Choosing Your Arena: State Versus Federal
Section II of III

Advocating the Rights of Employees in the 21st Century
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Marguerite M. Longoria
Loren Donnell
Ananyo Basu
Burr & Smith, LLP
442 W. Kennedy Blvd., Suite 300
Tampa, FL 33606
Tel: (813) 253-2010
Fax: (813) 254-8391
mlongoria@burrahdsmithlaw.com
www.burrandsmithlaw.com

IV. DIFFERENCES BETWEEN FLORIDA'S MINIMUM WAGE GUARANTEE AND THE FLSA

A Florida practitioner may encounter a worker who has been denied wages. This individual may have a claim for unpaid minimum wages and overtime compensation which could be brought in state or federal court or both. The attorney has some options to consider following the amendment to Florida's Constitution in 2004, which became effective for work performed on or after May 2, 2005. Ultimately, it is likely claims for minimum wage and overtime will end up in federal court unless the claims are restricted to the minimum wage guaranteed under the Florida Constitution. If the worker generally worked less than forty hours per week, it may make sense to only pursue the Florida minimum wage claim because the minimum wage is set higher in Florida than under the FLSA.

A. Florida's Guarantee of Minimum Wage

Effective May 2, 2005, at Article X, Section 24, Fla. Const. (hereinafter, "Guarantee"), Florida's Constitution requires employers to "pay Employees Wages no less than the Minimum Wage for all hours worked in Florida." Article X, Section 24, Fla. Const. Currently, this wage is set at $6.67 per hour. *See, Id*. at (c) (directing that the rate be recalculated on September 30th of each year succeeding the Guarantee's enactment).

B. Differences Between the Minimum Wage Guarantee and the FLSA

The guarantee provides that "case law, administrative interpretations, and other guiding standards developed under the federal FLSA shall guide the construction of this amendment and its implementing statutes or regulations." *Id.* at § 24 (f). Furthermore, Fla. Stat. 448.110, passed one year later, provides that no individual not entitled to minimum wage under the FLSA will be entitled to minimum wage under the Guarantee. However, there are significant differences between the statutes not limited to the fact that Florida only provides for minimum wage rather than minimum wage and overtime.[1]

1. Definitions

The Guarantee provides that "Employer," "Employee" and "Wage" shall be defined as they are under the FLSA. Notably these definitions are *very* broad. However, none of the complex jurisdictional requirements found in the FLSA are specified in the Guarantee, because there is no need for federal jurisdiction to be established.

2. Wage Guarantee and Exemptions

[1] Unlike the FLSA, Article X, Section 24, does not contain provisions regulating record keeping or prohibiting child labor.

With respect to employees eligible for the tip credit under the FLSA, the Guarantee states that employers may credit towards satisfaction of the minimum wage tips up to the amount of the allowable FLSA tip credit in 2003. *See* Art. X, Section 24.

Moreover, since the Guarantee contains no reference to the FLSA's statutory exemptions from minimum wage and overtime in Section 213(a) from minimum wage, these would also arguably be inapplicable even though they are construed in the FLSA's interpretative regulations.

3. What Hours Must Be Paid?

The Guarantee solely entitles employees to minimum wage as opposed to the FLSA, which also provides for maximum wages (or overtime compensation). Therefore, the FLSA contains many exemptions from coverage which are solely applicable to its overtime guarantees, such as the various exemptions in Sections 207 and 213(b), which include the Motor Carrier Act. Naturally, these provisions do not apply to the Florida Guarantee.

The Portal to Portal Act, 29 U.S.C. § 259 *et seq*., which amends the FLSA, identifies certain employee activities which are not compensable under the FLSA, such as: (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. 29 U.S.C. § 254(a). The Employee Commuting Flexibility Act contained in the Portal to Portal Act, states that employees may not be

entitled to compensation for time spent commuting back and forth to work in an employer's vehicle.[2] The Portal to Portal Act does not apply to the Florida minimum wage guarantee, and so, unlike the FLSA, the Guarantee may require that minimum wage be paid for time spent commuting as well as on preliminary and postliminary activities.

Another noteworthy difference between the FLSA and the Florida minimum wage act is that Florida's minimum wage act does not utilize the same language as the minimum wage provision found in Section 206 of the FLSA. The FLSA requires that an employer pay minimum wage to employees *for all hours worked in a workweek*, whereas the Florida minimum wage act requires that employers pay employees minimum wage *for all hours worked* (omitting the federal phrase "in a workweek").[3]

In *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 324 (Cal. App. 2 Dist. 2005), a California State appellate court affirmed the district court's method for calculating minimum wage based on each uncompensated hour worked. The plaintiffs, who were utility pole maintenance workers, brought claims to recover for uncompensated work that included, time spent loading equipment in work vehicles, travel time to job sites, completing daily paperwork, and maintaining vehicles. In finding each hour worked compensable under California's minimum wage law, the court recognized that the statutory language in the state law ("any employee receiving 'less than the minimum wage' is entitled to recover the unpaid balance of the 'full amount' owed") differed significantly from the federal law. *Id.* at 323. Furthermore, the court found the language

[2] The ECFA states that "the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee." 29 U.S.C. § 254(a).

[3] *Compare* 29 U.S.C. § 206 *with* Art 24, § X(c).

in California Wage Order No. 4, § 4(A),[4] which requires that an employer pay wages not less than the minimum wage *for all hours worked*, expresses the legislative intent that employees be paid minimum wage for each hour worked. *Id.* The court concluded that "where the language or intent of state and federal labor laws substantially differs, reliance on the federal regulations or interpretation to construe to state regulations is misplaced." *Id.*

Similarly, Florida's minimum wage law requires employers to pay employees minimum wage "no less than the Minimum Wage *for all hours worked*." Art. X, § 24(c)(emphasis added). This language is substantially different from that of the FLSA.[5] Florida's statutory language appears to more closely mirror that of California minimum wage law, *Labor Code* §1194 and California Wage Order No. 4, § 4(A), then that of the FLSA. Interpreted consist with *Armenta*, employers in Florida minimum wage as an average calculated by dividing total compensation paid during a workweek by the total number of hours worked per week (otherwise known as the "averaging" method). A prevailing plaintiff would thus be entitled to $6.67 for each hour worked and an additional equal amount of liquidated damages (total of $13.34 for each unpaid hour), if the employer is unable to show subjective and objective compliance with the minimum wage provision. Likewise, the Court in *Alvarez v. IBP, Inc.*, 339 F.3d 894, 912 *aff'd*, 546 U.S. 21 (2005), alluded to the likelihood that Washington State would adopt a per hour

[4] The Court also found the language in California Wage Order No. 4, § 4(B), which states, "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise," instructive on legislative intent. *Armenta*, 135 Cal. App. 4th at 323.

[5] *See* 29 U.S.C. § 206.

method of calculating the minimum wage since it omitted the phrase "in any workweek" from its minimum wage statute.[6]

In *Olufemi v. Your Care Clinics, LLC*, 2006 U.S. Dist. LEXIS 6599, *2 (M.D. Fla. February 3, 2006), plaintiff alleged violations of Article X, § 24 of the Florida Constitution stating his employer refused to pay him minimum wage for *each hour worked* during his last week of employment. The issue before the court, however, was plaintiffs' motion to dismiss defendants' counterclaim for breach of a non-compete for lack of subject matter jurisdiction. The court did not address the minimum wage issue or how the minimum wage should be calculated under the new law. The court held it had supplemental jurisdiction over defendants' counterclaim because the covenant not to complete is part of the employment contract and bears a logical relationship to the plaintiffs' FLSA claims for unpaid minimum wages. *Id*. at *8.

4. Limitations Periods

The Guarantee is governed by a general four (4) year statute of limitations and a five (5) year limitation period for willful violations. Art. X, § 24, (c). This very favorably compares to the FLSA which provides a statute of limitations of two years unless the cause of action arises from a "willful violation," in which case a three-year limitations period applies. 29 U.S.C. § 255(a). Florida's Guarantee, unlike the FLSA, does not contain specific recordkeeping regulations.

5. Prohibitions on Retaliation

Retaliation is prohibited under both the Guarantee and the FLSA. The FLSA makes it unlawful for any "person" to "to discharge or in any other manner discriminate

[6] *See***,** Marguerite M. Longoria, *Ouellette v. Wal-Mart Stores, Inc. and Florida's Minimum Wage Law: Are Class Actions for Minimum Wage on Florida's Horizon?* 79 Fla.B.J. , November 2005, at 60, 61.

against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act." 29 U.S.C. § 215(a)(3). The Guarantee prohibits any employer or other party from discriminating in any manner or taking adverse action against any person in retaliation for exercising rights protected under the Guarantee which include: filing a complaint, informing any person about that party's alleged noncompliance with the Guarantee, informing any person about his or her potential rights under the Guarantee or to assist him or her in asserting such rights. The language in the FLSA referring to "discharge" is arguably much narrower than the "adverse action" prohibition in the Guarantee. Similarly, the protected conduct under the Guarantee would appear to be broader because it does not require the individual to have "instituted a proceeding."[7]

6. Remedies

The remedies Section 216(b) provides to employees for violations of the FLSA's antiretaliation provision include equitable relief. Section 216(b) provides that an employer who violates the FLSA's antiretaliation provision shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of the antiretaliation provision and provides a private right of action to employees to seek this relief. *See Bailey v. Gulf Coast Transportation Inc.*, 280 F.3d 1333, 1335-36 (11th Cir. 2002). In the Eleventh Circuit, however, the remedies for retaliation do not include punitive damages. *See Snapp v. Unlimited Concepts Inc.*, 208 F.3d 928, 934 (11th Cir. 2000).

