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15

MOTIONS

VIII. [§15.13] MOTION TO REOPEN CASE

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I. [§15.1] INTRODUCTION

When a case reaches the trial stage, motions relating to amending the pleadings or limiting the scope of testimony and evidence, or even terminating the proceeding before submission to the trier of fact, are available. The making of certain motions relates to trial strategy, while the raising of other motions is almost obligatory.

The motions that parties make or do not make during trial are often crucial issues on appeal. Parties should ensure that either the filing of a written motion or a transcription of an oral motion commits the motion to the record.

The attorney should also ensure that a written order confirms, or the court reporter records, the court's action on each motion. The experienced trial attorney normally requests that the court reporter record all proceedings, especially sidebar conferences, in which parties and the court make motions and rulings, respectively.

Some of the motions discussed in this chapter are generally filed before trial. These include the motion to exclude witnesses (see §15.2), motion in limine (see §15.3), motion for continuance (see §15.10), and motion for view by the jury (see §§15.11–15.12).

II. [§15.2] MOTION TO EXCLUDE WITNESSES

For years, attorneys have "invoked the rule" to exclude witnesses from trial except when they are testifying. In *Dardashti v. Singer*, 407 So.2d 1098, 1100 (Fla. 4th DCA 1982), the District Court of Appeal, Fourth District, formalized the "rule," holding that "ordinarily when requested by either side, the trial judge will exclude all prospective witnesses from the courtroom . . . to avoid the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand." (quoting *Spencer v. State*, 133 So.2d 729, 731 (Fla. 1961)). Parties normally file the motion to exclude witnesses before starting voir dire.

Florida Statute 90.616(1) provides that "[a]t the request of a party the court shall order . . . witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses." The court may exclude witnesses on its own motion. However, the court may not exclude a witness who is: (1) a party and a natural person; (2) an officer or employee of a

party that is not a natural person; or (3) a person whose presence is shown to be essential to the presentation of the party's cause. *F.S.* 90.616(2).

Exclusion of witnesses is treated in more detail in Chapter 9 of this manual.

III. [§15.3] MOTION *IN LIMINE*

In a jury trial, a party normally asks the court in advance to prohibit improper conduct or exclude certain evidence by a motion *in limine*. (Of course, a party may also file a motion *in limine* to admit evidence.) A party usually presents the motion to the court shortly before trial and, depending on local custom, frequently argues the motion before voir dire. A party who anticipates that the adversary will attempt to taint the minds of jurors by prejudicial or inflammatory conduct or immaterial evidence must ask the court to prohibit such conduct or evidence by a motion *in limine*. A ruling on the motion by the court before commencing trial is imperative. The attorney who fails to seek such a prior ruling, even if successful in an objection to the conduct or evidence before the jury, will be haunted by the question of whether the taint was actually removed by the judge's limiting instruction to the jury that it disregard the conduct or evidence.

The court enforces a ruling in limine by holding a party in contempt or granting a mistrial. See *Tate v. Gray*, 292 So.2d 618 (Fla. 2d DCA 1974). See also *Ed Ricke & Sons, Inc. v. Green by & through Swan*, 468 So.2d 908 (Fla. 1985).

Parties must proffer testimony or evidence excluded by a favorable ruling on a motion in limine at trial to preserve the issue of the exclusion for appeal. *Connell v. Guardianship of Connell*, 476 So.2d 1381, 1382 (Fla. 1st DCA 1985). See also *F.S.* 90.104(1)(b).

IV. MOTION TO AMEND PLEADINGS TO CONFORM WITH EVIDENCE

A. [§15.4] In General

Issues tried by express or implied consent, although not initially raised in the pleadings, are treated as if they had been so raised. *Hemraj v. Hemraj*, 620 So.2d 1300, 1301 (Fla. 4th DCA 1993). The failure to make a

motion to amend the pleadings to conform to the evidence will not affect the trial result concerning those issues. *Fla.R.Civ.P.* 1.190(b). For a thorough discussion of "the broad test generally applied to determine whether an issue has been tried by implied consent," see *Smith v. Mogelvang*, 432 So.2d 119, 122 (Fla. 2d DCA 1983), in which the appellate court held that the issue of implied consent was decided by "a determination of what was fundamentally fair to each side." It is prudent, however, for parties to make a formal motion to amend the pleadings and seek a ruling to avoid controversy regarding jury charges as to the issues to be determined and the scope of closing argument.

