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Evidence

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EVIDENCE*

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* The decisions surveyed in this article appear in volumes 280 through 308 of the Southern Reporter, Second Series. In addition, the survey covers laws enacted by the 1974 and 1975 sessions of the Florida Legislature. Subsequent to the writing of this article, the Florida Legislature passed the Florida Evidence Code, Fla. Laws 1976, ch. 76-237. The Code will take effect July 1, 1977.

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I. MATERIALITY AND RELEVANCY

A. *Materiality*

Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue, the evidence is properly said to be immaterial.[1]

1. C. MCCORMICK, LAW OF EVIDENCE § 185 (2d ed. 1972).

In *Saviano v. State*,[2] the defendant, charged with sale of narcotics, raised the defense of entrapment. He sought to introduce evidence showing the extent of the connection between the buyer of the narcotics and the police. Such evidence was deemed material to the defense in issue.[3]

Seaboard Coast Line Railroad v. Zufelt[4] involved a car-train collision. The issue submitted to the jury was whether negligence on the part of the railroad was a *contributing* cause of the accident. The defendant sought, unsuccessfully, to introduce evidence of the level of the alchohol in the blood of the driver of the car. On appeal, the District Court of Appeal, First District, indicated that given the limited nature of the issue, introduction of the evidence "could have had no effect other than to open the minds of the jurors, to improper speculative excursions outside the issues developed by the pleadings."[5]

It has also been pointed out that where liability, but not damages, is of issue, evidence of the plaintiff having received social security and workmen's compensation benefits is not material.[6]

B. *Relevancy*

1. GENERALLY

Relevancy is the tendency of evidence to establish a material proposition. Evidence is relevant if it has *some* probative value concerning the issue in question.

Clark v. Grimsley[7] involved a contested will, wherein it was alleged that the sole devisee had exerted undue influence upon the testatrix. It was held that letters written by the testatrix to the devisee, during a 2 year span immediately prior to the execution of the will, were relevant to the allegation of undue influence since they presented a continuous pattern of the testatrix's state of mind.

In *Walton v. Robert E. Haas Construction Corp.*[8] the plaintiffs alleged that they became involved in an automobile accident as a

2. 287 So. 2d 102 (Fla. 3d Dist. 1973).

3. However, since the case was reversed on other grounds, this recognition was purely dictum.

4. 280 So. 2d 723 (Fla. 1st Dist. 1973).

5. *Id.* at 725.

6. Cook v. Eney, 277 So. 2d 848 (Fla. 3d Dist. 1973).

7. 270 So. 2d 53 (Fla. 1st Dist. 1972).

8. 259 So. 2d 731 (Fla. 3d Dist. 1972).

result of the defendant's failure to properly place warning devices around a portion of street upon which it was working. The plaintiffs attempted to offer evidence that no barricades existed around the site some hours after the close of work nor prior to the time of the accident. The trial court excluded this evidence, reasoning that the crucial question was whether the defendant erected the barricades at the close of work; since some third person could have removed the barricades later, their existence at that later time was irrelevant. However, on appeal, the District Court of Appeal, Third District, held that the absence of barricades some hours after the close of work had *some* probative value of their existence earlier and was therefore relevant.

In 1949 the Supreme Court of Florida, in *Barton v. Miami Transit Co.*,[9] held that when liability was admitted in a collision case, and only damage to the plaintiff was in issue, the trial judge *could* exclude evidence of the physical conditions surrounding the accident, going to the question of liability, in the interest of expediting the proceeding. In *Traud v. Waller,*[10] a collision case, the defendant admitted liability but contested damages. The plaintiff sought to introduce photographs of the collision to substantiate the damages claimed. However, the trial court, apparently relying on *Barton* and believing the photos were merely overkill on the issue of liability, excluded the evidence. On appeal, the District Court of Appeal, Third District, pointed out that the *Barton* decision acknowledged that in some instances, even where liability is admitted, a plaintiff should be allowed to show some phase of the collision to prove damages. Finding this to be such a case, the court noted that the proffered evidence was probative of the damage issue and as such, relevant.

Once evidence is found to be relevant, before it can be deemed admissible, its probative value must outweigh any grounds for not hearing the evidence (i.e. confusion, surprise, time, or prejudice). For example, in *Cook v. Eney,*[11] a personal injury action, the defendant introduced evidence that the plaintiff had received social security and workmen's compensation benefits, on the premise of rebutting the plaintiff's testimony regarding his motivation to

9. 42 So. 2d 849 (Fla. 1949).
10. 272 So. 2d 19 (Fla. 3d Dist. 1973).
11. 277 So. 2d 848 (Fla. 3d Dist. 1973).

work.[12] The District Court of Appeal, Third District, believed, however, that the potential prejudice to the plaintiff (i.e., the jury believing the plaintiff was seeking a double recovery) outweighed the probative value of the evidence on the issue of malingering.

In *Wilson v. State*,[13] the balance of relevancy and prejudice went the other way. The defendant was charged with murder. The record showed that a man of the defendant's blood type had sex with one of the victims prior to her death. Pornographic material which was found in the defendant's home and automobile was introduced at trial. The defense claimed this evidence was both irrelevant and prejudicial. On appeal, the Supreme Court of Florida not only found the evidence relevant, but that the relevancy outweighed its potential prejudice.

2. SIMILAR OCCURRENCES

A problem involving both relevancy and its counterweights is raised when a party attempts to prove that certain actions or conditions occurred by showing that similar actions or conditions occurred before or since. Frequently this problem arises in accident cases.

In *Perret v. Seaboard Coast Line Railroad*,[14] a personal injury action based on a car-train collision, the plaintiff sought to introduce evidence of a similar collision which occurred in the same location 2 weeks prior to his accident. The ostensible purpose of such evidence was to show the existence of a dangerous condition of which the defendant had knowledge. The court acknowledged that such evidence might have some probative value, but also discussed the potential misuse of the evidence which might create a time consuming and prejudicial collateral issue. Reviewing Florida law and cases from other states, the supreme court pointed out that admissibility will turn on the degree of similarity and closeness in time of the events sought to be associated. In the instant case, the evidence was admitted since both accidents involved vehicles travelling in the same direction, at the same crossing, at about the same time of day, under similar weather conditions, and the accidents took place only 2 weeks apart.

12. There is some doubt whether the "motivation" question was a material issue.
13. 306 So. 2d 513 (Fla. 1975).
14. 299 So. 2d 590 (Fla. 1974).

In *Friddle v. Seaboard Coast Line Railroad*[15] the Supreme Court of Florida, by referring to a well written dissent below, further elaborated upon its "similar occurrence" doctrine. Taking both opinions together, it appears that so long as there is "substantial similarity" between events, the similar occurrence evidence should be allowed, with the degree of similarity going toward the weight and not admissibility of the evidence. It was also pointed out that the similar occurrence may take place either prior or subsequent to the litigated occurrence. Finally, there is indication[16] that the necessity for showing substantial similarity is considerably relaxed where the evidence is offered not to show negligence, but to show the defendant's *notice* of a dangerous condition.

A concept analogous to the similar occurrence doctrine is involved in valuation of condemned property. Florida law allows as relevant proof of value at the time of condemnation, the price paid for the property by the condemnee, so long as the original purchase price was not too remote in time and other evidence establishes that the value of the property has not significantly changed. In *Nour v. Division of Administration,*[17] introduction of the purchase price by the state, over defendant's objection, was held reversible error where the purchase had occurred 15 years prior to the condemnation, there had been a transition in use of the property, and the condemnee had expended substantial sums on improvements.

The *Nour* holding was followed in *Whidden v. Division of Administration,*[18] where, on cross examination of the owner, the State inquired into the sum he had paid for the property 8 years prior to the taking. The court held the questioning improper not only because of the lapse of time, but because of the volatile economy and inflationary trends experienced in recent years, of which the court took judicial notice.[19]

Value of condemned property may also be established through proof of prices paid for similar property. Although the other property must be similar to that being condemned, it need not be in the

15. 306 So. 2d 99 (Fla. 1974).
16. Seaboard Coast Line R.R. v. Friddle, 290 So. 2d 85, 89 (Fla. 4th Dist. 1974).
17. 267 So. 2d 365 (Fla. 1st Dist. 1972).
18. 281 So. 2d 419 (Fla. 1st Dist. 1973).
19. *See* Section VIII, B, *infra*.

same vicinity or even in the same county.[20] Note that this rule does require that the price have actually been paid; mere offers or asking prices are inadmissible.[21]

3. POLYGRAPH TESTS AND VOICEPRINTS

Results of certain scientific tests may be the subject of relevancy attacks if there is doubt that they are in fact probative and if they may also cause undue prejudice, delay, surprise, or confusion. In a 1953 Florida decision[22] the probative worth of lie detector results was placed in doubt. That decision was widely cited[23] during the current survey period to exclude polygraph results from evidence, although there is some authority recognizing the advances which have been made in improving the accuracy of such tests.[24] However, if both parties stipulate to its admissibility, a polygraph result may be admitted into evidence.[25] In two recent decisions[26] the Third and Fourth Districts have held spectrographic analysis of recorded conversations (commonly called "voiceprints") admissible to prove the identity of the speaker. However, in both cases there was corroborating evidence establishing identity. The question of whether uncorroborated voice prints would be admissible was expressly left open. There appears to be no justification for this extra requirement since the existence of corroborative evidence should be a factor going only to weight and not to admissibility.

II. EXAMINATION OF WITNESSES

A. *Adverse Witnesses*

An examining attorney may, on direct examination, interrogate any "unwilling or hostile" witness by leading questions.[27] The exam-

20. Clairborne v. City of Jacksonville, 260 So. 2d 257 (Fla. 1st Dist. 1972).

21. Orlando-Orange County Express Authority v. Diversified Serv., Inc., 283 So. 2d 876 (Fla. 4th Dist. 1973); Rice v. City of Ft. Lauderdale, 281 So. 2d 36 (Fla. 4th Dist. 1973).

22. Kaminski v. State, 63 So. 2d 339 (Fla. 1953).

23. *E.g.*, Sullivan v. State 303 So. 2d 632 (Fla. 1974); State v. Curtis, 281 So. 2d 514 (Fla. 3d Dist. 1973), *cert. denied* 290 So. 2d 493 (Fla. 1974).

24. United States v. Urguidez, 356 F. Supp. 1363 (C.D. Cal. 1973).

25. Moore v. State, 299 So. 2d 119 (Fla. 3d Dist. 1974); Askary v. State, 294 So. 2d 33 (Fla. 3d Dist. 1974).

26. Alea v. State, 265 So. 2d 96 (Fla. 3d Dist. 1972) and Worley v. State, 263 So. 2d 613 (Fla. 4th Dist. 1972); *cf.* United States v. Addison, 498 F.2d 741 (D.C. Cir. 1974).

27. FLA. R. CIV. P. 1.450(a).

iner may not, however, impeach his own witness unless the court determines that the witness is adverse.[28]

The basis for impeaching an adverse *party* witness is governed by Florida Rule of Civil Procedure 1.450(a) which allows a party to an action to call an adverse party as a witness and to interrogate and impeach him "in all respects as if he had been called by the adverse party."

The same rule allows a similar interrogation of any "officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party." In corporation cases, the determination of whether the called witnes is adverse depends on the witness' affiliation with the adverse party on the date of the trial.[29] The trial judge may exercise discretion in deciding whether to allow the adverse witness to be called.[30] "Managing agent" has been construed to include a retired union official who although "not associated with the [defendant] union at the time of the trial . . . was apparently the designated representative of the union at the time of the trial."[31] Yet, a trial court was not found to have abused its discretion for refusing to allow a party "to call as an adverse witness a former salesman not then employed by or connected with the [plaintiff corporation] at the time of the trial."[32]

The impeachment of an adverse *non-party* witness is governed by the Florida Statutes. Upon a showing that the witness' testimony is prejudiced or adverse, the witness may be impeached by other evidence or a showing of a prior inconsistent statement.[33] Impeachment may not, however, be shown by general evidence of bad character.[34]

Whether the witness is a party or non-party, he is considered adverse when his testimony surprises or entraps the party calling

28. FLA. STAT. § 90.09 (1973).

29. Direct Transp. Co. v. Rakaskas, 167 So. 2d 623 (Fla. 3d Dist. 1964), *cert. discharged*, 176 So. 2d 68 (Fla. 1965).

30. Pitz v. Tempco Air-Conditioning, Inc., 268 So. 2d 556 (Fla. 3d Dist. 1972).

31. Farmer v. Brotherhood of R.R. Trainmen, 258 So. 2d 503, 504 (Fla. 3d Dist. 1972). The opinion fails to explain how the agent could be a "designated-representative" and yet be "not associated" with the union. Presumably the court intended a distinction between formal and informal representation.

32. Pitz v. Tempco Air-Conditioning, Inc., 268 So. 2d 556, 557 (Fla. 3d Dist. 1972).

33. Foremost Dairies, Inc. v. Cutler, 212 So. 2d 37 (Fla. 4th Dist. 1968).

34. FLA. STAT. § 90.09 (1973).

him.[35] Surprise or entrapment, moreover, must be clearly demonstrated. "[T]estimony is deemed a surprise if it is not that which the party *expected* and is detrimental to his cause."[36] It is not enough for the examining party merely to assert he did not know what the witness was going to say.[37]

B. Cross-Examination

1. GENERALLY

The right of cross-examination is implicit in the constitutional right of confrontation and it helps to assure truthful testimony.[38] The right to cross-examination has been extended to most adversary proceedings, including bail reduction hearings.[39]

Two cases during the survey period involved a question of whether the right to cross-examine a witness was denied where prior testimony had been preserved for trial. In *Hutchins v. State*[40] the District Court of Appeal, Third District, affirmed a conviction based on videotape testimony. Defense counsel, present at the taping of the testimony of a lab technician, had an opportunity to examine the witness. Duplicate copies of the video tape were made and one was furnished to the defendant. The witness was unavailable at the trial. The tape was admitted over the objection of the defendant that he was deprived of the right of confrontation at trial. Although the prosection failed to transcribe the taped testimony and furnish defendant with a copy pursuant to established rules of procedure,[41] the court found no harmful error. The court held that

35. Thomas v. State, 289 So. 2d 419 (Fla. 4th Dist. 1974).

36. *Id.* at 420-21 (emphasis in original).

37. Florida courts should be wary about applying a restrictive view on the adverseness of a witness in light of the recent Supreme Court decision of Chambers v. Mississippi, 410 U.S. 284 (1973), which held that state law interference with a defendant's right to defend himself against an adverse witness may be violative of due process.

38. Dutton v. Evans, 400 U.S. 74 (1970).

39. Stansel v. State, 297 So.2d 63 (Fla. 2d Dist. 1974).

40. 286 So. 2d 244 (Fla. 3d Dist. 1973).

41. Florida Rule of Criminal Procedure 3.190 (j) provides that the taking and preserving of testimony in criminal proceedings shall be in accordance with the rules of civil procedure. The court cited Florida Rule of Civil Procedure 1.310 as stating that preserved "testimony shall be recorded verbatim stenographically or by mechanical means *and transcribed unless the parties agree otherwise*" (emphasis added). By amendment effective January 1, 1973 (during the pendancy of the appeal), however, the rule was changed to require transcription of the testimony only upon the request of one of the parties.

since a written transcript of the deposition would be admissible, the admission of video tape is either admissible or no more than harmless error.

In the second case, *State v. Barnes*,[42] an alibi witness' pre-trial statement was preserved by a court reporter, the witness having died before the trial. The State did not have notice that the testimony was being taken and had no opportunity to be present and cross-examine the witness. The trial judge ordered the witness' statement into evidence. On appeal by the State, the District Court of Appeal, Second District, held that there had been no procedural deviation from the essential requirements of law. Statements made under oath should be admissible under proper protections established by the trial judge. The court pointed out that the State does not have the same right of confrontation as a criminal defendant. The court also noted that proper protections could be provided by the judge's instruction to the jury "as to the weight they may place upon the statement" and by the State's opportunity to impeach the witness statement through other witnesses.

2. SCOPE

In Florida, the permissible scope of cross-examination "extends to the entire subject matter of direct examination 'and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief. . . .' "[43]

In *C.A.W. v. State*,[44] the State's first witness, an alleged robbery victim, on direct examination described the robbery in detail, identified the defendant as one of the robbers, and further stated that she saw the robbers after the crime. On cross-examination, the defense sought to question her as to when she saw them and under what circumstances, but was denied this opportunity when the State objected to the questions as being beyond the scope of what was asked on direct. On cross-examination of another state witness (the arresting officer), defense counsel again asked how the defendant had been identified and what had occurred after the arrest. Objection by the State again was sustained by the trial court on the

42. 280 So. 2d 46 (Fla. 2d Dist. 1973).

43. Cocoa v. State, 62 So. 2d 892, 895 (Fla. 1953), *cert. denied*, 349 U.S. 931 (1954), *rehearing denied*, 350 U.S. 855 (1955).

44. 295 So. 2d 329 (Fla. 1st Dist. 1974).

sole ground that the questions were beyond the scope of direct examination. Reversing these rulings on appeal, the District Court of Appeal, First District, held that

> [q]uestions which are reasonably relevant to questions propounded on direct examination or answers elicited (or even volunteered) are not objectionable on the ground of being beyond the scope of direct examination.[45]

Here, since the subject matter of the questions "related to the identification of the defendant by the victim, the place of identification, and the manner thereof," exclusion of such relevant and material evidence was prejudicial to the defense.[46]

When a witness testifies to facts relating to an occurrence in his presence, he may be questioned, on cross-examination, as to all the facts connected with the matters already stated. This general rule was applied in *Elmore v. State*,[47] a murder prosecution, where, on direct examination of an eye witness to the altercation, the State's interrogation of the witness "abruptly ceased" at the point of her describing the first shots. Defense counsel sought to cross-examine the witness on her observations of the quarrel past that point, but the trial court sustained the State's objection. The District Court of Appeal, Fourth District, found a denial of defendant's right to fully cross-examine the witness, indicating, "The state's attorney . . . [can] not limit investigation into the entire transaction by asking the witness about only a part of the difficulty. . . ."[48]

The question of full and fair cross-examination arose again in *Lely Estates, Inc. v. Polly*,[49] a civil action for breach of an oral employment contract. As to certain checks already in the employee's possession, the plaintiff employee contended that these payments were drawn against his salesman's commission, whereas the defendant employer claimed that these amounts were loans to the plaintiff. To determine the purpose of the payments, defense counsel, during cross-examination of the plaintiff, attempted to inquire into whether these amounts had been reported as income on

45. *Id.* at 330.

