

EXPERT WITNESSES

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OVERVIEW

1. Purpose of expert testimony -

Expert testimony is used to assist the trier of fact in understanding complex matters (*F.S. 90.702*). The purpose of expert witness testimony is to assist lay jurors on matters that are beyond their common understanding. [*Sea Fresh Frozen Products, Inc. v. Abdin*, 411 So. 2d 218 (Fla. Dist. Ct. App. 5th Dist. 1982), petition denied 419 So. 2d 1195 (Fla)]

2. Ethical considerations in using expert witnesses -

The American Bar Association's Model Rules of Professional Conduct require an attorney to seek out expert services when needed to assist the client. [ABA's Model Rules of Prof. Conduct, Rules 1.1 (Competence) and 1.3 (Diligence)]

The Florida Rules of Professional Conduct that may affect an attorney's use of and relationship with an expert witness include:

- Rule 3.3, Candor Toward the Tribunal, states that an attorney may not knowingly permit witnesses to offer testimony that the attorney knows is false and permits the attorney to refuse to offer evidence that the attorney reasonably believes to be false. [R Regulating Fla Bar, Rule 4-3.3]
- Rule 3.4, Fairness of Opposing Party and Counsel, prohibits an attorney from fabricating evidence, from counseling or assisting a witness to testify falsely, or offering an inducement to a witness that is prohibited by law. [R Regulating Fla Bar, Rule 4-3.4]
- Rule 5.3, Responsibilities Regarding Non-Lawyer Assistants, establishes that an attorney must not ratify the unethical conduct of a retained expert. [R Regulating Fla Bar, Rule 4-5.3]
- Rule 5.4, Professional Independence of a Lawyer, governs fee-sharing with nonlawyers and restricts the formation of a partnership or professional corporation with nonlawyers. [R Regulating Fla Bar, Rule 4-5.4]
- Rule 8.4, Misconduct, prohibits an attorney from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness, prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, or

engaging in conduct that is prejudicial to administration of justice. [R Regulating Fla Bar, Rule 4-8.4]

3. Who is an expert?

An expert witness is an individual engaged in the practice of a profession who holds a professional degree from a university or college and has special training and experience, or one who possesses special knowledge or skill about the subject on which he or she is called to testify. [RCP 1.390]

Before hiring an expert, carefully review the expert's qualifications and interview the expert to make sure that the expert should be retained to assist the client. Consider discussing the expert with other attorneys who have used him or her before, actually retaining the expert. Additionally, review the expert's prior testimony to make sure that the expert's position in this case is consistent with the client's interests.

4. Required showing of qualifications -

An expert may be qualified in his or her given area of expertise as an authority by showing that through knowledge, skill, experience, training, or education the individual has sufficient knowledge and experience to opine on matters related to the facts in the case. [FS §90.702; *Lee County Electric Co-operative, Inc. v. Lowe*, 344 So. 2d 308 (Fla. Dist. Ct. App. 2d Dist. 1977), appeal after remand 367 So. 2d 1114 (Fla. Dist. Ct. App. 2d Dist.)]

The trial court will consider the witness's life experiences, education, professional standing, licenses, certifications, publications, actual knowledge, honors received, books written, chapters written, literature published, and other qualifying matters to determine if a witness should be accepted as an expert in a given field.

If a witness has some kind of specialized knowledge, training or experience, the witness can be recognized as an expert, even if lacking formal education. If the testimony will assist the trier of fact in regard to rendering a verdict, the witness will most likely be allowed to testify.

5. Court's discretion to accept qualifications -

It is within the province of the trial court to determine whether a witness offered as an expert should be accepted by the court to offer an opinion in a case. [*Ritter v. Jimenez*, 343 So. 2d 659 (Fla. Dist. Ct. App. 3d Dist. 1977)]

The trial court has broad discretion in determining who shall be accepted as an expert and in determining the range of subjects on which the expert will be permitted to testify. [*Dragon v. Grant*, 429 So. 2d 1329 (Fla. Dist. Ct. App. 5th Dist. 1983)]

There is no rigid rule on who will be allowed to testify as an expert in a case. The question that will be answered by the court is whether the expert's testimony can assist the jury in understanding the issues in the case, and whether the expert is properly qualified to render such opinions. [*Buchman v. Seaboard C.L.R. Co.*, 381 So. 2d 229 (Fla. 1980)] The court's decision will rest on whether the witness's background establishes sufficient experience and knowledge to render an opinion in the case that may be helpful to the jury.

The court's decision will not be disturbed on appeal absent a clear showing of error by virtue of an abuse of that discretion. [*Rodriguez v. State*, 413 So. 2d 1303 (Fla. Dist. Ct. App. 3d Dist. 1982), later proceeding 432 So. 2d 729 (Fla. Dist. Ct. App. 3d Dist.), habeas corpus proceeding 740 F.2d 884 (11th Cir. Fla.), cert. denied 469 U.S. 1113, 83 L. Ed. 2d 790, 105 S. Ct. 797]

6. Proper subjects for expert testimony -

Expert testimony is appropriate when the matter being testified about is one related to or requiring professional training, experience, or special knowledge. Expert testimony may be provided on a variety of scientific, technical or other specialized matters so long as the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue. [FS §90.702]

Experts have been called to testify on issues involving accounting, business, agriculture, medicine, science, mechanics, economics, pesticides, automobiles, construction, land values, DNA, ballistics, handwriting, engineering, architecture, and many other areas requiring specialized knowledge.

7. Matters not within jury's common knowledge -

Expert testimony is not appropriate when the matter that the expert is opining about is well within the jury's common knowledge. [*Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 16 Fla. L. Weekly D341 (Fla. Dist. Ct. App. 4th Dist. 1991), cause dismissed 589 So. 2d 1146, 20 Fla. L. Weekly S289 (Fla.))] If the expert's testimony is about something easily understood by an average juror without the need of technical, professional, or specialized knowledge, the trial court may properly exclude such testimony. [*Vega v. Pompano Beach*, 551 So. 2d 594, 14 Fla. L. Weekly 2563 (Fla. Dist. Ct. App. 4th Dist. 1989), review denied 564 So. 2d 490 (Fla)]

8. Ultimate issues; invasion of province of jury as finder of fact -

The expert's opinion must not invade the province of the jury as the ultimate finder of fact, but an expert may provide expert opinion even if it includes an ultimate issue to be decided by the trier of fact. [FS §90.703] Although an expert witness may provide an opinion even if it includes an ultimate issue to be decided by the trier of fact, the expert must not tell the trier of fact how to decide the case. Instead, the expert's opinion testimony should assist the jury in determining what has occurred and how it

occurred. [*Palm Beach v. Palm Beach County*, 460 So. 2d 879, 9 Fla. L. Weekly 448 (Fla. 1984), appeal after remand 507 So. 2d 1154, 12 Fla. L. Weekly 1253 (Fla. Dist. Ct. App. 4th Dist.)] The expert may also discuss violations of industry standards.