The remedies provided under the Guarantee and the FLSA are similar with respect to individual actions, and include back wages unlawfully withheld, plus an equal

[7] *See, e.g., Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1339 (11th Cir. 2000) (one-time statement by worker's counsel to the effect that worker had claims under the FLSA, which may have been described in words as vague as "Fair Labor" or "Wage Labor Hour or something like that," was "too indefinite.")

amount in liquidated damages, and attorney's fees and costs upon prevailing.[8] The Guarantee provides for fines to the state of $10,000 per violation.[9] Under the FLSA, a private right of enforcement terminates if the Secretary of Labor brings an action for enforcement, but under the Guarantee, the state attorney general may bring a civil action for enforcement without causing the individual to forfeit their right of private action.[10]

7. Collective vs. Class Action Remedies

The minimum wages rights under the Guarantee may be brought as a class action pursuant to Fla. R. Civ. Pro. 1.220. Art. X, § 24(e). Florida's class action Rule of Civil Procedure 1.220, is interpreted similarly to its federal counterpart, Fed. R. Civ. P. 23. *Liggett Group, Inc., et al. v. Engle*, 853 So.2d 434, 445 (Fla. 3d DCA 2003) (citations omitted). A party seeking certification of a class must survive a rigorous analysis to determine if it has met its burden to show numerosity, commonality, typicality, and adequacy of representation. *Freedom Life Ins. Co. of America v. Wallant*, 2004 Fla. App. LEXIS 2002, 6 (Fla. 4th DCA December 29, 2004). In addition, claims must meet at least one of the three bases for class certification. *See*, *Rule 1.220(b).* The party seeking certification must show either that (1) the prosecution of separate claims or defenses by or against individual members of the class would establish incompatible standards of conduct for the party opposing the class, or that adjudications concerning individual members of the class would, as a practical matter, be dispositive of the interests of other members of the class; (2) the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class; or (3) the claim or defense is not maintainable under either of the preceding bases, but that the questions of law or fact

[8] *See*, Art. 10, § 24 (c).
[9] *Compare*, 29 U.S.C. § 215(a) *with* Art. 10, § 24(c).
[10] *Compare*, 29 U.S.C. § 215(a) *with* Art. 10, § 24(c).

common to the putative class predominate over any question of law or fact affecting only individual members of the putative class, and that the class representation is the superior method for fair and efficient adjudication. *R. 1.220, Fla. R. Civ.P., Liggett Group,* 853 So. 2d at 445 (citations omitted). Pursuant to Fla. Stat. 448.110, the plaintiffs must prove prove the identity and damages of each individual plaintiff.

In contrast, the FLSA provides a mechanism known as the "collective action," through which employees can join together to assert their claims. *See,* 29 U.S.C. § 216(b). The collective action mechanism differs from the class action procedures available under Rule 23 and Florida Rule of Civil Procedure 1.220 in several material respects. First, the factors a court considers in determining whether a class is "similarly situated" for the purposes of Section 216(b) collective action are less stringent than the factors delineated in Rule 23. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996), *cert. denied,* 117 S.Ct. 435 (1996). In addition, to participate in a section 216(b) action and be bound by its results, an individual must affirmatively opt in to the action by filing a consent to join form.[11] In contrast, in a Rule 23 action a class member is bound by the results unless he or she affirmatively opts out of the class. R. 23(c)(2)(B-C), Fed.R.Civ.P.

A certified Rule 23 class is more likely to incorporate all or most eligible members. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 310 (3d Cir. 2003). In a Section 216(b) collective action, the opt-in rate is typically significantly lower than the potential pool of plaintiff-employees in an opt-out class for various reasons, including apathy, lack of follow-through and fear of retaliation. *See, generally, Soler v. G & U,*

[11] 29 U.S.C. § 216(b). The statute of limitations continues to run on even the named plaintiffs claims until a consent to join form is filed. *Harkins v. Riverboat Serv.*, 2002 U.S. Dist. LEXIS 19637, 6-7 (N.D. Ill., May 17, 2002).

Inc., 1980 U.S. Dist. LEXIS 11285, 17 (S. D. N. Y., May 7, 1980), citing, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707, n. 18 (1945). Aggregation of claims in larger numbers in a Rule 23 class **"**profoundly affects the substantive rights of the parties to the litigation. Notably, aggregation affects the dynamics for discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants. The more aggregation, the greater the effect on the litigation." *De Asencio*, 342 F.3d at 310.

The FLSA does not preempt state law contract provisions that are more generous than the FLSA demands. *Freeman v. City of Mobile*, 146 F.3d 1292, 1298 (11th Cir. 1998). Therefore, actions under Florida's new minimum wage amendment should not be preempted by the FLSA because its provisions are more generous than the FLSA with respect to the statute of limitations for bringing claims.

A given plaintiff or plaintiffs can bring an opt-in collective action and class opt-out claims for minimum wage under both the FLSA and the Guarantee in one action to obtain both the unpaid minimum wage and overtime. However, choosing to do so means you will sacrifice your ability to sue in state court.[12] Trying plaintiffs' federal and state claims together serves judicial economy. For instance, in *Goldman v. Radioshack Corp.*, 2003 U.S. Dist. LEXIS 7611, * 16 (E.D. Pa. April 17, 2003), a district court in Pennsylvania stated that trying federal and state wage claims in separate courts might result in findings in one action which would be preclusive on the other, or, might result in conflicting findings or judgment, and concluded that "proceeding in both forums would needlessly increase litigation expenses for both parties." *See also*, e.g., *Acosta*, 2006 U.S. Dist. LEXIS 153, * 14 (to decline jurisdiction over state law claims while retaining

[12] *See Breuer v. Jim's Concrete of Brevard, Inc.*,538 U.S. 691 (2003) (resolving circuit split as to whether plaintiffs have the right to prosecute a FLSA action to final judgment in state court and holding that suits brought in state court under the FLSA may be removed to federal court).

jurisdiction over federal claims would be a poor use of judicial resources) and *Beltran-Benitez v. Sea Safari Ltd.,* 180 F. Supp.2d 772, 774 (E.D. N.C. 2001) (denying defendant's motion to dismiss state law claims because the FLSA does not prohibit Rule 23 opt-out class actions for related state law claims; noting that judicial economy is served by trying these claims together).

8. Implementing Legislation

On December 12, 2005, the Florida legislature enacted Florida Statute Section 448.110, which imposed additional requirements on plaintiffs bringing suits under the Florida minimum wage act, including that the plaintiff notify the employer in writing of their intention to sue prior to filing the action.[13] On June 30, 2006, Judge Moody in the Middle District of Florida, in *Throw v. Republic Enterprise Systems, Inc.*, 2006 U.S. Dist. Lexis 46215 (M.D. Fla. June 30, 2005), held that plaintiffs who bring a suit under the Florida minimum wage act are not required to satisfy the notice requirement of Section 448.110(6)(a) because Section 24(e) of the Act "creates a constitutional right directly enforceable in a court of law by an aggrieved party with no requirement that notice be given." *Id*. at **1-6. While this opinion appears to extinguish the notice requirements enacted by the Legislature, out of an abundance of caution, plaintiffs counsel may wish to provide notice consistent with Section 448.110.

V. SCOPE OF DISCOVERY

Discovery consumes a tremendous amount of time, effort, and cost in the litigation process. As such, the decision of where to file to best streamline the discovery process is an important one. The practitioner should take into account the type of discovery the action will require (i.e., financial worth, emotional and mental anguish,

[13] Fla. Stat. § 448.110(6)(a)(2005).

email and other electronic discovery, mental exams, etc.) and which venue (state or federal court) will best facilitate those needs. The following discusses the difference between discovery practices in federal verse Florida state courts focusing on the basic discovery practice and electronic discovery.

A. What is Discoverable?

A few of the most basic rules of civil procedure governing discovery in federal and Florida state courts differ. Rule 26 of the Federal Rules of Civil Procedure was amended in 2000 to circumscribe discovery to matters relevant to the "claim or defense of any party…" as well as to provide that "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Furthermore, the Rule was amended to require that information must be relevant to be discoverable.

This amended federal rule requires "attorney initiated" discovery to focus on the actual claims and defenses involved in the action. This encourages parties to identify all claims and defenses in the pleadings rather than attempt to serve discovery designed to develop new claims and defenses. However, via "court initiated discovery" the parties may expand the scope of discovery to information relevant to the subject matter of the action.