46. *See also* Settle v. State, 288 So. 2d 511 (Fla. 2d Dist. 1974).

47. 291 So. 2d 617 (Fla. 4th Dist. 1974), *citing* Savage & James v. State, 18 Fla. 909 (1882).

48. *Id.* at 620, *quoting* Haager v. State, 83 Fla. 41, 49, 90 So. 812, 815 (1922).

49. 308 So. 2d 165 (Fla. 2d Dist. 1975).

the plaintiff's income tax return. Upon objection, the trial court refused to allow this inquiry on cross-examination. The District Court of Appeal, Second District, found the trial court's refusal to permit this cross-examination to be reversible error since the reporting of these payments was crucial in determining whether the checks were a loan or a commission.

To achieve full and fair cross-examination of a witness, the defense should be afforded an opportunity to see and examine during cross-examination any memoranda used by a State witness in aid of his testimony.[50] This principle was applied in *Soler v. Kukula,* a civil action arising out of an automobile accident where an investigating officer was called by the plaintiff as a witness and allowed to testify from his personal notes and records of the accident.[51] The trial court denied the defendant access to these notes on the ground that they were covered by the confidentiality privilege under Florida Statues section 316.066 (1973). The District Court of Appeal, Third District, reversed, holding that the plaintiff had waived the protection granted such accident reports by the statute and that the defendant's right to cross-examine the officer required access to the notes.

A decision apparently inconsistent with *Soler* was reached in *Clements v. State,*[52] a per curiam affirmance, without opinion, of a robbery conviction and life sentence. At the direction of the prosecuting attorney, one of the officers (Davis) read "minute and detailed descriptions" of the robbers from a report prepared by officer Arcuni, who was the first officer on the scene of the crime. Officer Arcuni's report was purportedly a composite of descriptions given him by eye witnesses. Officer Davis had not been at the crime scene to hear these statements and officer Arcuni did not testify at trial. The defendant sought to examine the report as a preface to his cross-examination of officer Davis. The State's objection to the defendant's access to the report was sustained by the trial court and affirmed by the majority on appeal. However, Judge Walden noted in his dissenting opinion that in

> [e]liminating hearsay features which were not placed in issue, it is of manifest importance that such examination be permitted.

50. Minturn v. State, 136 So. 2d 359 (Fla. 3d Dist. 1962).
51. 297 So. 2d 600 (Fla. 3d Dist. 1974).
52. 283 So. 2d 877 (Fla. 4th Dist. 1973).

> It allows the defense to determine if the material was read with fidelity and if it was in context, among other things. It allows a determination as to whether there were critical omissions or disqualifications.[53]

Furthermore, Judge Walden correctly recognized that it is reversible error to refuse the defense the right to inspect material used by a witness to refresh his memory even where the witness himself prepared the writing. Since in the instant case the memoranda had been prepared by someone other than the witness, an even more fundamental right of cross-examination had been foreclosed.

Florida Rule of Criminal Procedure 3.250 provides that a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury. In *Walters v. State*,[54] during cross-examination of a State witness, the marking of an article for identification by the defense was held not to constitute introduction of the article into evidence. Thus, the District Court of Appeal, Third District, found reversible error in the trial court granting the State, over the defendant's objection, the right to opening and closing argument to the jury.

C. *Redirect Examination*

The general function of redirect examination is to reply to new matters drawn out on cross-examination. Thus, testimony elicited on cross-examination may open the door to new inquiries on redirect. However, the inquiry on redirect is limited strictly to the testimony given on cross-examination. In *Spears v. State*,[55] the court found that the testimony elicited during the defense's cross-examination of an investigating officer as to statements made by one companion of the defendant at the time of the charged offense did not "open the door" for the State, on redirect, to elicit testimony concerning a statement, directly implicating the defendant, made to the officer by *another* companion.

Redirect may also permit the admission of testimony not otherwise admissible. In *National Car Rental System, Inc. v. Holland*,[56]

53. *Id.* at 878 (Walden, J., dissenting). The facts of the case are revealed in this dissenting opinion.

54. 288 So. 2d 298 (Fla. 3d Dist. 1974).

55. 301 So. 2d 24 (Fla. 2d Dist. 1974).

56. 269 So. 2d 407 (Fla. 4th Dist. 1972).

the plaintiff's witness to an automobile accident, during cross-examination by the defendant's attorney, testified that there was no way the plaintiff could have avoided hitting the defendant's vehicle. The defendant failed to object, at that time, that such an opinion was inadmissible since the witness had not been qualified as an expert. On redirect, plaintiff's attorney attempted to have the witness elaborate on her statement, at which time the defendant's attorney objected. The trial court overruled the objection, and on appeal the court held that since the witness' original statement was made without objection on cross-examination, questions seeking elaboration of such a point on redirect were permissible within the discretion of the trial judge.

III. Opinion And Expert Testimony

A. *Lay Opinion*

Generally, lay opinion testimony is inadmissible because either the jury is as competent as the layman to draw a conclusion from the facts, or the subject matter requires expert analysis.

Lay opinion may be admissible, however, for certain purposes.[57] Thus, an owner may be qualified to testify as to his opinion of the market value of stolen property at the time of the theft.[58] And, a building contractor, sued for breach of contract for failure to construct a building according to specifications, may give opinion as to the present value of the buildings.[59] Furthermore, in a will revocation proceeding, a disinterested lay witness who had close contacts with the decedent and was familiar with her handwriting might properly express an opinion of the handwriting for authentication.[60]

The admissibility of lay opinion to show that a criminal defendant is sane or insane is yet another exception to the general bar against lay opinion.[61]

57. The extent of testimony by opinion witnesses usually lies within the discretion of the trial court. Hughes v. Canal Insurance Co., 308 So. 2d 552 (Fla. 3d Dist. 1975).

58. Vickers v. State, 303 So. 2d 700 (Fla. 1st Dist. 1974), *citing* Wright v. State, 251 So. 2d 890 (Fla. 1st Dist. 1971).

59. *See* Pic v. Hoyt Dev. Co., Inc., 309 So. 2d 586 (Fla. 2d Dist. 1975).

60. *See* Clark v. Grimsley, 270 So. 2d 53 (Fla. 1st Dist. 1972).

61. Butler v. State, 261 So. 2d 508 (Fla. 1st Dist. 1972). However, in Hixon v. State, 165 So. 2d 436, 441 (Fla. 2d Dist. 1964), lay witnesses' testimony were excluded because they had observed the defendant only for a brief time and the symptoms of the accused's type of mental disorder were difficult for a lay person to detect.

B. *Expert Subject Matter*

To prevent an invasion of the province of the jury, expert opinion is inadmissible as to matters within common knowledge.[62] The subject matter of expert testimony must "be so related to some science, profession, business or occupation as to be beyond the understanding of the average layman."[63]

C. *Expert Qualifications*

A witness offered as an expert must be qualified as such by having "sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth."[64] Florida Rule of Civil Procedure 1,390(a) defines an "expert witness" as

> a person duly and regularly engaged in the practice of his profession who holds a professional degree from a university or college and has had special professional training and experience or one possessed of special knowledge or skill about the subject upon which he is called to testify.

As a general rule the trial court has a duty "to determine the qualification of an expert witness on the subject matter on which he testifies and [the trial court's] judgment will not be disturbed on appeal unless a clear abuse of discretion is made to appear."[65]

Qualifying as an expert in one area may not extend to other areas. Thus, a chiropractor was properly prohibited from testifying as to whether plaintiff's poor eyesight was a result of an accident, when there was no showing that the witness had any expertise in problems relating to eyes or vision.[66]

Similary, in *Seaboard Coast Line Railroad v. Hill*[67] the trial court found that the local chief of police, who had over 10 years experience investigating accidents, was not qualified to give an opinion on a car's speed based on the vehicle's appearance after

62. Farmer v. Brotherhood of R.R. Trainmen, 258 So. 2d 503 (Fla. 3d Dist. 1972), *citing* Rosenfeld v. Johnson, 161 So. 2d 703 (Fla. 3d Dist. 1964).

63. Seaboard Coast Line R.R. v. Hill, 250 So. 2d 311, 315 (Fla. 4th Dist. 1971), *cert. discharged*, 270 So. 2d 359 (Fla. 1973).

64. McCormick, *supra* note 1, § 13 at 30.

65. Gates & Sons, Inc. v. Brock, 199 So. 2d 291 (Fla. 1st Dist. 1967).

66. Aiken v. Miller, 298 So. 2d 477 (Fla. 1st Dist. 1974).

67. 250 So. 2d 311 (Fla. 4th Dist. 1971), *cert. discharged*, 270 So. 2d 359 (Fla. 1973).

impact with a train. The District Court of Appeal, Fourth District, found no abuse of the trial judge's discretion and emphasized the witness' own acknowledgement that he was not a "traffic expert."

Nonetheless, in one questionable decision the Third District, in effect, expanded the expert's area of expertise. A police officer who investigated an accident was allowed to give his opinion of the monetary damage sustained by one of the vehicles.[68] The court noted that the "sole" purpose of the testimony was to assist the jury in reconstructing the force of impact caused by the collision, and that the officer had investigated numerous accidents as an investigator for 7 years. The decision did not clarify how this experience qualified the officer to assess the money damage caused by the collision.

D. *Basis of Testimony*

An expert may testify as to the facts within his personal knowledge and expert inferences therefrom.[69] In the case of a mental examination, it is not necessary that the expert state the detailed circumstances of the examination before giving his finding. The opposing party may elicit the basis for such inferences on cross-examination.[70]

As a general rule, the opinion of a physician as to the condition of an injured plaintiff, based wholly or in part on the history of the case as told to him by the plaintiff, is inadmissible when the examination was made for the purpose of qualifying the physician to testify as a medical witness.[71] Such a physician is referred to as an "examining physician" as contrasted with a "treating physician" who actually administers to a patient for purposes of treatment. In *Marine Exploration Co. v. McCoy,*[72] a doctor examined the plaintiff once and testified as to the extent of his disability. The doctor's opinion was based partially on information supplied by the plaintiff but partially on the doctor's own observations along with hospital records which were introduced into evidence. The defendant claimed that even partial reliance on the plaintiff's representations rendered the doctor's opinion inadmissible. The court, on appeal,

68. Waller v. Traud, 301 So. 2d 127 (Fla. 3d Dist. 1974).
69. McCormick, *supra* note 1, § 14 at 31-32.
70. Jones v. State, 289 So. 2d 725 (Fla. 1974).
71. Marshall v. Papineau, 132 So. 2d 786 (Fla. 1st Dist. 1961).
72. 308 So. 2d 43 (Fla. 3d Dist. 1975).

affirmed the trial court's holding that the medical opinion, under such circumstances, was admissible. The fact that the plaintiff supplied a partial basis for the doctor's opinion was a factor for the jury to consider in determining the weight and credibility it should afford the testimony.

E. *Form of Testimony*

A common method of exacting opinions from experts on the particular facts of a case is by use of hypothetical questions. Hypothetical questions must be based on facts supported by "competent substantial evidence in the record at the time the question is asked or by reasonable inferences from such evidence."[73] The examining party, however, in propounding the hypothet, may use such evidence viewed in a light most favorable to him. Thus, in a personal injury action which resulted from a collision between a motorcycle and a truck[74] where experts were called upon by the defense to estimate the speed of the vehicles on impact, the District Court of Appeal, Third District, held that the experts could choose controverted evidence most favorable to the side of the defense in arriving at their conclusions.

Nonetheless, hypotheticals must be based on facts in the record and must include facts sufficient for the expert to form an opinion.[75] Ordinarily, of course, only the expert and not the trial judge would be in a position to know whether he has been submitted sufficient facts. For this reason "deficiencies in a factual predicate . . . normally relate to the weight and not the admissibility of the opinion."[76] Still, an objection to the adequacy of the predicate will be sustained where the hypothetical "omits a fact which is so obviously necessary to formation of an opinion that the trial judge may take note of the omission on the basis of his common knowledge. . . ."[77] In *Nat Harrison Associates, Inc. v. Byrd,*[78] an expert was asked to

73. Nat Harrison Associates v. Byrd, 256 So. 2d 50, 53 (Fla. 4th Dist. 1971). *See also* Cromarty v. Ford Motor Co., 308 So. 2d 159 (Fla. 1st Dist. 1975).

74. Seibels, Bruce & Co. v. Giddings, 264 So. 2d 103, 105-06 (Fla. 3d Dist. 1972).

75. Steiger v. Massachusetts Cas. Ins. Co., 273 So. 2d 4, 6 (Fla. 3d Dist. 1973); Nat Harrison Associates v. Byrd, 256 So. 2d 50 (Fla. 4th Dist. 1971).

76. 256 So. 2d at 53.

77. *Id.*

78. 256 So. 2d 50 (Fla. 4th Dist. 1971).

determine hypothetically the difference in speed between two vehicles at the time of collision. Photographs depicting damages to the vehicles were the only basis in evidence for an opinion of their relative speeds. The District Court of Appeal, Fourth District, held that because a necessary factual predicate, the weight of the vehicles,[79] was not contained in the hypothetical nor supported by any evidence previously presented, the expression of opinion was inadmissible.

F. *Weight and Sufficiency*

Florida law is settled that "[e]xpert testimony, though persuasive, is not conclusive or binding on the jury, and the jury is free to determine its credibility and to decide the weight to be ascribed."[80]

In *Bhem v. Division of Administration*,[81] a case involving condemnation through eminent domain, the issue at trial was the amount of business damages suffered by the condemnee. The expert opined that the amount was $19,175. The condemning authority offered no evidence, apparently relying on his attack of the comdemnee's presentation. The jury awarded $9,500. The condemnee argued, on appeal, that under these circumstances the jury was bound by the expert's figure. The District Court of Appeal, Fourth District, however, held that the expert testimony was a maximum amount requested, not a minimum amount admitted, and pursuant to the general rule that expert opinion is not binding upon a jury, the court affirmed the jury's finding. In so doing, however, the court took notice of the fact that their decision was in direct conflict with the decision of the District Court of Appeal, First District, in *Jacksonville v. Yerkes*.[82] In that case the condemnor's expert's opinion was stricken, being based upon certain incorrect facts. The condemnor put on no further evidence and the court held that in the absence of contrary evidence the fact finder was constrained to adopt the condemnee's expert's opinion as to the dollar amount of damages.

79. The necessity of knowing the weight of each vehicle was acknowledged by the expert in prior testimony.

80. Trolinger v. State, 300 So. 2d 310, 311 (Fla. 2d Dist. 1974); *see* Vaillancourt v. State, 288 So. 2d 216 (Fla. 1974); Byrd v. State 297 So. 2d 22 (Fla. 1974).

81. 292 So. 2d 437 (Fla. 4th Dist. 1974).

82. 282 So. 2d 645 (Fla. 1st Dist. 1973).

The above cases deal with the weight which is to be afforded an expert's opinion. But what of the sufficiency of the opinion itself? In *E.R. Squibb & Sons, Inc. v. Stickney,*[83] the plaintiff's two medical experts testified that the Squibb Company's orthopedic grafting matter, Boplant, was, in their opinions, inherently defective due to the presence of antigen residuals. The appellate court, in reversing a jury award against Squibb for negligence, breach of express and implied warranty, and fraud, held as to this expert testimony:

> The fact that the product contained antigen residuals which occasionally cause the graft to fail forms no proper basis for the conclusion that the product is inherently defective in view of the high percentage of success realized in thousands of other similar operations. It has been uniformly held that the testimony of an expert witness which is premised solely upon a demonstrably false assumption of fact or patent misconception of law is not a sufficiently competent foundation to sustain a verdict.[84]

In overturning the jury verdict the court was not interfering with the jury's function of *weighing* the expert testimony; rather, it was deciding as a matter of law that the expert opinions were legally insufficient.

IV. Competency and Privileges

A. *Children*

When a child is called as a witness, it is the judge's duty and normal practice to examine the child to ascertain his competence to testify.[85] As a general rule the trial judge is vested with broad discretion in allowing the testimony of minors.[86] The prime test of a minor's competency to testify is intelligence rather than age.[87]

In *Davis v. State,*[88] a 7-year-old was allowed to testify at a nonnonjury trial even though she was initally too timid to respond fully to the State Attorney's questions. Refusing to grant defense coun-

83. 274 So. 2d 898 (Fla. 1st Dist.), *cert. denied,* 285 So. 2d 414 (Fla. 1973), *cert. denied,* 416 U.S. 961 (1974).

84. *Id.* at 907; *see* Limmiatis v. Canal Authority, 253 So. 2d 912 (Fla. 1st Dist. 1971).

85. Bill v. State, 93 So. 2d 575 (Fla. 1957).

86. Clinton v. State, 53 Fla. 98, 43 So. 312 (1907).

87. Bill v. State, 93 So. 2d 575 (Fla. 1957).

88. 264 So. 2d 31 (Fla. 3d Dist. 1972).

sel's motion to exclude the witness, the trial judge permitted her to sit on his lap and finish testifying. On appeal, the court noted that since "the evidence of intelligence, ability to recall, relate and to appreciate the nature and obligations of an oath are not fully protrayed by a bare record . . ." allowing the testimony was within the discretion of the trial judge.[89] The decision was rendered with the recognition that the trial judge, in exercising his discretion, had utilized the same criteria in declaring the minor's two younger brothers to be incompetent.

In *Sarles v. State*,[90] involving a probation revocation hearing, the court held that it was not an abuse of discretion to allow a 12-year-old to testify. In *Hall v. State*,[91] the 8-year-old child of an alleged rape victim testified that he was in the third grade, went to Sunday school, and knew the meaning of an oath to tell the truth. The decision to permit him to testify was held to be within the judge's sound discretion.

Harrold v. Schluep[92] established that the trial court should make a special effort to instruct a child plaintiff on the meaning and obligation of truthfulness. Morevoer, the child need not understand the specific penalties of perjury but only comprehend that something will happen if he lies. *Harrold* involved a minor bicyclist, 6 years, 8 months of age, who brought suit against a motorist for injuries sustained in a collision. There being no witnesses to the conduct of either party prior to impact other than the opposing party, it was vital to the plaintiff's case that he be allowed to testify as to his and the defendant's behavior. Nonetheless, the trial court found the plaintiff incompetent to testify. However, the court, on appeal, directed that a more determined and special effort should have been made to qualify the child as a witness in view of the fact that his claim depended largely on having an opportunity to deny the motorist's testimony as to his inappropriate bicycle handling or to explain his version of the manner in which the collision occurred.