9. Opinion not binding on trier of fact -

Expert testimony on technical subjects is usually provided in the form of an opinion. The trier of fact may accept such opinion testimony, reject it, or give such opinion the weight which it determines is deserved, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all other evidence in the case. [Florida Standard Jury Instruction 2.2(b)]

10. Trial court's discretion to permit expert testimony -

A decision as to how and when an expert's testimony will assist the jury in understanding the issues in the case is left to the trial court, which has broad discretion in making this determination. [*Angrand v. Key*, 657 So. 2d 1146, 20 Fla. L. Weekly S289 (Fla. 1995)] If the subject about which the expert will opine is beyond the understanding of the average lay person and the witness has such qualifications and experience in a given area that will probably aid the trier of fact in its search for truth in the case, then the expert testimony should be allowed. [*Buchman v. Seaboard C. L. R. Co.*, 381 So. 2d 229 (Fla. 1980)]

When in doubt, move to exclude the opposing expert's testimony and request an evidentiary hearing outside of the presence of the jury. Challenge the opposing expert's testimony on the grounds that the matters are well within the jury's common knowledge or invade the province of the jury as a fact finder.

11. Standard for admissibility of disputed scientific evidence -

Novel and untested scientific evidence is not admissible in Florida unless it meets the test established in *Frye* [*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)]; see *Flanagan v. State*, 625 So. 2d 827, 18 Fla. L. Weekly S475 (Fla. 1993); *Ramirez v. State*, 651 So. 2d 1164, 20 Fla. L. Weekly S19 (Fla. 1995), reh'g denied (Mar. 21, 1995)] Under *Frye*, counsel must first establish that the scientific principle that counsel is attempting to introduce in evidence has gained general acceptance in the particular field in which it belongs. However, the court is only required to evaluate whether novel scientific evidence is unreliable if opposing counsel makes specific objections. [*Hadden v. State*, 690 So. 2d 573 (Fla. 1993)]

12. Factors determining admissibility -

The trial court must decide whether to admit the testimony of an expert that is based upon a novel scientific principle by applying the following four-step process. [*Ramirez v. State*, 651 So. 2d 1164, 1167, 20 Fla. L. Weekly S19 (Fla. 1995), reh'g denied (Mar. 21, 1995)]

First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence.

Second, the trial judge must decide whether the expert's testimony is based on a scientific principle that has gained general acceptance in the field in which it belongs.

Third, the trial judge must determine whether the witness is qualified as an expert to present an opinion on the subject at issue.

Fourth, the judge may allow the expert to render an opinion on the subject of his or her expertise, but it will be up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.

13. Scientific aids and theories -

Numerous scientific concepts and theories may be used by the expert when testifying to support his or her opinion. It is important that the scientific concepts and theories used by the expert be based upon generally-accepted standards in the expert's field.

The burden is on the proponent of the evidence to establish that the scientific concepts and theories being advanced by the expert are generally accepted in the expert's field. The trial court then decides if this burden has been met. A *Ramirez-Frye* hearing challenging the underlying scientific theory and testing procedures used by the proposed expert should be conducted before trial. [*Ramirez v. State*, 651 So. 2d 1164, 20 Fla. L. Weekly S19 (Fla. 1995), reh'g denied (Mar. 21, 2005); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)]

EXPERTS' DEPOSITIONS

14. Deposition of expert -

The testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions.

Experts' depositions may be used at trial by any party, regardless of the expert's place of residence. No special form of notice need be given that the deposition will be used for trial. [RCP 1.390(b)]

As a result of *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996), Rule 1.280(b)(4)(A) of the Florida Rules of Civil Procedure was amended effective January 1, 1997, to permit and limit expert discovery. A party may obtain the following information regarding any person expected to be called as an expert at trial:

A. scope of employment and compensation;

- B. general litigation experience, including plaintiff/defendant experience;
- C. identity of other cases in a reasonable time period in which the witness has testified;
- D. portion of the expert's income derived from serving as an expert witness, but not the expert's earnings in general or from testifying.

Further inquiry into this area should only be by motion to the court.

15. Use of video depositions -

If you are planning on using an expert's deposition at trial, consider videotaping the deposition so that the jury may have the benefit of seeing and hearing the expert. Any deposition may be recorded by videotape without leave of court or stipulation of the parties. [RCP 1.310(4)] No special form of notice need be given that the deposition will be used for trial. [RCP 1.390(b)]

In personal injury cases, treating physicians are often unavailable for trial. Videotaping their depositions and showing them to the jury is an effective and efficient way of minimizing scheduling problems.

16. Objections -

All objections based on form must be raised at the deposition or they will be waived. [RCP 1.330(d)(3)(B)] In order to preserve an objection based on form, such as a compound question, leading, harassing the witness, calling for legal conclusions, etc., object and state the legal grounds for the objection. [RCP 1.330(d)(3)(B)]

Substantive objections to an expert's testimony are preserved during a deposition. [RCP 1.330(d)(3)(B)] If an objection is based on hearsay or some other substantive matter, counsel does not need to raise an objection since it will automatically be preserved for judicial review. [*See David v. Jacksonville*, 534 So. 2d 784, 13 Fla. L. Weekly 2533 (Fla. Dist. Ct. App. 1st Dist. 1988)]

Make sure that the objections are ruled upon before the deposition is shown or read to the jury. This will save invaluable court time. If possible, try to schedule the objections for hearing before the trial begins. By the time the case is tried, all videotapes should be edited so as to reflect the court's rulings.

17. Preparing for an expert's deposition -

To prepare for an expert's deposition, counsel should review the law, determine what essential elements must be proven through the expert witness, and list the facts that will be established through the expert. Next, counsel should outline all of the key points that must come out through the testimony of each expert witness. The outline should set up the foundation necessary for expert testimony or the introduction of exhibits.

Take the time to outline the general areas of inquiry that will be covered during the deposition. Do not rehearse actual questions and answers with the experts because this will give an appearance of scripted testimony. Instead, discuss the general principles and concepts that will be addressed, the format that will be used, and the order in which the topics will be discussed.

