays the role of gatekeeper when making this analysis.

# *VITIELLO v. STATE*, 281 So.3d 554 (5th DCA 2019)…Continued

The reliability inquiry "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93, 113 S.Ct. 2786. Factors which inform whether a particular methodology is reliable "include whether the expert's theory or technique: (1) can be or has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error or standards controlling its operation; and (4) is generally accepted in the relevant scientific community." Pipitone v. Biomatrix, 288 F.3d 239, 244 (5th Cir. 2002). This list of factors, however, is not exhaustive.

Many other factors may be relevant to this inquiry, and the trial court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S.Ct. 1167, 143L.Ed.2d 238 (1999).

Once the trial court has found the methods and principles upon which the testimony is based are reliable, it must assess whether those methods and principles were reliably applied to the facts of the case. § 90.702(3), Fla. Stat. (2016).

# The Daubert Criteria – Five Factors for Determining Reliability of a Methodology.

**1. Testability of the Technique or Theory**

Can the method or theory be tested? Is the conclusion based on sufficient data or facts? Is the conclusion based on reliable principles and methods that have been consistently applied?

**2. Peer Review and Publication**

Has the methodology or theory has been subjected to peer review (the evaluation of scientific, professional or academic work by others in the same field).

**3. Known and Potential Error Rate**

What is the potential error rate of the technique? Helps to determine whether the methodology is accurate. What are the potential flaws and are they present?

**4. Existence and Maintenance of Standards and Controls**

Are there clear standards for applying the methodology? More likely to deem testimony reliable if the expert can demonstrate the existence and maintenance of standards and controls.

**5. General Acceptance Within the Scientific or Relevant Community**

General acceptance of the methodology is vital in determining admissibility of evidence. While not the sole consideration, a methodology that is widely accepted within the scientific community will likely be reliable.

# Motion in Limine

- Latin (roughly translated): "In the beginning" or "at the start."
- Purpose is to address potentially prejudicial evidence prior to the trial.
- Most commonly used for jury trials (judge in "gatekeeper" role).
- Still has value for family law:
  - **Streamline the trial:** Pre-trial rulings prevent constant objections during the flow of evidence, making the trial more efficient.
  - **Aid judicial economy:** Deciding complex legal issues (such as *Daubert* challenges to expert testimony) in advance of trial saves court time.
  - **Help/Force preparation:** The process requires counsel to meet, confer, and narrow down actual disputes before the trial date.
  - **Preserve the appellate record:** Rulings on motions in limine can help frame issues clearly for any potential appeal.

[i.e. Evaluators, hearsay issues (exceptions), applicability of certain defenses or claims].

# Motion in Limine

- A litigant must secure a ruling from the Court in order to preserve the issue
  - BUT HOW???

# Motion in Limine

- Make a Motion in Limine silly…

**F.S. §90.104 Rulings on evidence.**

(1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:

(b) When the ruling is one excluding evidence, 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.

*If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.*

Cash v. State, 875 So. 2d 829, 832 n.3 (Fla. 2d DCA 2004) ("We note that a party is no longer required to renew an objection made in a motion in limine at trial." (citing §90.104(1), Fla. Stat. (2003)).

# Motion in Limine

BUT BEWARE:

- The order granting a motion in limine-or the transcript of the hearing- must clearly indicate what specific evidence is being excluded.
  - *SourceTrack, LLC v. Ariba, Inc.*, 958 So. 2d 523, 526 (Fla. 2d DCA 2007), "absent a transcript of the hearing on the motion in limine, we must affirm a ruling that is not fundamentally erroneous on its face."
- IF the trial court makes a TENTATIVE ruling or defers ruling on the MIL
  - You MUST proffer the excluded evidence OR timely object to the evidence at trial
  - Tolbert v. State, 922 So. 2d 1013, 1016–17 (Fla. 5th DCA 2006). Trial court reserved ruling on the motion in limine. Found it was waived where ruling was never made, and there was nothing in the record to suggest that [Appellant] subsequently pressed the trial court for a ruling or objected when the testimony was introduced.
- IF a party violates a definitive ruling on a motion in limine, you STILL MUST OBJECT- also must move for mistrial (jury trials).
  - *Ocwen Fin. Corp. v. Kidder*, 950 So. 2d 480, 483 (Fla. 4th D.C.A. 2007).