The court set out criteria for qualifying a child as to competency. First, intelligence and the ability to understand are the prime test of competency. Children must have sufficient intelligence to

89. *Id.* at 32, *citing* Clinton v. State, 53 Fla. 98, 43 So. 312 (1907).
90. 294 So. 2d 95 (Fla. 1st Dist. 1974).
91. 260 So. 2d 881 (Fla. 2d Dist. 1972).
92. 264 So. 2d 431 (Fla. 4th Dist. 1972).

receive impressions of the facts about which they testify and the capacity to relate those facts correctly. In addition, the child must appreciate the nature and obligation of the oath, however the trial judge may instruct the child in this respect. The child need not understand specific consequences of lying, merely that it will produce effects adverse to him.

Since the trial court failed to sufficiently assist the plaintiff in the instant case, and insufficiently pursued an inquiry into the child's actual ability to understand and communicate truth, the case was remanded. Special note was made by the court that the unfamiliar courtroom environment may have contributed to the child's responses. The court apparently desired the trial judge to take steps to neutralize this factor.

B. *Drugs*

In *Collie v. State,*[93] the court held that a trial judge may strike the testimony of a witness observed by the court to be under the influence of drugs at the time of testifying. In this particular case, the witness did not even know where she was. It should be noted, however, that the *Collie* holding was partially based on the fact that the witness' testimony constituted cumulative evidence.

C. *Settlement Offers*

Offers or agreements to settle or compromise claims generally are excluded on the basis of a strong public policy favoring out of court settlements.[94] However, under some circumstances, reference to settlements may reach the jury. In *Compania Dominicana de Aviacion v. Knapp,*[95] a plane crashed into an automobile paint and body shop, resulting in a personal injury action against the airline and its insurer. A witness to the crash, while testifying, implied that the defendant insurance company had paid for the cleanup of the cars he kept on a nearby lot. Although an objection to this implication was sustained and the jury instructed to disregard it, the defendant insurance company sought a new trial, considering such pay-

93. 267 So. 2d 382 (Fla. 3d Dist. 1972).

94. Bill Currie Ford, Inc. v. Cash, 252 So. 2d 407 (Fla. 2d Dist. 1971), *overruled on other grounds,* 284 So. 2d 385 (Fla. 1973).

95. 251 So. 2d 18 (Fla. 3d Dist. 1971).

ment to be the settlement of a remote claim and its mention to the jury improper. However, the court on appeal, held the statement non-prejudicial, given its remoteness to the personal injury action, and stated that in any event, the trial court's instruction to disregard the statement was sufficient to correct any harm done.

Settlement agreements between a plaintiff and one of several co-defendants whereby the liability of the agreeing co-defendant is variable, depending on the verdict as to the non-agreeing co-defendant, are also admissible.[96]

D. *Psychiatrists and Psychologists*

A court ordered psychiatric examination is generally not considered violative of a defendant's right to freedom from compelled self-incrimination. Psychiatrists may render opinions concerning sanity based on factual statements made by the defendant-patient; however, direct testimony concerning facts surrounding a crime, ascertained during a compulsory mental examination, is prohibited.[97]

In *Roseman v. State*,[98] a criminal prosecution, the defendant claimed prejudicial error when the trial judge allowed psychiatrists to testify as to facts the defendant revealed concerning his participation in a crime. But the court noted that the defense itself had elicited in detail, through testimony of its own doctors, all the facts and circumstances leading up to and including the alleged crime, thereby making that information no longer privileged.

Parkin v. State[99] settled the law in Florida that a defendant relying on an insanity defense must cooperate with court-appointed experts or be precluded from offering the testimony of his privately engaged expert on the matter. However, in *McMunn v. State*,[100] the court expressed concern about the *Parkin* rule as it related to the privilege against self-incrimination. The State had urged that the defendant be compelled to cooperate with a court-appointed psychiatrist if he wished to rely on an insanity defense and that the State

96. These "Mary Carter" agreements are discussed in detail in section V, D, 9, *infra*.
97. Parkin v. State, 230 So. 2d 817 (Fla. 1970).
98. 293 So. 2d 64 (Fla. 1974).
99. 238 So. 2d 817 (Fla. 1970).
100. 264 So. 2d 868 (Fla. 1st Dist. 1972).

then be allowed to impeach the defendant's testimony by interrogating the court-appointed psychiatrist regarding statements made to him by the defendant. The court viewed this proposed impeachment technique as equivalent to coercing a confession and violative of the defendant's right against self-incrimination.

The reasoning of *McMunn* was blended with that of *Parkin* in *Jones v. State.*[101] There the State claimed that statements made by a defendant to a psychiatrist engaged only to examine the defendant and testify at trial are not properly in evidence, and therefore, are not an allowable basis for expert testimony.[102] Thus, the State maintained, such expert testimony is admissible only if the defendant himself testifies to the statements made to the psychiatrist. The supreme court rejected this view, holding that the effect of such an exlcusionary ruling would require the defendant to take the stand against his will before allowing him to introduce expert testimony as to his defense of insanity.

Interesting dictum from the *Jones* court stated that unless a person is a raving maniac or complete imbecile, a jury can hardly be deemed competent to reach a satisfactory decision on the question of his mental condition without the aid of expert witnesses. Yet 2 weeks later in *Byrd v. State,*[103] the same court upheld a rape conviction where the State presented no medical testimony whatsoever while the defense presented two psychiatrists who testified as to the insanity of the appellant at the time of the offense. The State presented only the testimony of two lay witnesses regarding the appellant's sanity. Finding that the evidence of insanity which the appellant sought to introduce at trial was insufficient to create the requisite reasonable doubt in the mind of the jury, the supreme court upheld the conviction since a jury does not necessarily have to accept expert testimony over non-expert testimony.[104]

E. *Attorney—Client*

The reconciliation of interests in privacy and confidentiality with the countervailing need for evidence is the major problem facing the courts in the area of attorney-client privilege. For example,

101. 289 So. 2d 725 (Fla. 1974).
102. See Section III, D, *supra.*
103. 297 So. 2d 22 (Fla. 1974).
104. See Section III, F, *supra.*

in *Anderson v. State,*[105] the defendant, charged with stealing and receiving stolen property, hired an attorney and on his own initiative turned the property over to the attorney's receptionist. The attorney then gave the property to the police, whereupon the prosecution subpoenaed the attorney and his receptionist to testify how and from whom they had received the property. In holding that neither the attorney nor the receptionist could be made to testify, the court found the nonverbal communication on the part of the defendant in the act of turning over the property to be privileged. Under these circumstances, the court said that to require the attorney to testify would do violence to the fundamental concept of the attorney-client privilege since such testimony would conclusively show that the defendant once had the stolen property in his possession.

The growing size and importance of the public defender's office has possible ramifications in the area of attorney-client privilege. In *Olds v. State,*[106] a public defender was found in contempt of court for attemping to use certain evidence to impeach a prosecution witness after the trial judge had instructed the attorney to desist. The evidence sought to be introduced for impeachment purposes was made known to the public defender through his office, which had represented the witness in a prior case in which he was a defendant. The trial judge believed the material communicated by the witness to the public defender's office to be privileged. However, on appeal, the court pointed out that all such communication either took place in the presence of a third person or was otherwise not "confidential." Since the appellant public defender was under a duty to defend his client zealously, the contempt finding was reversed. However, the court took notice of the potential for conflict in the future where one of several co-defendants represented by the public defender's office later appears as a prosecution witness against a former co-defendant.

F. *Immunity from Prosecution*

Florida Statutes section 914.04 (1973) does not permit a witness to refuse to testify on the grounds that the testimony might incriminate him, but provides immunity from any prosecution arising out

105. 297 So. 2d 871 (Fla. 2d Dist. 1974).
106. 302 So. 2d 787 (Fla. 4th Dist. 1974).

of any transaction or matter about which is testified. In *Lurie v. Florida State Board of Dentistry,*[107] the petitioner, a state licensed dentist, was granted immunity from prosecution at the time he was compelled to testify about his involvement in a stolen car ring. This testimony was subsequently used by the State Board of Dentistry to revoke his license. The Supreme Court of Florida, overruling a prior decision,[108] recognized an extended scope of the statutory immunity, to bar not only future criminal prosecutions but administrative revocations of professional licenses as well.[109]

G. *Informers*

A frequent question in criminal litigation is whether the State can be forced to reveal the identity of its confidential informers. The answer turns on the use to which the informers' statements are put. Thus, for example, in a probation revocation proceeding, as opposed to a trial, the judge is given considerable discretion in requiring informers to be identified.[110]

In *State v. Katz,*[111] where the informants' statements were not sought to be used against the defendant at trial, but merely contributed to the probable cause which was the basis of a search warrant, the District Court of Appeal, Fourth District, held that disclosure of the informers' identity was not required. The court relied in part on the authority of Florida Rule of Criminal Procedure 3.220(c)(2) which provides that disclosure of an informant shall not be required unless the informant is to be produced at a hearing or trial, or if failure to disclose the identity will infringe upon the constitutional rights of the accused.[112]

In *English v. State,*[113] the defendant filed a motion to compel disclosure of the identity of an informant on the ground that the informant's testimony was essential to the defendant's defense of entrapment. Since the defendant was charged with delivery and sale of drugs, and the informant did induce the defendant to sell to an

107. 288 So. 2d 223 (Fla. 1973).

108. Headly v. Baron, 228 So. 2d 281 (Fla. 1969). (*Lurie* reinstated the holding of Florida State Bd. of Architecture v. Seymour, 62 So. 2d 1 (Fla. 1952)).

109. *See* State ex rel. Vining v. Florida Real Estate Comm'n 281 So. 2d 487 (Fla. 1973).

110. Singletary v. State, 290 So. 2d 116 (Fla. 4th Dist. 1974).

111. 295 So. 2d 356 (Fla. 4th Dist. 1974).

112. *See also* State v. Davis, 308 So. 2d 539 (Fla. 3d Dist. 1975).

113. 301 So. 2d 813 (Fla. 2d Dist. 1974).

agent, and was present at the alleged sale, the court ordered the informant's identity disclosed.

In *Ricketts v. State,*[114] the informant had been an active participant in an illegal lottery operation and was the only witness who was in a position to amplify or contradict the testimony of a State witness. Under such circumstances, the defendant was entitled to disclosure of the informer's identity, and the District Court of Appeal, Fourth District, held as reversible error the trial court's refusal to compel such disclosure.

The Third District reached a different result in *Jackson v. State,*[115] a case in which the informant did not deal directly with the defendant as in *Ricketts.* Although here the informant's activities in assisting an undercover officer to effectuate a sale of narcotics were significant, and he was present and did witness the alleged transactions, the court found these facts to be insufficent to require disclosure of his identity.

In an earlier discussion[116] the Third District had quashed an order requiring disclosure of a confidential informant where the informant had not introduced the defendant to the law enforcement officer and did not witness the alleged criminal transaction. In *Doe v. State,*[117] where the informant drove an officer to a pool hall and exchanged greetings with the defendant, but did not arrange the transaction, the Third District noted, as it later would in *Jackson,*[118] that the mere presence of the informer at an illegal drug sale or an introduction to set up the sale by the defendant to an officer would not require disclosure of the informer's identity.

If the State refuses to comply with an order to disclose the informer's identity, the trial judge may dismiss the case as a legitimate exercise of the court's inherent authority to compel obedience of its orders. If the State believes the order compelling disclosure as in error, the proper remedy is timely appellate review of the order.[119]

H. *Self-Incrimination*

The potential conflict between the right to remain silent and

114. 305 So. 2d 296 (Fla. 4th Dist. 1974).
115. 307 So. 2d 188 (Fla. 3d Dist. 1975).
116. State v. Brown, 285 So. 2d 52 (Fla. 3d Dist. 1973).
117. 262 So. 2d 11 (Fla. 3d Dist. 1972).
118. Jackson v. State, 307 So. 2d 188 (Fla. 3d Dist. 1975).
119. State v. Wells, 308 So. 2d 163 (Fla. 1st Dist. 1974).

the need for evidence is exemplified by *Salem v. State*,[120] where a defendant-attorney and his partner were investigated by a grand jury. During the investigation the defendant was granted immunity, pursuant to a Florida statute,[121] from criminal prosecution of all charges except perjury.

However, he was found guilty of contempt by the grand jury for giving false, evasive, and unresponsive testimony. Subsequently, the defendant was called as a witness at the trial of his law partner and again was offered immunity from all charges except perjury. This time he refused to testify on the ground that his statements would tend to be self-incriminating. The basis of his fear was that his testimony at the trial, no matter how truthful, would be compared with his grand jury testimony, which had already been declared false, and thus he would be prosecuted for perjury. In reversing the trial court's contempt judgment, the District Court of Appeal, Third District, held that the defendant was constitutionally entitled to assert his "right of silence" and that "[the right to be free from compelled self-incrimination] not only exempt[s] one from answering questions that directly incriminate but . . . extend[s] . . . to questions that in anywise tend to incriminate."[122]

Because of the absolute nature of the right, the courts have been willing to find broad waivers of it where accused persons testify on their own behalf. Thus, it has generally been held that an accused waives his privilege to refuse to testify to the extent of permissible cross-examination by taking the stand in his own defense.[123] In addition, one who institutes a law suit waives any right he might have had to avoid answering relevant questions even though the answers may be incriminating.[124] In *Lely Estates, Inc. v. Polly*,[125] for example, an employee brought an action against his employer for breach of the employment contract. The employee contended that certain payments to him were commissions while the employer argued that they were loans. The District Court of Appeal, Second District, held that it was reversible error not to allow cross-

120. 305 So. 2d 23 (Fla. 3d Dist. 1974).

121. FLA. STAT. § 914.04 (1973).

122. Salem v. State, 305 So. 2d 23, 28 (Fla. 3d Dist. 1974), *quoting* State v. Sullivan, 37 So. 2d 907 (Fla. 1948).

123. MCCORMICK, *supra* note 1, § 132 at 278; *accord*, Kilgore v. State, 271 So. 2d 148 (Fla. 2d Dist. 1972).

124. Minor v. Minor, 232 So. 2d 746 (Fla. 2d Dist. 1970), *aff'd*, 240 So. 2d 301 (Fla. 1970).

125. 308 So. 2d 165 (Fla. 2d Dist. 1975).

examination of the plaintiff as to whether the payments had been reported as income on his tax returns, regardless of whether plaintiff's answers might incriminate him.

Despite such cases which liberally construe certain acts as waivers of rights against self-incrimination, in other situations the courts have been extremely protective. In *Walton v. Robert E. Haas Construction Corp.*,[126] one of the plaintiffs was a witness in a prior wrongful death action involving the same accident at issue in the instant case. He had previously declined to answer certain questions during the taking of a deposition in the prior case, based on his right against self-incrimination, fearing the possibility of a manslaughter charge. However, in his own suit he claimed no right and answered all questions. The trial court allowed as evidence, for impeachment purposes, the prior invocation of the right. In reversing this decision, the District Court of Appeal, Third District, held that the constitutional right against self-incrimination prevents the admission in a civil case of the exercise of the privilege in a prior action. In addition, such prior invocation of the right cannot be regarded as impeachment since the fact that one claims a constitutional right may not be said to show a disregard for the truth.

State v. Dawson[127] also exemplifies strict scrutiny of a waiver. In *Dawson*, the defendant was an attorney who practiced as a professional service corporation. He had been charged with grand larceny against several insurance companies by fraudulent representations in the settlement of automobile accident claims on behalf of his clients. During the course of its investigation, the grand jury subpoenaed the defendant's employees to produce records of the defendant's professional corporation, which were produced under protest. The trial court dismissed the grand jury's indictments. Affirming on appeal, the district court held that the general rule[128] precluding a corporation from exercising a right against self-incrimination was inapplicable to a professional service corporation. The court's rationale was based on examination of the legislative intent of the Professional Service Corporation Act of Florida,[129] which was enacted for the purpose of providing tax advantages, while also attempting to preserve the non-corporate status of the

126. 259 So. 2d 731 (Fla. 3d Dist 1972).
127. 290 So. 2d 79 (Fla. 1st Dist. 1974).
128. MCCORMICK, *supra* note 1, § 121 at 269.
129. FLA. STAT. §§ 621 *et seq.* (1973).

professional.[130] Thus, the court adopted the defendant's contention that all documents produced by the employees were personal to him as an attorney and that he, through his employees, was being compelled to produce evidence in violation of his right against self-incrimination.

Traditionally, the right to be free from compelled self-incrimination does not protect against matters which could not give rise to criminal liability.[131] However, the Supreme Court of Florida, in *State ex rel. Vining v. Florida Real Estate Commission,*[132] departed from the traditional rule and expanded the scope of the right. The defendant was charged by the Real Estate Commission with violation of the Florida real estate license law,[133] which required the defendant to file sworn answers to the charges. Failure to deny the charges would result in the charges being deemed admitted. The defendant refused to answer the commission's question. The court found the statutory requirement to violate his right against self-incrimination and therefore prohibited the commission from enforcing so much of the statute as required the defendant, in a disciplinary proceeding, to respond to the charges against him. Basing its decision on *In Re Gault*[134] and *Spevack v. Klein,*[135] the court held "that the right to remain silent applies not only to the traditional criminal case, but also to proceedings 'penal' in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood."[136] The court noted a national trend applying the right against self-incrimination to "penal" proceedings regardless of their "criminal" status in the traditional sense.

I. *Insurance*

Prior to *Shingleton v. Bussey,*[137] any purposeful reference to insurance policy limits during a trial when it was not relevant, could be grounds for reversal.[138] Subsequent to *Shingleton* there existed

130. 290 So. 2d at 82.

131. McCORMICK, *supra* note 1, § 121 at 256.

132. 281 So. 2d 487 (Fla. 1973); *accord,* Kozerowitz v. Florida Real Estate Comm'n, 289 So. 2d 391 (Fla. 1974).

133. FLA. STAT. §§ 475 *et seq.* (1973).

134. 387 U.S. 1 (1967).

135. 385 U.S. 511 (1967).

136. 281 So. 2d at 491.

137. 223 So. 2d 713 (Fla. 1969).