Go over the expected cross-examination. This will give the expert an opportunity to fully prepare for the deposition. Prepare a file for each expert witness. The file should include your outline, copies of the exhibits that will be used with the expert witnesses, the experts' reports, the relevant deposition, trial subpoena, return of process, and any working notes that you may have that relate to the witness.

TRIAL PREPARATION

18. Disclosing the expert witness list -

Most trial orders require that experts be disclosed well before the case is scheduled for trial. Parties should exchange expert witness lists at least 90 days before trial.

Trial orders require that the parties list the experts' names and addresses, the experts' opinions, the basis for those opinions, and the experts' background.

Consider propounding expert witness interrogatories to the adverse party pursuant to Florida Rule of Civil Procedure 1.280 to discover the names and opinions of the experts hired by your opposing counsel before the Court orders the disclosure. Answers to expert witness interrogatories are usually very general and will not provide you with the entire information you need to fully explore the expert's opinion. It is best to set the deposition of the adverse party's expert witness as soon as you are ready so as to maximize your preparation for trial.

19. Reading the expert's publications and articles -

When facing an opposing expert, read the articles and publications written by that expert. Try to use that expert's own prior writings to impeach him or her. This will prove to be very effective at trial.

Before allowing your own expert to testify at trial, make sure that his or her articles and publications are consistent with the opinions he or she is given at trial on your client's behalf.

20. Reading the expert's previous testimony -

Most experts used in trial have testified previously in court. There are probably numerous trial transcripts and prior depositions of the expert's testimony in existence. In order to properly prepare for a deposition or cross-examination of an expert, it is

important to obtain as many prior trial transcripts and depositions of the expert as you can possibly find. By using prior trial testimony and deposition testimony, you will greatly increase the likelihood of controlling the expert witness during your questioning.

If you are calling an expert as a witness who has testified previously at trials or in depositions, make sure that the expert is able to reconcile his previous opinions with the one he is giving in your case. Otherwise, you should consider hiring another expert.

21. Preparing the expert for trial -

Prepare to meet with the expert witness at least one week before the trial in order to evaluate his or her position in the case, ability to speak, and manner of dressing. Provide the expert witness with some suggestions on how he or she should dress at trial, and how he or she should handle himself or herself before the jury. Go over the expected testimony with the expert witness discussing the key points, the evidentiary foundations necessary to be established at trial, as well as any problem areas that may be encountered during the case. Before trial, give the expert an opportunity to read his or her deposition before he or she testifies at trial.

If counsel wants the expert witness to work with an exhibit, chart, or other demonstrative aid, allow the expert to see the chart or model before the trial so that he or she will appear comfortable with the exhibit by the trial date. Well before the expert witness takes the stand make sure the expert witness has seen all exhibits that will be introduced through him or her.

Establish a good relationship with the expert witness by being considerate and pleasant to work with. Make arrangements for a second pretrial meeting right before the expert witness takes the stand. During this second pretrial meeting, you should briefly cover the essential points of the testimony and answer any questions that the expert witness may have.

Try to anticipate your opposition's evidentiary objections to your direct examination and research the law so that you may present a solid argument against them. Be prepared to proffer the excluded testimony on the record outside the presence of the jury if the objection is sustained.

DIRECT EXAMINATION

22. Laying the foundation -

Before an expert is allowed to testify, it should first be established that:

- A. the expert's opinion will be helpful to the trier of fact in deciding the issues in this case;
- B. the witness is qualified as an expert;
- C. the expert's opinion is based on the evidence offered at trial;

D. the expert testimony does not present substantial dangers of unfair prejudice outweighing its probative value. [*Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 16 Fla. L. Weekly D341 (Fla. Dist. Ct. App. 4th Dist. 1991), cause dismissed 589 So. 2d 291 (Fla.) and (disapproved on other grounds by *Angrand v. Key*, 657 So. 2d 1146, 20 Fla. L. Weekly S289 (Fla.))]

23. Sequence of testimony -

The direct examination of an expert witness should consist of:

- Introduction
- Background and qualifications
- Review of documents in the case
- Materials or exhibits
- Findings and conclusions
- Opinions
- Factual support for opinions

24. Qualifying the expert -

To qualify the expert, simply have the expert testify as to his or her background, including all degrees obtained, work experience, scientific experience, and other achievements such as awards received, books written, authoritative literature published. Once it has been established that the expert has the background necessary to support an opinion in the case, counsel may begin to ask opinion questions of the expert, or may formally tender the witness as an expert before asking opinion questions.

In establishing an expert witness foundation, organize the questions so that it does not appear that the expert is bragging about his or her background. Instead, lead the expert witness during the qualification stage of the direct examination so that the highlights of the proposed expert's career come from you. For example, ask the expert: "You graduated from the University of Miami Medical School in 1972 with Honors, didn't you?"

Remember to qualify the expert in the area that the expert will testify about by showing that the expert's knowledge and experience in a given subject makes him or her authoritative in that area. The trial court has broad discretion in determining the range of subjects upon which experts may testify; nevertheless, the trial court will limit the expert's testimony to those matters that are within the realm of the expert's background and experience. [*Laffman v. Sherrod*, 565 So. 2d 760, 15 Fla. L. Weekly D1853 (Fla. Dist. Ct. App. 3d Dist. 1990)]

25. Tendering the witness as an expert -

After making the necessary qualification questions to establish a proper foundation, counsel traditionally “tendered” the witness as an expert; in other words, asked the court to declare that the witness was an expert. Under the modern view, counsel should simply go right on with the questions to elicit the witness’s opinions.

Although the use of the traditional approach is waning, a good argument can be made for it because it may give the witness a certain cachet in the eyes of the jury. Of course, the court may, in explaining to the jury what an expert witness is, add at the end, “You are not bound by such testimony. You may accept it or reject it, wholly or in part.” That takes some of the effect out of the blessing.

Tendering the witness, however, has the advantage of heading off a problem five or six questions later. When counsel asks a question about the subject matter of the witness’s expertise, and opposing counsel objects “Not qualified” or “lack of foundation,” then at side bar, counsel must argue why the witness is qualified to answer the question.

The proper offer is to define clearly the witness’s expertise because the witness cannot properly be asked opinion questions beyond the scope of that expertise, and the court and the jury have a right to know what that scope is. Counsel may want to think about defining an expert’s area of expertise as broadly as possible in order to enhance the matters about which the expert may testify. Conversely, opposing counsel will want to keep the expert’s area of expertise as narrowly defined as possible.