The failure to object to evidence as being outside the scope of the pleadings may waive any objections to a motion to conform the pleadings to the evidence at the conclusion of the case. See *Hemraj*, 620 So.2d at 1301; see also *Buday v. Ayer*, 754 So.2d 771, 772 (Fla. 2d DCA 2000) (stating that the objecting party "must satisfy the trial court that admission of the evidence will cause it to suffer prejudice"); *Flemming v. Flemming*, 742 So.2d 843, 844 (Fla. 1st DCA 1999) (holding that the issue of rotating custody was not tried by implied consent because a proper objection had been raised). However, waiver will not be found for objecting to an amendment to add a separate cause of action or claim if the evidence was consistent with the pled claim, *Freshwater v. Vetter*, 511 So.2d 1114, 1115 (Fla. 2d DCA 1987), *approved* 537 So.2d 561, or was relevant to the pled claim, *Raimi v. Furlong*, 702 So.2d 1273, 1285 (Fla. 3d DCA 1997).

The court may find that a party impliedly consented to the issue being tried, or did not impliedly consent, based on two criteria:

> (a) whether the opposing party had a fair opportunity to defend against the issue and (b) whether the opposing party could have offered additional evidence on that issue if it had been pleaded. . . . The more of an indication that additional evidence could have been offered by the opposing party if the issue had been pleaded, the greater the potential unfairness to that party from the issue not having been pleaded. And, of course, the converse may apply. Application of the foregoing criteria should determine whether or not there was prejudicial surprise and, accordingly, whether or not a finding of implied consent to the trial of the unpleaded issue would be fair.

Smith, 432 So.2d at 122.

B. [§15.5] Time Of Motion

Parties can make a motion to amend the pleadings to conform with the evidence during trial and even after judgment. *Fla.R.Civ.P.* 1.190(b). But see *Lasar Manufacturing Co. v. Bachanov*, 436 So.2d 236, 237-38 (Fla. 3d DCA 1983) (stating that "liberality in granting leave to amend diminishes as the case progresses to trial"); see also *Hollub v. Clancy*, 648 So.2d 296, 296 (Fla. 3d DCA 1995) (trial court properly denied plaintiffs' motion to amend complaint at conclusion of their case-in-chief because allowing amendment would have prejudiced defendants).

C. [§15.6] Discretion Of Court

When a party tries to introduce evidence at trial to support a theory of recovery or defense that is outside of the issues raised by the pleadings, the opponent should object. The court may permit the adverse party to amend the pleadings to raise that issue. Unless the objecting party convinces the court that prejudice to that party's claim or defense will result from the receipt of evidence on the issue, the court will freely permit the amendment. *Fla.R.Civ.P.* 1.190(b). See *Bachanov*, 436 So.2d at 237-38 (stating that under Rule 1.190, a test of prejudice to the objecting party is the primary consideration in determining whether to grant a motion for leave to amend).

In *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corporation*, 537 So.2d 561, 562 (Fla. 1989), the counter-plaintiff failed to prove the counterclaim that it pled but proved an unpled claim. The trial court erroneously determined that the proven claim was included within the general allegations and allowed evidence of that unpled claim. *Id.* On appeal, the district court reversed and remanded the case to the trial court with directions to allow the counter-plaintiff to amend its counterclaim. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corporation*, 527 So.2d 211, 216 (Fla. 3d DCA 1987). The Florida Supreme Court accepted jurisdiction, based on a certified conflict, and held that it was error for the district court not to direct a verdict in favor of the counter-defendant. *Arky*, 537 So.2d at 563.

Nevertheless, when a party files a motion to amend the pleadings, it is still the rule, even after *Arky*, that in the absence of prejudice or surprise, the court may allow the amendment. See, e.g., *Flick v. Charlton*, 26 So.3d 715 (Fla. 2d DCA 2010). However, a court should not allow a party to plead a completely new cause of action. *Freshwater*, 511 So.2d at 1115.

V. DISMISSAL OF ACTIONS

A. [§15.7] Motion To Dismiss For Failure To State Cause Of Action And For Lack Of Subject Matter Jurisdiction

A pleading that seeks affirmative relief is subject to a motion to dismiss for failure to state a cause of action, even at trial. *Fla.R.Civ.P.* 1.140(h)(2). Parties must exercise care in drafting pleadings seeking affirmative relief. If a court dismisses a pleading at trial for failure to state a cause of action, the attorney may not only face the humiliation of the unexpected termination of the trial, but may also encounter problems concerning the statute of limitations.

Parties can file a motion to dismiss the action for lack of subject matter jurisdiction at any time. *Id.* However, a party should not delay in raising lack of subject matter jurisdiction if it becomes a relevant issue.

It is better for parties to raise statute of limitations and res judicata issues as affirmative defenses rather than in a motion to dismiss, because a motion to dismiss is confined to the allegations of the pleadings, and these affirmative defenses require facts to support them. *City of Clearwater v. United States Steel Corporation*, 469 So.2d 915, 916 (Fla. 2d DCA 1985), provides a narrow exception in which the parties stipulated to facts outside of the pleadings that supported the affirmative defense.