Shannon Tan, *Don't Waive Your Appeal: A Guide to Preserving Trial Error*. Vol. 86, No. 4 Florida Bar Journal. Pg 16 (2012 ).

# Challenges During Trial

**Objections and Proffers**

Presented by Paula Bartlett

**Underused Motions**

Presented by Lawrence Datz

# Objections

**RESOURCES**

**§ 90.104 Rulings on Evidence**

1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
   a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground or objection if the specific ground or objection was not apparent from the context; or
   b) When the ruling is one excluding evidence, 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.

# Objections

**§ 90.104 Rulings on Evidence…Continued**

If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or proffer of proof to preserve a claim.

(2) Goal: Keeping inadmissible evidence from exposure to fact finder by any means.

(3) Nothing in Section 90.104 precludes a court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge.

***Florida Trial Objections 6th Edition* – Erhardt**

"In the absence of a proper, timely, and specific objection, a trial judge does not have an obligation to prohibit inadmissible evidence from being considered…"

***The Florida Bar Journal* Vol 89, No. 4 The Perfect Proffer by Jason Lambert**

**Google AI**

# Objections

- **Make timely specific objections that preserve the record on appeal:**
  - It's always helpful to know the rules of evidence.
  - Keep a copy of Erhardt – Florida Trial Objections.
  - **AI MOMENT:** I asked Google to List Evidentiary and Other Objections at trial.
    - "Evidentiary objections at trial, governed by … Rules of Evidence, prevent inadmissible, unreliable, or unfairly prejudicial information from reaching the [judge]."
    - "They are raised to exclude evidence, preserve appellate issues, and maintain courtroom procedural fairness."
    - "Objections must be made in a timely manner (immediately after the question is asked or before the answer is given) to be effective."
    - The most common Evidentiary Objections are Relevance, Hearsay, Lack of Foundation/Authentication, Privileged Information.
    - Procedural & Other Objections include Leading (on direct), Argumentative, Asked and Answered, Assumes Facts not in Evidence, Compound Question, Vague/Ambiguous/Unintelligible.

# Objections

- **<u>Make Objections Timely</u> – Objections must be made at the time of infraction.**
  - <u>Pay attention</u> – Counsel's question itself can solicit an objectionable answer – **Object before the witness answers.**
    - (Did your boyfriend's auntie's cousin Vinny tell you … ?); OR
    - The witness's answer might contain an objectionable statement. (How do you know …?) Witness's answer: "My boyfriend's auntie's cousin Vinny told me…" ) **Object as soon as possible.**
  - If your objection is sustained after a witness begins to answer- don't forget to include an *ore tenus* **Motion to Strike** the witness's answer.
  - If your objection is overruled on a topic likely to reoccur - testimony from a particular witness or about a particular statement – Counsel may request a standing objection to that specific topic. Be sure to request the judge acknowledge the standing objection on the record. <u>Be careful</u> – Only questions/answers dealing with that precise issue are covered by your standing objection. If any new issue, material, or topic is added, a new objection is necessary.
  - If crucial evidence has been excluded – request to make a proffer.

# Objections

- **<u>Make Specific Objections</u>** – Use proper legal grounds – no speaking objections.
  - Speaking objections constitute unauthorized communications with the judge and, "…characteristically consist of impermissible editorials or comments made by unscrupulous lawyers to influence the [judge]." *-Michaels v State 773 So.2d 1230, 1231 (Fla. 3d DCA 2000)*
  - While most judges - appellate or otherwise - are learned and intelligent, they're human, too. Don't make it harder for any court to find in your client's favor by having to sift word salad objections. If you are not doing your own appeals, like me, you can add appellate counsel there too.