In Florida state court, there is no distinction between attorney-initiated and court-initiated discovery. The parties may seek discovery regarding any matter, not privileged, "relevant to the subject matter of the pending litigation." Rule 1.280, Fla.R.Civ.P. The test for such discovery is directed to the subject matter of the action rather than to pleading issues. *See, Charles Sales Corp. v. Rovenger,* 88 So. 2d 551 (Fla. 1956).

B. Initial Disclosures

Procedural differences in the discovery process between federal and state court also include the requirement for initial disclosures in federal court. In federal court, under Rule 26(a)(1)(A) the parties are obligated to disclose witnesses or documents which support its claims or defenses. Moreover, no discovery may be had absent special court order prior to the parties' case management conference. *See*, Rule 26(d). Except with respect to timing, this difference is not material in that in state court, this information is certainly available by propounding specific discovery requests.

C. Duty to Supplement

Under Florida's Rules of Civil Procedure, a discovery response is complete when made, and additional discovery should be propounded at the end of the discovery period requesting the opposing party to supplement its disclosures to reflect any information later acquired, or subsequently determined to be incomplete or incorrect. *See*, Rule 1.280(e). However, Federal Rule 26(e) imposes upon each party the duty to supplement or correct any previous disclosure or response if that party learns that "in some material respect" the information disclosed is incomplete or incorrect, or additional information has been made known to other parties during the discovery process.

D. Discovery of Financial Worth

Another material difference between the federal and Florida state venue is that no discovery of financial worth may be had in Florida state court until a party has been granted a motion to plead punitive damages. *See,* § 768.72(1), Fla. Stat. *See, Simeon, Inc. v. Cox*, 671 So.2d 158, 160 (Fla. 1996) (holding Fla. Stat. 768.72 creates a substantive

legal right not to be subject to a punitive damages claim and ensuing discovery of financial worth until trial court determines a reasonable basis exists for recovery of punitive damages) *and Cypress Aviation Inc. v. Bollea*, 826 So. 2d 1091 *3-4 (Fla. 2d DCA 2002)(stating that procedure in 768.72 must be followed even where pleading alleges fraud).

In the specific context of employment discrimination claims under the FCRA, Section 768.72 does not apply to claims for unlawful employment practices. Fla.Stat. § 760.111(5); *see Kraft Gen. Foods v. Rosenblum*, 635 So. 2d 106, 109 (Fla. 4th DCA 1994)(pointing to Section 760.11(5) for the proposition that "when the legislature intends to waive the 'no-punitive-damage-claim-without-leave-of-court' requirement, it obviously knows how to say so in unmistakable language").

In contrast, in federal court, where punitive damages are plead, a majority of federal courts will permit discovery of the net worth and financial condition of the defendant, without requiring the plaintiff to establish a *prima facie* case on the issue of punitive damages. However, the procedure mandated under 768.28 are considered substantive and applicable to state claims in the Middle District of Florida (*see*, *Neill v. Gulf Stream Coach, Inc.,* 966 F.Supp. 1149 (M.D. Fla. 1997)) but are viewed as procedural and inapplicable to Florida state law claims in the Southern District of Florida (*see, e.g., Primerica Financial Services, Inc. v. Mitchell*, 48 F.Supp.2d 1363 (S.D. Fla. 1998).

D. Mental Examinations

Compulsory mental examinations also widely differ under Fed. R. Civ. Pro. 35 and Fla. R Civ. Pro. 1.360. The Florida rule more liberally permits mental examinations;

however, the Florida rule also affords the examined with greater protections then provided for under the federal law.

Motions requesting Fed. R. Civ. P. 35 examinations are typically granted when one or more of the following factors are present:

> (1) a cause of action for intentional or negligent infliction of emotional distress;
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> (2) an allegation of a specific mental or psychiatric injury or disorder;
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> (3) a claim of unusually severe emotional distress;
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> (4) the plaintiff's offer of expert testimony to support a claim of emotional distress; and/or
>
> (5) the plaintiff's concession that her mental condition is "*in controversy*" within the meaning of Rule 35. (emphasis added).[14]

Claiming mental anguish or 'garden variety' emotional distress will not place a plaintiff's mental condition *in controversy* with the meaning of Fed.R.Civ.P. 35. However, claiming ongoing emotional distress may be enough to warrant a mental examination in federal court. *See Schlunt v. Verizon Directories Sales-West, Inc*., 2006 U.S. Dist. LEXIS 38819, **7-8 (M.D. Fla. 2006) (claiming that the plaintiff continued to have trouble sleeping and emotionally had not recovered from the incident was sufficient for the court to find that plaintiff was suffering from an ongoing emotional condition that meet the Rule 35 "in controversy" and "good cause" requirements), citing *Henry v. City of Tallahassee*, 2000 U.S. Dist. LEXIS 20469, *2 (N.D. Fla. Dec. 6, 2000) (claiming continuing emotional distress may warrant a Rule 35(a)). The federal rule allows a mental examination only upon order of the court; which can be made by motion, showing

[14] *See Schlunt v. Verizon Directories Sales-West, Inc*., 2006 U.S. Dist. LEXIS 38819 (M.D. Fla. 2006).

good cause shown and that the examined and all parties received notice setting forth the time, place, manner, conditions and scope of the examination.

Conversely, under Florida's rule for compulsory examinations, a party may make a request for a mental examination to the party without leave of court. Fla. R. Civ. Pro. 1.360(a)(1)(B). The rule states, "Any party may request any other party to submit to, or to produce a person in that other party's custody or legal control for, examination by a qualified expert when the condition which is the subject of the requested examination is in controversy . . . . An examination under this rule is authorized when the party submitting the request has good cause for the examination." What constitutes "good cause" is not abundantly clear under Florida law. However, the Supreme Court has held, in evaluating a rule similar to Florida Rule 1.360, that "the requirements of 'in controversy' and 'good cause' are not met by mere conclusory allegations of the pleadings -- nor by mere relevance to the case -- but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). Plaintiffs will more likely find themselves subjected to a mental exam in state court than in federal court where permission from the court is required.

Florida state courts, however, have allowed plaintiff's attorneys to witness the examination, and have allowed videographers and court reporters to tape the examination. *See e.g. Broyles v. Reilly*, 695 So. 2d 832, 833-834 (Fla. 2nd DCA 1997); *Freeman v. Latherow*, 722 So. 2d 885, 886 (Fla. 2nd DCA 1998); *Brompton v. Poy-Wing, M.D.*, 704 So. 2d 1127 (Fla. 4th DCA 1998). The videotape may be deemed privileged

work product until it is utilized in a court proceeding. *McGarrah v. Bayfront Medical Center*, 889 So. 2d 923 (Fla. 2d DCA 2000). In Florida, the party opposing the presence of third parties in the examination room has the burden to establish that the third party's presence would disrupt the examination and that no other qualified physician can be located in the area who would be willing to perform the examination with a third party present. *Broyles*, 695 So. 2d at 833-834; *Wilkins v. Palumbo*, 617 So. 2d 850 (Fla. 2d DCA 1993). "The concerns of physicians for conducting examinations without the distraction of third persons cannot outweigh the [examinee's] rights." *Byrd v. Southern Prestressed Concrete, Inc.*, 928 So. 2d 455, 459 (Fla. 1st DCA 2006), quoting, *United States Sec. Ins. Co. v. Cimino*, 754 So. 2d 697, 702 (Fla. 2000).[15] The examining doctor must provide through an affidavit case-specific reasons of why they would be disrupted by the third parties presence. *Id.*

Federal courts are not as likely to allow attorneys or court reporters witness the examination. In *Schlunt*, the plaintiff failed to persuade the court that her attorney, a court reporter, or a tape recorder should to be present during the examination. 2006 U.S. Dist. LEXIS 38819, at **9-12. The court found the language in Fed. R. Civ. Pro. 35 adequately safeguarded the plaintiff by authorizing her to obtain a detailed written report from examiner setting forth the specific findings. *Id*. Under federal law pursuant to Fed. R. Civ. P. 26, the court has the capacity to order conditions on the examination "if it believes such conditions are required to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Notwithstanding, federal courts have held that attorneys, court reporters, and recording devices are distractions that

[15] The *Byrd* also stated that the purpose underlying this principle of law "is to protect plaintiffs from improprieties that might otherwise be committed by the examiners, who are retained by the defendant and who frequently end up testifying as expert witnesses on behalf of the defendant."

may compromise the accuracy of the examination and turn a neutral examination into an adversarial event. *See e.g. Shirsat v. Mutual Pharm. Co*., 169 F.R.D. 68, 70 (E.D. Pa. 1996) ("the presence of an observer interjects an adversarial, partisan atmosphere into what should be otherwise a wholly objective inquiry . . . it is recognized that psychological examinations necessitate an unimpeded, one-on-one exchange between the doctor and the patient"); *Wheat v. Biesecker*, 125 F.R.D. 479, 480 (N.D. Ind. 1989) (denying a protective order seeking to prevent an examination without the presence of the plaintiff's attorney and stating, "[t]he presence of the lawyer for the party to be examined is not ordinarily either necessary or proper"). Therefore, if a mental examination is unavoidable, your client will find more safeguards in state court than in federal court.