B. [§15.8] Voluntary Dismissal And Dropping A Party

A party who has sought affirmative relief in a pleading may terminate the action without court order, "[e]xcept in actions in which property has been seized or is in the custody of the court." *Fla.R.Civ.P.* 1.420(a)(1). Parties must take this action before a hearing on a motion for summary judgment or, if the motion is denied, before the jury retires to deliberate or before submission of a nonjury case to the court for decision. *Id.*

When a plaintiff voluntarily dismisses an action, the lawsuit terminates, and the trial court is divested of jurisdiction, *Pivo v. Bank of N.Y.*, 121 So.3d 23, 32 (2013), except to tax costs, *Rule* 1.420(d). If, however, other parties have filed claims or motions seeking leave of court to file claims for affirmative relief, it appears that one party discontinuing its claim will not terminate the action under *Rule* 1.420, unless all parties

stipulate to dismiss the entire action or the court enters an order dismissing the entire action. See *Our Gang, Inc. v. Commvest Securities, Inc.*, 608 So.2d 542, 544 (Fla. 4th DCA 1992) (voluntary dismissal of action was precluded due to defendant's pending motion for leave to file counterclaim).

When a party discontinues its claim against one or more parties and other parties continue to have claims that have been asserted in the action, the provisions of *Rule* 1.250(b) have been applied rather than *Rule* 1.420. See *Gonzalez v. Turner*, 427 So.2d 1123, 1124 (Fla. 3d DCA 1983); *Fischer v. Bartberger*, 330 So.2d 507, 507 (Fla. 4th DCA 1976).

A voluntary dismissal of an action under *Rule* 1.420(a) is without prejudice to the refiling of the claim unless the party has previously dismissed an action based on or including the same claim, or unless the court orders otherwise.

The statute of limitations does not toll for the period of time between the filing of the claim and the voluntary dismissal. *Guerrero v. Fonte*, 507 So.2d 620, 621 n.2 (Fla. 3d DCA 1987); *Fernon v. Itkin*, 476 F.Supp. 1, 3 (M.D. Fla. 1977), *aff'd* 604 F.2d 669. Before voluntarily dismissing an action, the attorney must consider whether the statute of limitations would bar later refiling the claim. See *Randle-Eastern Ambulance Service, Inc. v. Vasta*, 360 So.2d 68, 68 (Fla. 1978). Similar considerations apply to dropping a party.

Costs are assessed against a party voluntarily dismissing an action. *Rule* 1.420(d); *Wilson v. Rose Printing Co.*, 624 So.2d 257, 258 (Fla. 1993). Those costs may include "reasonable and necessary preparation costs and fees of expert witnesses who were never called to testify because a plaintiff voluntarily dismissed." *Coastal Petroleum Co. v. Mobil Oil Corp.*, 583 So.2d 1022, 1023 (Fla. 1991). The Florida Supreme Court in *Coastal Petroleum* stated as follows:

> When a voluntary dismissal occurs after an opposing party has incurred legitimate trial-preparation expenses, we believe the trial court properly may entertain a motion to award costs against the dismissing party. This is a matter largely left to the discretion of the trial court. As a general rule, we believe these costs should not exceed the amount that reasonably would have been awarded had the precise same expenditures occurred in litigation that actually went to trial.

Id. at 1025. The court also held that the trial court may enhance the award if it finds that the dismissing party acted in bad faith by dismissing the lawsuit. *Id.* at 1026.

The Florida Supreme Court reaffirmed its holding in *Coastal Petroleum* in *Wilson*, declaring that *Rule* 1.420(d) is unambiguous in directing that costs are to be assessed in an action that is voluntarily dismissed. *Wilson*, 624 So.2d at 528. The court stated:

> Where a nondismissing party seeks costs under this rule, a court is without authority to defer assessment pending disposition of a subsequent action. . . . The discretion referred to in *Coastal Petroleum* pertains solely to the amount of costs to be assessed in the dismissed suit.
>
> Further, this Court has consistently held that where a statute or agreement of the parties provides that the term "costs" includes attorneys' fees such fees are taxable under rule 1.420(d).

Id.

C. [§15.9] Involuntary Dismissal

Florida Rule of Civil Procedure 1.420(b) provides in part:

> After a party seeking affirmative relief in an action tried by the court without a jury has completed the presentation of evidence, any other party may move for a dismissal on the ground that on the facts and the law the party seeking affirmative relief has shown no right to relief, without waiving the right to offer evidence if the motion is not granted.

Fla.R.Civ.P. 1.420(b).

The motion for dismissal in a nonjury case is similar in effect to the defending party's motion for directed verdict at the close of the claimant's case in a jury trial.

Rule 1.420(b) further provides: "[a]ny party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court."

An involuntary dismissal operates as an adjudication on the merits unless the court specifies in its order that the dismissal is without prejudice. *Id.*

In jury trials, parties rarely file motions for dismissal under *Rule* 1.420(b) based on failure to comply with the Florida Rules of Civil Procedure or a court order. A motion for mistrial is more common and usually more appropriate.