  **PRACTICE POINT:** Carefully, strategically construct your questions, especially on possibly reversable/appealable issues to give as much objective context, clarity, and relevancy as possible for evidence that might be excluded. (See "Wing and Prayer" proffer later)

# Proffers

- If the court excludes pivotal evidence (reversable "harmful" error), request to proffer the testimony.
- The party seeking to admit the evidence must make a proffer unless the substance of the evidence is apparent from the context.
- The proffer gives the court a fuller picture of the evidence and an opportunity to reconsider its prior exclusion, to preserve the evidence so the appellate court can decide whether the trial court's ruling was correct.
- Use pre-trial evidentiary motions, (i.e. - Motions in Limine, Daubert challenges to expert testimony, Child Hearsay) whenever possible for major evidentiary issues (as you heard earlier from my colleague) and make your proffers there to avoid the "shifting sands of a trial in progress." *Donely v State, 694 So.2d 149, 150 (Fla. 4th DCA 1997)*

# Proffers

- During trial: Remember to request to make a proffer for any evidence excluded *at trial* and *at the right procedural time* during trial.
- MAKE THE PROFFER - The first time an issue is raised cannot be on appeal*. Avoid the holding, "…because counsel failed to proffer, this issue is not preserved for appeal." *Finley v Finley and many others*
- PROPER TIMING OF PROFFER
  - Case involved an auto accident and two drag racing drivers. Counsel questioned a witness regarding intoxication of one or both drivers. Opposing counsel objected and the court sustained because the only evidence before the court was that the drivers had been drag racing (not drunk). Counsel proffered, yet the court continued to sustain opposing counsel's objections.
  - The second driver later testified that that he had not been drag racing and that the first driver had been driving erratically. Thereafter, counsel failed to reintroduce (proffered) evidence of the first driver's intoxication. Thus, a seemingly correct initial proffer, the timing of the proffer, before the relevance of the proffered testimony was clear, precluded reversal on appeal."

*Persaud v State 755 So.2d 150 (Fla.4th DCA 2000)*

# Proffers

**Three type of proffers: Perfect, Good Enough, and Wing and a Prayer.**

- PERFECT: Actual Testimony or Documents
  - Witness answers questions on the record which gives the appellate court a complete perspective on the questions and answers and permits a proper review. (i.e. expert sworn testimony)
  - Objections are permitted, but the court should permit questions to be answered to complete the record for appellate review. Excluded documents must be introduced into the trial record even though excluded from evidence. They should be fully marked and described on the record and left with the clerk to become part of the record.

- GOOD ENOUGH: Oral or Written Testimony
  - Summarizes the proposed evidence and is sufficient to preserve the evidentiary exclusion for appellate review by stating with specificity the anticipated testimony of the witness. i.e. – Line of questioning, detailed description.
  - Three keys: Be clear you're making a proffer; aware of the context in which the proffer is made and possible need for additional context (remember above re: proper timing); and be very clear about the purpose and relevance of the proffered evidence. Try to proffer the actual witness testimony first (refer to PERFECT above)

- WING AND PRAYER: Context From the Question
  - It's not a proffer at all. You're relying on your questions and clarity to give the context of the excluded evidence. Especially in family law, those properly constructed questions might just save you on appeal.
  - " As you can see, there is but a razor's edge separating the cases in which the questions were sufficient to avoid the need for a proffer and those in which the questions were insufficient. Context and relevance are the touchstones of any successful proffer, but are the most critical when the appellate court will only have the question to review and not the proposed response." - Jason Lambert

# Proffers

- HOW TO DECIDE WHICH TYPE OF PROFFER TO MAKE? YA DON'T.
  - The trial courts have discretion to determine the method of making proffers.
  - HOWEVER, it is reversible error for the court to refuse or cut short a proffer, except on wholly irrelevant or unraised issues.

**PRACTICE POINT:** Identify any possible evidence issues that could be reversable. Work on the relevance, clarity, and context, of each of your key issue questions. Keep your trial objection booklet handy.