E. Electronic Discovery

Effective December 1, 2006, the Federal Rules of Civil Procedure were amended to recognize electronic discovery. Although the Florida Rules of Civil Procedure have not been updated to provide guidance for electronic discovery disclosure and procedures, Florida case law seems to mirror the federal rules quite closely.

The federal rules expressly direct the parties to discuss issues related to the production of electronic information early in litigation under Rule 26.[16] During the planning for discovery conference, the parties are to discuss where electronic data is stored and what form the electronic data will be produce. Fed. R. Civ. Pro. 26(f)(6) and 16(b) further encourage the parties to request that the court incorporate in its case scheduling order any agreement made by the parties to address privilege issues that may subsequently arise during litigation. Committee notes recognize that these agreements will be instructive if the court must decide privilege issues. Moreover, the Committee

[16] Fed. R. Civ. Pro. 26(f).

notes to Fed. R. Civ. Pro. 26(b)(5) recognize the increased potential for inadvertent disclosure of otherwise privileged materials during a electronic production and instruct the parties to discuss privilege issues in the initial stages of litigation.

Amended Rule 26 also imparts the duty to disclose "electronically stored information" that is "reasonably accessible" unless the electronic production would cause "undue burden and cost." Fed. R. Civ. P. 26(b)(2). Although the rules did not define what constitutes undue burden and cost, the Committee notes to this rule set forth several factors that may be relevant in making the "undue burden/cost" determination. These factors include:

> (1) the specificity if the discovery request;
>
> (2) the quantity of the information available for other and more easily accessed sources;
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> (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
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> (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
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> (5) predictions as to the importance and usefulness of the further information;
>
> (6) the importance of the of issues at stake in the litigation; and
>
> (7) the parties' resources.

These factors are largely the same as the seven factors outlined in *Zubulake v. UBS Warburg, LLC,* 216 F.R.D. 280, 284 (S.D.N.Y. 2005).[17] The *Zubulake* court

[17] "(1) The extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (3) the total cost of production, compared to the resources available to each party; (4) the relative ability of each party to control costs and its incentive to do so; (5) the importance of the issues at stake in the

determined that under certain circumstances a shift in the cost of producing electronic discovery to the requesting party may be warranted.

Fed. R. Civ. Pro. 34(b) also provides guidance regarding the form in which electronic information should be produced. It instructs parties to produce electronic data "in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable." A requesting party may designate the form in which they would like the electronically stored information produced (i.e., word processing documents, email messages, electronic spreadsheets, image and sound files, etc.).[18] Moreover, if a requesting party is not satisfied with the form in which the information is produced, and the parties cannot come to agreement regarding form after they meet and confer, the requesting party can file a motion to compel.[19] A party may not convert the electronic information to a form that is more difficult or burdensome to use -- "the information should not be produced in a form that removes or significantly degrades this [searchable] feature." Committee notes to Fed. R. Civ. Pro. 34(b); *see In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2007 U.S. Dist. LEXIS 2650, *14 (E.D.N.Y. January 12, 2007) (finding documents scanned into TIFF images to remove metadata was not sufficient under the new rules).

The Florida Rules of Civil Procedure do not directly address electronic discovery requirements. However, Rules 1.280(b) and 1.30(a) have been found sufficiently broad enough to require parties to produce electronic discovery ***relevant to the underlying dispute***. Fla. R. Civ. Pro. 1.280(b) states that "parties may obtain discovery regarding

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litigation; (6) and the relative benefits to the parties of obtaining the information." *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2005).

[18] *See* Committee notes to Rule 34(b).

[19] *See id.*

any matter, not privileged, that is relevant to the subject matter of the pending action." *See State Farm Fire & Casualty Co.*, 669 So. 2d 303 (Fla. 3d. DCA 1996) (granting request for computer printouts that are relevant and "readily available"); *Kyker v. Lopez,* 718 So. 2d 957, 959 (Fla. 5th DCA 1998) (denying petitioners appeal of a non-final order for a protective order because the computer-generated sales reports were relevant to claims of mismanagement of financial affairs).

Discovery should not to be used for a "fishing expedition to see if causes of action exist," *Northrup Grumman Corporation v. Swope*, 717 So. 2d 213 (Fla. 5th DCA 1998); therefore, Florida state courts require that requests for electronic discovery be narrowly tailored to discover information relevant to the underlying dispute.[20] Florida courts further suggest that parties implement safeguards to ensure confidential information is protected during the discovery process.[21] In *Strasser v. Yalamanchi,* 669 So. 2d 1142, 1143 (Fla. 4th DCA 1996), the court found Florida's discovery rules broad enough to encompass a search of a defendant's computer system for purged information but allowed the search only if there was no less intrusive manner to obtain the information. Likewise, relying on *Strasser,* in *Menke v. Broward County School Board*, 916 So. 2d 8 (Fla. 4th DCA 2005), the court found that allowing a forensic computer expert unfettered access to the teacher's home computer would cause irreparable harm if privileged information was disclosed. The court held that unless there is evidence that information is being destroyed to thwart discovery, the requesting party should allow the opposing party an opportunity to produce electronically stored information to prevent disclosure of potentially confidential and privileged information. *Id*. at 12.

[20] The Florida Bar Journal, Robert H. Thornburg, *Electronic Discovery in Florida*, October 2006, p. 34-41.
[21] *Id*.; *see* Committee Notes Fed. R. Civ. Pro. 26(f) and 26(b)(5).

Florida state courts have not yet directly addressed the issue of cost-shifting for large electronic data requests similar to *Zubulake*; however, in *Centex-Rooney Construction Co, v. Martin Co*., 725 So, 2d 1255 (Fla. 4th DCA 1999), the Fourth District Court of Appeal found that the trial court did not abuse its discretion when it found the sizable costs incurred by the law firm Holland & Knight in developing a computer-based program to evaluate and review electronic discovery was reasonable and awarded the firm all costs.

In general, the federal rules provide the practitioner with a more transparent view of what electronic data exists, what is privileged, where it is stored, and how is can be retrieved. However, these advantages must be weighed in balance with Fed.R.Civ.P. 26 and *Zubulake's* shift of costs provisions.

VI. EVIDENCE

Evidentiary rules play a major role is the outcome of a case. Whether a case is litigated in federal court verses state court may determine whether relevant key evidence will be discoverable and/or admissible. This section discusses the distinctions between Florida's evidentiary rules and federal evidentiary rules for several topics (tape recording, sexual history and predisposition, expert witnesses, spoliation, attorney-client privilege, hearsay (EEOC determinations), and mental exams) to aid the employment law practitioner decide the question -- where to file?

A. Tape Recordings

It is not an uncommon for an employee to present to their attorney tape recorded telephone conversations, tape recorded office meetings, or other tape recorded discussions that took place in their current or former workplace in support of their case.

Whether these recordings are admissible and whether the client could potentially be sued under a criminal federal or Florida state wiretapping law is the subject of this subsection.

Both federal and Florida wiretapping laws provide that the ***unlawful interception*** of *wire*, ***oral or electronic communications*** are *inadmissible* in a court proceeding. 18 U.S.C. § 2515; Fla. Stat. § 934.06. The recording of conversations by tape recorder, cell phone, electronic camera, video camera, or other recording devices easily fit into the federal and Florida definition of "interception" under these Acts.[22]

The federal wiretapping law, however, provides an additional exception to an otherwise unlawful "interception" that is not found in the Florida law. Under the federal law, if the person recording the conversation is a "party to the communication" there is no wiretapping violation. 18 U.S.C. § 2511(2)(d).

Therefore, under federal law, simply being present in the room when the communication and recording takes place will satisfy the "party to the communication" exception. For example, in *Pitts Sales, Inc. v. King World Prods.*, 383 F. Supp. 2d 1354, (S.D. Fla. 2005), an associate producer for the television show *Inside Edition* was shooting a news story regarding abuses perpetrated by and against employees of magazine-sales companies. The associate producer obtained a sales position with Pitt Sales and wore a hidden camera and microphone to record the daily activities of its employees. Pitt Sales sued for illegal interception of oral communications, use of illegality-intercepted communications, and other counts including fraud. The defendant moved for summary judgment on the basis that no law was violated. After establishing

[22] *See* 18 U.S.C. §§ 2510 *et. seq.*; Fla. Stat §§ 934.02 *et. seq.*

that Pitts Sales had standing to sue,[23] the court determined that the recordings were lawful under 18 U.S.C. § 2511(2)(d). The court acknowledged that the "party to the communication" exception does not require that the person making the recording participate in the conversation; the person need only be present when the oral communications he records are uttered. *Id*. at 1361.