138. Pierce v. Smith, 301 So. 2d 805 (Fla. 2d Dist. 1974).

two schools of judicial thought with regard to the mentioning of insurance policy limits before a jury. One held that such a reference to a jury constituted harmful error as a matter of law while the other took the position that the question of harmful error in relation to the mention of insurance limits was a factural question to be determined by a review of the record in each case.[139] The latter approach was adopted by the Supreme Court of Florida in *Stecher v. Pomeroy*[140] where it held that insurance limits should not be mentioned to the jury, but if such mention is made, it constitutes harmless error where the jury's verdict has not been adversely affected thereby.

The supreme court amplified the *Stecher* holding in *Josey v. Futch*[141] by enumerating potential factors which may be indicative of adverse jury influence, including the size of the verdict in relation to the policy limits, the nature and extent of the plaintiff's injuries, and the amount originally sought by the plaintiff. The position now taken by the Florida courts has resulted in a series of decisions which focus on the facts of each case to determine whether the admission of the insurance evidence substantially affected the jury's decision.[142]

J. *Identification by Decedant's Family*

Generally, Florida courts have found prejudicial error when, in a homicide prosecution, a member of the deceased's family is called to testify concerning identification of the victim when unrelated witnesses are available.[143] There are, however, exceptions to the rule. If the jury already knows that the victim was survived by the witness because of other evidence ascertained from that witness, it is harmless error if the related witness testifies concerning the victim's identity. Such testimony establishes nothing to prejudice the defen-

139. Josey v. Futch, 254 So. 2d 786 (Fla. 1971).

140. 253 So. 2d 421 (Fla. 1971).

141. 254 So. 2d 786 (Fla. 1971).

142. Allred v. Chittenden Pool Supply, Inc., 298 So. 2d 361 (Fla. 1974); Peppe v. Clow, 307 So. 2d 886 (Fla. 3d Dist. 1975); Traveler's Ins. Co. v. Odoms, 306 So. 2d 207 (Fla. 1st Dist. 1975); Pierce v. Smith, 301 So. 2d 805 (Fla. 2d Dist. 1974); Millitello v. Guest, 248 So. 2d 662, *quashed* 254 So. 2d 195, *on remand*, 258 So. 2d 463 (Fla. 2d Dist. 1972), (verdict by district court due to insurance evidence quashed and remanded in light of Stecher v. Pomeroy); Compania Dominicana de Aviacion v. Knapp, 251 So. 2d 18 (Fla. 3d Dist. 1971). *But cf.* Cook v. Eney, 277 So. 2d 848 (Fla. 3d Dist. 1973) (evidence of workman's compensation).

143. *See* Scott v. State, 256 So. 2d 19, 20 (Fla. 4th Dist. 1971).

dant that is not already before the jury. If a relative does so testify, and in the process makes highly prejudicial remarks, the defense attorney may move for a mistrial, or in the alternative, a polling of the jury. If he receives and accepts the latter and makes no further motion for mistrial, error is waived.[144]

In *Barrett v. State*[145] the victim's father identified a photograph at trial. The defense did not move for a mistrial until the close of all the evidence. The District Court of Appeal, Fourth District, despite the availability of other reasoning,[146] determined that failure to make a timely objection to this form of identification was fatal. The court stated:

> The accused in a criminal proceeding is not entitled to the privilege of refraining from making timely objection to matters felt to be prejudicial and then waiting until the relative strength of the prosecution . . . can be evaluated before raising a cry of prejudice.[147]

K. *Witness Lists*

In *Williams v. State,*[148] the defendant was convicted by eyewitness accounts of an armed robbery. Without having exchanged witness lists, the defendant attempted at trial to produce three relatives to testify that they had loaned the defendant the money which was in his possession when he was apprehended. Although he had told counsel who had initially represented him about the witnesses, the defendant failed to inform counsel representing him at trial about them. The trial judge excluded the witnesses summarily because the defendant had requested the exchange of witness lists but had failed to furnish a complete witness list himself pursuant to Florida Rule of Criminal Procedure 1.220(g).[149] The District Court of Appeal, Fourth District, reversed, holding that a witness should be excluded only under the most compelling circumstances. Where a party fails to produce a complete witness list, as here, the court should inquire as to why disclosure was not made, the extent of

144. Foster v. State, 266 So. 2d 97 (Fla. 3d Dist. 1972).
145. 266 So. 2d 373 (Fla. 4th Dist. 1972).
146. *See* Scott v. State 256 So. 2d 17 (Fla. 4th Dist. 1971).
147. 266 So. 2d at 375.
148. 264 So. 2d 106 (Fla. 4th Dist. 1972).
149. Amended and renumbered as FLA. R. CRIM. P. 3.220(j).

prejudice, and intermediate means available to rectify the prejudice.

Although the earlier case of *Cacciatore v. State*[150] reached a different result on facts similar to those in *Williams*, the two cases are distinguishable. In *Williams*, the witnesses could well have changed the outcome of the case by testifying as to the origin of the money, while in *Cacciatore* the court found that the testimony from the excluded witnesses would not have affected the result in its case.

V. IMPEACHMENT

A. *Generally*

The purpose of impeachment evidence is not to adduce proof, but to annul the harmful effects of adverse testimony by reflecting unfavorably on a witness' credibility.[151] Credibility of a witness may be called into question by showing that a witness has made contradictory statements regarding material testimony, or has been convicted of a crime, or has had a bad reputation for truth and veracity, or has some motive, interest, or bias in giving the particular testimony which is under attack.[152] However, such impeachment evidence should not be considered as substantive evidence, and an opposing party is generally entitled to an instruction on this point.[153]

Impeachment is proper at one of two stages during a trial: (1) on cross-examination of a witness and (2) on rebuttal, through another witness or by documentary evidence (technically termed impeachment by contradiction).[154] However, the "collateral fact" limitation may be applicable. Unless the testimony sought to be impeached concerns a relevant and material fact, a witness may not be impeached. For example, if X's relevant testimony is that a traffic light was red when the defendant passed through it, X may not normally be impeached by evidence concerning X's statement of his occupation, that being only collateral testimony.[155] Generally

150. 226 So. 2d 137 (Fla. 3d Dist. 1969).

151. Thomas v. State, 289 So. 2d 419 (Fla. 4th Dist. 1974), *citing* Adams v. State, 34 Fla. 185, 15 So. 905 (1894). *But see* Wallace v. Rashkow, 270 So. 2d 743 (Fla. 3d Dist. 1972).

152. *See* Taylor v. State, 139 Fla. 542, 549, 190 So. 691, 694 (1939).

153. Thomas v. State, 289 So. 2d 419 (Fla. 4th Dist. 1974). The instruction point is discussed in Wallace v. Rashkow, 270 So. 2d 743 (Fla. 3d Dist. 1972). *See also* Walter v. State, 272 So. 2d 180 (Fla. 3d Dist. 1973).

154. MCCORMICK, *supra* note 1, § 33 at 66 and § 47 at 97.

155. Statewright v. State, 278 So. 2d 652 (Fla. 4th Dist. 1973), *quashed on other grounds*,

though, impeachment by showing motive, bias, interest, prior conviction, or poor reputation for truth and veracity is not subject to the collateral fact rule.[156]

Furthermore, an impeachment attempt may be denied if the evidence offered is prejudicial and likely to be misused by the jury. In *Cook v. Eney*,[157] a medical malpractice action, the defendant-appellee claimed he was correctly permitted by the trial court to question the plaintiff concerning the latter's receipt of social security and workmen's compensation benefits—such inquiry being for the purpose of impeaching plaintiff's earlier testimony concerning his motivation and desire to return to work. The District Court of Appeal, Third District, disagreed, holding the impeachment evidence was likely to be unduly prejudicial since the jury might have been led to feel the plaintiff had already been compensated.

B. *Impeaching One's Own Witness*

Section 90.09 of Florida Statutes sets forth the rule concerning impeachment of one's own witness, permitting in certain situations impeachment by inconsistent statements.[158] The statute somewhat relaxes the strict and arbitrary common law rule which had absolutely forbidden impeaching one's own witness. Since it abrogates the common law, the statute has been strictly construed, thus perpetuating much of the injustice which has occurred under the common law rule.[159]

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300 So. 2d 674 (Fla. 1974); Whitley v. State, 265 So. 2d 99 (Fla. 3d Dist. 1972); MCCORMICK, *supra* note 1, § 33 at 66 and § 47 at 98.

156. *See* Alford v. State, 47 Fla. 1, 36 So. 436 (1904).

157. 277 So. 2d 848 (Fla. 3d Dist. 1973).

158. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, *in case the witness prove adverse,* contradict him by other evidence, or prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement. (emphasis added) FLA. STAT. § 90.09 (1973).

159. MCCORMICK, *supra* note 1, § 38 at 75-78, presents a concise criticism of the rule: (1) the party calling the witness does not actually vouch for his trustworthiness. He calls only those witnesses who happened to have observed the particular facts in controversy; (2) if the witness lies so as to benefit the opposing party, the adversary will not attack him, and the calling party is not permitted to do so under the rule; (3) restricting impeachment by prior inconsistent statements, as in the Florida statute, also restricts proper evaluation of a witness' testimony and is a serious obstruction to discovering the truth. *See also* Comment, *Impeaching One's Own Witness,* 49 VA. L. REV. 996 (1963).

Secton 90.09 only applies in those cases in which the witness proves to be *adverse.*[160] This limitation, however, may be circumvented by explaining the inquiry not as an attempt to impeach the witness, but as merely a means to refresh his memory or "to awaken his conscience" for the purpose of drawing out an explanation of his apparent inconsistency.[161]

In civil actions, the common law prohibition of impeaching one's own witness has been abolished when the person called is an adverse *party* witness. Pursuant to Rule 1.450(a) of the Florida Rules of Civil Procedure, an adverse party witness may be contradicted and impeached as if he had been a witness called by the adverse party.

C. *Impeachment By Inconsistent Statements*

1. FOUNDATION

Prior to impeachment of a witness by his inconsistent statements, it is necessary to lay a proper predicate for such impeachment. A proper foundation is laid on cross-examination by asking the witness about the circumstances of the inconsistent statement so as to designate the particular occasion (time, place, persons involved, etc.). Further, the witness must be asked whether or not he made such a statement.[162]

When a witness, during the setting of the foundation, states that he does not remember making any such prior inconsistent statement, a proper predicate cannot be laid and impeachment is not permitted.[163] However, this rule does not apply in a criminal case where the accused's statement is in the nature of an admission or confession which is admissible as direct evidence of guilt.[164]

Seaboard Coast Line Railroad v. Zuflet,[165] involved a collision

160. See Thomas v. State, 289 So. 2d 419 (Fla. 4th Dist. 1974); Jones v. State, 273 So. 2d 8 (Fla. 3d Dist. 1973); Maness v. State, 262 So. 2d 716 (Fla. 3d Dist. 1972); Gibbs v. State, 193 So. 2d 460 (Fla. 2d Dist. 1967).

161. *See* MCCORMICK, *supra* note 1, § 38 at 77.

162. Jones v. State, 281 So. 2d 398 (Fla. 2d Dist. 1973); Bright v. State, 250 So. 2d 10 (Fla. 3d Dist. 1971); FLA. STAT. § 90.10 (1973).

163. Covington v. State, 302 So. 2d 483 (Fla. 2d Dist. 1974); Walter v. State, 272 So. 2d 180 (Fla. 3d Dist. 1973). *Compare* Sutton v. State, 239 So. 2d 644 (Fla. 1st Dist. 1970), *with* Rankin v. State, 143 So.2d 193 (Fla. 1962). *See* MCCORMICK, *supra* note 1, § 37 at 72, for the proposition that the impeaching party should be permitted to prove the *making* of the prior inconsistent statement.

164. Covington v. State 302 So. 2d 483 (Fla. 2d Dist. 1974).

165. 280 So. 2d 723 (Fla. 1st Dist. 1973).

between an automobile and a train. The defendant, trying to prove that the plaintiff driver was intoxicated, was not permitted to impeach a witness' testimony that a whiskey bottle found in the auto had not been opened. Failure to lay a proper foundation prevented the defendant from introducing a photograph of a bottle of whiskey found in the wrecked automobile with its seal broken and part of the contents missing.

A further trap for the unwary materializes when impeachment by animus (motive, bias, etc.) is attempted and the impeachment testimony goes beyond mere animus and shows contradictory statements. As a general rule, no foundation need be set for impeachment by rebuttal testimony showing animus. However, where the intended animus testimony goes further and exposes a prior inconsistent statement, a foundation must be laid on cross-examination of the witness being contradicted.[166]

2. OTHERWISE INADMISSIBLE EVIDENCE

Evidence rendered inadmissible for failure to advise a defendant of his *Miranda* rights, or by improper search and seizure, is not barred for all purposes. In *Oregon v. Haas,*[167] the United States Supreme Court held that even though a defendant's *Miranda* rights were violated, thus rendering his inculpatory statements inadmissible in the prosecution's case in chief, such statements were admissible for impeachment purposes when the defendant testified contrary to his prior inculpatory statements.[168] A similar rule has been applied in Florida in situations where the evidence is inadmissible because obtained pursuant to an illegal search.[169]

Furthermore, the logic of the rule permitting impeachment use of otherwise inadmissible evidence has been recognized, although in dicta, in civil cases. *Fireman's Fund Insurance Co. v. Riley*[170] was an action for libel against an insurance adjuster arising out of a previous automobile accident case. The plaintiff in the prior suit, also the plaintiff in the libel action, had told the adjuster, in privileged communication, that he, the plaintiff, was speeding at the

166. Seaboard Coast Line R.R. v. Hunt, 299 So. 2d 84 (Fla. 1st Dist. 1974).

167. 420 U.S. 714 (1975).

168. *See* State v. Retherford, 270 So. 2d 363 (Fla. 1972); Walls v. State, 279 So. 2d 95 (Fla. 2d Dist. 1973).

169. Dornau v. State, 306 So. 2d 167 (Fla. 2d Dist. 1974).

170. 294 So. 2d 59 (Fla. 3d Dist. 1974).

time of the accident. At trial, the plaintiff denied he was speeding and the adjuster was called to impeach the plaintiff's statement. The privileged inconsistent statement was allowed over objection. The plaintiff then obtained a judgment against the adjuster for libel. On appeal, the court stated that a party cannot avoid being impeached through use of a prior inconsistent statement on the ground that the statement was privileged and therefore inadmissible as direct evidence.

3. POLICE REPORTS

In a conflict certiorari case,[171] the Supreme Court of Florida has held that police reports may be used to impeach a testifying officer regarding a critical, material, and vital point which is reasonably exculpatory of the defendant, provided an in camera review is first conducted to delete extraneous matter.

The court also indicated that negative use of police reports should not usually be permitted. An example of negative use would be: "Why did you not include in your report the fact, as you testified here today, that the defendant was dressed in dark clothing?" However, a positive, proper use might be permitted, such as: "Why did you indicate in your report that the defendant was not injured and yet testify here today that the defendant was shot and bleeding?"

The fact that the reports are often short and incomplete and made under pressures of investigation may presumably be raised on redirect. It remains to be seen what effect the court's decision will have upon the quality of police reports since omissions therein are encouraged as a result.

4. STATEMENTS IN PLEADINGS

Generally, pleadings in the case at trial are not admissible to prove or disprove a fact in issue since they are only a tentative outline of the pleader's case subject to change and prior to full development of the facts.[172] However, if relevant, pleadings filed in a *prior* lawsuit are admissible in a later suit for impeachment purposes.[173] This is true even if the pleadings are unverified or unsigned

171. State v. Johnson, 284 So. 2d 198 (Fla. 1973). *See also* Jones v. State, 281 So. 2d 398 (Fla. 2d Dist. 1973).

172. Harrold v. Schluep, 264 So. 2d 431 (Fla. 4th Dist. 1972), *citing* Hines v. Trager Constr. Co., 188 So. 2d 826, 831 (Fla. 1st Dist. 1966).

173. *Id. citing* Davidson v. Eddings, 262 So. 2d 232 (Fla. 1st Dist. 1972).

by the witness against whom impeachment is directed provided that the party seeking admission establishes that the witness actually suplied the information contained in the pleadings.[174]

5. PRIOR CONSISTENT STATEMENTS

The usual rule is that a witness' testimony may not be bolstered or corroborated by his own prior consistent statement. However, it is permissible to use prior consistent statements to "rehabilitate" an impeached witness when the consistent statement would weaken or negate the impeachment by inconsistent statement.[175] One such situation occurs when the original impeachment is by a showing of bias, corruption, or other motive to falsify, and the corroborating consistent statement is shown to have been made at a time prior to the existence of the alleged bias, etc. In such cases, the prior consistent statement effectively destroys the force of the impeaching evidence. Another exception is found when the original impeachment is by prior inconsistent statement (self-contradiction), but the witness denies ever having made the inconsistent statement. In such a case, a prior *consistent* statement is admissible as corroborating the witness' denial of having uttered the inconsistent statement (not as corroboration of his trial testimony).[176]

D. *Motive, Interest, Bias, or Prejudice*

1. GENERALLY

Witnesses may be questioned, without need for laying a foundation, regarding their motives, interests, or biases which may reflect unfavorably upon their credibility. Such matters are not collateral or immaterial and thus not subject to the rule of collateral limitation.[177] It is therefore proper to inquire on cross-examination as to whether the witness has been paid by his employer to testify against the defendant, or if his employer has any interest in the defendant's prosecution.[178] A witness who is a victim of a crime may be ques-

174. Davidson v. Eddings, 262 So. 2d 232 (Fla. 1st Dist. 1972). *Contra*, Phillips v. Dow Chem. Co., 247 Miss. 193, 151 So. 2d 199 (1963). *See also* Kesmarki v. Kisling, 400 F.2d 97, 102 (6th Cir. 1968).

175. Kellam v. Thomas, 287 So. 2d 733 (Fla. 4th Dist. 1974).

176. *Id.*

177. *See* Johnson v. State, 178 So. 2d 724 (Fla. 2d Dist. 1965); see text accompanying note 152 for an explanation of the rule.

178. State v. Johnson, 285 So. 2d 53 (Fla. 2d Dist. 1973).

tioned also as to whether he has a civil suit pending against the defendant for the purpose of showing interest in the outcome of the criminal trial.[179] Recently, the District Court of Appeal, First District, rejected a bias impeachment attempt on grounds that the facts indicating bias were too remote in time, and perhaps place, to form a basis for impeachment.[180] Defense counsel attempted to show that the State's witness had been arrested some 2 years earlier and that avoidance of charges motivated his decision to testify as an undercover agent. The prior criminal incident had occurred in another state. Though the impeachment attempt was forbidden, the court made it clear that if the witness were recently or presently under actual or threatened prosecution of investigation, then defense counsel would have had an absolute right to expose such circumstances.