# Underused Motions

1. Motion to Dismiss for pleadings
    A. Read the Florida Family Law Rules of Procedure!
    B. Specific Rules 12.110, 12.120, 12.130, 12.140, 12.150
2. Motion for Summary Judgment “or, alternatively”
3. Motion to Dismiss for failure to prove a prima facie case

# DRAFTING JUDGMENTS AND ORDERS

Presented by
Lawrence Datz
and
Makisha Lester

# Types of Orders or Judgments

1. Judge announces ruling and asks attorney to prepare order or judgment

2. Judge asks for proposed orders or judgments as a form of written argument

# Anatomy of a Court Order or Judgment

1. Relevant Procedure
2. Facts
3. Legal Authority for Conclusion
4. Analysis
5. Ruling

# Judge Announces Ruling and Asks Attorney to Prepare Order/Judgment

1. Attorney becomes the judge's scrivener.

2. Relevant Procedure
   - A. This case was heard after due notice to the parties; and
   - B. Upon the "(name of motion(s) or pleading(s))" (docket no.) filed by (party)
   - C. Other relevant procedure - - What would attorneys, a successor judge, or an appellate court want or need to know about the procedure, e.g., a party unrepresented, court reporter present; agreement in lieu of hearing)

3. Facts
   - A. Facts which the judge told the attorney to include (avoid making findings on issues where no testimony or evidence would support them);
   - B. Relevant facts to support analysis and ruling
   - C. Distinguish between direct evidence and inferences from the evidence
   - D. Ask the judge questions when counsel is instructed to prepare the Order, (e.g., how much detail, when do payments start)

4. Legal Authority for Conclusion

5. Analysis - - Apply the law to the facts and reason to a conclusion

6. Ruling
   - A. Clear and concise
   - B. Include necessary details
   - C. Use appropriate language, (e.g., "hold harmless and indemnify")

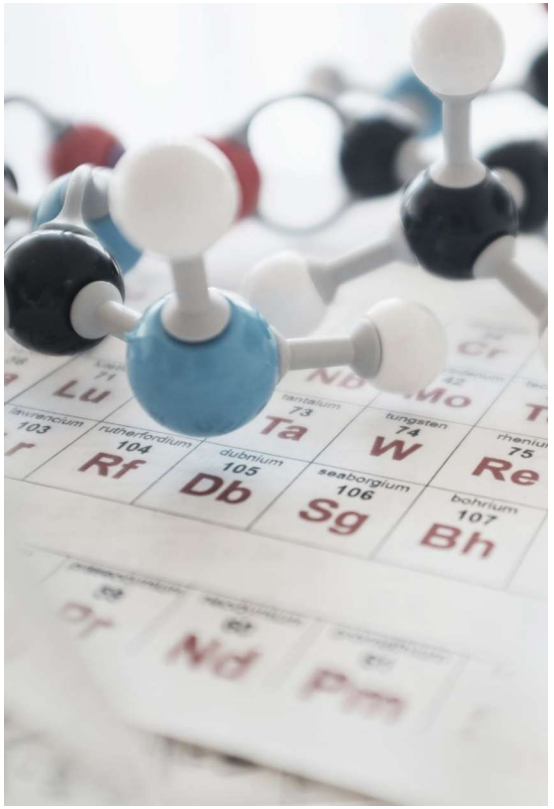
# Judge Asks for Proposed Order/Judgment as a Form of Written Argument

1. Same Elements as court-directed order
    A. Relevant Procedure
    B. Facts
    C. Legal Authority for Conclusion
    D. Analysis
    E. Ruling

2. What's Different
    A. Advocate for client's position
    B. However, don't go overboard - - All findings of fact must be supported by "competent, substantial evidence."
    C. Cite to exhibits of evidence
    D. If client willing and able to pay for transcript, and you have enough time, order the transcript and cite to it.
    E. Cite legal authority to support decisions
    F. Assume the judgment or order will be appealed.

# Technical Elements

1. Transitions
    A. From the evidence, the Court finds
    B. Therefore, it is
    C. Adjudicatory or Decretal Section
        1) "Ordered" for an order
        2) "Adjudged" for a judgment
        3) Not both
    D. Done and ordered
2. Judge's name and title (Ima D. Viden, Circuit Judge)
3. Copies to:



# Why do the proposed findings and conclusions matter on appeal?

- Appeals live and die on the written order
- Appellate courts review:
  - What the judge said (oral pronouncement), and
  - What the judge signed (written order)
- Conflict between the two = reversible risk
- Proposed orders are often drafted by counsel due to the heavy case load of the judges – Therefore there is a heightened scrutiny as to who said what.