Florida law does not provide a "party to the communication" exception to its wiretapping law. Under Florida law, the interception or recording of *oral communications* is lawful if all parties to the communication give prior consent. Fla. Stat. § 934.03. The Florida Supreme Court, however, in *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985), recognized that legislature "did not intend that every oral communication be free from interception without the prior consent of all the parties to the communication." By definition, Fla. Stat. § 934.02(2) in part, provides an *oral communication* is one "uttered by a person exhibiting an expectation that such communication is not subject to interception." Fla. Stat. § 934.02(2). Therefore, under Florida law, if the person whose conversation is recorded has no reasonable expectation of privacy, there is no violation of Florida's wiretapping law and the tape recording may be admissible in a court proceeding.[24]

In Florida, "[a] reasonable expectation of privacy under a given set of circumstances depends upon one's actual *subjective expectation of privacy* as well as *whether society is prepared to recognize this expectation as reasonable*." *Inciarrano*, 473 So. 2d at 1275 (emphasis added). The following cases are examples in which Florida

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[23] Whether a corporation or association has standing to sue under the Wiretap Act, 18 U.S.C. §§ 2510 *et. seq.*, depends on whether the corporation is deemed to have a possessory interest in the communication. *Pitts Sales, Inc. v. King World Prods*., 383 F. Supp. 2d 1354, 1357 (S.D. Fla. 2005).

[24] Fla. Stat. §§ 934.02(2); 934.06.

courts have declined to extend a reasonable expectation of privacy to a person's place of business because the court found society was not prepared to recognize such an expectation. *See e.g. Morningstar v. State*, 428 So. 2d 220 (Fla. 1982) ("finding that although defendant may have had reasonable expectation of privacy in his private office, that expectation was not one which society was willing to accept as reasonable or willing to protect"); *Cohen Bros., LLC v. ME Corp.*, S.A., 872 So. 2d 321 (Fla. 3d DCA 2004) (finding no expectation of privacy existed when company committee members secretly recorded conference calls); *Jatar v. Lamaletto*, 758 So. 2d 1167 (Fla. 3d DCA 2000) ("Society is willing to recognize a reasonable expectation of privacy in conversations conducted in a private home. However, this recognition does not *necessarily* extend to conversations conducted in a business office.")(emphasis in original).

Although the federal wiretapping law applies a standard similar to Florida's wiretapping law, not all federal cases evaluate an expectation of privacy in conjunction with whether society is prepared to recognize such an expectation as reasonable. *See Walker v. Darby*, 911 F.2d 1573, 1578 (11th Cir. 1990). Instead, some federal courts, including the Eleventh Circuit, determine whether there is an expectation of non-interception of the oral communication as provided for under 18 U.S.C. § 2510(2).[25] *Id*. The Eleventh Circuit in *Walker* agreed with other federal courts that distinguished between an expectation of privacy under the Forth Amendment and the expectation of non-interception under § 2510(2). The court stated there is a difference "between a public employee having a reasonable expectation of privacy in personal conversations taking place in the workplace and having a reasonable expectation that those

[25] Federal courts have distinguished the constitutional expectation of privacy provided by the Fourth Amendment and the expectation of non-interception under 18 U.S.C. § 2511(2). Florida courts have not articulated this distinction.

conversations will not be intercepted by a device which allows them to be overheard inside an office in another area of the building."[26] *Id*. at 1578-79. In this case, the court recognized that a reasonable exception of non-interception, justified under the circumstances, could exist in an office setting where the plaintiff's supervisors affixed an intercom by and above the plaintiff's desk to record his conversations and discussions. The plaintiff had filed an EEOC Charge alleging race discrimination.

As a preliminary matter, employment law practitioners will fair best in federal court if they can take advantage of the "party to the communication" exception under 18 U.S.C. § 2511. However, if this exception does not apply, both federal and Florida law seem to apply similar objective and subjective tests in determining whether an individual has a reasonable expectation that the communication would not be subject to interception.

B. Evidence of Sexual History and Predisposition

A claim of sexual harassment or rape involving one's workplace may open the door to evidence of the victim's prior sexual history and/or predisposition in both federal and Florida state courts. Although Florida's Rape Shield Statute Section 794.022 tends to allow more evidence in than Federal Rule of Evidence 412, Rule 412(b)(2) gives the district court discretion to admit prior sexual history and predisposition evidence in cases of sexual harassment.

The federal rule as to admissibility of sexual history evidence is facially quite strict.[27] Under Fed. R. Evid. 412, the proponent must request leave of court to file a motion under seal to offer evidence related to "sexual predisposition" or "sexual behavior." Fed. R. Evid 412(c). This includes evidence of mode of speech, lifestyle, and

[26] *See Kemp v. Block*, 607 F. Supp. 1262, 1265 (D. Nev. 1985) (finding no expectation of privacy from interception exists if the speaker talks too loudly)
[27] An amendment in 1994 applied Rule 412 to civil cases as well.

behavior in the workplace.[28] The proponent of this evidence has the burden of proof to show that the value of this evidence outweighs any unfair prejudice. *See EEOC v. Wal-Mart Stores*, 1999 U.S. App. LEXIS 29858, **10-11 (10th Cir. 1999)(finding evidence of victim's sexual relationships with coworkers outside work, and evidence of Wal-Mart management's generalized suspicions about her relationships outside work, was not relevant to her claims of harassment at work. Wal-Mart failed to demonstrate that the district court abused its discretion by excluding Wal-Mart's proffered Rule 412 evidence, and the district court's decision was affirmed); *Barta v. City of Honolulu*, 169 F.R.D. 132, 136 (D.Haw.1996)(issuing a protective order to prevent discovery into plaintiff's sexual conduct outside the workplace which did not involve defendants finding this type of evidence would not pass Rule 412 scrutiny); *Socks-Brunot v. v. Hirschvogel Inc*., 184 F.R.D. 113, 124 (S.D. Ohio 1999)(granting new trial when the defense was allowed to present evidence to the jury that painted "the picture of a sexually aggressive, foul-mouthed, bad mother and wife, none of which was relevant").

The Eleventh Circuit, in *Judd v. Rodman*, 105 F.3d 1339, 1343 (11th Cir. 1997), recognized the Rule 412 balancing test could allow in evidence of prior sexual history if relevant to the source of the disease at issue. In *Judd*, a nude dancer, brought an action against basketball star Dennis Rodman alleging that he wrongfully transmitted genital herpes to her. The jury in the lower court found in favor of Rodman. The victim sought review, contending that the lower court abused its discretion in admitting evidence of her breast augmentation surgery, prior sexual history, and employment as a nude dancer. The court found that evidence of prior sexual relationships was highly relevant to Rodman's liability because the central issue of the case was whether victim contracted genital

[28] *See Socks-Brunot v. Hirschvogel Inc*., 184 F.R.D. 113 (S.D. Ohio 1999).

herpes from Rodman. *Id*. at 1343. The appellate court held that the lower court did not abuse its discretion in admitting evidence of her prior sexual history, and employment as a nude dancer. The court held that the lower court's admission of this evidence did not constitute reversible error because it was substantially more probative than prejudicial and, therefore, could have been properly admitted at trial. *Id*. Accordingly, the court affirmed the judgment of the lower court.

When it comes to the admissibility of a rape victim's sexual history, Fed. R. Evid. 412(b)(1)(A)-(C) only permits the admissibility of such evidence in the following special circumstances: (1) When it is offered to prove that a person other than the accused was the source of the semen; (2) when it is offered prove consent and consists of "specific instances of sexual behavior by the victim with the accuser, or (3) when the exclusion of the evidence would violate defendant's constitutional rights. In practice, the last clause regarding a defendant's constitutional rights can provide a legal loop-hole for courts who wish to allow such evidence. A wide interpretation of constitutional rights could serve to defeat the claims of privacy.

The Florida Rules of Evidence do not have a provision unilateral to Fed. R. Evid. § 412. Instead, Florida courts determine the admissibility of such evidence under the exceptions to otherwise inadmissible character evidence, Fla. R. Evid. 90.404, and its Rape Shield Statute, Fla. Stat. § 794.022. *See Killian v. State*, 730 So. 2d 360, 362 (Fla. 2nd DCA 1999)(rejecting "dirty books" as inadmissible 90.404 character evidence because possession of "dirty books" was not sufficiently similar to the sexual battery charge under Fla. Stat. § 794.011(2)).

Florida's Rape Shield Statute Section 794.022 makes the same exception as Fed. R. Evid. 412 by allowing "specific instances of prior consensual sexual activity between the victim and any person other that the offender." It does allow admission of sexual history evidence if it is established by the court's *in camera* inspection that the evidence will prove that defendant was not the source of semen, pregnancy, injury, or disease. It allows such evidence also when consent is at issue, again after an *in camera* proceeding tends to establish a pattern of conduct by the victim so similar to that in the case that it becomes relevant to consent. Thus, Florida allows the evidence to come in for a slightly wider range of proofs (i.e., not just semen but pregnancy, injury, disease, etc.). Florida also allows evidence of conduct with persons other than the accused – if the pattern of conduct is sufficiently similar (to infer consent).