2. MARY CARTER AGREEMENTS

In the notable decision of *Ward v. Ochoa,*[181] the Supreme Court of Florida held that "Mary Carter Agreements"[182] are admissible evidence since they may reflect upon the credibility of testimony of a party to the agreement. Such agreements can be admitted upon request by any defendant who stands to lose as a result of the agreement.

An interesting procedural conflict however has arisen concerning "Mary Carter Agreements." During trial, in *General Portland Land Development Co. v. Stevens,*[183] although the court required the *production* of a suspected "Mary Carter Agreement," it made clear as part of that order that upon production the agreement would not be permitted in evidence and disclosed to the jury. However, it would be marked for identification and made part of the court record. The plaintiff appealed, claiming the refusal to enter the agreement into evidence and present it to the jury was error. The defendant, on appeal, contended no error had occurred since the

179. Bessman v. State, 259 So. 2d 776 (Fla. 3d Dist. 1972).

180. Morrell v. State, 297 So. 2d 579 (Fla. 1st Dist. 1974).

181. 284 So. 2d 385 (Fla. 1973), *noted in* 28 U. MIAMI L. REV. 988 (1974).

182. A "Mary Carter" agreement is one between a plaintiff and one of the multiple defendants to the effect that if the agreeing co-owner will conduct its defense so as to increase the non-agreeing co-defendant's liability, the liability of the agreeing co-owner will be proportionately reduced.

183. 291 So. 2d 250 (Fla. 4th Dist. 1974).

plaintiff never made a formal proffer of the agreement. The District Court of Appeal, Fourth District, held that, given the trial court's initial statement that upon production it would not accept the agreement into evidence, such a proffer would have been clearly unavailing and therefore a formal proffer was unnecessary to show error.[184]

Less than 5 months later, a strikingly similar case again came before the Fourth District in *Parish v. Armstrong.*[185] Again, during trial the plaintiff became suspicious that a "Mary Carter Agreement" existed and requested its production *and* admission into evidence. At the time of that trial, *Ward v. Ochoa*[186] had not yet been decided. The trial court refused plaintiff's request to present the agreement to the jury. This refusal was cited as error by the plaintiff on appeal. The defendant claimed that since the plaintiff never made a formal proffer or otherwise managed to get the agreement into the court record, the admissibility of such an agreement could not be determined on appeal. The above related facts come from the dissent. The majority affirmed without opinion.

It is difficult to reconcile *Portland* and *Parish.* The only apparent distinction is that in *Portland* the agreement was made part of the court record. But as the dissent in *Parish* points out during argument over admissibility of the agreement, defendant's counsel admitted it existed and such admission was sufficient to demonstrate the gist of the agreement and its admissibility. One can only speculate as to why the majority acted in such a manner.

E. *Character*

When a witness takes the stand, he thereby places his credibility in issue.[187] Thus, it is proper to attempt to impeach credibility. However, when the character of the witness forms the basis of the impeachment, and the witness (usually a criminal defendant) has not placed his general character in issue, the only proper object of

184. It appears from the opinion, however, that the plaintiff failed even to formally object to the trial court's *sua sponte* statement that while production would be compelled, the agreement would not be permitted into evidence. In fact, it appears that at the time of the trial court's statement, the plaintiff acquiesced.

185. 302 So. 2d 767 (Fla. 4th Dist. 1974).

186. 284 So. 2d 385 (Fla. 1973).

187. *See* Baxter v. State, 294 So. 2d 392 (Fla. 4th Dist. 1974), *cert. denied,* 303 So. 2d 26 (Fla. 1974).

the inquiry is his general reputation in the community for truth and veracity.[188]

Though the distinction may be without measurable difference,[189] for purposes of admissibility it is important to distinguish between an attack based upon general reputation for truth and veracity and an attack based upon general bad character. While evidence of a witness' poor reputation for truth and veracity is generally admissible to impugn credibility once a proper foundation is set,[190] evidence of one's bad character is admissible only after the witness has already introduced evidence of his good character.[191]

VI. OTHER CRIMES

A. *Generally*

There are three purposes for which evidence of prior crimes or convictions may be admitted in Florida courts: (1) to impeach the credibility of a witness;[192] (2) to show, in criminal cases, an offense relevant to a material issue of fact;[193] and (3) to test a character witness' knowledge of the defendant.[194]

B. *Impeachment of Witness' Credibility*

1. GENERALLY

The general rule concerning use of prior criminal convictions for impeachment purposes is supplied by section 90.08 of the Florida Statutes.[195] Under the statute, only the fact of conviction is admissi-

188. *Id.* The trend is to define "community" broadly to mean any place in which the person to be impeached is well known. *See* Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937).

189. *See* Baxter v. State, 294 So. 2d 392, 394 (Fla. 4th Dist. 1974) (Waldin, J., dissenting).

190. Sherwood v. State, 271 So.2d 21 (Fla. 3d Dist. 1972). The following foundation is generally considered sufficient:

Q. Do you know John Jones' present general reputation for truth and veracity in the community in which he lives (or works)?
A. Yes.
Q. What is his reputation?
A. Bad.

If the response to the first question is negative, the witness is not qualified to give reputation testimony.

191. *See* Andrews v. State, 172 So. 2d 505 (Fla. 1st Dist. 1965).

192. *See* Section VI, B *infra*.

193. *See* Section VI, C *infra*.

194. *See* Section VI, D *infra*.

195. FLA. STAT. § 90.08 (1973) provides in pertinent part:

ble, and the nature of the specific crime may not be indicated. Furthermore, there must have been an express adjudication of guilt by the court,[196] and mere evidence of a criminal offense without a conviction does not fall within section 90.08.[197]

Although the conviction may be for either a felony or misdemeanor under state law,[198] the District Court of Appeal, First District, has held that a conviction by a summary court-martial is not a conviction within the meaning of section 90.08.[199]

2. PROCEDURE

Once the conviction and crime are held to be admissible, there are specific limits to the questioning which may take place.[200] The witness, including a defendant who elects to testify, may be asked whether he has ever been convicted of a crime, and if so, how many times. If the witness admits having been convicted, and truthfully answers as to the number of convictions, then the inquiry must cease, and the particular crime cannot be indicated unless it was perjury.[201] If, on the other hand, the witness denies any previous convictions, the opposing party may produce the record of such convictions.[202] The witness may at this time, or on redirect examination, explain the nature of the crime or cite other relevant facts in an attempt to rebut any adverse implications.[203]

> Evidence of [conviction of *any crime*], including the fact that the prior conviction was for the crime of perjury, may be given to affect the credibility of the said witness, and such conviction may be proved by questioning the proposed witness, or, if he deny it, by producing a record of his convictions. . . .

As for impeaching a witness in Florida, See Section V *supra*.

196. Weathers v. State, 56 So. 2d 536 (Fla. 1952).

197. Braswell v. State, 306 So. 2d 609 (Fla. 1st Dist. 1975); Statewrights v. State, 278 So. 2d 652 (Fla. 4th Dist. 1973), *quashed*, 300 So. 2d 674 (Fla. 1974); Note, 15 U. FLA. L. REV. 220 (1962); *see* Note, 37 U. CIN. L. REV. 168 (1968).

198. *See* Hendrick v. Strazzulla, 135 So. 2d 1 (Fla. 1961); Roe v. State, 96 Fla. 723, 119 So. 118 (1928). Evidence of prior juvenile court adjudications are inadmissible since they are not "convictions." FLA. STAT. § 39.10(4) (1973).

199. Braswell v. State, 306 So. 2d 609 (Fla. 1st Dist. 1975). The court was concerned with a 1948 summary court-martial conviction. The court expressly left open the question of whether a *general* court-martial "conviction" would come within FLA. STAT. § 90.08 (1973).

200. Jones v. State, 305 So. 2d 827 (Fla. 4th Dist. 1975); Whitehead v. State, 279 So. 2d 99 (Fla. 2d Dist. 1983).

201. FLA. STAT. § 90.08 (1973).

202. Lockwood v. State, 107 So. 2d 770 (Fla. 2d Dist. 1958). Wise counsel, upon examining the record, should stipulate to the conviction in order to prevent such exposure.

203. *See* Noeling v. State, 40 So. 2d 120 (Fla. 1949).

In *State v. Young*,[204] the defendant witness acknowledged that he had been convicted but stated that this had happened only once. In this circumstance, the State was found not to be acting improperly by asking further questions as to whether the witness had been convicted of other specifically mentioned crimes since it did so on the premise of refreshing the witness' memory. The line of questioning used was clearly prejudicial under both section 90.08 and the case law interpreting it. However, the District Court of Appeal, First District, did not consider either that contrary to the statute, the specific crimes were named, or that such information was highly prejudicial even though the issues were before the court. Instead, the court reasoned that a witness may be questioned as to the number of his previous convictions, and that the state may properly refresh his memory so that the witness may correct his testimony or deny other convictions. The court then relied on the protective mantle of the harmless error rule. When compared to section 90.08, the *Young* case appears to have been incorrectly reasoned. Once the defendant replied that he had been convicted on only one previous occasion, the proper procedure for the State to follow would have been to submit an admissible record of convictions—not to orally suggest that other specific convictions had occurred.

A similarly liberal interpretation of section 90.08 was offered by the Supreme Court of Florida in *Warren v. State*.[205] At trial, on cross-examination of the defendant regarding prior convictions, repeated suggestions were made by the prosecution, in the form of questions, that the defendant had been convicted of a felony despite the defendant's denials. When defense counsel indicated the prosecution was relying on an FBI "rap sheet," and not an admissible record of conviction, the trial court instructed the jury to disregard the questioning concerning defendant's prior conviction. Nevertheless, the jury convicted the defendant and he was sentenced to death. On direct appeal, the Supreme Court of Florida held that the prompt instruction to the jury, and the fact that the last impression came from the defendant and indicated no conviction, rendered any prejudice harmless error.

Stricter adherence to section 90.08 is illustrated by the recent case of *Jones v. State*.[206] In *Jones*, on direct examination the defen-

204. 283 So.2d 58 (Fla. 1st Dist. 1973), *cert. denied*, 290 So. 2d 61 (Fla. 1974).
205. 270 So. 2d 8 (Fla. 1972).
206. 305 So. 2d 827 (Fla. 4th Dist. 1975).

dant testified that he had three prior convictions, but later revised his testimony to indicate only one prior conviction. On cross-examination, the defendant was questioned regarding this discrepancy and explained that he had been convicted of escape three or four times. The prosecutor then asked if the defendant had ever been convicted of armed robbery. Although the defendant's motion for mistrial was denied, the court instructed the jury to disregard the questions concerning prior convictions. On appeal, the District Court of Appeal, Fourth District, reversed and remanded for a new trial on the grounds that the inquiry was clearly improper and the prejudicial impact could not have been removed by the trial court's instruction to the jury.

The District Court of Appeal, First District, has significantly altered the procedure under section 90.08 by imposing a new limitation on impeachment by way of prior conviction. In *Braswell v. State*,[207] the court decided not only that a military summary court-martial is not a conviction within the meaning of section 90.08, but

> further that in order for a conviction to be admissible under that statute the crime must not have been so remote in time as to have no appreciable bearing on the witness' present credibility where there is nothing in the record to show that the witness has not reformed.[208]

The issue of what length of time constitutes remoteness was left within the sound discretion of the trial judge to be determined in light of the circumstances surrounding the particular conviction sought to be shown.

C. *Relevance to Fact in Issue*

1. GENERALLY

As a general rule, evidence of other crimes is inadmissible to prove either bad character or propensity of a party for criminal conduct. However, such evidence is admissible if offered: (1) to prove identity; (2) to show a continuing scheme or plan of which the present crime is a part; (3) to prove intent; (4) to establish a motive; (5) to disprove entrapment; or (6) to show the context of the crime

207. 306 So. 2d 609 (Fla. 1st Dist. 1975).
208. *Id.* at 613.

charged.[209] In 1959 in the landmark case of *Williams v. State*[210] the Supreme Court of Florida announced its departure from the general exclusionary rule, with its many exceptions, in favor of a general rule of admissibility based on relevancy. If such evidence is relevant for any purpose save that of showing bad character or propensity, it should be admitted.

A liberal reading of *Williams* suggests a significant broadening in the use of evidence of other crimes and a policy favoring admissibility of highly prejudicial evidence upon a showing of relevance.[211] However, in practice the difference has been one of labels only; the courts have merely utilized the previous "exceptions" as the measure of relevancy.[212]

Recently, the Supreme Court of Florida indicated a more restrictive attitude toward application of the *Williams* rule. In *McGough v. State*[213] the court held inadmissible evidence of other crimes which are *remote in time*. Though relevancy is the test under the *Williams* rule, the time factor is a part of the test for relevancy. In addition, the court held inadmissible evidence concerning criminal events which had occurred 4 years prior to the charged offense. The court left further refinement of the outer limits of "remoteness" for subsequent case-by-case analysis.

Another limitation on the *Williams* rule is that evidence of other crimes, even though relevant, may not be used to excess.[214] One court had held that even though almost conclusive evidence of defendant's guilt was shown, an overzealous prosecutor committed prejudicial error in parading before the jury a full review of the defendant's criminal conduct, thus transforming a criminal trial into a mere sideshow.[215]

Under present procedures, once relevancy is shown, evidence of a collateral crime is admissible upon clear and convincing proof of

209. MCCORMICK, *supra* note 1, § 190.

210. 110 So. 2d 654 (Fla. 1959). *See* Green v. State, 190 So. 2d 42 (Fla. 2d Dist. 1966) for an excellent interpretation of *Williams*.

211. *See* Franklin v. State, 229 So. 2d 892, 893-94 (Fla. 3d Dist. 1969).

212. *See* Alford v. State, 307 So. 2d 433 (Fla. 1975); Ashley v. State, 265 So. 2d 685 (Fla. 1972); Green v. State, 190 So. 2d 42 (Fla. 2d Dist. 1966).

213. 302 So. 2d 751 (Fla. 1974); *cf.* State v. Statewright, 300 So. 2d 674 (Fla. 1974).

214. *See* State v. Davis, 290 So. 2d 30 (Fla. 1974); Ashley v. State, 265 So. 2d 685 (Fla. 1972); Denson v. State, 264 So. 2d 442 (Fla. 1st Dist. 1972).

215. Denson v. State, 264 So. 2d 442 (Fla. 1st Dist. 1972). Chief Judge Spector, in his dissenting opinion contended that there is no merit in reversing where there is conclusive evidence of guilt as to the crime charged.

a connection between the defendant and the collateral occurrences.[216] That the defendant committed the collateral offense need not be proven beyond reasonable doubt, but mere suspicion of such fact is inadequate; the other crime's connection with the accused and with the offense being prosecuted must be established by clear and convincing proof or by the making of a prima facie case.[217] Once this burden is met it is of little consequence whether the other crime was committed prior or subsequent to the one being prosecuted[218] or whether the defendant was, in fact, merely accused but never arrested.[219]

Relevant evidence of other crimes does not become inadmissible solely because the defendant was acquitted of the other crime.[220] Though this is presently the majority view, it has recently been subjected to close scrutiny. Thus, in *Lawson v. State,*[221] the District Court of Appeal, Third District, indicated its concern "with the prosecution's sometimes stubborn determination to introduce evidence of collateral crimes where relevance at best is borderline."[222] As an aid in stemming reliance on such testimony, the court decided that there must be an even stronger showing of relevance where the prosecution intends to use evidence of another crime for which the defendant was acquitted.

The United States Court of Appeals for the Fifth Circuit introduced a constitutional dimension to the prior acquittal problem.[223] Based on the principles of collateral estoppel and double jeopardy, as espoused in *Ashe v. Swenson,*[224] the Fifth Circuit concluded that the prosecution is constitutionally precluded from introducing, at a subsequent trial for a different crime, evidence of other crimes of

216. Rehms v. State, 279 So. 2d 839 (Fla. 1973). *See also* Whitehead v. State, 279 So. 2d 99 (Fla. 2d Dist. 1973).

217. Parnell v. State, 218 So. 2d 535 (Fla. 3d Dist. 1969).

218. Webber v. State, 305 So.2d 235 (Fla. 2d Dist. 1974); Ashley v. State, 265 So.2d 685 (Fla. 1972).

219. State v. Statewright, 300 So. 2d 674 (Fla. 1974); Banks v. State, 298 So. 2d 543 (Fla. 1st Dist. 1974); Rodriquez v. State, 281 So. 2d 921 (Fla. 2d Dist. 1973).

220. Lawson v. State, 304 So. 2d 522 (Fla. 3d Dist. 1974); Blackburn v. State, 208 So. 2d 625 (Fla. 3d Dist. 1968).

221. 304 So.2d 522 (Fla. 3d Dist. 1974).

222. *Id.* at 523. Under present law, defendant may introduce evidence of his acquittal, but must do so by submitting the court record. Chippas v. State, 194 So. 2d 593 (Fla. 1967).

223. Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972).

224. 397 U.S. 436 (1970).

which the defendant had been acquitted.[225] At the present time, the Florida courts appear to be resisting this decision.[226]

2. IDENTITY

Evidence of other crimes is admissible to cast light upon the character of the act under investigation by showing the identify of the accused.[227] However, the identity of the accused must be a material fact at issue.[228] Furthermore, it should be required that such evidence be necessary; that is, there is not ample proof of identity without evidence of other crimes.[229]

Identify is often shown through proof of other "signature" crimes or a modus operandi which earmarks the handiwork of the defendant. In such situations the other crime must be both similar in class and distinctiveness to the one being prosecuted.[230] Mere repeated commission of crimes of the same class, such as repeated robberies or thefts, is insufficient.[231]

In *Davis v. State,*[232] two witnesses testified that the defendant had committed another crime of the same class as the one charged—robbery. The testimony revealed that in commission of a food store robbery the defendant was disguised in a pair of women's bikini panties worn as a mask, with a blue sock on his right hand and a kitchen towel over his left hand. However, no such modus operandi was involved in the crime for which the defendant was on trial. Admission of this unrelated "other crime" evidence constituted reversible error.