# Controlling Authority (Oral Pronouncements vs. Written Orders)

**General rule:**

- Written order controls for appellate purposes

**BUT:**

- Oral pronouncements matter when evaluating:
  - Accuracy
  - Intent
  - Whether the judge exercised independent judgment (*McGowan v. McGowan,* 344 So.3d 607)

**Inconsistencies can trigger:**

- Motions to Conform
- Motions for Rehearing
- Appellate Reversal or Remand

# Appellate Lens on Proposed Orders

**Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004)**

The Florida Supreme Court identified factors that appellate courts consider when a judge adopts a party's proposed order:

- Wholesale or verbatim adoption of one party's proposed final judgment. D.R. Dep't of Children and Families**,** 236 So. 3d 1175, 1176,-77 (Fla. 1st DCA 2018) (reversal is required when the circumstances "create an appearance that a judgment does not reflect the judge's independent decision-making")
- Absence of oral findings by the trial court before entry of the written judgment. Also, is the proposed order consistent with the court's oral rulings?
- Multiple, obvious, or easily avoidable errors in the adopted order, particularly in classification and valuation of assets and liabilities. Did the trial court review the evidence?
- Internal inconsistencies within the judgment, including conflicts between factual findings and valuation charts. Competent Substantial evidence?
- Concessions by counsel that the proposed order contained errors, which were nevertheless repeated in the final judgment.
- Circumstances that create an appearance that the judgment does not reflect the judge's independent decision-making. (*McGowan v. McGowan)*

# The Appellate Problem

**When proposed findings expand, contradict, or "improve" on what the judge said:**

- Appellate courts may conclude:
  - The judge did not exercise independent judgment
  - The order reflects advocacy, not adjudication
- Especially problematic with credibility findings, best interests, equitable distribution, and fact-intensive rulings
- It is a red flag if the findings appear for the *first time* in the written order.

# What Gets Lawyers in Trouble

- Adding:
  - New factual findings (maybe you forgot to argue in court)
  - Legal conclusions not stated on the record
- "Cleaning up" or strengthening the ruling (THE JUDGE DID NOT ASK YOU TO DO THAT!)
- Using boilerplate inconsistent with oral comments
- Reframing discretionary calls to sound more absolute

**Appellate consequence:**
What helps you at trial may hurt you on appeal.

# How to Draft Safely

- Track the oral ruling carefully:
  - Notes!!!  (If you can't read your own handwriting, type. If you can't type fast enough, ask your judge to clarify their ruling.)
  - Hire a court reporter. The per diem rate is worth the peace of mind.
- Mirror the court's language where possible (This is where the verbatim language is helpful)
- If the court was silent on an issue:
  - Keep findings neutral and restrained (This is not your opportunity to take a second bite of the apple). Ex. Headings, highlights, etc…)

# How to Draft Safely

- Flag uncertainty:
  - "Consistent with the Court's ruling from the bench…"
  - Example: Don't do this: "The Court finds the Wife lacked credibility."
  - Instead do this:
    - "Consistent with the Court's oral ruling, the Court did not rely on Wife's testimony in resolving this issue."
    - "As stated on the record…"
    - "Based on the evidence the Court referenced at hearing…"
    - "To the extent addressed by the Court orally…"
  - These phrases alert an appellate court that you are not overreaching**.**
    - This reflects what the court *did*, not what it *might have meant*.
    - If it wasn't said, don't sneak it in.
- Always circulate to opposing counsel and/or the pro se litigant on the other side. Be sure to place a deadline for the opposing side to respond, allowing them enough time to object to any provisions. If they don't timely respond, then you can send it to the court acknowledging that it is being sent without objection.