Some judges will not give the blessing, but simply tell counsel to proceed. If the judge does accept the tender, however, the procedure can do no harm, giving the jury the sense that this person has been blessed by the court as an expert on a particular matter. Also such a practice may help the young practitioner to focus on what precise subject matter that individual is an expert and to ensure that his or her questions are within that scope. Many judges want to keep things moving in their courtroom and would like to eliminate any unnecessary questions; they may view this as an unnecessary waste of time. In addition, some judges feel that a witness can be allowed to give an expert opinion without necessarily having been blessed with the overall title of expert.

26. Opposing counsel’s right to voir dire -

An attorney opposing an expert has the right to challenge the expert’s ability to provide expert testimony before the witness offers an opinion. [FS § 90.705] This may be done by questioning the witness at trial after the expert has testified about his or her background but before the witness testifies. If this occurs, the trial court will probably allow the opposing counsel to inquire of the expert solely on the narrow question of whether the witness has sufficient qualifications to render opinions. Once this procedure has been completed, the court will rule on whether to accept the witness as an expert in the given field for which he or she is being offered.

Alternatively, opposing counsel may request to voir dire the expert to challenge the expert's qualifications and experience at an evidentiary hearing before trial.

If the questioning party establishes that the expert does not have a sufficient basis for his or her opinion, the opinions and inferences of the expert are inadmissible. [FS § 90.705]

If counsel conducting the direct testimony does not tender the witness as an expert, opposing counsel may miss the opportunity to object to the expert's lack of qualifications. However, the opportunity will not be missed if, when the key question is asked to elicit the expert's opinion, counsel objects. The basis of the objection is that the person is not qualified on that particular subject.

27. Excusing the jury -

Many judges excuse the jury during the voir dire process. Others prefer counsel to work this out before the witness is seated to testify by conducting an evidentiary hearing outside the presence of the jury. In either event, make sure to challenge the expert before he or she testifies because the issue may be waived once the opinions are rendered.

28. Using leading questions -

The voir dire should consist of mostly, if not only, leading questions. Consider it as a cross-examination limited to the proposed expert's qualifications to render an opinion in the case.

29. Stipulation to expert's qualifications -

In an attempt to cut off an extended description of why opposing counsel's expert is preeminent in his or her field, counsel may attempt instead to stipulate to the expert's qualifications. However, this can backfire if there is a legitimate reason to challenge an expert that is not raised.

If the judge, in the interest of time or otherwise, coerces counsel to stipulate, offering counsel should make an exhibit of the witness's curriculum vitae. This may sometimes be preferable to a direct examination of the witness's qualifications, where counsel could not have the witness testify about every article written. The jury will see every page of the witness's lengthy curriculum vitae or resume. However, as part of trial preparations, counsel should review the expert's published literature to determine if any of it supports the adversary's case.

30. Use of demonstrative aids -

An expert may use demonstrative aids in testifying, provided that the expert establishes that the demonstrative aid is accurate, true and correct with respect to what

she is attempting to demonstrate and will assist the expert in explaining her opinion to the jury. For example, if a medical doctor is using an anatomical model, it must be established that the model is accurate and anatomically correct. If an expert is using a chart of a scene, it must be established that the chart reasonably and accurately portrays the scene as it appeared at the time in question.

Consider using charts, graphs, slides, photographs, enlargements, anatomical models, and other demonstrative aids to assist the jury in understanding what the expert will testify about. Have the expert step down from the witness chair and educate the jury using the demonstrative aid.

31. Demonstrative evidence is used to illustrate factual contentions or expert opinions. It supplements oral presentation and allows the attorney to take portions of the evidence and enlarge, color, modify, and otherwise emphasize important features in it.

Demonstrative evidence is used to help the jury and judge understand the case. Something as simple as enlarging a photograph or using a drawing of an accident scene can greatly assist the jury through the details of the case. Yet, too much demonstrative evidence may result in the jury feeling bombarded and overwhelmed, which will reduce the effectiveness of its use. Also, it is possible that the opposing side can use the attorney's demonstrative evidence to his own advantage. Therefore, the attorney must carefully consider the types and uses of demonstrative evidence before committing to its use.

32. Types of demonstrative evidence -

Demonstrative evidence may consist of trial exhibits admitted into evidence or visual aids not entered into evidence but used to explain relevant matters. Examples include:

- Product models;
- Charts or diagrams;
- Anatomical models or medial illustrations;
- Re-enactment by video animation, or re-creation;
- Calculations on a chalk board;
- Computer simulations of an accident, event, or product defect;
- Film, computer simulations, slides, or photographs of a crash test; or
- Summaries of evidence.

33. Use of demonstrative evidence at trial -

A. Demonstrative evidence should be used if it will strengthen the case. To make this determination, consider the following:

- Whether crucial aspects of the case may be difficult for the jury to understand;

- Whether particular aspects of the case need to be emphasized; and
- Ways in which different kinds of demonstrative evidence may be used in the case. For example, an enlargement of crucial pages of a contract may allow the expert witness to explain the terms more clearly to the jury; or a model of an airplane may clarify the manner in which an airline accident occurred; or a crash test or simulation may give the jury a more vivid image of how the automobile rolled over and crushed the passenger.

Your goal is to have someone who knows nothing about your case understand what you are trying to prove simply by looking at a demonstrative aid. If the demonstrative evidence is complicated or will take more than a few seconds to communicate in a way that the jury will understand, rework the exhibit or rethink the use of demonstrative evidence.

In addition to the above analysis, the attorney must consider the client's budget and determine the most cost-effective form of demonstrative evidence that can be used.

Save expenses by having your staff prepare demonstrative exhibits whenever possible. Many copiers and computers have tremendous capabilities. The less time you have to prepare demonstrative evidence, the more expensive it becomes and the less able you will be to modify or correct it before trial. Therefore, do not wait until the last minute to prepare your demonstrative evidence, but rather attempt to obtain it at least 60 days before trial and have it ready at least 30 days before trial.

B. Admissibility of Demonstrative Evidence. Most demonstrative evidence will require authentication or identification before it will be allowed into evidence. *F.S. 90.901*. To lay a foundation for the demonstrative evidence, the attorney should have a witness state that the witness is familiar with the object, scene, event, principle, or information depicted (see *Daniels v. State*, 634 So.2d 187 (Fla. 3d DCA 1994); explain the witness's basis for familiarity with the object, scene, event, principle, or information depicted (*id.*); and testify that, in the witness's opinion, the piece of evidence is fair, true, and accurate representation of the object, scene, event, principle, or information depicted. (Demonstrative exhibits must constitute an accurate and reasonable reproduction of the objects or matters involved in the actual case.)