In *Kozel v. Ostendorf*, 629 So.2d 817, 817 (Fla. 1994), the trial court granted the defendant's motion to dismiss for failure to state a cause of action and gave the plaintiff twenty days to file an amended complaint. The parties agreed to extend the deadline another ten days, but the plaintiff failed to file an amended complaint until over five months past the deadline. *Id.* The defendant then moved to dismiss the complaint with prejudice, which the trial court granted. *Id.*

The Florida Supreme Court held that although the trial court acted within the boundaries of the law, dismissal based solely on the attorney's neglect

> unduly punishes the litigant and espouses a policy that this Court does not wish to promote. The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation. . . . This purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal and that is directed toward the person responsible for the delayed filing of the complaint.
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> * * *
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> Because dismissal is the ultimate sanction in the adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result.

Id. at 818. The Florida Supreme Court set forth factors to help trial courts determine whether dismissal with prejudice is warranted, cautioning that

"[u]pon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative." *Id.*

VI. [§15.10] MOTION TO CONTINUE TRIAL

Local court rules and orders for pretrial conferences often contain specific provisions for making pretrial motions to continue the trial. The attorney should study these local rules and orders carefully. A motion for continuance must be in writing unless it is made at the trial or hearing, must state all facts showing good cause for the continuance, and, except for good cause shown, must be signed by the party requesting the continuance. *Fla.R.Civ.P.* 1.460; *Fla.R.Jud.Admin.* 2.515(a), 2.545(e).

The attorney whose case is called for trial and who moves for a continuance at trial on the ground of insufficient time to prepare usually receives a less-than-warm reception by the court and ends up trying the case. Certain unforeseeable problems, however, may arise immediately before or during trial that would warrant a continuance. Obvious examples include the sudden illness of a party, a significant material witness under subpoena, or the trial attorney. If the nonavailability of a witness is a ground for seeking a continuance, *Rule* 1.460 requires that the motion show when the movant believes the absent witness will be available.

If an unavailable witness's deposition was taken before trial, the attorney should consult *Rule* 1.330, concerning use of depositions at trial, before moving for a continuance. See *Schwind Harvesting v. Boatman*, 424 So.2d 948, 949 (Fla. 1st DCA 1983) (discussing application of *Rule* 1.330); see also *Friedman v. Friedman*, 764 So.2d 754, 755 (Fla. 2d DCA 2000) (affirming that admissibility of nonparty witness's discovery deposition as substantive evidence continues to be governed by *Rule* 1.330(a)).

The failure of a material witness under subpoena to appear at trial is distressing to the court and the litigants. Several options are available to the practitioner depending on individual trial strategy: (1) use of office personnel to locate and produce the witness; (2) disclosure of the problem to the court and counsel and a request to the court to recess the trial; (3) pursuit of contempt (and probable alienation of the witness); (4) motion for a mistrial; or, as a last resort, (5) voluntary dismissal of the action under *Rule* 1.420(a), if possible. The court will generally consider favorably a request for recess or short continuance to determine the reason for the absence.

Granting or denying motions for continuance is "generally left to the broad discretion of the trial court." *Baron v. Baron*, 941 So.2d 1233, 1235 (Fla. 2d DCA 2006) (noting also that "that discretion is not unlimited"). In a civil case, the attorney's withdrawal does not give the client an absolute right to a continuance. *Cole v. Heritage Communities, Inc.*, 838 So.2d 1237, 1238 (Fla. 5th DCA 2003).

VII. MOTION FOR VIEW BY JURY

A. [§15.11] In General

A party may move that the jury be permitted to view the premises or location involved in the trial or other objects not practically brought into the courtroom. The movant bears the cost of transporting the jury and the officer (usually the bailiff) who accompanies the jury. These expenses may be taxed as costs. *Fla.R.Civ.P.* 1.520; *Waller v. Baxley*, 565 So.2d 808, 808 (Fla. 2d DCA 1990).

B. [§15.12] Procedure

A party should file a motion for view by the jury as soon as the party determines that the photographs, diagrams, and verbal descriptions by witnesses will not be sufficient. The logistics involved in a jury view require time to arrange transportation. Whether a view is permitted is within the sound discretion of the trial judge. *Fontainebleau Hotel Corp. v. Goddard*, 177 So.2d 555, 556 (Fla. 3d DCA 1965).

Parties may not take testimony during a view by the jury. The purpose of a view is to aid in the analysis of the evidence taken during trial. *Dempsey-Vanderbilt Hotel v. Huisman*, 153 Fla. 800, 15 So.2d 903, 906 (1944). If there is conflicting testimony at trial, the jurors may consider their own observations during the view to aid in resolving the conflict. *Id.*

A party or witness may not ride in an automobile with jurors during a view. *Atlantic Coast Line R. Co. v. Seckinger*, 96 Fla. 422, 117 So. 898, 898 (1928).