Florida courts, for their part, have applied the state rule both to allow and exclude sexual history evidence. *See Lewis v. State*, 591 So. 2d 922 (Fla. 1991)(finding the rule of relevancy must give way to the defendant's constitutional rights when admitting evidence of prior sexual conduct of a sexual battery victim interferes with the defendant's confrontation rights or otherwise precludes the defendant from presenting a full and fair defense); *Kaplan v. State*, 451 So. 2d 1386 (4th DCA 1984)(upholding defendant's conviction for sexual battery when evidence of the victim's prior consensual sexual activity was not relevant and was properly excluded because it did not show a pattern of behavior resembling her encounter with defendant).

In sum, while the federal rule is marginally better than the Florida rule that allows in evidence of pregnancy, injury and disease, a conservative Eleventh Circuit Court may all but erase the difference.

C. Standards for Expert Witnesses

The testimony of an expert witness is crucial to the outcome of a case at trial. Expert testimony can be used to prove liability and damages (compensatory, economic and/or punitive). Furthermore, successfully challenging opposing counsel's expert witness will undoubtably provide a loudable advantage at trial.

Federal and Florida law provide vastly different standards for admissibility of expert witness testimony. Florida state courts apply the more inclusive *Frye* test to determine the admissibiltiy of scientific evidence whereas fedeal courts apply the more strigent *Dauburt* test for all expert testimony. In addition, Florida state courts follow the pure opinion doctrine which is not suject to *Frye* (testimony based solely on experts training and experience not relying upon some scientific principel or test which implies an infallibility).[29] Overall, Florida state courts allow more expert testimony.

Prior to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), relevancy in combination with the *Frye v. United States* 293 F. 1013 (D.C. Cir. 1923) test were the dominant standards for determining the admissibility of scientific evidence in federal courts. The 1923 Federal Court of Appeals ruling in *Frye v. United States* 293 F. 1013 (D.C. Cir. 1923)(involving the admissibility of polygraph evidence), provided the test that was applied for many decades. Under *Frye*, the court based the admissibility of testimony regarding novel scientific evidence on whether it had "gained general acceptance in the particular field in which it belongs." The trial court's gatekeeper role in this respect is typically described as conservative, thus helping to keep "pseudoscience" out of the courtroom by deferring to experts in the field.

[29] *See Cordoba v. Rodriguez*, 939 So. 2d 319, 322 (Fla. 4th DCA 2006).

In *Daubert*, the Supreme Court ruled that the 1923 *Frye* test had been superseded by the 1975 Federal Rules of Evidence and specifically Rule 702 governing expert testimony. Fed. R. Evid. 702 originally stated:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Daubert*, the court ruled that nothing in the Federal Rules of Evidence governing expert evidence "gives any indication that 'general acceptance' is a necessary precondition to the admissibility of scientific evidence. Moreover, such a rigid standard would be at odds with the rules' liberal thrust and their general approach of relaxing the traditional barriers to 'opinion' testimony." The Daubert standard was refined by two additional Supreme Court rulings; which together comprise the "Daubert trilogy." In *Joiner* (*General Electric Co. v. Joiner*, 522 US 136 (1997)), the Supreme Court held that an abuse of discretion standard of review was the proper standard for appellate courts to use in reviewing a trial court's decision of whether expert testimony should be admitted. Thus, appellate courts must defer to the lower trial courts decision regarding the admissibility of expert testimony unless they are *strikingly wrong*. In *Kumho Tire*, (*Kumho Tire Co. v. Carmichael* 526 U.S. 137 (1999)), the Supreme Court held that the judge's gatekeeping function identified in *Daubert* applies to *all expert testimony*, including that which is non-scientific.

In 2000, the Supreme Court approved amendments to the Federal Rules of Evidence relating to opinion evidence and expert testimony to conform to the *Daubert* trilogy. In addition to amending Rules 701 and 703, Rule 702 now includes the

additional provisions which state that a witness may only testify 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 *Daubert* decision was intended to reduce the volume of so-called junk science in the court room. The problem (in the view of the defense bar) was that juries are not competent to recognize flaws in scientific testimony, and junk science might lead to the issuance of awards that deter manufacturers from introducing innovations into the marketplace out of fear of unwarranted tort liability for injuries their products have not caused. According to a 2002 RAND study, post-*Daubert,* the percentage of expert testimony by scientists that was excluded from the courtroom significantly rose. This rise likely contributed to a doubling in successful motions for summary judgment in which 90% were against plaintiffs.[30] Inevitably, the exclusion of expert testimony affects plaintiffs far more than defendants because plaintiffs may not be able to meet the required burden of proof. Questions may also be raised as to the ability of judges to keep up with the complex and fast-advancing fields of study in the many disciplines both scientific and non-scientific that are pursued in academia and industry today. At any rate, the federal courts must follow the standard set by *Daubert*.

Daubert's holdings may be summarized as follows:

(1) Trial judges are gatekeepers allowing only reliable, relevant evidence to enter the courtroom. Federal courts will no longer apply *Frye* since the Federal Rules of Evidence mark a clear departure from it.

(2) The trial judge should apply a five-factor test to determine if a theory or technology is scientific knowledge that will assist the trier of fact, although

[30] Dixon, L, Gill B. Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the *Daubert* Decision. RAND Institute for Civil Justice. 2002.

other factors may be applied within the discretion of the court. The factors are:

a. Can the theory or technique be tested.
b. Has it been subjected to peer review or publication.
c. What is the actual or potential rate of error.
d. Is it generally accepted within the relevant scientific community and if so to what degree.
e. Whether standards and controls exist and are applied.

(3) The abuse of discretion standard is to apply for purposes of appellate review. *General Electric v. Joiner*, 522 U.S. 136 (1997).

(4) The trial judges' gate-keeping function applies to **all expert testimony** not just scientific testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Florida state courts still follow the older standard of *Frye* for determining admissibility of scientific evidence. Accordingly the following (less stringent) approach is required. *Ramirez v. State*, 651 So.2d 1164 (Fla. 1995). As a threshold matter, the trial judge must determine if the expert testimony will assist the trier of fact in understanding the evidence or determining a fact at issue. Then the trial judge must decide whether the expert evidence is based on a generally accepted scientific principle. Then the trial judge must determine whether the witness is qualified as an expert in the field at issue. If all of these are found, the trial judge may then allow the evidence and the jury determines the credibility of the witness.

In addition, Florida courts have held the following.

(1) Expert testimony deduced from novel scientific evidence is not admissible in Florida unless it is "sufficiently established to gain general acceptance in the particular field to which it belongs."

(2) The *Frye* standard need only be applied where the scientific evidence in question is novel or new in some way. *Brim v. State*, 695 So.2d 268 (Fla. 1997).

(3) *Frye* does not apply where the evidence is simply opinion testimony based solely on the expert's own training and experience. *Hadden v. State*, 690 So.2d 573.

(4) The basic underlying scientific principles and methodology upon which the opinion is based must be generally accepted in the relevant scientific community. *Brim v. State*, 695 So.2d 268 (Fla. 1997).

(5) "If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use." *Stokes v. State*, 548 So.2d 188, 193-94 (Fla. 1989).

(6) The expert should rely upon methods that other experts in the field rely on but some difference in view regarding causation is acceptable. *E.I. DuPont de Nemours Co. v. Castillo*, 748 So.2d 1108 (Fla. 3d DCA 2000).

Unlike *Daubert*, which governs all expert witness testimony, Florida state courts do not apply *Frye* to an expert's opinion testimony. Under Florida's pure opinion doctrine, an expert can provide opinion testimony to the jury if that opinion is based upon their "personal experience and training." *Flanagan v. State of Florida*, 625 So. 2d 827 (Fla. 1993). The Fourth District Court of Appeal, in *Holy Cross Hospital, Inc. v. Marrone*, 816 So. 2d 1113 (Fla. 4th DCA 2001), explained the distinctions as follows:

> "Pure opinion" refers to expert opinion developed from inductive reasoning based on the experts' own experience, observation, or research, whereas the *Frye* test applies when an expert witness reaches a conclusion by deduction, from applying new and novel scientific principle, formula, or procedure developed by others.

Notwithstanding the admissibility of an expert's opinion testimony in Florida's state courts, opinion testimony is regularly challenged by opposing counsel as scientific evidence subject to *Frye*. *See State Farm v. Johnson*, 880 So. 2d 721 (Fla. 2d DCA 2004)(finding pure opinion testimony regarding link between automobile accident and fibromyalgia condition was admissible if based on expert's clinical experience); *Marsh v. Valyou*, 917 So. 2d 313 (Fla. 5th DCA 2005)(holding pure opinion testimony not admissible on similar facts).

Overall, Florida law admits testimony related to scientific evidence on a more lenient basis under the *Frye* test than federal courts under the *Daubert* test. Moreover, in Florida state court a practitioner may provide the jury with pure opinion testimony not subject to the *Frye* test. However, the practitioner who relies on expert opinion testimony should be prepared for a challenge.