Alternatively, the attorney may need an expert to establish the foundation before introducing the exhibit into evidence or showing it to the jury. By customary practice, if any expert will use demonstrative evidence to explain his or her testimony, the expert must establish that the use of the exhibit will facilitate the presentation of the testimony to the jury.

34. Eliciting expert testimony -

Once the expert has been qualified as an authority, counsel may elicit expert testimony. [FS §§ 90.702 and 90.703] Expert testimony usually consists of educating the jury and providing authoritative opinions about the case.

35. Educate the jury -

The direct examination should first educate the jury on the subject about which the expert will testify. Technical matters, terms, and words should be explained and defined at this time. This way, the jury will understand what will be presented to them later.

36. Develop the expert's testimony to set up the opinion -

Establish what the expert reviewed and what work the expert did to reach an opinion. Once the expert has educated the jury and advised them what he or she did to assist in reaching an opinion, ask the witness questions that will lead to the opinion testimony.

The opinion questions should be asked as follows: "Have you reached an opinion within a reasonable degree of [scientific, medical, engineering, etc.] probability as to what caused the Plaintiff's injuries?" Expert's answer should be "yes." The next question should be: "What is your opinion?"

Once the opinion testimony has been delivered, follow up with questions establishing why the expert has reached that opinion and buttress the expert's opinions with sufficient case-specific, factual support.

37. Leading questions may be used with an expert in the following situations:

- A. preliminary matters such as a person's name, address, and background;
- B. general qualifications;
- C. undisputed facts, for example: "I would like to direct your attention to October 23, 1995. You were in Paris on that day; were you not?";
- D. the expert turns adverse or hostile [RCP 1.450; FS §90.608];
- E. when the witness has difficulty speaking;
- F. when necessary to refresh a witness's recollection, [FS 90.613]; and
- G. if the expert becomes an unwilling, reluctant, or recalcitrant witness. [*See Erp. v. Carroll*, 438 So. 2d 31 (Fla. Dist. Ct. App. 5th Dist. 1983)]

38. Use plain and simple language -

During the trial, develop the direct examination through the use of simple and plain language. Avoid reading questions to the witness. This will bore the jury and leave them with the feeling that the presentation was rehearsed. Counsel may have an outline present, but it should only be used as a reference and not as a script. Remember to guide the witness through the testimony so that he or she does not ramble.

39. Focus on the expert -

The jury's focus of the direct examination should be on the expert witness and not on counsel. Unlike cross-examination, counsel should limit use of leading questions. The majority of questions should be open-ended, allowing the witness to provide the answer.

If you are having a hard time formulating a proper question, start questions with who, what, why, when, where and how.

THE EXPERT OPINION

40. Opinions, generally -

An expert's opinion in Florida must be stated within a reasonable degree of probability. This has often been defined as a 51% likelihood that the opinion is correct.

The expert's opinion may explain what, why, how, where and when things happen.

41. The basis of opinion testimony by experts -

The facts or data upon which the expert bases the opinion or inference may be those facts or data perceived by or made known to him or her at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject and support the opinion expressed, the facts or data may not be admissible in evidence. [FS § 90.704]

Expert opinions may be based on materials provided to the expert before trial, information that the expert has personal knowledge about, or based upon hypothetical questions. Nevertheless, the expert's opinion must be based on facts supported by the record. [*R. P. Hewitt & Associates, Inc. v. McKimie*, 416 So. 2d 1230 (Fla. Dist. Ct. App. 1st Dist. 1982)]

When testifying, an expert does not need to disclose the facts or data he or she reviewed before opining in a case. If asked on cross-examination, the expert must specify the facts and data that he or she relied on in reaching the opinion. [FS § 90.705(1)]

42. Expert's opinion may include ultimate issue of fact -

Once an expert has been qualified, he or she may testify in the form of an opinion or inference that includes an ultimate issue to be decided by the trier of fact. [FS § 90.703] Nevertheless, the expert's opinion must not invade the province of the jury as the ultimate finder of fact; the opinion must not tell the trier of fact how to decide the case. Instead, the expert's opinion testimony should assist the jury in determining what has occurred and how it occurred. [*Palm Beach v. Palm Beach County*, 460 So. 2d 879, 9 Fla. L. Weekly 448 (Fla. 1984), appeal after remand 507 So. 2d 1154, 12 Fla. L. Weekly 1253 (Fla. Dist. Ct. App. 4th Dist.)]

43. Expert's opinion must be based on facts supported by the record -

Expert opinions must be based upon the evidence at trial that has been offered or will be offered. It is only admissible if the opinion testimony can be applied to the evidence at trial. [*Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 16 Fla. L. Weekly D341 (Fla. Dist. Ct. App. 4th Dist. 1991), cause dismissed 589 So. 2d 291 (Fla) and (disapproved on other grounds by *Angrand v. Key*, 657 So. 2d 1146, 20 Fla. L. Weekly S289 (Fla.))] If the expert's opinion is not based on facts supported by the record, then the testimony will not be allowed. [*R. P. Hewitt & Associates, Inc. v. McKimie*, 416 So. 2d 1230 (Fla. Dist. Ct. App. 1st Dist. 1982)]

44. Facts observed by expert or within expert's knowledge -

An expert opinion must be based upon a direct factual foundation. It cannot be based upon pure speculation. An opinion supported solely by an inference that is not factually supported at trial will not be allowed. [*Reaves v. Armstrong World Industries, Inc.*, 569 So. 2d 1307, 15 Fla. L. Weekly D2683, Prod. Liabl. Rep. (CCH) P. 12685 (Fla. Dist. Ct. App. 4th Dist. 1990), review denied 581 So. 2d 166 (Fla.)]

Experts may testify based upon facts that they actually observed, or based on the findings of their own experiments or life experiences. If an expert has tested a particular chemical with laboratory animals and has observed that the laboratory animals develop a certain disease resulting from the exposure to the chemical, the expert may be called at trial to testify about the experiments and their results. Similarly, if an engineer has tested a product and has determined that a certain type of product has a defect, that expert will be allowed to testify at trial about his or her findings.

45. Facts derived directly from one source and partly from another -

An expert may use information that is derived from different sources in reaching his or her opinion. It does not matter that part of the information came from one source and that the other part came from another source, so long as the facts or data obtained are of a type reasonably relied upon by experts in the subject to support the opinion expressed. [FS § 90.704]

46. Direct personal observation not required -

An expert is not required to personally observe the matters at issue before being allowed to provide an opinion testimony in a case. The expert may rely on experiments, evaluations and examinations conducted by others. It is simply necessary that the experts establish that he or she reviewed the information and that the information is of a type usually relied on by experts. [FS § 90.704]

47. An expert's opinion may be supported by others' depositions or based on documents normally relied upon in the industry. An expert may review deposition

testimony of other fact witnesses in the case and may derive an opinion based on the facts provided by the other witnesses.