The court normally will not charge the jury on the inferences to be drawn from a view. See *Orme v. Burr*, 157 Fla. 378, 25 So.2d 870, 879 (1946) (court's reference to what inference jury might or might not draw from their view should have been omitted).

When the court grants a motion for a view by the jury, the attorney should ask the judge to instruct the jury concerning the purpose of the view and direct that the jury communicate only with the bailiff or other officer accompanying the jury. As a practical matter, it is virtually impossible to have a view in which the jurors do not communicate with each other either verbally or nonverbally. The trial attorney should request the permission of the court to be present at the scene of the view. The attorney must observe the actions and gauge the reactions of the jury during the view. Misconduct by a juror, the bailiff, a party, or an attorney can be a basis for mistrial.

Reference made in closing argument to observations during a view must be analyzed carefully. The attorney cannot testify. The attorney cannot be certain what individual jurors observed. Although observations of the jury are not strictly evidence, the court can use observations to resolve evidentiary conflicts.

In nonjury trials, parties may request that the trial judge, as trier of fact, view the scene. But see *Hammond v. Carlyon*, 96 So.2d 219, 222 (Fla. 1957) (view of premises by trial judge cannot be used as basis for judgment); see also *Harrison v. Savers Federal Savings & Loan Ass'n*, 549 So.2d 712, 714 (Fla. 1st DCA 1989) (same).

Although the trial court has discretion as to the time, circumstances, and conditions of the jury view, *Panama City v. Eytchison*, 134 Fla. 833, 184 So. 490, 492 (1938), the court abuses its discretion if it allows a view that has a misleading effect. *Darley v. Marquee Enterprises, Inc.*, 565 So.2d 715, 719 (Fla. 4th DCA 1990) (holding that the trial court abused its discretion in directing a jury view to take place during the daytime, because the subject accident occurred at night in a "very dark" parking lot, and "the daytime view did not provide the jury with an opportunity to see the parking lot under the conditions that prevailed at the time of the accident").

VIII. [§15.13] MOTION TO REOPEN CASE

A plaintiff normally makes a motion to reopen the case after resting and after a defending party has moved for dismissal or directed verdict, but before the trial judge has ruled. See *Grider-Garcia v. State Farm Mutual Automobile*, 73 So.3d 847, 849 (Fla. 5th DCA 2011). A motion to reopen is commonly made when, through oversight, available evidence establishing capacity to sue or an element of a cause of action has been omitted. Examples include when the answer of the defending party denies the

appointment of a personal representative or guardian, and when proof has been overlooked in the ownership of an automobile, promissory notes, or checks.

The granting or denial of a motion to reopen a case is within the sound discretion of the trial judge. *Id.* The trial judge should normally grant the motion to avoid manifest injustice if the evidence is readily available. "Law suits are no longer a cat and mouse game to such an extent that a party will be denied an opportunity to have a jury determine the justice of his cause on such a minor technicality." *Akins v. Taylor*, 314 So.2d 13, 14 (Fla. 1st DCA 1975). Trial courts should "liberally allow a case to be reopened for the purpose of reflecting the true state of the facts by receiving additional *evidence of existing facts* inadvertently omitted," but not "to *change existing facts*." *Silber v. Cn'R Industries of Jacksonville, Inc.*, 526 So.2d 974, 978 (Fla. 1st DCA 1988); see also *Grider-Garcia*, 73 So.3d at 849 (addressing factors to be considered in determining whether to permit reopening).

IX. MOTION FOR DIRECTED VERDICT

A. [§15.14] In General

A party in a jury trial may move for a directed verdict at the close of the evidence offered by the adverse party. The purpose of the motion is to ask the court to determine that the adverse party's evidence fails to create issues for the jury and that the movant is entitled to prevail. The motion must state the specific grounds on which it is based. A movant does not lose the right to offer evidence if the court denies the motion. If the court grants the motion, the order is effective without assent of the jury. *Fla.R.Civ.P.* 1.480(a). Failure to make a motion for a directed verdict will preclude contending on appeal that the evidence was insufficient to support the verdict. *Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So.2d 1283, 1285 (Fla. 1st DCA 1993).

The trial court may properly defer ruling on a motion for directed verdict until the jury renders a verdict. *Ricks v. Loyola*, 822 So.2d 502, 506 (Fla. 2002).

B. [§15.15] By Defendant

The defendant should move for a directed verdict at the close of the plaintiff's case. In accordance with the 2010 amendment to Florida Rule of

Civil Procedure 1.480(b), a defendant is no longer required to renew its motion at the conclusion of all of the evidence to preserve the issue. Failure to make a proper and timely motion for directed verdict precludes the right to move for judgment notwithstanding the verdict and precludes appellate review concerning the sufficiency of the evidence to support the verdict. *Prime Motor Inns, Inc. v. Waltman*, 480 So.2d 88, 90 (Fla. 1985).