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225. *See also* Johnson v. State, 285 So. 2d 436 (Fla. 1st Dist. 1973) (Rawls, C.J., dissenting). For further discussion, see *Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes for which the Defendant Has Been Acquitted,* 2 FLA. ST. U.L. REV. 511 (1974).

226. Blackburn v. State, 286 So. 2d 30 (Fla. 3d Dist. 1973); Davis v. State, 277 So. 2d 311 (Fla. 4th Dist. 1973), *aff'd,* 290 So. 2d 30 (Fla. 1974); State v. Fisher, 264 So. 2d 857 (Fla. 3d Dist. 1972); Note, 2 FLA. ST. U.L. REV. 511, 531-32 (1974). *See also* United States v. Addington, 471 F.2d 560, 567 n.5 (10th Cir. 1973).

227. Ashley v. State, 265 So. 2d 685 (Fla. 1972).

228. *See, e.g.,* Alston v. State, 297 So. 2d 344 (Fla. 3d Dist. 1974).

229. *See, e.g.,* Drayton v. State, 292 So. 2d 395 (Fla. 3d Dist. 1974). *But see* Gordan v. State, 288 So. 2d 295 (Fla. 4th Dist. 1974).

230. *E.g.,* Beasley v. State, 305 So. 2d 285 (Fla. 3d Dist. 1974); Drayton v. State, 292 So. 2d 395 (Fla. 3d Dist. 1974).

231. Davis v. State, 276 So. 2d 846 (Fla. 2d Dist. 1973), *aff'd,* 290 So. 2d 30 (Fla. 1974). *See also* Braer v. State, 302 So. 2d 485 (Fla. 2d Dist. 1974); Golphin v. State, 293 So. 2d 755 (Fla. 2d Dist. 1974); Drayton v. State, 292 So. 395 (Fla. 3d Dist. 1974); Dinkens v. State, 291 So. 2d 122 (Fla. 2d Dist. 1974).

232. 276 So. 2d 846 (Fla. 2d Dist. 1973), *aff'd,* 290 So. 2d 30 (Fla. 1974).

In *Beasley v. State,*[233] the defendant was convicted in the lower court of breaking and entering with intent to commit grand larceny and of committing grand larceny. During the trial, the State presented evidence of two collateral break-ins. In reversing the lower court, the District Court of Appeal, Third District, held that the State had produced evidence tending to show a " '[m]ere similarity of offenses without regard to the singular manner of this perpetration.' "[234]

A more liberal application of the *Williams* rule is the decision in *Ashley v. State.*[235] Defendant was charged with five murders—one of a hitchhiker and the other four occurring in a restaurant approximately 1 hour after the murder of the hitchhiker. The restaurant murders were consolidated in one trial, and the hitchhiker case was tried at a later date. The defendant's accomplice gave eyewitness testimony at both trials. Further evidence of the defendant's oral confession was introduced. Convictions resulted at both trials, and the defendant received the death penalty.

In his appeal to the Supreme Court of Florida the defendant contended that the trial court committed error in the second trial (for the murder of the hitchhiker) by permitting evidence of the commission of the restraurant murders for which he had been convicted earlier. The pertinent evidence concerned the identical nature of the bullets removed from the five victims, and the fact that all had been fired from the same gun.

After recital of the *Williams* rule the court concluded that the evidence was proper, bearing upon the issues of motive, intent, identity, and modus operandi.[236] It would appear, however, that these elements of the crime were not at issue. Since the State had eye-witness testimony which identified the defendant as the culprit as well as the defendant's confession, there was ample proof of the crime without resort to evidence of the companion crime.

3. MOTIVE

Evidence of collateral crimes is admissible to show motive for

233. 305 So. 2d 285 (Fla. 3d Dist. 1974).

234. *Id.* at 286, *quoting* Duncan v. State, 291 So. 2d 241 (Fla. 2d Dist. 1974).

235. 265 So. 2d 685 (Fla. 1972).

236. The court also relied on the fact that the defendant's own attorney had brought up the defendant's prior conviction, in his voir dire examination.

the crime charged. In *State v. Statewright,*[237] the State contended that the motive for murder was the defendant's fear that his victim would publicly reveal the defendant's homosexuality. During its trial presentation the State attempted to elicit testimony concerning the defendant's sexual reputation. Although such a probe was improper,[238] the defense failed to object. The defendant, testifying on his own behalf, and again on cross-examination, denied being a homosexual, and denied having performed an unnatural sex act 5 years previously. He also alleged self-defense in the killing. In rebuttal, the State called a police officer who testified that he had arrested the defendant in 1961 on a charge of performing an unnatural sex act. The defendant was convicted.

The District Court of Appeal, Fourth District, reversed on the ground, *inter alia,* that the prior sexual offense was a collateral and irrelevant matter and therefore the state was bound by the answers given by the accused. On certiorari, however, the Supreme Court of Florida held that the evidence of the prior arrest and crime was relevant to show motive and premediation for the murder, and was admissible into evidence.

In *Alford v. State,*[239] the defendant was convicted of the rape and murder of a 13 year-old female. In his appeal the defendant argued that the trial court erred in admitting evidence that he and another man had attempted a homosexual act immediately prior to the commission of the crime charged. The prosecution claimed the evidence was relevant to show the defendant's state of mind and motive immediately prior to the rape and murder. Relying in part upon *Statewright,* the court agreed that sexual frustration arising from the earlier unsuccessful encounter was relevant to show motive for the subsequent rape and murder.

The District Court of Appeal, Third District, has held that where there is otherwise ample evidence of a defendant's motive, detailed testimony of a collateral offense which tends to establish motive should not be permitted.[240]

237. 300 So. 2d 674 (Fla. 1974), *quashing* 278 So. 2d 652 (Fla. 4th Dist. 1973). Presumably, the decision in *Statewright* would fall under the remoteness rule later announced in McGough v. State, 302 So. 2d 751 (Fla. 1974).

238. The state cannot attack an accused's character unless the accused first puts it in issue. However, no reversible error occurs unless the error is preserved by an objection. State v. Jones, 204 So. 2d 515 (Fla. 1967).

239. 307 So. 2d 433 (Fla. 1975).

240. Lawson v. State, 304 So. 2d 522 (Fla. 3d Dist. 1974).

4. RES GESTAE

If the other crime is a part of the same transaction, or is necessarily involved in an explanation of the crime charged, or is required to complete the story of the crime charged by proving the immediate context, it is generally held to be relevant and admissible.[241] Thus, evidence indicating that a defendant committed another robbery immediately prior to, and as a part of, the same series of incidents comprising the robbery charged is admissible.[242]

However, the other crime must have some connection or material bearing on the crime charged. In *Mason v. State,*[243] the defendant was convicted of assault with intent to commit rape. At trial the prosecutor introduced into evidence a wallet and newspaper clipping found at the scene of the crime. The newspaper clipping stated that defendant had been acquitted of a similar assault in another state. Reversing and remanding for a new trial, the court declared the clipping was not part of the *res gestae*, and had no relevant bearing on the crime charged, other than to show bad character. It appears that in order to be part of the *res gestae* the prior crime must be committed in close temporal proximity to the crime being prosecuted.[244]

VII. DEAD MAN'S STATUTE

The dead man's statute[245] bars the testimony of an interested person regarding transactions and communications between that person and another, who at the time of trial is deceased. The rationale of the rule is that in controversies over contracts or other transactions where one party to the transaction has died and others survive, fraud and hardship would result if the living persons were permitted to testify in their own behalf concerning the transaction.

The threshold question for the application of the statute to disqualify a person from testifying is whether the witness is an interested person. In *Clark v. Grimsley*,[246] two surviving daughters of the deceased challenged a will on the ground of undue influence. The

241. Gordan v. State, 288 So. 2d 295 (Fla. 4th Dist. 1974); Horner v. State 149 So. 2d 863 (Fla. 3d Dist. 1963). *See* section XII, D for discussion of hearsay.

242. Kinchen v. State, 297 So. 2d 341 (Fla. 3d Dist. 1974).

243. 286 So. 2d 17 (Fla. 2d Dist. 1973).

244. *See* Gordan v. State, 288 So. 2d 295 (Fla. 4th Dist. 1974).

245. FLA. STAT. § 90.05 (1973).

246. 270 So. 2d 53 (Fla. 1st Dist. 1972).

will devised the testatrix' entire estate to a third daughter. The witness, a sister-in-law of one of the daughters contesting the will, was allowed to authenticate certain letters as being in the testatrix' handwriting. The court held that the witness was in no way an interested person under the statute since she as an individual did not stand to gain or lose by the *direct* legal operation and effect of the judgment.

Application of the statute is restricted by its own terms in cases where the decedent's testimony is offered into evidence, for example, by prior deposition. In such a case a surviving party can give testimony which would otherwise be inadmissible under the statute.[247]

Note, however, that a party can lose the protection of the statute by waiver. In *Robinson v. Miller,*[248] the issue arose whether the defendants had paid a certain sum to the plaintiff's deceased husband. On direct examination, one of the defendants testified that he had paid the money to the decedent. Plaintiff's counsel did not object, but rather cross-examined the defendant on this point. When the defendant reiterated his statement concerning payment on redirect, however, plaintiff's counsel objected on grounds of violation of the dead man's statute. The trial court found no waiver and sustained the objection. But on appeal, the District Court of Appeal, Second District, held that the initial failure to object and subsequent cross-examination constituted a waiver of the protections of the dead man rule. The court further held that the waiver of the statute by the plaintiff should apply equally to each of the defendants involved, and was applicable to subsequent proceedings upon remand of the case.

Since the statute's protection can be waived, a pretrial order excluding testimony relating to certain subjects by the defendant and all other persons interested in the case has been held erroneous as premature.[249] However, a party's waiver of the dead man's statute concerning a particular transaction does not constitute a waiver concerning a permissive counterclaim where a separate transaction is at issue, although the same decedent is involved.[250] Thus, where

247. Cohen v. Glickman, 300 So. 2d 318 (Fla. 3d Dist. 1974). Note that FLA. R. CIV. P. 1.330 (a)(3) allows the use of a witness' deposition for any purpose if the court finds that the witness is deceased.

248. 296 So. 2d 58 (Fla. 2d Dist. 1974).

249. Wallace v. Gilbert, 250 So. 2d 14 (Fla. 2d Dist. 1971).

250. Grayson v. Fishlove, 266 So. 2d 38 (Fla. 3d Dist. 1972).

D's executor sues A for payment of a debt to D, and the executor waives the dead man rule, the statute's protection still exists for the executor if A sues D's estate based on a separate debt owed by D to A.

VIII. JUDICIAL NOTICE

A. *Generally*

The doctrine of judicial notice is one of great potential usefulness, but courts have been cautious in its application.[251] The effect of judicial notice is to permit courts to take cognizance of certain facts without requiring formal proof.

Generally, the types of facts judicially noticed fall into one of two categories: (1) matters within the common knowledge of reasonably informed people;[252] and (2) matters of official record.[253] There has been some recognition of a trend toward the establishment of a third category, falling between the other two and comprised of those matters which are "verifiably certain by reference to competent, authoritative sources."[254]

B. *Matters of Common Knowledge*

During the survey period, courts have taken judicial notice of the widespread use of television antennae,[255] the "summary" nature of summary court-martial proceedings during and immediately following World War II,[256] the fact that a "submachine"gun may be hand held as distinguished from a machine gun on a mount resting on the ground,[257] the respective characteristics and properties of screens and glass jalousies,[258] the inflationary trends of recent

251. *See* MCCORMICK, *supra* note 1, § 328.

252. *See* Makos v. Prince, 64 So. 2d 670 (Fla. 1953); MCCORMICK, *supra* note 1, § 329.

253. Makos v. Prince, 64 So. 2d 670 (Fla. 1953). Florida has adopted the Uniform Notice of Foreign Law Act, FLA. STAT. § 92.031 (1973).

254. Freimuth v. State, 272 So. 2d 473, 477 (Fla. 1972); Yellow Cab Co. v. Broward County, 282 So. 2d 1 (Fla. 4th Dist. 1973). As to a nebulous fourth category of "legislative facts," *compare* MCCORMICK, *supra* note 1, § 331 *with*, Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972).

255. Brown v. City of Vero Beach, 271 So. 2d 222 (Fla. 4th Dist. 1972), *cert. denied*, 275 So. 2d 539 (Fla. 1973).

256. Braswell v. State, 306 So. 2d 609 (Fla. 1st Dist. 1975).

257. Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972).

258. Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685 (Fla. 4th Dist.), *cert. denied*, 254 So. 2d 789 (Fla. 1971).

years,[259] and the fact that the word "pig" has in recent times come to be used as a derisive name for police.[260]

On the other hand, courts have refused to judically notice whether a "class" is of sufficient number for purposes of a class action,[261] and whether the primary business of a beauty salon is the sale of merchandise of a cosmetic nature or the providing of a service in order to determine the application of bulk sales laws.[262]

C. *Matters of Official Record*

1. MUNICIPAL ORDINANCES

In *Holmes v. State,*[263] the Supreme Court of Florida overruled the previous rule[264] that municipal ordinances must be specifically pleaded and proven. Trial courts may now take judicial notice of a municipal ordinance which they are called upon to enforce. This places municipal ordinances more in line with the treatment afforded to private laws, statutes of sister states, and the laws of foreign countries.[265]

2. ADMINISTRATIVE RULES AND REGULATIONS

The court has also receded from its position that an authenticated copy of an official administrative rule or regulation of a state or federal agency adopted pursuant to law must be introduced before a court may take judicial notice of the particular rule or regulation.[266] Courts may now take judicial notice of official records of administrative agencies without the introduction of an authenticated copy.[267]

259. Whidden v. Division of Administration, 281 So. 2d 419 (Fla. 1st Dist. 1973).

260. City of St. Petersburg v. Waller, 261 So. 2d 151 (Fla.), *cert. denied*, 409 U.S. 989 (1972).

261. Harrell v. Hess Oil & Chem. Corp., 287 So. 2d 291 (Fla. 1973). The court, in a class action brought by owners of property bordering on a creek for damages due to alleged pollution, refused to take notice of the fact that number of such "plaintiffs" was too large for all to be joined in one suit. Thus, unlike the cases cited in notes 252-257 *supra, Harrell* involved a *question of law* to be determined on the basis of evidence introduced at the preliminary hearing.

262. Yarbrough v. Rogers, 300 So. 2d 286 (Fla. 4th Dist. 1974).

263. 273 So. 2d 753 (Fla. 1973), *noted in* 25 U. FLA. L. REV. 811 (1973).

264. Freeman v. State, 19 Fla. 552 (1882).

265. *See* FLA. STAT § 92.01 (1973).

266. *See* Mobley v. State, 143 So. 2d 821 (Fla. 1962).

267. Freimuth v. State, 272 So. 2d 473, 475 (Fla. 1972).

3. JUDICIAL PROCEEDINGS

The courts of Florida will not take judicial notice of the contents of the record of a separate and distinct case, even if pending or disposed of in the same court.[268] The appropriate method of proof of such facts is to introduce the court file of the other case, or a certified copy thereof, into evidence.[269]

However, a court may take judicial notice of its own files. *State v. Hinton*[270] involved a motion to suppress evidence alleged to have been seized illegally. The court held that it could judicially notice that its own file in the cause contained no search warrant, thus shifting the burden to the State to sustain the validity of the search.[271]

IX. PRESUMPTIONS

In *Aetna Life Insurance Co. v. Fruchter,*[272] the supreme court cautioned the trial courts against instructing juries on presumptions. Matters of presumption arising from the evidence are usually for the court in determining whether or not there is a sufficient basis for submitting the case to a jury as a matter of law. If a prima facie case is made out, then the jury should be allowed to weigh the evidence free of any "presumption" instruction.

Among the presumptions recognized during the survey period are presumptions that all men are sane,[273] that the directors of a corporation act honestly and in the best interests of the stockholders in the sale of corporate assets,[274] and that public officials properly perform the duties of their office.[275]

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268. Mennella Plastering, Inc. v. Adobe Brick & Supply Co., 273 So. 2d 1 (Fla. 1973). However, the court found such procedure,in the absence of a showing of prejudice, to be harmless error.

269. Bergeron Land Dev., Inc. v. Knight, 307 So. 2d 240 (Fla. 4th Dist. 1975); Truxell v. Truxell, 259 So. 2d 766 (Fla. 1st Dist. 1972).

270. 305 So. 2d 804 (Fla. 4th Dist. 1975).

271. *Id.* at 807. *See* Megdell v. Adeff, 296 So. 2d 596 (Fla. 3d Dist. 1974), in which the court declared that the trial judge should have taken judicial notice of the "uncertainty" created in a case due to reassignment from one judge to another for purposes of ruling on a motion to dismiss for failure to prosecute.

272. 283 So. 2d 36 (Fla. 1973).

273. Byrd v. State, 297 So. 2d 22 (Fla. 1974); Cook v. State, 271 So. 2d 232 (Fla. 2d Dist. 1973).

274. De La Rosa v. Tropical Sandwiches, Inc., 298 So. 2d 471 (Fla. 3d Dist. 1974), *cert. denied,* 312 So. 2d 760 (1975).

275. Askew v. Taylor, 299 So. 2d 72 (Fla. 1st Dist. 1974); Yonge v. Askew, 293 So. 2d 395 (Fla. 1st Dist. 1974).

In *Milros-Sans Souci, Inc. v. Dade County,*[276] a taxpayer argued that proof of general office practice and course of conduct in the tax assessor's office was insufficient to establish that notice of a tax assessment increase reached the taxpayer by mail. The case involved the familiar presumption that when mail has been properly addressed, stamped, and mailed pursuant to normal office procedure, the mail has been received by the addressee.[277] The court held that the taxpayer, by merely denying receipt of the notice of increase in assessment, could not overcome that presumption. The court noted that to expect the county to prove evidence of mailing specific assessment increases would be to impose an unreasonable burden.

The effect of a conclusive presumption is that no evidence may be introduced to rebut the presumption. Such presumptions have been adopted as a matter of social policy. Thus, in *Tappan v. State,*[278] a bank was conclusively charged with knowledge of its records. The conclusive presumption that a child under 6 years of age is incapable of being contributorily negligent was noted in dicta in *Harrold v. Schluep.*[279]

X. ADMINISTRATIVE PROCEEDINGS

Generally, state administrative agencies are not bound by the technical rules of evidence followed in the courts.[280] Relevant statutes prescribe evidentiary standards applicable in agency proceedings and in judicial review of such proceedings.[281]

In essence, section 120.58 of the Florida Administrative Procedure Act of 1975[282] provides the following rules. All relevant, material, and noncumulative evidence which reasonably prudent men would rely upon in the conduct of their affairs shall be admissible in agency proceedings. Hearsay, not supplementary or explana-

276. 296 So. 2d 545 (Fla. 3d Dist. 1974), *cert. denied,* 310 So. 2d 744 (Fla. 1975).