# Protecting the Record

- If opposing counsel's proposed order:
  - Conflicts with oral rulings and/or adds unsupported findings then you have options:
    - Timely respond to the e-mail voicing your objections and communicate with opposing counsel. (Judges don't want multiple 30-page proposed orders).
    - If that doesn't work, THEN file:
      - Written objections, your own alternative proposed order, or a Motion to conform order to oral pronouncement
- If you fail to object, then you may undercut yourself on appeal

# Appeals Reward Accuracy, Not Creativity

- Perlow teaches:
  - Proposed orders are not harmless
  - Consistency equals credibility
- The safest proposed order:
  - Reflects what the judge actually said
  - Shows the judge's independent decision-making
- Draft like an appellate judge is reading it—because they will be.

# Post-Trial Motions

- Presented by Michael Duncan

# Post-Trial Motions

**There are a Number of Post Trial Motions Permitted by the Rules**

- Not all will necessarily impact your record on appeal
- Rules 12.530 and 12.540 typically apply

**Which Post Trial Motions Can Impact Your Appeal?**

- Motions to Reopen (if filed prior to entry of Final Judgment)
- Motions for Rehearing

# Motions to Reopen Evidence Under Rules 12.530/12.540

- Rule 12.530 does not explicitly use term “reopen” evidence but does refer to “take additional testimony”

- Rule 12.540 refers to granting relief from judgment “on motion and on such terms as are just” for, among other things, “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing”

# Motions to Reopen Evidence Under Rules 12.530/12.540…Continued

- **Florida Courts Have Considered Motions to Reopen Evidence After Trial.** *Allen v. Allen*, 346 So. 3d 667, 669 (Fla. 1st DCA 2022)
  - Four factors have been discussed: "(1) its timeliness; (2) the character of evidence she seeks to introduce; (3) the effect of the evidence's admission; and (4) the reasonableness of her excuse justifying reopening."
  - **PRACTICE NOTE** – If you learn of or suspect a basis for reopening the testimony and the trial court has not yet entered the Final Judgment/Order, ACT IMMEDIATELY

# Motion for Rehearing – When Required?

- Rule 12.530 Motion for Rehearing MUST Be Filed to Challenge Any Ruling in Which You Contend the Trial Court Failed to Make Required Specific Factual Findings
  - EXAMPLE – Fla. Stat. section 61.075 (equitable distribution, including identification of assets and liabilities and their classification, unequal distribution), 61.08 (alimony), deviation from CSG, attorney's fees awards, etc.
- "[T]he rules apply only when a judge is required to make specific findings of fact and not when a party seeks to make other challenges to a trial court's order. *In re Amends. to Fla. Rule of Civil Proc. 1.530 & Fla. Family Law Rule of Proc. 12.530*, 373 So. 3d 1115, 1115 (Fla. 2023).However, the rule "does not address or affect, by negative implication, any other instance in which a motion for rehearing is or might be necessary to preserve an issue for appellate review." For example, if an error appears for the first time on the face of the final judgment, a motion for rehearing is required to preserve the issue for appeal. *Williams v. Williams*, 152 So. 3d 702, 704 (Fla. 1st DCA 2014).

# Motion for Rehearing – When Not Required?

- Fla. Fam. R. P. 12.530(e) (a motion for rehearing is not required to challenge the sufficiency of the evidence in non-jury cases).

- A motion for rehearing is not required to challenge whether a final judgment is unsupported by competent, substantial evidence. *Ospina-Shone v. Shone*, 399 So. 3d 1143, 1145 n.1 (Fla. 3d DCA 2024) (citing *Aguilera v. Agustin*, 374 So. 3d 4, 4 (Fla. 4th DCA 2023)).

# When Must Motion for Rehearing be Filed?

- TIMING - Must be filed in the trial court not later than 15 days after a verdict is returned or the date the final judgment is rendered. Rule12.530(b).
  - Moving for rehearing from a non-final order is "unauthorized" and will not toll the time to file a notice of appeal. *Send Enterprises, LLC v. Set Drive, LLC*, 390 So. 3d 48, 50 (Fla. 3d DCA 2023).