An expert's opinion may be based on documents, such as other experts' reports and findings, that counsel provides to the expert before the expert testifies at trial, provided that the documents are of the type usually relied upon in the expert's area of expertise. [FS § 90.704] Documents such as depositions, interrogatory answers, industry papers, reports, photographs, and other information are frequently used by experts in reaching their opinions.

48. Opinions based on inadmissible information -

Experts may reach opinions based on information that would not be admissible at trial. In testifying, the experts cannot read the inadmissible information to the jury, but may rely upon that information in reaching an opinion. For example, if the expert has reviewed a report that in and of itself would be inadmissible because it consists of hearsay, the expert cannot read the report to the jury, but would be allowed to review the report and reach an opinion based on such review. [FS § 90.704]

The expert can be challenged with the underlying documentation, even though hearsay, for purposes of cross-examining the expert [FS § 90.706]

49. Statistics and estimates -

Statistics may be used to support an expert's opinion. Many epidemiological studies are based on statistical information. An expert's opinion based on statistics will state the probabilities that something occurred or failed to occur.

Opinions may be based on estimates, provided that the estimates themselves are of a type that experts in the field reasonably rely upon. [FS § 90.704; *Fay v. Mincey*, 454 So. 2d 587 (587 (Fla. Dist. Ct. App. 2d Dist. 1984)] If there is a lack of basis to show the reliability of the underlying estimates, then the expert testimony based upon the unreliable data may be excluded. [*Crawford v. Shivashankar*, 474 So. 2d 873, 10 Fla. L. Weekly 2019, 56 A.L.R. 4th 1097 (Fla. Dist. Ct. App. 1st Dist. 1985)]

50. Computer simulations -

Computer simulations may be used by experts to assist them in explaining their opinions to the jury. To use the computer simulation, it must first be established that the simulation will assist the expert in explaining his or her opinions to the jury. Next, establish that the computer simulation accurately describes the scene, product, or matter fairly and accurately. There is no need that the individual who created the computer simulation be present, unless there is a question as to the accuracy of the computer simulation. If so, then the creator of the computer simulation should be called as a witness to establish the necessary foundation before the expert uses the computer simulation to testify at trial. If the expert created the computer simulation, then the

expert may establish the foundation necessary to answer any questions regarding the scale or the accuracy of the computer simulation.

51. Published treatises -

An expert witness is not advised to use a published treatise to buttress his or her testimony on direct examination. [*Medina v. Variety Children's Hospital*, 438 So. 2d 138 (Fla. Dist. Ct. App. 3d Dist. 1983)] Nevertheless, authoritative publications may be used during cross-examination of the witness.

52. Hypothetical question -

A hypothetical question is one that seeks opinion testimony from an expert who has been asked to assume that certain facts are true. The hypothetical question must be based on facts that have been proven or will be proven at trial. [*R. P. Hewitt & Associates, Inc. v. McKimie*, 416 So. 2d 1230 (Fla. Dist. Ct. App. 1st Dist. 1982)] The question is prefaced with a long statement of facts followed by a question like this: "Assuming those facts to be true, do you have an opinion within a reasonable degree of probability as to whether [fill in the blank]?" The expert's answer to the hypothetical question may be an opinion. [*North Broward Hospital Dist. v. Johnson*, 538 So. 2d 871, 13 Fla. L. Weekly 2705 (Fla. Dist. Ct. App. 4th Dist. 1988), companion case 538 So. 2d 875, 13 Fla. L. Weekly 2734 (Fla. Dist. Ct. App. 4th Dist.), companion case 538 So. 2d 876, 13 Fla. L. Weekly 2709 (Fla. Dist. Ct. App. 4th Dist.) and review denied 551 So. 2d 462 (Fla)]

It is very important to be sure that the components of the hypothetical questions are themselves proved in the record. Counsel may finish a long, eloquent question, only to have the adversary properly object if some component has not been proved in the record, or if counsel is asking the expert to assume something contrary to what is in the record.

EXPERT TESTIMONY ON PARTICULAR TOPICS

53. Medicine -

Experts in the medical field are necessary in many cases involving personal injury, products liability, medical malpractice, and scientific cases. Medical doctors are able to establish liability, causation, and damages. Consider contacting major medical schools, hospitals, and referral expert services to assist you in obtaining an expert in this field.

54. Business -

Experts in business are needed mostly in commercial cases for a variety of different subjects. Experts in this area can be found by contacting large accounting firms or universities and colleges with good business schools. You may also consider calling

the local Chamber of Commerce for information on the leading authorities in a given area of business or expert referral services to assist you in obtaining an expert in this field.

55. Agriculture -

Experts in agriculture are necessary in numerous types of cases, including personal injury, commercial litigation, pesticide litigation, and related matters. Experts in this field are generally found in universities with agriculture schools, federal and state governmental agencies relating to agriculture, and certain expert referral companies.

56. Real or personal property value -

Experts on valuation of real or personal property are needed for eminent domain cases and other real estate litigation. Real estate appraisers should be certified and should possess the appropriate licenses and accreditations. In cases involving valuation, the credibility and background of the expert is extremely important. These types of cases are usually referred to as the "battle of experts." Make sure to take whatever time is necessary in choosing the right expert for your case. Consider contacting large real estate companies, universities and colleges, and expert referral services in finding a valuation expert.

57. Value of services -

Experts regarding value of services are needed to establish damages in many different civil cases. These expert witnesses should be selected based on the services that you are attempting to value. For example, if the case involves the value of accounting services, then an accountant should be hired. If the case involves value of services provided by an interior decorator, then an interior decorator should be hired to serve as an expert in this field. Contact the leading relevant associations, as well as colleges, universities or companies that work in that particular field.

58. Handwriting -

Handwriting experts are necessary in cases where the authenticity of documents or signatures is being challenged. Criminal cases and probate litigation often require the use of handwriting experts. Handwriting experts are often affiliated with universities or state and federal governments. Consider contacting them or an expert referral service when looking for a handwriting expert.

59. How an accident occurred -

Accident reconstructionists are often used to explain how accidents occurred. These experts are usually engineers who have developed a special knowledge in accident reconstruction as a result of work experience following years of investigating and studying accidents. These individuals often advertise in local litigation-oriented publications or may be found listed as experts in several jury reporting publications. You

may also find several qualified reconstructionists at universities and colleges and with the expert referral companies.