C. [§15.16] By Plaintiff

Counsel for the plaintiff should consider making a motion for a directed verdict at the close of the defendant's case when the defendant's case does not create sufficient factual issues for the jury. In cases such as rear-end automobile collisions, if the defendant fails to overcome the "rear-end presumption," the plaintiff may move successfully for a directed verdict on the issue of liability and proceed to a jury determination on the remaining issue of damages. See *Yellow Cab Company of St. Petersburg, Inc. v. Betsey*, 696 So.2d 769, 771 (Fla. 2d DCA 1996).

X. [§15.17] OFFERS OF PROOF AND PROFFERS OF EXHIBITS

Offers of proof of excluded testimony and proffers of exhibits that have been excluded are not technically motions, but they require affirmative action on the record by the offering attorney. During trial, the judge may sustain an objection to either a question posed to a witness or the offering of an exhibit into evidence. The inquiring or offering party must be familiar with *Fla.R.Civ.P.* 1.450. The inquiring party should make a specific offer on the record of what he or she expects to prove through the witness's answer or the exhibit. If the inquiring party does not make that offer or proffer, it cannot demonstrate prejudice on the record in posttrial motions or appeals. *Ritter's Hotel v. Sidebothom*, 142 Fla. 171, 194 So. 322, 323 (1940); *Mighty Oak, Inc. v. Hartford Accident & Indemnity Co.*, 399 So.2d 425, 427 (Fla. 5th DCA 1981).

The party should make the offer of proof or the proffer of an exhibit to the trial judge outside the hearing of the jury when the testimony or exhibit is excluded. *Rule* 1.450(a) appears to contemplate a verbal summary by the examining attorney of what he or she expects to prove by the witness's answer. It is generally considered better practice when making an offer of proof, however, to pose the specific excluded question to the witness and have the witness answer that question and any related questions.

When an excluded exhibit is proffered, *Rule* 1.450(b) requires that the clerk or judge file the exhibit.

The offer of proof of excluded testimony and the proffer of an excluded exhibit accomplish two purposes: (1) the excluded testimony or exhibit becomes part of the record, and (2) the trial judge may reverse the ruling excluding the testimony or exhibit.

XI. MOTION TO STRIKE

A. [§15.18] In General

Motions to strike and to admonish the jury to disregard are made after the fact. Parties file these motions, for example, when the witness has given an unresponsive answer to the question asked; the witness has included information about which he or she is not competent to testify; a witness, party, or attorney has made an impermissible and prejudicial remark or observation; or an attorney has failed to live up to the promise to lay a foundation for the admissibility of testimony or previously introduced evidence. See *Fla.R.Civ.P.* 1.140(f), 1.150. The object of the motion is for the judge to rule that objectionable oral statements or documents cannot be considered as evidence. A motion to strike should always include a request that the judge admonish the jury to disregard the objectionable remark, testimony, or exhibit. If the court grants the motion to strike, technically, the jury may not consider the testimony, remark, or exhibit as evidence. If the court does not tell the jury to disregard the item, however, the granting of the motion to strike is a hollow victory. If the trial judge has previously granted a motion in limine as to certain evidence or testimony and that order is violated, a motion for mistrial should be considered as an alternative.

B. [§15.19] Time For Motion

A motion to strike testimony or an impermissible prejudicial remark should be made immediately after the event occurs. The failure to make the motion and inquiry into the objectionable testimony may constitute a waiver. The failure of the offering attorney to subsequently establish a predicate for previously admitted testimony or evidence does not become apparent until the offering party concludes presentation of its case. The motion to strike should be made promptly at that time.

C. [§15.20] Discretion Of Movant

Whether a party moves to strike testimony or an exhibit is a matter of discretion. The motion itself may emphasize the testimony or the exhibit. If the motion is made in the presence of the jury and the court denies it, the material objected to will certainly be emphasized. If the court granting a motion to strike and providing a limiting instruction to the jury cannot reasonably remove the prejudicial effect, the party may want to move for a mistrial. As the trial judge noted in the often-quoted case of *O'Rear v. Fruehauf Corporation*, 554 F.2d 1304, 1309 (5th Cir. 1977), "[y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good."

XII. MOTION FOR MISTRIAL

A. [§15.21] In General

As noted in §15.20, a motion for mistrial should be filed when an inadmissible and impermissible act, statement, or event has occurred that, in all likelihood, renders a fair trial impossible. The moving party should make the motion immediately after the act, event, or statement, or it may waive the right to move for mistrial. *City of Orlando v. Birmingham*, 539 So.2d 1133, 1134-35 (Fla. 1989); *Millar Elevator Service Co. v. McGowan*, 819 So.2d 145, 153 (Fla. 2d DCA 2002). The goal of a motion for mistrial is to have a new trial with a new jury on another day.