# Relevant Case Law

- A party's failure to raise the trial court's lack of required findings in a motion for rehearing precludes appellate review. *Hardison v. Bank of New York Mellon*, 399 So. 3d 1173, 1174 (Fla. 3d DCA 2024).
- Successive motions for rehearing are not authorized. *Poky Mgmt., LLC. v. Solutrean Inv. Group, LLC.*, 390 So. 3d 753, 756 (Fla. 5th DCA 2024).

# Ensuring the Record is Complete

Presented by Michael Korn

# Ensuring the Record is Complete

**1. Is a substitute record of proceedings available when no court reporter attended the hearing?**

Rule 9.200(b)(5) Florida Rules of Appellate Procedure allows for the submission of a "statement of evidence or proceedings if no reporter attended or a transcript is otherwise unavailable."

**2. What is the procedure to be followed?**

The appealing party prepares a statement of the evidence or proceedings "from the best available means, including the party's recollection" and serves it upon opposing counsel.

The opposing party has 15 days to serve objections or proposed amendments.

The initial statement and any objections are then filed with the trial court for "settlement and approval".

Once settled and approved, the statement is to be included by the Clerk in the Record on Appeal.

**3. While it is better than nothing, such a statement is often not much better than nothing.**

This reinforces the point that if there is any chance that the trial or hearing in question will be relevant to an appeal, a court reporter should be retained.

# Recent Opinions Addressing Appellate Finality and Preservation

A-Team Response Rest. Corp. v. Citizens Prop. Ins. Corp., 50 Fla. L. Weekly D2537 (Fla. 3rd DCA November 26, 2025).

- Appellant only cited in its timely Notice of Appeal the Order denying rehearing, and failed to mention the actual Final Order to which the timely Motion for Rehearing was directed.
- Although the Motion for Rehearing tolled the time for filing an appeal, the resulting Order alone was itself not independently appealable.
- However, because the pleading was timely, and the Third District found that there was nothing in the Record showing that granting review of the underlying order would prejudice the other side, appellant was permitted to seek review of the underlying Order.

# Recent Opinions Addressing Appellate Finality and Preservation

Miller v. Jiyon Ko, 383 So. 3d 435 (Fla. 3d DCA 2023).

- The Third District rejected husband's argument that wife's Notice of Appeal had not complied with Rule 9.110 (d), which expressly requires disclosure of the underlying motion which delayed rendition in the Notice.
- Although wife's Notice of Appeal did not comply with Rule 9.110(d), husband still did not cite any case which supported his proposition that this somehow waived the abeyance provided for under the rule or abandoned former wife's Motion for Re-hearing.
- Rule 9.110(d) contains mandatory language that the appeal "shall be held in abeyance until the motions are either withdrawn or resolved by the rendition of an order disposing of the last such motion." While the Court did not "condone" wife's failure to comply with Rule 9.110, the Third District rejected the husband's abandonment and waiver arguments.

# Recent Opinions Addressing Appellate Finality and Preservation

Fletcher v. Bd. of Cty. Comm'rs of Monroe Cty., 50 Fla. L. Weekly D2612 (Fla. 3d DCA December 10, 2025).

- Although this is not a family law case, this opinion should be considered when appealing an Amended Judgment.
- A foreclosure Judgment was entered on July 16. The Court issued an Amended Judgment on July 25.
- Appellant's Notice of Appeal was timely as to the July 26 Amended Judgment, but not as to the July 16 original Judgment.
- The Third District found that even if an Amended Final Judgment materially modifies an original Final Judgment, where the Notice of Appeal is only timely as to the Amended Final Judgment, the appellate court's jurisdiction on appeal is limited to reviewing only the amended portions of the Judgment, citing Caldwell v. Walmart Stores, Inc., 987 So. 2d 1226, 1229 (Fla. 1st DCA 2008).
- In this case, the issue being appealed related to a predecessor summary judgment order striking Appellant's affirmative defenses, which had nothing to do with the Amended Judgment. Therefore, the appeal was dismissed for lack of jurisdiction.
- Therefore, as a practice pointer, if a Notice of Appeal was not filed while the Motion for Rehearing directed to the original Judgment is pending and an amended Judgment is entered, a party may lose the ability to review all parts of the original Judgment.

# QUESTIONS?