277. Brown v. Griffen Indus., Inc., 281 So. 2d 897 (Fla. 1973).

278. 277 So. 2d 310 (Fla. 4th Dist. 1973).

279. 264 So. 2d 431 (Fla. 4th Dist. 1972).

280. FLA. STAT. § 120.58 (Supp. 1974).

281. *See* Jones v. City of Hialeah, 294 So. 2d 686 (Fla. 3d Dist. 1974); Florida Dep't of Health & Rehabilitative Services v. Career Serv. Comm'n, 289 So. 2d 412 (Fla. 4th Dist. 1974).

282. For a detailed discussion of the Florida Administrative Procedure Act, see Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments,* 29 U. MIAMI L. REV. 619 (1975).

tory of other admissible evidence, is inadmissible by itself unless it comes within a particular exception recognized in civil actions. Copies or excerpts are admissible as documentary evidence if the original is not readily available. Cross-examination is expressly permitted whenever testimony or documents are made part of the record.

Of significant evidentiary import are three recent decisions of the Supreme Court of Florida. In *Buchman v. State Board of Accountancy*,[283] *Kozerowitz v. Florida Real Estate Commission*[284] and *State ex rel. Vining v. Florida Real Estate Commission*,[285] the court extended the fifth amendment privilege against self-incrimination to administrative proceedings penal in nature, e.g., license revocations or suspensions. These cases raise the question of the future scope and applicability of constitutional safeguards, traditionally employed in criminal cases, to administrative hearings of a penal nature.

XI. DEMONSTRATIVE EVIDENCE

A. *Generally*

Demonstrative evidence is that which "can convey a relevant firsthand sense impression to the trier of fact, as opposed to [evidence] which serve[s] merely to report the secondhand sense impressions of others."[286] For example, the photograph of a scene,[287] as opposed to a witness' description of the scene, constitutes demonstrative evidence.

Demonstrative evidence may be inadmissible because it fails to convey any definite information. A tape recording purportedly reproducing a bribe was held inadmissible due to its poor quality since admitting the tape would have prejudiced the defendant by possibly causing the jury to speculate on the basis of those portions which were intelligible.[288]

283. 300 So. 2d 671 (Fla. 1974).

284. 289 So. 2d 391 (Fla. 1974).

285. 281 So. 2d 487 (Fla. 1974).

286. MCCORMICK, *supra* note 1, § 212.

287. *See* Mullard v. State, 280 So. 2d 16 (Fla. 3d Dist. 1973); Seibels, Bruce & Co. v. Giddings, 264 So. 2d 103 (Fla. 3d Dist.), *cert. denied*, 269 So. 2d 370 (Fla. 1972).

288. Carter v. State, 254 So. 2d 230 (Fla. 1st Dist. 1971), *cert. denied*, 257 So. 2d 260 (Fla. 1972). *See also* Scaldefeim v. State, 294 So. 2d 407 (Fla. 3d Dist.), *cert. denied*, 303 So. 2d 21 (Fla. 1974), 419 U.S. 993 (1975).

B. *Photographs*

Photographs may be admitted through a witness who testifies that they correctly and accurately portray the facts represented. The witness need not be the photographer nor a person familiar with camera mechanisms.[289] Such testimony would go to the weight given to the photographs as evidence, not to their admissibility.[290]

Photographs are admissible, although not taken at the time of the event in question, if the authenticating witness testifies that they accurately depict the event when it occurred. In *State Department of Public Works v. Manning,*[291] a motorist brought an action against the department for negligent maintenance of its highways. The department had introduced a witness, one of its employees, who testified that there were no defects in the shoulder of the road when he left the job site on the previous day. The plaintiff submitted photographs taken 2 days after her accident which showed a substantial drop-off between the paved highway and its unpaved shoulder. The department objected, claiming that the drop-off had been deepened when cars drove around plaintiff's wreck. The photographs were nevertheless admitted on the testimony of an investigating officer who stated that they accurately depicted the drop-off immediately after the accident. Apparently, the objecting party may not exclude photographs merely by presenting witnesses who contradict the testimony of the authenticating witness.

The presence of the authenticating witness at the scene depicted by the photographs may not be necessary. In a prosecution for passing a forged check, a "Regiscope" photograph taken during the check cashing was properly admitted through the complementary testimony of the two witnesses.[292] The store employee who had cashed the check and operated the "Regiscope" testified that she recognized the check and that the photo accurately represented the check and the customer I.D. card. She could not, however, say that the photo accurately represented the person standing before her when she took it. The defendant's former em-

289. *See* Oja v. State, 292 So. 2d 71 (Fla. 2d Dist. 1974).

290. State Dep't of Transp. v. Manning, 288 So. 2d 289 (Fla. 2d Dist.), *cert. denied*, 295 So. 2d 307 (Fla. 1974).

291. *Id.*

292. Oja v. State, 292 So. 2d 71 (Fla. 2d Dist. 1974). The same rule is applied to "Regiscope" photos as to other photographs. They must be verified by someone having knowledge of what is depicted.

ployer, not present when the check was cashed, identified the check as a company check, identified the person in the photo as the defendant, and, going beyond the testimony of the store employee, stated that the photo accurately depicted the defendant's appearance at the time of the incident.

A highly controversial use of photographs occurs in murder prosecutions, where the state offers photographs of the deceased. The inflammatory effect on jurors which can be caused by the display of such pictures is obvious, particularly when the photos are gory. The Supreme Court of Florida has on occasion encouraged this practice. In *Mardoff v. State*[293] they stated, "the defendant could not complain because of [the photograph's] shocking nature when the horrible scene disclosed was one which he, himself, created."

In *State v. Wright*,[294] the court stated its current position that allegedly gruesome and inflamatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. The rule has been liberally applied to admit photographs which portrayed the setting of an armed robbery and shooting,[295] established the identity of a murder victim,[296] and depicted the wounds of the deceased.[297] Photographs have also been admitted by the supreme court for use in connection with testimony regarding the cause of death, and to refute a defendant's claim of self-defense.[298] Thus, in *Henninger v. State*[299] the supreme court deemed properly admitted three enlarged color photographs showing the murder victim in various positions with knife wounds in her back, and with her head partially severed from her body.

To the contrary, the Supreme Court of Florida in *Alford v. State*,[300] noted in dictum that such photos may be excluded as inflammatory.

> Once it has been established that the photographs are relevant, it must then be determined whether the gruesomeness of the portroyals is so inflamatory as to create an undue prejudice in the

293. 143 Fla. 64, 196 So. 2d 625 (1940).
294. 265 So. 2d 361 (Fla. 1972); *accord*, Bauldree v. State, 284 So. 2d 196 (Fla. 1973).
295. Pressley v. State, 261 So. 2d 522 (Fla. 3d Dist. 1972).
296. State v. Wright, 265 So. 2d 361 (Fla. 1972).
297. *Id.*
298. Henninger v. State, 251 So. 2d 862 (Fla. 1971).
299. 251 So. 2d 862 (Fla. 1971).
300. 307 So. 2d 433 (Fla. 1975).

minds of the jury, and thereby overcomes the value of their relevancy.[301]

In *Beagles v. State*,[302] a murder prosecution, the defendant admitted "the victim's death, how her death occurred, her identity, and that a bullet went into her brain and did not come out. . . ."[303] The trial court nevertheless admitted 15 color photographs of the victim after her body was removed from its shallow grave, 10 of them taken of the body after it had been taken from the scene. Many were unquestionably gory and gruesome. The defendant was subsequently convicted. On appeal, the District Court of Appeal, First District, reversed, holding that since the defendant had made so many admissions in the trial court, "there was no fact or circumstance in issue which necessitated or justified the admission of the numerous gruesome photographs in question."[304]

C. *Handwriting Samples*

Handwriting samples, like other demonstrative evidence, must be properly authenticated. In *Clark v. Grimsley*,[305] a revocation of will proceeding, the court admitted a sample of the handwriting of the testatrix since it was authenticated by a disinterested witness who was familiar with her handwriting. Since the witness visited the testatrix weekly, shopped for her, and saw her handwriting often, the court stated that the witness was sufficiently familiar with the handwriting to authenticate the proffered sample.

Pate v. Mellen[306] limits the discretion of a trial judge to exclude handwriting samples sought to be introduced under Florida Statutes section 92.38 (1973).[307] The central issue in *Pate* concerned the validity of gifts allegedly made to the defendant by a deceased donor. To establish the validity of the decedent's signature, by com-

301. *Id.* at 440.
302. 273 So. 2d 796 (Fla. 1st Dist. 1973).
303. *Id.* at 799.
304. *Id.*
305. 270 So. 2d 53 (Fla. 1st Dist. 1972).
306. 275 So. 2d 562 (Fla. 1st Dist. 1973).
307. FLA. STAT. § 92.38 (1973) states:

> Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the jury, or to the court in case of a trial by the court, as evidence of the genuineness, or otherwise, of the writing in dispute.

parison, the defendant-donee proffered numerous checks, purportedly signed by the decedent and testified that she had witnessed the signing of each. This testimony was unrebutted and unquestioned.

Still, the trial court refused to admit the checks without verification by another witness. The District Court of Appeal, First District, held that absent any question of the authenticity of the checks the lower court had abused its discretion in refusing to admit them as exemplars.

XII. HEARSAY

A. *State of Mind*

Legal issues often depend on the existence of a particular state of mind. When statements are offered to prove a state of mind, a distinction should be made between statements which are offered to prove circumstantially the state of mind of the declarant and those statements which seek to prove it directly. For example, to prove the state of mind of depression, a circumstantial statement would be "I want to die"; a direct statement would be "I am depressed." The former is not hearsay while the latter falls under a hearsay exception.[308] However, some Florida courts have ignored this distinction and lumped both types of statements together.

In *Allen Morris Co. v. McNally,*[309] the court upheld the admission of testimony of two witnesses as to the voluntary statements made by the plaintiff concerning her pain and suffering which resulted from an automobile accident. The plaintiff's statements, made while she was in the hospital, were being offered to establish her mental and emotional condition. The court did not decide whether it was necessary to examine the nature of the statements and assess whether they were direct or circumstantial evidence. The court simply stated that the statements were exceptions to the hearsay rule and were admissible.

Nonetheless, this exception to the hearsay rule, which has been particularly significant in the use of the defense of entrapment, has not always been confused. In *Brown v. State,*[310] the defendant was convicted of the delivery of heroin to a police officer and an informant. The defendant pleaded entrapment, but the trial court refused

308. MCCORMICK, *supra* note 1, § 294 at 694.
309. 305 So. 2d 79 (Fla. 3d Dist. 1974).
310. 299 So. 2d 37 (Fla. 4th Dist. 1974).

to allow evidence of conversations between the defendant and the informant. The District Court of Appeal, Fourth District, reversed, and held that the conversations were admissible as non-hearsay, rather than as a hearsay exception, since they were not being introduced for the truth of the matter asserted, but to establish the defendant's state of mind which is basic to the defense of entrapment.

Despite the existence of the conceptual distinction, in practice it would seem that no actual harm is done by confusing the two situations since in both cases the testimony is admissible.

B. *Business Records*

The increased probability of trustworthiness, which is the basic rationale for permiting business records into evidence, is governed by Florida Statutes section 92.36 (2) (1973).[311]

The court in *National Car Rental System, Inc. v. Holland,*[312] upheld the lower court's refusal to allow introduction into evidence of a document entitled "doctor's certificate" signed by a doctor who was not present to testify. The certificate was offered to prove the physical health of a driver at the time of an accident. The only basis laid for the admission of this document was the testimony of the plaintiff's employer who identified the document as part of his business records. This statement was insufficient since it did not establish that the certificate was made in the regular course of business.

The need for establishing the prerequistes for the business records exception is demonstrated in *Holt v. Grimes.*[313] Here the record on appeal reflected absolutely no testimony as to the mode of preparation of the records sought to be introduced. Further, the witness testifying in regard to the records was not a "custodian or other qualified witness" as required by section 92.36. The District Court of Appeal, Third District, held that the lower court commit-

311. FLA. STAT. § 92.36(2) (1973) states:

> A record of an act, condition or event, including a record kept by means of electronic data processing, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

312. 269 So. 2d 407 (Fla. 4th Dist. 1972).

313. 261 So. 2d 528 (Fla. 3d Dist. 1972).

ted no error in sustaining the objections to admission and directing a verdict.

However, despite the statutory requirements, including timeliness, the District Court of Appeal, Third District, in *Federated Department Stores, Inc. v. Antigo Industries, Inc.*,[314] held that a statement of account was admissible as a business record in an action to recover on an account stated, even though the statement was made 9 months after the first transaction between the parties. The court indicated that irrespective of the time involved, sufficient business regularity was established by the testimony of the plaintiff's president who claimed that the statement was one of several monthly statements sent to the defendant during the period of their transactions.

A recent development in the area of business records has been the use of computer print-outs. Foundation requisites here do not differ from those required for other business records. However, due to the complex nature of the computer and the lay jury's unfamiliarity with computer operation, certain special problems may arise. Thus, the court must make certain that the foundation is sufficient to warrant a finding of reliability, and that the opposing party have an opportunity to verify the process by which the information is programmed into the computer.[315]

Another potential problem in the computer area is the definition of "in the regular course of business," since it is possible that a print-out offered into evidence has been obtained from a computer program specifically designed for use in litigation. Thus, the courts will be forced to closely examine the manner in which print-outs are prepared.[316]

A recent Florida case involving computer print-outs, *Pickrell v. State*,[317] held that it was error to admit testimony by a police officer that, in response to his request, the Division of Motor Vehicles had by teletype identified the owner of a motor vehicle. The court stated that computer print-outs are admissible as are business records, if the custodian or other qualified witness is available to testify as to the manner of preparing the print-outs and the trustworthiness of

314. 297 So. 2d 591 (Fla. 3d Dist. 1974).
315. McCORMICK, *supra* note 1, § 314 at 734.
316. *Id.*
317. 301 So. 2d 473 (Fla. 2d Dist. 1974).

the product. No such verification had been made here; thus, the admission was held to be error, although harmless.

C. *Admissions*

1. GENERALLY

Admissions are the words or acts of an opponent offered as evidence against him.[318] They are sometimes admitted under the theory that an admission is usually against interest and therefore probably true. Perhaps a better explanation is the use of admissions on a fairness basis rather than on some concept of increased reliability. A party can hardly object that he had no opportunity to cross-examine his own statements or that his statements are untrustworthy. Thus, there is some disagreement as to whether admissions are an exception to the hearsay rule or are nonhearsay. Most courts, including Florida's, have adopted the former view[319] whereas the new Federal Rules of Evidence section 801(D)(2) classify admissions as nonhearsay.

McKay v. Perry,[320] a dog-bite case, is an example of the use of the admissions exception to the hearsay rule. The plaintiff offered testimony of a third person who spoke with the defendant after the incident. The testimony showed that the defendant told a third person that he owned a dog similar to the one described by the plaintiff. The trial court held the testimony inadmissible as hearsay. However, the District Court of Appeal, Second District, held that the testimony was an admission and could be placed into evidence as proof of ownership of the dog.

Admissions are often confused with another hearsay exception—declarations against interest—and are, at times, called "admissions against interest." There are several distinctions between the two.[321] This confusion in terms can be seen throughout the decisions. One particularly striking example is *Trad v. City of Jacksonville.*[322] This case presented the question of value in a condemnation proceeding and at issue was the introduction of a tax receipt and real estate valuation from the city. The evidence showed

318. McCORMICK, *supra* note 1, § 262 at 628.
319. *Id.* at 629. *See* section XI, F, *infra.*
320. 286 So. 2d 266 (Fla. 2d Dist. 1973).
321. McCORMICK, *supra* note 1, § 262 at 630. See section XII, E, *infra.*
322. 279 So. 2d 385 (Fla. 2d Dist. 1973).

the property was assessed at almost twice the amount offered by the condemning authority. The court held that the tax receipt and valuation were *admissions against interest*. However, the court then noted that evidence of assessment of valuation has been held admissible in other courts as *declarations against interests*. The court apparently treated the two terms as interchangeable.

2. PLEADINGS

The case of *Harrold v. Schluep*[323] involved the question of inadmissibility of statements made in an opponent's pleadings. In a suit based on an automobile accident, the defendant's attorney read excerpts of the plaintiff's complaint to the jury during closing argument for the purpose of impeaching a witness to the accident. The *Harrold* court felt that such use of pleadings is improper unless the pleading is first introduced into evidence. This appears to be a proper statement of Florida law. However, the court, in dicta, stated that "[p]leadings are not admissible in evidence to prove or disapprove a fact in issue."[324] This statement is troublesome in two respects. First, in *Harrold*, the defendant's attorney was using the pleading not to prove or disprove a fact in issue, but to impeach a witness.

Second, and more significantly, the court's statement of law appears to be a misapplication of the rule stated in *Hines v. Trager Constr. Co.*[325] *Hines* was a situation involving alternative pleading. Although pleadings are generally admissible against the pleader,[326] the *Hines* court stated that when the pleading sought to be used is in the alternative and therefore by its nature tentative, an adverse party may not introduce such pleading into evidence claiming that it is an admission. Permitting such use would discourage the recognized practice of pleading in the alternative. The *Harrold* court applied the *Hines* rule, denying admissibility, in a case not involving alternative pleadings.