60. Speed of moving objects -

The speed of moving objects may be an issue in many personal injury cases involving automobile, airplane, and motorboat crashes. Experts regarding the speed of moving objects are usually engineers who specialize in the calculation of speed. Contact the major universities and colleges and expert referral services to assist you in finding experts in this area.

61. Ballistics -

Ballistics experts may be necessary in cases involving gunshots. Most criminal cases involving guns require ballistic experts to establish that the bullet found in the victim was consistent with the type of bullet fired from a particular gun. Ballistics experts are used quite often by criminal defense attorneys and by state prosecutors. These witnesses are often associated with forensics teams. Consider contacting universities and colleges or expert referral companies to assist you in finding a ballistics expert.

62. DNA -

DNA experts are often required in criminal case as well as matters involving paternity. In both case, the identify of a suspect is narrowed by using DNA results to limit the likelihood of accusing the wrong party of a crime or with paternity. DNA experts may be found as part of forensics teams. DNA experts may also be found in numerous universities and colleges or by contacting an expert referral company.

63. Fingerprint and footprint -

Fingerprint and footprint experts may be required to establish the identify of a particular person in a given case. Fingerprint and footprint experts are most often used in criminal cases. Consider contacting universities and colleges or expert referral companies to assist you in finding a fingerprint/footprint expert.

64. Other experiments, demonstrations and tests -

Depending on the type of case that you are handling, you may need specialized experiments, demonstrations, and tests performed by your expert. Before agreeing to fund case-specific experiments, demonstrations, and tests, make sure that those experiments, demonstrations, and tests will meet the *Frye-Ramirez* test [*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Ramirez v. State*, 651 So. 2d 1164, 20 Fla. L. Weekly S19 (Fla. 1995), reh'g denied (Mar. 21, 1995) in order to avoid unnecessary expenditures for results that may be inadmissible at trial. Have the expert first explain

whether the experiment, demonstration, or test sought is generally accepted in the expert's field.

CROSS-EXAMINATION OF EXPERTS

65. Allowable questions -

The trial court will allow a trial attorney great leeway in cross-examining experts. Questions regarding the expert's ability to be fair and unbiased will all be admissible. Additionally, direct attacks on the expert's prior studies and work, as well as how the expert reached an opinion in the case, are appropriate questions on cross-examination.

Always cross-examine an expert witness. There is nothing worse than allowing an expert witness to give his or her opinions without challenge. The jury may believe that by failing to cross-examine the expert you have accepted the expert's opinion.

66. The sequence of the cross -

During the cross-examination of an expert witness, prepare an outline of leading questions that demonstrate the expert's:

- lack of education
- lack of training
- lack of practical experience in the field
- lack of review of particular materials in the case
- lack of information
- lack of sufficient time to properly prepare opinion
- lack of knowledge of all the facts in the case
- lack of personal knowledge of experiments or authoritative literature
- bias in the case
- interest in the outcome of the case

67. Attack the expert's weaknesses -

Zero in on the weaknesses of the expert or of his or her testimony and expose them to the jury. This may be accomplished in many ways.

First, read and summarize the deposition taken of the expert witness or read and summarize prior depositions given by that same expert in other cases to find inconsistent statements.

Second, research whether the expert has written any articles, books, editorials, or the like that may contradict his opinion in your case.

Third, determine what school the expert has graduated from and see if any of the professors who taught the expert have different opinions that may be introduced and compared to the expert's opinion at trial.

68. Establish bias -

The most effective way of beginning the cross-examination of an expert is to challenge the expert witness's credibility. Attempt to expose his or her bias. An expert witness may be shown to be biased because of money, professional alliances, or his or her relationship with the attorney or the attorney's client.

Point out the disproportionate amount of time in court which the expert spends in comparison to the amount of time he or she spends in his or her given field of expertise. Question the number of times that the expert witness has testified on behalf of the particular opposing lawyer or the lawyer's law firm. Mention the number of times the expert has testified for parties that stand for similar things; for example, insurance companies, large manufacturers, big businesses, plaintiffs in personal injury claims, etc.

69. Challenge the expert's qualifications -

Counsel should attempt to attack an expert's qualifications. No matter how qualified an expert witness may be in a given field, there are probably levels in his or her field that the expert has not reached.

If the opposing side's expert witness only has a Master's degree, point out that he or she lacks a Ph.D. However, this should be done only if your expert has a Ph.D. in his or her given field. If applicable, point out that the expert witness has not published any articles in his or her learned field, or has not held any teaching positions in colleges or universities.

70. Attempt to have the opposing expert agree with you -

Attempt to make the opposing expert your witness. Have the opposing expert testify in general principles that are consistent with your theory of the case. If you ask basic, leading questions that cannot be denied, the expert will have to admit the truth of what you are asking.

71. Failure to consider other facts or data -

Consider attacking the expert's opinion by establishing that the information the expert used to reach an opinion was not complete; or was based upon information not reasonably relied upon by other experts; or was based on information given to the expert solely by opposing counsel; or the expert considered facts that were erroneous or inconclusive.

72. Attack the underlying facts using a hypothetical question -

Consider using a hypothetical question in order to change the facts the expert considered so that they are consistent with your theory of the case. Then ask the expert controlled questioned within that restricted factual scenario. This will allow you to tell your version of the case through the opposing expert. Unlike a hypothetical question on direct examination, the hypothetical question on cross-examination consists of a long, detailed factual scenario followed by a direct leading question relating to the factually restricted hypothetical.

73. Authoritative texts -

Authoritative publications can be used during cross-examination of the witness. It must first be established that the expert considers the author of the publication to be authoritative. [FS § 90.706] If the expert does not recognize the author of the published treatise to be authoritative, then the court may recognize the treatise as authoritative. [FS § 90.706] If the court recognizes the treatise as authoritative, then the expert may be questioned regarding the published authoritative treatise. [*Green v. Goldberg*, 630 So. 2d 606, 18 Fla. L. Weekly D2657 (Fla. Dist. Ct. App. 4th Dist. 1993)]

Identify the article or chapter, read the relevant portions that contradict the opinion of the expert, and then ask the expert if he or she agrees with the statement that you just read. It does not matter whether the expert agrees or disagrees; you have effectively demonstrated to the jury that other published experts do not agree with the opposing witness's position.

74. Prior inconsistent statements -

An expert may be impeached using prior inconsistent statements or trial testimony. Contact attorneys who have previously cross-examined or deposed the opposing expert and request prior trial transcripts and deposition testimony. Review each trial transcript and prior deposition to discovery inconsistent positions and opinions. Prepare to impeach the opposing expert using the prior testimony at trial or depositions.