A trial court may defer ruling on a motion for mistrial, similar to ruling on a directed verdict, until the jury returns its verdict. *Ricks*, 822 So.2d at 506-07. Two considerations that may encourage the trial court to defer its ruling are (1) the conservation of judicial resources; and (2) the undesirability of allowing an attorney to benefit from intentional misconduct. *Ed Ricke & Sons, Inc. v. Green by & through Swan*, 468 So.2d 908, 910 (Fla. 1985).

Whether the attorney makes the motion for mistrial in the jury's presence is a matter of discretion. If the attorney makes the motion before the jury, and the judge denies the motion, the matter has been emphasized in the jury's presence, and the effect on the jury may never be known.

See also §6.14 of this manual.

B. Grounds For Motion

1. [§15.22] Hung Jury

When it becomes apparent that the jury cannot reach a verdict, the attorney should move for a mistrial.

2. [§15.23] Fewer Than Six Sworn Jurors Present

Occasionally a juror becomes ill, dies, or fails to appear, and no alternates are available. The trial judge may continue the trial, *Pessolano v. State*, 161 So.2d 237, 237 (Fla. 3d DCA 1964), or grant a mistrial, unless the parties have stipulated to proceed with less than the minimum number of jurors, *Schield Bantum Co. v. Greif*, 161 So.2d 266, 268 (Fla. 3d DCA 1964).

3. [§15.24] Misconduct Of Juror

Parties should bring improper conduct by a juror to the attention of the court immediately, and if that conduct is established or if a strong suspicion is indicated, the court should grant a mistrial. In any event, the party should make the motion to protect the record.

Juror misconduct by intoxication results in a mistrial. See *Goldring v. Escapa*, 338 So.2d 871, 873 (Fla. 3d DCA 1976); *Alonso v. Ford Motor Co.*, 54 So.3d 562 (Fla. 3d DCA 2011); but see *Baez v. State*, 699 So.2d 305, 306 (Fla. 3d DCA 1997) (stating, "without any inquiry into the precise condition of the allegedly impaired juror, there could be no showing that he was not competent to deliberate with the consequence that he need not have been excused at all"). A juror communicating with parties, witnesses, or attorneys may also cause the same result. However, if the communication does not concern the merits of the case and the trial judge questions the juror and feels certain that the contact will not affect the decision, the court need not grant a mistrial. *South by & through South v. Palm Bay Club, Inc.*, 486 So.2d 31, 31-32 (Fla. 3d DCA 1986).

The issue of juror misconduct will become all the more challenging with the advancement of social media. This relatively new era has prompted many trial judges to provide juries with pretrial instructions regarding refraining from inappropriate posts on social media platforms; however, it is suggested that a party request such an instruction in the event that the trial judge does not regularly give one, to help curb such misconduct. Further, if

a party becomes aware of a juror's inappropriate social media posts, the party should attempt to obtain a screenshot of the post before the juror deletes it, see *U.S. v. Fumo*, Criminal Action No. 06-319, 2009 WL 1688482, at *58 (E.D. Pa. June 17, 2009) (juror "panicked" and deleted relevant comments from his Facebook page after seeing a newscast regarding his posts), and should promptly bring the conduct to the trial court's attention.

4. [§15.25] Misconduct Of Clerk, Bailiff, Or Reporter

Misconduct by the clerk or other courtroom personnel is rare. An attorney, however, must be alert to personnel making inadvertent remarks to each other concerning witnesses or discussing the content of exhibits in the courtroom while court is in recess and the jury is entering or leaving the room.

5. [§15.26] Actions Of Parties

Misconduct by parties that may cause an attorney to move for a mistrial may range from "staged" or seemingly feigned gestures or expressions to overemotional outbursts and direct violations of trial procedure.

6. [§15.27] Failure Of Subpoenaed Witness To Appear

Occasionally a witness under subpoena will fail to appear; will appear, tire of waiting, and leave; or will simply get lost in the courthouse. An attorney must be familiar with *Fla.R.Civ.P.* 1.330, especially subdivision (a)(3), and be prepared to offer the witness's deposition if one is available. If no deposition is available or if the court has disallowed its use, the attorney should weigh the options and determine whether to move for a continuance or a mistrial or, if representing the plaintiff, voluntarily dismiss.

7. [§15.28] Misconduct Of Attorney

Actions of trial counsel that may constitute grounds for moving for a new trial include

- violating an order of the court, such as an order on a motion in limine;

- making an inflammatory or prejudicial argument (see chapters 8 and 16, in which improper opening and closing arguments are addressed in full);

- accusing a party or witnesses of perjury, *Griffith v. Shamrock Village Inc.*, 94 So.2d 854, 857 (Fla. 1957);

- mentioning receiving or not receiving traffic citations, *White v. Consolidated Freightways Corp. of Delaware*, 766 So.2d 1228, 1232 (Fla. 1st DCA 2000);

- using unauthenticated medical writings in cross-examination of an expert witness, *Call v. Tirone*, 522 So.2d 533, 535 (Fla. 3d DCA 1988); and

- arguing the "golden rule"; *i.e.*, urging the jurors to place themselves in a party's position to reach the result that the jurors would want if they were that party, *Shaffer v. Ward*, 510 So.2d 602, 603 (Fla. 5th DCA 1987); see also §16.7 of this manual.