The *Harrold* court further confused the law by attempting to distinguish *Davidson v. Eddings*[327] which held that pleadings of a party in a prior lawsuit are admissible as evidence against him in a

323. 264 So. 2d 431 (Fla. 4th Dist. 1972).
324. *Id.* at 435.
325. 188 So. 2d 826 (Fla. 1st Dist. 1966).
326. MCCORMICK, *supra* note 1, § 265 n.46.
327. 262 So. 2d 232 (Fla. 1st Dist. 1972).

subsequent case. The *Harrold* court viewed as crucial the fact that in *Davidson* the pleading sought to be intduced was from a former lawsuit. No reason is offered by the *Harrold* court why previous pleadings are any worthier than pleadings in the same case. It would appear the only proper distinction lies between tentative alternative pleadings, and final, non-alternative pleadings.[328]

3. SETTLEMENT AGREEMENTS

The courts, when dealing with admissions made in the course of settlement efforts, are faced with two conflicting policies. As mentioned earlier,[329] admissions are usually allowed based on a fairness policy. However, another goal which the courts strive for is the encouragement of settlements. A policy which would allow the admission of statements made in the course of a settlement discussion, against the declarer would do little to foster settlements. As such, it has generally been held that admissions made as part of settlement offers are not admissible. In *Hill v. City of Daytona Beach,*[330] the court held that in a condemnation action it was error to admit into evidence, either for impeachment purposes or as evidence of the value of the land, an unexecuted written settlement agreement between the condemnee and the condemnor city. The city wished to introduce the agreement to establish the value of the land. The owner was asking for more than three times the amount shown on the agreement. The court said, "it has long been the law of this state that an offer to settle or compromise a claim or dispute between parties is not admissible as an admission against the party making the offer as to the amount of liability."[331]

4. VICARIOUS ADMISSIONS

Generally, when a party to a suit has expressly authorized another person to speak for him, the statements of that person are allowed as admissions. However, when there is no express authorization to speak, the tendency has been to admit the agent's statements as admissions only when made in relation to the scope of the agent's duty. This position has created problems regarding admis-

328. McCORMICK, *supra* note 1, § 265 n.55.
329. See text accompanying note 319 *supra*.
330. 288 So. 2d 306 (Fla. 1st Dist. 1974).
331. *Id.* at 308.

sion statements made by an employee after an accident. Such statements, it has been argued, are not within the scope of the employee's duties.

In *Lan-Chile Airlines, Inc. v. Rodriguez*,[332] a suit against a foreign airline, plaintiffs were beaten while at an airport. Testimony by the assailants at trial indicated that they were hired by agents of the airline to attack the plaintiffs in order to discourage their labor union activities. The court held that the trial judge had made a finding that a prima facie case of agency had been proven, prior to permitting the testimony, and thus no error was committed. "The fact of agency may be demonstrated by inference from facts and circumstances and the concept of the parties involved in a particular case."[333]

In *Seaboard Coast Line Railroad v. Nieuwendaal*,[334] the facts indicated that before sunrise a collision had occurred between the plaintiff's automobile and the defendant's train. The issue was whether the train had been engaged in a switching operation at the time of the accident. If it had been, the railroad had violated a Florida statute[335] which required visual warnings under these circumstances. No dispute as to the absence of visual warnings existed. The conductor had told an investigating officer shortly after the accident that the train had been engaged in a switching operation. The court held that the conductor's statement was admissible as an admission although the conductor took the stand and denied making the statement. "It is well settled that an admission against interest may be introduced into evidence as substantive evidence of the truth of the matter stated. This is so even though the person making the admission against interest subsequently denies making such admission."[336] The court never addressed itself to the question of whether the statement was made within the scope of employment.

5. SILENCE

If a statement is made by another person in the presence of a party to the action, containing assertions of facts which, if untrue,

332. 296 So. 2d 498 (Fla. 3d Dist. 1974).
333. *Id.* at 500, *citing* 29 AM. JUR. 2d *Evidence* § 663 (1965).
334. 253 So. 2d 451 (Fla. 2d Dist. 1971).
335. FLA. STAT § 357.08 (1973).
336. 253 So. 2d at 452.

the party would naturally be expected to deny, his failure to speak may be used against him as an admission.[337]

The District Court of Appeal, First District, in *Daugherty v. State,*[338] ruled that it was error, although harmless, to admit a bystander's testimony that before a robbery one of the participants said to him, in the defendant's presence, "[w]e are going to hit the store so you better get out." The court declared that as to the defendant this was not an admission by silence, and cautioned against misconceptions concerning use of hearsay testimony on the ground that the defendant was present at the time the statement was made. The court said, "[t]he otherwise hearsay statement can only be admitted when it can be shown that in the context in which the statement was made, it was so accusatory in character that the defendant's silence may be inferred to have been assent to its truth."[339] The admission by silence exception was found not applicable in this case because the statement made to a third person was not sufficiently accusatory regarding the defendant.

D. *Res Gestae*

The term *res gestae* is sued to describe statements which are made in connection with litigated facts in order to fully illuminate the witness' testimony. It has been used not only to admit hearsay, but to admit declarations that in many cases were never hearsay, such as "verbal acts"[340] or statements being used for circumstantial proof.[341]

The phrase has been much criticized for its vagueness and imprecision. It appears that most jurisdictions, although not Florida, have now abandoned its use since declarations which are *res gestae* and are hearsay usually fall under one of the following specific exceptions: declarations of present bodily conditions, declarations of present state of mind, excited utterances, and declarations of present sense impression.[342] Nonetheless, despite the criticism and the lack of precision, the Florida courts persist in the use of this outmoded term.

337. McCORMICK, *supra* note 1, § 270 at 651-52.
338. 269 So. 2d 426 (Fla. 1st Dist. 1972).
339. *Id.* at 427.
340. *See* McCORMICK, *supra* note 1, § 249 at 589.
341. *See Id.* § 289 at 687.
342. *Id.* § 288 at 686.

In *Elmore v. State*,[343] the defendant and the deceased became involved in a fight which resulted in a fatal shooting. Within seconds of the shooting, a bystander appeared on the scene with a shotgun and said to the defendant, "[i]f you had given out I was going to help you." The District Court of Appeal, Fourth District, held that the trial court erred in not admitting this statement into evidence, as part of the *res gestae*, to substantiate a claim of self-defense. The court outlined four points necessary for a statement by a third party to become part of the *res gestae:* (1) the statement must be spontaneous; (2) the statement must have been made by one who witnessed the subject act; (3) the statement must be made at the scene of the act; and (4) the statement must be relevant.

Another example of *res gestae* can be found in *Appell v. State*.[344] Here, the defendant's revolver discharged while he was returning it to the victim. The lower court conviction was reversed when *res gestae* statements showing an accidental shooting were held admissible. The facts indicated that approximately 2 hours after the shooting, the victim's mother saw him in the hospital. The victim had not been interviewed before this time and no outside influence had been exerted on him. The victim made statements to his mother which would have exculpated the defendant. The lower court held these statements inadmissible. The District Court of Appeal, Fourth District, reversed, holding that the *res gestae* exception to the hearsay rule applied. The court found several factors which had to be examined in order to determine "sponteneity": (1) the time gap between the statement and the accident; (2) the voluntary nature of the declaration; (3) the self-serving nature of the statement; and (4) the declarant's physical and mental condition at the time of the statement. It is submitted that rather than attempt to define and apply *res gestae,* the court might have admitted the statement as a declaration of present mental state or as a declaration against interest, since the statement would have damaged the victim's position if a later civil suit developed.

Court confusion of *res gestae* with other hearsay is not unusual. In *Daugherty v. State*[345] the trial court characterized a statement as part of the *res gestae* while on appeal it was analyzed as an admis-

343. 291 So. 2d 617 (Fla. 4th Dist. 1974).
344. 250 So. 2d 318 (Fla. 4th Dist. 1971).
345. 269 So. 2d 426 (Fla. 1st Dist. 1972).

sion. In *Lawrence v. State*,[346] a second degree murder case, the prosecution sought to introduce testimony concerning a multiparty conversation in which the defendant and the victim took part and which occurred immediately prior to the shooting of the victim. The State contended the conversation was admissible as an admission since it took place in the presence of the defendant. The defendant urged that this "in the presence of the defendant" doctrine of admissibility had been abolished in *Daughtery v. State*[347] and that only by showing a defendant's silence in the face of accusatory conversation sufficient to be deemed an admission, could such conversation be admissible. The court, however, chose not to come to grips with the arguments of the parties but rather allowed the conversation since it fell within the overall *res gestae*. Given the court's inclination to allow the testimony, it might have done so based on the recognized "excited utterance" exception[348] to the hearsay rule so as to avoid the confusion involved with the use of *res gestae*.

E. *Declarations Against Interest*

In order to satisfy this exception to the hearsay rule in its traditional form, two requirements must be met. First, the declaration must contain facts which are against the pecuniary or proprietary interests of the declarant. Second, the declarant must be presently unavailable. Declarations against interest should be distinguished from admissions.[349]

Traditionally, statements against penal interests have not been admissible as a hearsay exception.[350] However, there is a recent trend away from this position. For example, the Federal Rules of Evidence allow an exception for statements against penal interest.[351] If the declaration against interest exception is based on the rationale that one does not make untrue statements against his own financial or proprietary interest, surely the rejection of declarations against penal interests cannot be justified.

Notwithstanding this trend and logic, Florida still fails to rec-

346. 294 So. 2d 371 (Fla. 1st Dist. 1974).
347. 269 So. 2d 426 (Fla. 1st Dist. 1972).
348. MCCORMICK, *supra* note 1, § 297.
349. *See* Section XII, C *supra*.
350. MCCORMICK, *supra* note 1, § 273 at 673.
351. FED. R. EVID. § 804(B)(3).

ognize declarations against penal interest as hearsay exceptions. In *Francis v. State*[352] it was stated in dicta:

> Although some jurisdictions and the proposed Federal Rules of Evidence recognize declarations against penal interest as an exception to the hearsay rule, appellant has been unable to point to any definitive opinion from either the Florida Supreme Court or any of the District Courts of Appeal which recognize the declaration against penal interest doctrine, nor has our independent research revealed any. We therefore find that the declaration against penal interest exception to the hearsay rule is not recognized under Florida law.[353]

Florida's refusal to recognize declarations against penal interest as hearsay exceptions was again manifested in *Pitts v. State*.[354] There the defendants were charged with murder. They sought to admit a confession to the crime by an uncharged third person who refused to testify at the trial on fifth amendment grounds.[355] Although clearly hearsay, the defendants sought to allow the confession's introduction as a declaration against penal interest. The court clearly held that no such exception is recognized in Florida. In addition, it suggested that even if such an exception existed, its availability would depend upon other corroborative indicia of reliability being present.

The *Pitts* court justified its refusal to recognize the "against penal interest" exception by hypothesizing that a defendant could be acquitted by offering the confession of an uncharged third party, and upon subsequent trial of that third party, he could introduce a confession of the first defendant, who would not be subject to double jeopardy. This logic neglects three important considerations: (1) the original defendant will not always have made a confession which the third party can later use; (2) use of an original defendant's hearsay confession in a second trial would be predicated on the original defendant's unavailability, and since he would be protected from a second prosecution, refusal to testify on fifth amendment grounds would not constitute such unavailability; and (3) the court's logic

352. 308 So. 2d 174 (Fla. 1st Dist. 1975).

353. *Id.* at 176.

354. 307 So. 2d 473 (Fla. 1st Dist. 1975).

355. The court discussed the question of whether refusal to testify constituted sufficient "unavailability" within the "against interest" exception, but left the question open.

assumes that confronted with two confessions to the same crime, the second jury would believe the prior defendant's confession.

F. *Acts and Declarations of Co-Conspirators*

The co-conspirator exception to the hearsay rule has been stated to hold that any act or declaration by one co-conspirator committed (1) during the existence of a conspiracy and (2) in furtherance thereof is admissible against each and every co-conspirator provided that a foundation of independent proof is first laid establishing the conspiracy.[356] There have been several theories to support this exception. The traditional reason is the agency rationale that co-conspirators are co-agents and thus are held responsible for each other's acts and declarations.[357] Another theory is that co-conspirator declarations are unusually trustworthy, like declarations against interest, and therefore are hearsay exceptions.[358] One author[359] contends that neither of these rationales are impressive and the admission of the hearsay is based on policy. There is such a high probative need for the testimony, that co-conspirator declarations are admitted out of necessity.

In *Parker v. State*,[360] and its companion case, *Hudson v. State*,[361] the District Court of Appeal, Fourth District, held that extrajudicial declarations of one co-conspirator made outside the presence of another co-conspirator may be admitted where the declaration was made in furtherance and during the existence of the conspiracy. The court emphasized that before the declaration may be admitted, the defendant's participation must first be established by other non-hearsay evidence.

The co-conspirator rule requiring that there first be independent evidence of the existence of a conspiracy prior to the use of hearsay, was followed in *Honchell v. State*.[362] However, a footnote to the case indicates that it is possible for the order of proof to be reversed:

356. Levie, *Hearsay and Conspiracy*, 52 MICH L. REV. 1159, 1161 (1954).
357. *Id.* at 1163, *citing* Van Riper v. United States, 13 F.2d 961 (2d Cir. 1926).
358. *Id.*, *citing* 4 WIGMORE, EVIDENCE § 1080a (3d ed. 1940).
359. *Id.* at 1166.
360. 276 So. 2d 98 (Fla. 4th Dist. 1973).
361. 276 So. 2d 89 (Fla. 4th Dist. 1973).
362. 257 So. 2d 890 (Fla. 1971).

> While the existence of conspiracy and the connection of the defendant therewith normally must precede the introduction of evidence of acts and declarations of the other parties thereto, the trial judge in his discretion may permit the order of proof to be reversed, admitting evidence of the acts and declarations of the co-conspirators before proof is given of the conspiracy itself. However, this is conditional on the prosecutor subsequently furnishing adequate proof of the conspiracy itself.[363]

In *Resnick v. State*[364] the court, after reiterating the co-conspirator rule emphasized that it was not necessary that the conspiracy be proven only by direct evidence, but rather it may also be shown by circumstantial evidence.

G. *Prior Recorded Testimony*

Recorded testimony in prior hearings is held to be a hearsay exception because the parties have had the same opportunity to cross-examine. The only procedural safeguard missing is jury observation. Generally, there are three requirements for the prior recorded testimony exception: (1) the witness must be unavailable; (2) the witness must have been under oath at the time the statement was made; and (3) there must have been a reasonable opportunity to cross-examine the witness.[365]

In *Alford v. State,*[366] the Supreme Court of Florida clearly laid out the factors to be considered in determining the admissibility of prior testimony. The defendant had been convicted of rape and murder. A witness who testified at the preliminary hearing identified the killer's car and hat at the scene. Prior to trial the witness left the state and refused to return and testify at trial. The trial court admitted the testimony from the preliminary hearing and the admission was upheld on appeal where: (1) the state tried in good faith to produce the witness and his absence was not caused or contrived by the state; (2) counsel for the defendant appeared and cross-examined the witness at the preliminary hearing; (3) the testimony was previewed outside the presence of the jury; and (4) similar supportive testimony to that of the absent witness was given by two

363. *Id.* at 890 n.1. This case was cited, but not followed in Parker v. State, 276 So. 2d 98, 100 (Fla. 4th Dist. 1973).

364. 287 So. 2d 24 (Fla. 1974).

365. MCCORMICK, *supra* note 1, § 255 at 616.

366. 307 So. 2d 433 (Fla. 1975).

other witnesses at the trial. The court noted that no attempt had been made to get the witness' deposition, but concluded that the testimony at the preliminary hearing was more reliable than a deposition.

Apparently, the most critical factor in the use of the prior testimony exception is whether the defendant had an opportunity to cross-examine the witness. In *James v. State*,[367] a witness who testified at the preliminary hearing died prior to trial. The testimony was the only direct evidence implicating the defendant. The trial court admitted the testimony. On appeal, the court discussed the defendant's arguments as to the difference between a preliminary hearing and a trial, noting that: (1) the preliminary hearing must be held without undue delay, thus there is little opportunity to prepare; and (2) since the only issue is probable cause at a preliminary hearing, the defense may not deem it wise to disclose its defense or its evidence. However, the court dismissed these arguments as a basis for concluding that the right of confrontation is not satisfied at a preliminary hearing. In *State v. Barnes*,[368] the trial court admitted statements of a witness made before an official court reporter. The witness had died prior to trial. The statement was taken by the defendant's counsel in question and answer form, but without notice to the State and the State had no oppportunity to cross-examine. The court held that since the State is not accorded the same right or confrontation in a criminal prosecution that is allowed the defendant, and since the judge could instruct the jury as to the weight of the evidence and the State could still impeach the witness' statement, the statement should be admissible. However, it seems that in this situation, unlike other hearsay exceptions, there is no substantial indicia of reliability apart from the fact that the statement was made under oath. The seven paragraph opinion is not persuasive.

H. *Probation Hearings*

A revocation of probation hearing is informal and does not take the course of a regular trial. Its purpose is to satisfy the conscience of the court as to whether conditions of a suspended sentence have been violated and to give the accused an opportunity to be heard.[369]

367. 254 So. 2d 838 (Fla. 1st Dist. 1971).
368. 280 So. 2d 46 (Fla. 2d Dist. 1973).
369. Broll v. State, 32 So. 2d 607, 609 (Fla. 1947).

As a result of this relatively relaxed procedural framework, a question has arisen as to the use of hearsay evidence at probation revocation hearings.

The District Court of Appeal, Third District, in *Hampton v. State*,[370] held that probation could not be revoked *solely* upon hearsay evidence. It also indicated in dictum, somewhat ambiguously, that revocation proceedings "are not rendered erroneous by the admission of hearsay testimony. . . ."[371] This decision left open the question of whether any hearsay evidence is properly admissible.

This question was seemingly answered in the affirmative by the Third District in *Randolph v. State*[372] wherein it was stated that hearsay testimony which "would have been inadmissable at trial [was] properly . . . considered in the instant case. . . ."[373]

However, the District Court of Appeal, First District, in *White v. State*,[374] considered after *Hampton* and *Randolph*, stated that "we are acquainted with no case holding that hearsay testimony is properly admissible in [probation revocation] proceedings. It is not."[375]

Thus there is agreement that probation cannot be revoked *solely* upon hearsay evidence, but disagreement as to whether hearsay is admissible at all. Given the increased recognition afforded probation revocation hearings by the United States Supreme Court in *Mempha v. Rhay*[376] it would appear the First District's position is the better view.

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370. 276 So. 2d 497 (Fla. 3d Dist. 1973).

371. *Id.* at 497.

372. 292 So. 2d 374 (Fla. 3d Dist. 1974).

373. *Id.* at 375.

374. 301 So. 2d 464 (Fla. 1st Dist. 1974).

375. *Id.* at 465.

376. 389 U.S. 128 (1967). The court held that an indigent defendant had a right to the assistance of appointed counsel at a probation revocation hearing. The probation revocation hearing was found to be a critical stage of a criminal prosecution where substantial rights of the accused may be affected.