Data banks about expert witnesses (maintained by on-line services, the Academy of Florida Trial Lawyers, or the Dade County Trial Lawyers Association) are increasingly available, which compile records of where the expert witnesses have previously testified and in what cases. Many plaintiff and defense trial bars have data banks concerning other case pending against a particular doctor.

75. Impeachment using depositions -

When an expert witness makes a statement in trial that is inconsistent with his or her prior deposition or trial testimony, counsel should first highlight the question that was answered differently at the current trial. Make sure that the current trial testimony being impeached is a direct inconsistent statement with the prior statement, then ask the following questions:

- A. Do you remember having had your deposition taken on (state the date)?
- B. Do you remember that a court reporter was present at your deposition?
- C. Do you remember having been sworn in to tell the truth?
- D. Did you tell the truth on that date?
- E. (If applicable) Do you remember having the opposing attorneys present at your deposition?

After you have set the foundation for the impeachment, ask the witness the following question: “Do you remember having been asked the following question and your giving the following answer?” At that point, read the question previously asked and the answer given by the witness in the deposition.

76. Impeachment using inconsistent statements in documents or past speeches -

A similar method may be used to impeach an expert witness using an inconsistent statement in a document, such as an affidavit, sworn statement, letter, or past speech, etc. Follow these steps: First, highlight the inconsistent trial testimony that will be impeached. Second, identify and authenticate the document that will show the inconsistent statement. Third, ask the following questions:

- A. Do you remember having given a statement to (person) regarding how the accident occurred?
- B. Did you give that statement freely?
- C. Who was present when you gave your statement?
- D. When was the statement given?

Fourth, the witness should then be shown the exhibit and asked the following question: “I show you what has been marked as Plaintiff’s Exhibit “A” for identification. Is this a copy of your sworn statement?”

Finally, read the relevant portion of the statement that directly contradicts the trial testimony of the witness.

77. Financial interest -

A trial attorney may cross-examine an expert based upon financial interest in the following manner [*Elkins v. Syken*, 672 So. 2d 517, 21 Fla. L. Weekly S159 (Fla. 1996)]:

- An expert may be asked what work he or she generally does, what percentage of the work is performed for plaintiffs and what percentage of the work is performed for defendants, and what compensation he or she is receiving in return for work performed in the pending case. [*Elkins v. Syken*, 672 So. 2d 517, 21 Fla. L. Weekly S159 (Fla. 1996)]
- The expert may be required to give an approximation of the portion of their professional time or work devoted to service as an expert. This can

be a fair estimate of some reasonable and truthful component of that work, such as hours expended or percentage of income earned from that source or the approximate number of evaluations for litigation that he or she performs in a given year.

- The expert may be required to identify specifically each case in which he or she actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. The production of the expert's business records, files and income tax forms may be ordered produced only upon motion and only upon the most unusual or compelling circumstances.
- The expert need not answer how much money he or she earns as an expert.

Whether it is helpful to ask opposing party's expert about his or her fee may depend in part on the fee involved. Counsel should know before asking the question what the fee is (request through interrogatories, at deposition), and shouldn't ask unless he/she knows. If it is an exorbitant amount, ask. The impact of the answer may depend upon whether this is a professional witness, rather than a professional person called as a witness. Most people expect that professionals, such as practicing doctors, will be paid for their time. Conversely, counsel who is calling this expert should prepare the expert to answer a fee question forthrightly and without embarrassment.

REQUEST FOR AN EXMINATION BY AN EXPERT

78. Physical examination; identifying blood group -

A party may request that the other party submit to a medical examination by a qualified expert. This usually occurs when the physical condition of a party is in controversy in the case. [RCP 1.360(a)]

Additionally, in cases where the condition in controversy is not physical, including paternity cases where the blood group is an issue, a party may move for an examination by a qualified expert. This court may establish protective rules governing such examinations as necessary. [RCP 1.360(a)(1)(B)]

79. The request -

The request for a medical examination may be served on the opposing party without leave of court after commencement of the action, and on any other person with or after service of process and the initial pleading on that party. The request must specify a reasonable time, place, manner, conditions and scope of the examination, and the person or persons by whom the examination is to be made.

80. The response -

The party to whom the request is directed must serve a response within 30 days after service of the request. A defendant, however, need not serve a response until 45

days after service of the process and the initial pleading on that defendant. Upon motion, the court may allow a shorter or longer time. The response must state that the examination will be permitted as requested, unless the request is objected to, in which even the reasons for the objection must be stated.

81. Disclosure of reports -

The party requesting the examination must deliver to the other party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis, and conclusions, with similar reports of all earlier examinations of the same condition. [RCP 1.360(b)(2)] After delivery of the detailed written report, the party requesting the examination is entitled to receive all reports of any examinations of the same condition, previously or thereafter made, from the opposing attorney. [RCP 1.360(b)(1)]

82. Sanction for failure to disclose reports -

When a party is required to submit to medical testing under a court order, that party may request a copy of any medical report made pursuant to the exam. Once the request is made, the party causing the examination must deliver a copy of any report. Failure to do this permits the requesting party to file a motion to compel production. A trial court's decision to exclude evidence under Rule 1.360 is subject to review for abuse of discretion. [*Stiles v. Barger*, 559 So. 2d 365, 15 Fla. L. Weekly D893 (Fla. Dist. Ct. App. 1st Dist. 1990)]

The trial court abused its discretion in a paternity case by excluding the results of a third human leukocyte antigen (HLA) blood test, which was critical evidence necessary to resolve the diametrically opposed conclusions of two prior tests. To resolve the conflicting results of the first two different blood tests by different laboratories, the trial court had ordered another test directly checking for the antigen in question. However, the trial court had refused to allow the appellant to submit the third test into evidence as a sanction for counsel's failure to respond to the appellee's request for a copy of the test results prior to the final hearing. That exclusion was error because, in actions determining paternity or child support, exclusion of a witness's testimony is generally a drastic remedy that should be invoked only under the most compelling circumstances. This is true even where the exclusion was provoked by counsel's tactics, provided the testimony was essential to the party's case and the other side would not be prejudiced. [*Stiles v. Barger*, 559 So. 2d 365, 15 Fla. L. Weekly D893 (Fla. Dist. Ct. App. 1st Dist. 1990)]

83. Expert examiner as witness -

The examiner may be called as a witness by any party to the action, but may not be identified as appointed by the court. [RCP 1.360(b)(1)(c)]