D. Standards for Spoliation of Evidence

A duty to preserve relevant evidence is imposed by both federal and Florida law. The laws, however, are in disagreement as to when this duty attaches. It is important that the practitioner be familiar with what evidence must be preserved and when the duty to preserve evidence attaches. In addition, the practitioner should timely notify opposing counsel of electronic data and document preservation requirements because spoliation cannot be undone.

"Spoliation is 'the destruction or significant alteration of evidence, or the failure to preserve property or another's use of evidence in pending or reasonably foreseeable litigation.'" *West v. Goodyear Tire & Rubber Co*., 167 F.3d 776, 779 (2d. Cir. 1999). To successful bring a claim for spoliation there must be a duty to preserve. *Zubulake v. UBS Warburg* (*Zubulake* VI), 220 F.R.D. 212, 216 (S.D.N.Y. 2003). The court may allow an unfavorable inference against the party responsible for the spoliation if the evidence subject to spoliation was germane to proof of an issue at trial. *Id*. The federal and Florida laws are also at odds as to whether spoliation can be brought as a separate cause of action.

Federal courts have recognized that the duty to preserve evidence attaches "when the party has notice that the evidence is relevant to the litigation or when a party should

have known that the evidence may be relevant to future litigation." *Zubulake* VI, 220 F.R.D. at 216; *see Griffin v. GMAC Commercial, LLC,* 2007 U.S. Dist. Court LEXIS 10504, *8 (N.D. Fla. February 15, 2007) (Without this safeguard litigants could "shred documents to their heart's content" with no repercussion prior to an official filing). The *Zubulake* IV court recognized that a defendant should not be required preserve every paper document and every back-up tape in its possession. Litigants must preserve information it knows, or reasonably should know would be relevant to the case, including evidence generated by "key players" to the action. *Id.* at 217-218.

Florida courts have taken a different stance. Florida courts recognize a duty to preserve evidence when implicated by contract, by statute, by court order, or by a properly served discovery request. *See e.g. Martino v. Wal-Mart Stores, Inc*., 908 So. 2d 342, 348 (Fla. 2005) (*concurring,* Wells J.); *Silhan v. Allstate Ins. Co*., 236 F. Supp. 2d 1303, 1309 (N.D. Fla. 2002); *Strasser v. Yalamanchi*, 783 So. 2d 1087, 1093-94 (Fla. 4th DCA 2001).

Notwithstanding the Third District's refusal to recognize a common law duty to preserve, it has stated that formal notice of intent to file may be enough to require preservation of evidence. *Pennsylvania Lumberman's Mutual Insurance Co. v Florida Power and Light Company*, 724 So. 2d 629, 630 (Fla. 3rd DCA 1999). *See also Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088 (Fla. 4th DCA 2001)(finding that Publix had a duty of preserve evidence (a broken soda bottle) because an incident report and its refusal to release the report to the plaintiff as privileged work product showed it anticipated litigation on the issue); *Brown v. City of Delray Beach*, 652 So. 2d

1150, 1153 (Fla. 4th DCA 1995)(finding a duty to preserve arose when the police officer promised to preserve the evidence).

Moreover, practitioners cannot bring an independent cause of action against first-party defendants for spoliation of evidence in Florida state courts. *See Martino*, 908 So. 2d at 347. In *Martino*, the Florida Supreme Court held that the remedy for spoliation brought against a first-party defendant must be consistent with the presumption analysis it set forth in *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987) and not the decision set forth by the Third District in *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. 3d DCA 1984). In *Bondu* Third District Court of Appeal permitted an independent cause of action for first-party defendant spoilers. The Court found *Bondu* at odds with the *Valcin* presumption, which provides if the first-party defendant is negligent for loss of key evidence in the dispute, then a rebuttable presumption of negligence for the underlying tort is applied. The Court clarified that *Valcin* does not prescribe an independent cause of action.

In contrast, federal law does allow an independent cause of action for spoliation of evidence against first-party defendants. *Zubulake*, 220 F.R.D. at 216 (S.D.N.Y. 2003).

The federal duty to preserve evidence is much broader than Florida's duty to preserve. Under the federal law the duty to preserve attaches early in litigation (when the party has notice that the evidence is relevant) and data must be preserved by key players to the dispute. Furthermore, new requirements regarding electronic data under the Federal Rules of Civil Procedure 16(f) and 26(f) put the parties on notice about the type and form of electronic information that will be sought during discovery. *See infra* at

Section V.G. Florida law provides narrower protections and does not allow for an independent cause of action for spoliation of evidence against first-party defendants.

D. Other Evidentiary Issues

1. Attorney Client Privilege

Corporations under federal and Florida law are protected by the attorney-client privilege. *See Upjohn v. United States*, 449 U.S. 383 (1981). As such, corporations may attempt to shield evidence from a jury by asserting this privilege. Florida's attorney-client privilege law codified in Fla. Stat. Section 90.502 provides greater guidance and transparency as to which communications are covered by this privilege in the corporate context. Federal law provides no parallel standard.

Generally, the attorney-client privilege under federal common law[31] and Fla. Stat. Section 90.502, are similar. Parties may assert the attorney-client privilege if the following elements are present:

(1) Where legal advice of any kind is sought;

(2) from a professional legal advisor in his capacity as such;

(3) the communications relating to that purpose;

(4) made in confidence;

(5) by the client;

(6) are at his instance permanently protected;

(7) from disclosure by himself or by the legal advisor,

[31] The attorney-client privilege in federal question cases is governed by federal common law. Fed. R. Evid. 501; *see Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992) (holding that the federal law of privilege applies where the court's jurisdiction is premised on a federal question, even if the evidence sought is relevant to pendent state law claim. However, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law").

(8) except the protection may be waived.[32]

Although Fla. Stat. Section 90.502 largely mirrors federal common law, it also expressly extends the attorney-client privilege to "communications made by a person who seeks or receives services from the Department of Revenue under the child support enforcement program to the attorney representing the department." Fla. Stat. § 90.502(5). Furthermore, it ensures that the attorney-client privilege is limited but is not entirely circumvented by Florida's Sunshine laws. Fla. Stat. § 90.502(6) ("A discussion or activity that is not a meeting for purposes of s. 286.011 shall not be construed to waive the attorney-client privilege established in this section. This shall not be construed to constitute an exemption to either s. 119.07 or s. 286.011"); *see Melbourne v. A.T.S. Melbourne, Inc.*, 475 So. 2d 270, 271 (Fla. 5th DCA 1985)(Section 119.07(3)(o), provides an exemption from public disclosure of attorney files prepared during the pendency of litigation).

Florida's guidelines for determining whether and under what circumstances a corporation can invoke the attorney-client privilege are important to the practice of employment law. *See Southern Bell Telephone and Telegraph Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994); *St. Joe Co. v. Liberty Mut. Ins. Co*., 2006 U.S. Dist. LEXIS 85260, 12-13 (M.D. Fla. November 22, 2006); *Tyne v. Time Warner Entm't Co., L.P*., 212 F.R.D. 596, 598 (M.D. Fla. 2002). In *Southern Bell*, the Florida Supreme Court set forth the following requirements to test whether communications made in the corporate context are attorney-client privileged communications:

[32] *Provenzano v. Singletary*, 3 F. Supp. 2d 1353, 1366 (M.D. Fla. l997), *aff'd*, 148 F.3d 1327 (11th Cir. 1998); *Universal City Dev. Ptnrs, Ltd. v. Ride & Show Eng'g, Inc.*, 230 F.R.D. 688 (M.D. Fla. 2005); *Boyles v. Mid-Florida TV Corp.*, 431 So. 2d 627, 638 (Fla. 5th DCA 1983).

(1) the communications would not have been made but for the contemplation of legal services;

(2) the employee making the communication did so at the direction of his or her corporate supervisor;

(3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;

(4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties; and

(5) the communication is not disseminated beyond those persons who because of the corporate structure, need to know its contents.

There is no published federal case applying this test to the federal common law attorney-client privilege. In federal court, a practitioner may show that the communications the corporation attempts to protect do not relate to legal services and are, therefore, not attorney-client privileged communications. *See, e.g., Pollack v. United States*, 202 F.2d 281, 286 (5th Cir. 1953), *cert denied*, 345 U.S. 993 (1953) ("privilege accorded to communications between attorney and client does not apply except where the attorney acts in his professional capacity"); *United States v. Davis*, 636 F.2d 1028, 1041 (5th Cir. Unit A 1981) (preventing the attorney-client privilege from being invoked to protect communications that do not relate to legal services); *Cutrale Citrus Juices USA, Inc. v. Zurich Am. Ins. Group*, 2004 U.S. Dist. LEXIS 22487, *10, n. 12 (M.D. Fla. September 10, 2004) ("Where a lawyer is engaged to advise a person as to business matters as opposed to legal matters, or when he is employed to act simply as an agent to perform some non-legal activity for a client . . . there is no privilege."). The five-factor test enunciated in *Southern Bell*, however, provides the practitioner with clearer guidance

as to the type of communications which may be protected by the attorney-client privilege in a corporate context.