For further discussion of mistrial based on attorney misconduct, see §§1.11–1.12 of this manual.

XIII. FORMS

COMMENT: The forms suggested below are guides for oral motions rather than written ones, but may also be used as written motions. Normally, motions made during trial are made orally and are dictated into the record, eliminating the need to present the motion in written form. If no court reporter is present, the movant must prepare any motion made in written form, in which case it would be necessary to include, in addition to the information set out for the oral motions, the title of the court, the title of the cause, the signature of the movant's attorney, and the usual certificate of service.

A. [§15.29] Motion For Directed Verdict At Conclusion Of Plaintiff's Case

IN THE CIRCUIT COURT
..... COUNTY, FLORIDA

Case No. .....

.....,

Plaintiff,

vs.

.....,

Defendant.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Defendant, ..., moves for a directed verdict in favor of defendant on the following grounds:

1. There has been no evidence adduced that is legally sufficient to support a verdict for plaintiff.

2. There is no evidence from which a jury could find defendant guilty of any actionable negligence.

3. It affirmatively appears that plaintiff's negligence is the sole proximate cause of .....his/her..... injury.

4. It affirmatively appears that there is no evidence from which a jury could lawfully find for plaintiff on .....his/her..... cause of action based on .....(theory of recovery)..... because [state grounds].

I certify that a copy hereof has been furnished to .....(name)..... by .....(method of delivery)..... on .....(date)......

Attorney for Defendant
.....(address and phone number).....
Florida Bar number .....

B. [§15.30] Motion For Directed Verdict By Defendant At Conclusion Of Entire Case

(Party Designation) **(Title of Court)**

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Defendant, ..., renews its motion for a directed verdict made at the conclusion of plaintiff's case on the grounds stated in that motion and on the following additional grounds:

1. .....

2. .....

(Certificate of Service)

Attorney for Defendant
.....(address and phone number).....
Florida Bar number .....

C. [§15.31] Motion For Directed Verdict By Plaintiff

(Party Designation) **(Title of Court)**

PLAINTIFF'S MOTION FOR DIRECTED VERDICT

Plaintiff, ..., moves for a directed verdict in favor of plaintiff and against defendant on the following grounds:

1. It affirmatively appears from the evidence that defendant was guilty of negligence, and that the negligence was the proximate cause of plaintiff's injury.

2. It affirmatively appears that plaintiff was not guilty of any negligence.

3. There has been no evidence adduced in this cause that is legally sufficient to support a verdict for defendant.

(Certificate of Service)

Attorney for Plaintiff
.....(address and phone number).....

Florida Bar number .....

D. [§15.32] Motion To Strike

(Party Designation) **(Title of Court)**

.....PLAINTIFF'S/DEFENDANT'S..... MOTION TO STRIKE

.....Plaintiff/Defendant....., ..., moves to strike the following:

1. .....

2. .....

and further requests the court to instruct the jury to disregard .....(matter stricken).....

(Certificate of Service)

Attorney for .....Plaintiff/Defendant.....
.....(address and phone number).....
Florida Bar number .....

E. [§15.33] Motion For Mistrial

(Party Designation) **(Title of Court)**

.....PLAINTIFF'S/DEFENDANT'S..... MOTION FOR MISTRIAL

.....Plaintiff/Defendant....., ..., moves for a mistrial on the following grounds:

1. .....

2. .....

3. .....

(Certificate of Service)

Attorney for .....Plaintiff/Defendant.....
.....(address and phone number).....
Florida Bar number .....

F. [§15.34] Motion In Limine

(Party Designation) **(Title of Court)**

.....PLAINTIFF'S/DEFENDANT'S..... MOTION IN LIMINE

.....Plaintiff/Defendant....., ..., moves to exclude any and all evidence concerning [insert description of evidence desired to be excluded] on the following grounds:

1. **.....**
2. **.....**
3. **.....**

(Certificate of Service)

Attorney for .....Plaintiff/Defendant.....
.....(address and phone number).....
Florida Bar number .....

G. [§15.35] Motion For Jury View

(Party Designation) **(Title of Court)**

.....PLAINTIFF'S/DEFENDANT'S..... MOTION FOR JURY VIEW

.....Plaintiff/Defendant....., ..., moves for a jury view of [describe object to be viewed] on the following grounds:

[set out facts showing reason for taking jury view, such as fact that accident occurred at an unusual intersection/motion pictures or photographs could not depict the area adequately/a substantial proportion of the evidence could be misconstrued or misunderstood in the absence of the view]

(Certificate of Service)

Attorney for .....Plaintiff/Defendant.....
.....(address and phone number).....
Florida Bar number .....

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