2. Self-Critical Analysis Privilege

Another related issue worth a brief mention, is the self-critical analysis privilege. Florida practitioners should be aware that some federal courts, including a federal district court in Florida, have recognized this privilege.[33]

Self-critical analysis allows corporations to conduct research and investigations under the protection of the attorney-client relationship in order to evaluate the validity of its policies and practices.

The Northern District of Florida in *Reid v. Lockheed Martin Aeronautics Co.,* 199 F.R.D. 379 (N.D. Ga. 2001), applied the privilege in a Title VII action. In *Freiermuth v. PPG Indus.*, 218 F.R.D. 694, 696-697 (N.D. Ala. 2003), the court recognized the self-critical analysis privilege as a way "to encourage employers to undertake candid self-evaluations of their performance in the equal employment opportunity arena." *But see Johnson v. United Parcel Service, Inc*., 206 F.R.D. 686 (M.D. Fla. 2002) (rejecting self-critical analysis privilege).

This seemingly limited privilege has been further eroded by the "Thompson Memo,"[34] which allows prosecutors to give corporations a "cooperation credit" if they agree to waive attorney-client and work product privileges, and the subsequent "McNulty Memo,"[35] which revised the criticized Thompson Memo, and permits a "voluntary" waiver of the attorney-client and work product privileges if the Justice Department

[33] The Eleventh Circuit Court of Appeals has not addressed this issue.
[34] The Thompson Memo is named for the then-Deputy Attorney General Larry Thompson.
[35] The McNulty Memo is named for Deputy Attorney General Paul McNulty.

approves the waiver.[36] The American Bar Association has argued that the Thompson and McNulty memos undermine the attorney-client privilege by encouraging corporations to waive the attorney-client privilege for a "cooperation credit" and discourages corporations from seeking advice and guidance from legal counsel regarding compliance with legal standards.

Although, Florida has not statutorily recognized the self-critical analysis privilege, this is a privilege practitioners may encounter in their federal practice. [37]

[36] *See* Statement of Karen J. Mathis, President of the American Bar Association, Subcommittee on Crime, Terrorism, and Homeland Security, Committee on Judiciary, United State House of Representative, *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations,* March 8, 2007.
[37] Florida privileges exist only by statute. § 90.501, Fla. Stat. (1991); *Procter & Gamble Co. v. Swilley*, 462 So. 2d 1188, 1195 (Fla. 1st DCA 1985) ("concluding that no academic privilege exists in Florida and that the court was not at liberty to create such a privilege"); *State v. Castellano*, 460 So. 2d 480, 481 (Fla. 2d DCA 1984) ("privileges in Florida are no longer created by judicial decision").

E. Hearsay Evidence

Like most states today, Florida's hearsay rules track the federal rules fairly closely. However, there are a few points of divergence that we discuss below. One point of divergence is (1) Fed. R. Evid. 803(4) and Fla. R. Evid. 90.803(4) exceptions to hearsay for purposes of medical diagnosis or treatment and (2) Florida's designation of EEOC and FCHR determinations as inadmissible hearsay.

1. Statements for the purpose of Medical Diagnosis or Treatment.

The Florida statutes add the italicized section to the language of the federal rule. Statements made for the purpose of medical diagnosis or treatment [*by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts which statements describe*] and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Thus, the Florida version is narrower than the federal exception in that it enumerates the acceptable utterers of the statements. In practice, however, the Florida courts appear to admit or exclude evidence under this rule much as the Federal courts would. This may be seen in the following recent decisions. *See Douglas v. State*, 913 So. 2d 1234 (Fla. 3rd DCA 2005) (A rape treatment center's physician was allowed to testify as to the victim's history, as well as the findings from his physical examination under the medical diagnosis hearsay exception in Fla. R. Evid. 90.803(4) (2003) because there was the requisite showing that the statements were made for the purposes of

diagnosis or treatment, and the victim knew the statements were being made for that purpose.); *Neeley v. State*, 883 So. 2d 861, 863 (Fla. 1st DCA 2004) (finding a phrase "from arrested assailant," included in the medical record, was not relevant to medical diagnosis or treatment); *Herrera v. State*, 879 So. 2d 38 (Fla. 4th DCA 2004) (The appellate court held that the victim's statement to a nurse that she was forced to have sex and that semen was sprayed in her face was admissible under Fla. R. Evid. 90.803(4) as statements made for purposes of medical diagnosis or treatment, but her statement that she was threatened that if she did not remove her clothes they would be ripped-off and that nude pictures were taken of her were not relevant to medical diagnosis or treatment and their admission was error).

2. EEOC and FCHR Determinations

EEOC investigative reports and probable cause determinations may be admissible in a jury trial in the Eleventh Circuit under the Fed. R. Evid. 803(8) public records exception to hearsay. *See Barfield v. Orange County*, 911 F.2d 644 (11th Cir. 1990).

Not all federal courts, however, are in agreement on this issue. *Id.*; *see John Yellow Freight System*, 734 F.2d 1304, 1309 (8th Cir. 1984)(EEOC reports differ in "quality and factual detail" and the decision to admit in a jury trial should be left to the district court's discretion); *Plummer v. Western Int'l Hotels Co.*, 656 F.2d 502, 505 (9th Cir. 1981)(providing plaintiff's right to introduce EEOC determinations in a Title VII case regardless of probative value analysis).

The Eleventh Circuit has determined that EEOC reports and determination are "highly probative" and therefore that their admissibility should be determined by the district court by evaluating (1) whether and what parts of the report should be admitted,

(2) whether the report presents issues of trustworthiness under Fed. R. Evid. 803(8)(c); and (3) whether its probative value surpasses the danger of unfair prejudice under Fed R. Evid. 403. *Barfield*, 911 F.2d at 650.

In contrast, FCHR determinations are inadmissible hearsay in Florida. Pursuant to Florida Statute § 760.11(5) provides that the "Commission's determination of reasonable cause is not admissible into evidence in any civil proceeding, including any hearing or trial, except to establish for the court the right to maintain the private right of action." No case has been brought in Florida to challenge this provision.

Therefore the "best venue" (be it federal or Florida state courts), when it comes to the admissibility of EEOC and FCHR reports and determinations, is federal court if you want the information in and state court if you wish to keep the information out.

F. Objecting to Mental Records

Claiming the "garden variety" damages for emotion distress, anguish, humiliation, and loss of consortium in Florida's state courts may allow in evidence of prior mental examinations and/or records. Moreover, it may subject clients to a mental examination. As such, federal law is preferential if one wishes to protect otherwise privileged examination records.

The Federal Rule of Evidence 503 and the Florida Rule of Evidence 90.503 preserve the confidentiality of communications and/or records made "for the purpose of diagnosis or treatment of the patient's mental or emotional condition." *See Byxbee v. Reyes*, 850 So. 2d 595, 596 (Fla. 4th DCA 2003) ("allowing discovery of the records because they contain information about the patient's physical or medical condition would be to engraft an additional exception to Section 90.503(4)"). However, federal and

Florida courts are at odds as to whether an element of the plaintiffs' claim can sufficiently place his or her mental condition *in controversy* as to waive this privilege.

Under federal law, merely claiming damages based on emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment in life will *not* place a plaintiff's condition *in controversy* as to waive the patient-psychiatrist privilege. *See, e.g.*, *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551 (N.D. Ga. 2001); *Morton v. The Haskell Co.*, 1995 WL 819182 (M.D. Fla. 1995); *Bennett v. White Laboratories. Inc.*, 841 F. Supp. 1155 (M.D. Fla. 1993); *Robinson v. Jacksonville Shipyards Inc.*, 118 F.R.D. 525 (M.D. Fla. 1988).

Conversely, in Florida, the Third District Court of Appeal in *Arzola v. Reigosa*, 534 So. 2d 883 (Fla. 3d DCA 1988), determined that seeking damages for metal anguish may expose plaintiff's otherwise confidential psychological records to discovery. *See Scheff v. May*o, 645 So. 2d 181, 182 (Fla. 3d DCA 1994)(affirming same). In *Nelson v. Womble*, 657 So. 2d 1221, 1222 (Fla. 5th DCA 1995), the Fifth District followed the guidance of *Arzola* and found that a plaintiff's mental condition was *in controversy* and the records were discoverable, because the plaintiff sought damages for mental anguish and loss of consortium. In *Olges v. Dougherty*, 856 So. 2d 6, 13-14 (Fla. 1st DCA 2003), which signals a slight erosion from the above line of cases, the First District found plaintiff's condition was no longer *in controversy* once he abandoned any attempt to recover damages for mental anguish, emotional distress and other emotional damages. The court stated, "Not every automobile accident case gives rise to good cause to require the plaintiff to undergo a mental examination." *Id*. at 13.