CHAPTER 5
WITNESSES

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I. [5.1] INTRODUCTION

This chapter discusses the competency of a person to be a witness and the examination of witnesses in general. Opinion and expert testimony are covered in Chapter 7 of this manual, and impeachment of witnesses is addressed in Chapter 6.

II. COMPETENCY TO TESTIFY

A. In General

9. [5.10] Burden To Prove Incompetency

1. [5.2] Statutory Basis

F.S. 90.601 provides that [e]very person is competent to be a witness, except as otherwise provided by statute. This creates a presumption of competency until the contrary is shown. *Zabrani v. Riveron*, 495 So.2d 1195 (Fla. 3d DCA 1986).

F.S. 90.601 reaffirms the previous elimination of most common-law grounds for disqualification: disqualification because of a criminal conviction has been repealed (see *F.S.* 90.08 (1975)); religious conviction is no longer a necessary prerequisite to testifying (see *F.S.* 90.06 (1975)); children under the age of 14 are no longer presumed incompetent (see 5.11); and persons recently adjudicated incapacitated are no longer rebuttably presumed incompetent (see 5.12).

NOTE: *F.S.* 90.602, the Dead Persons Statute, was repealed by Chapter 2005-46, 1, Laws of Florida, effective July 1, 2005. See 5.13.

2. [5.3] What Constitutes Competency

To be competent, a person must be capable and qualified. *Crockett v. Cassels*, 95 Fla. 851, 116 So. 865 (1928). Generally, a witness must understand the nature of, and must qualify himself by, taking an oath that he or she considers binding on his conscience. *Id.*; 5.6. A person capable of testifying may be precluded as unqualified in limited circumstances. For example, an adult is unqualified if he or she does not take the prescribed oath. See *F.S.* 90.605; 5.6. One who lacks personal knowledge is unqualified. See *F.S.* 90.604; 5.7. Jurors and judges are unqualified except in limited circumstances. See *F.S.* 90.607; 5.145.21. Because *F.S.* 90.603 uses the term disqualification when addressing the intellectual ability of witnesses, the distinction between qualification and capability is somewhat obscured.

The prerequisite to competency is capability. The witness must have both sufficient intellectual capacity to understand the nature and obligation of the oath and the ability to perceive, remember, and communicate accurate sensory perceptions to the trier of fact. See *F.S.* 90.603; *Rivet v. State*, 556 So.2d 521 (Fla. 5th DCA 1990); *Kaelin v. State*, 410 So.2d 1355 (Fla. 4th DCA 1982). This ability is presumed unless the contrary is shown by competent evidence. *F.S.* 90.601; *Hawk v. State*, 718 So.2d 159 (Fla. 1998), *abrogated on other grounds* 803 So.2d 598. A witness is incompetent to testify if the trial court determines the witness is (1) unable to communicate to the jury; (2) unable to understand the duty to tell the truth; or (3) unable to perceive and remember the events. *Rutherford v. Moore*, 774 So.2d 637, 646 (Fla. 2000). See *F.S.* 90.603, 90.604.

Immaturity and mental illness will not necessarily disqualify a witness, but are factors that courts carefully consider in determining threshold intellectual ability. See 5.115.12.

3. [5.4] Who Determines Competency

The competency of a witness is a question of law for the trial judge. See *F.S.* 90.105(1); *Goldstein v. State*, 447 So.2d 903 (Fla. 4th DCA 1984). In making its determination of competency, the trial court may consider evidence given by the witness. *F.S.* 90.604. See *Rutledge v. State*, 374 So.2d 975 (Fla. 1979); *Dean v. State*, 355 So.2d 130 (Fla. 1st DCA

1978) (voir dire examination by court is acceptable); *Fernandez v. State*, 328 So.2d 508 (Fla. 3d DCA 1976) (voir dire examination of witnesses by counsel is acceptable procedure); *Harrold v. Schluep*, 264 So.2d 431 (Fla. 4th DCA 1972) (voir dire examination by court and parties is acceptable). In *Palazzolo v. State*, 754 So.2d 731 (Fla. 2d DCA 2000), the conviction was reversed in part because the trial court (1) failed to allow defense counsel an opportunity to conduct voir dire on the minor witnesss competency; and (2) failed to make a case-specific determination of the witnesss competency before allowing the testimony. *Id.*

The court may also rely on expert or lay testimony regarding a witnesss competency. For example, the court may consider testimony previously given during the trial regarding the particular witness whose competency is in question. See *Florida Power & Light Co. v. Robinson*, 68 So.2d 406 (Fla. 1953). In a hearing outside the presence of the jury, the court may consider expert testimony concerning the witnesss competency. See *Kaelin v. State*, 410 So.2d 1355 (Fla. 4th DCA 1982); compare *Goldstein* (expert testimony as to mentally ill witnesss competency to testify was not improper bolstering of witnesss credibility). In addition, the court may consider the testimony of others concerning the witnesss competency. See *Davis v. State*, 348 So.2d 1228 (Fla. 3d DCA 1977) (mother of child witness testified regarding childs competency). In determining competency, the court must evaluate the witnesss ability to understand the nature of the oath rather than the witnesss tendency to lie (which is a credibility issue). *Tampa Brass & Aluminum Corp. v. American Employers Insurance Co.*, 709 So.2d 548 (Fla. 2d DCA 1998).

The determination of witness competency is within the sound discretion of the trial court and will not be disturbed on appeal in the absence of manifest abuse. *Rutledge*; *Davis*, 348 So.2d at 1230 (trial court abused its discretion in allowing [five-year old witness] to testify at trial in light of a record permeated with instances of undue influence over [witness] by his parents). Additionally, the failure to timely object to the competency of a witness will waive the issue on appeal. See *Toussaint v. State*, 755 So.2d 170 (Fla. 4th DCA 2000) (counsels failure to object to competency of child victim meant that victims competency was never placed at issue in case). In fact, a determination of competency is not required unless it is placed at issue in the trial as a result of an objection by counsel. For cases in which a childs competency was placed in issue, see, *e.g.*, *Lloyd v. State*, 524 So.2d 396 (Fla. 1988); *Z.P. v. State*, 651 So.2d 213 (Fla. 2d DCA 1995); *Griffin v. State*, 526 So.2d 752 (Fla. 1st DCA 1988).

4. [5.5] Credibility Or Competency

If the court determines that a witness is competent, the evidence relied on by the court to make that determination may be admitted before the trier of fact to assist in the evaluation of the witnesss credibility. *Harrold v. Schluep*, 264 So.2d 431, 435 (Fla. 4th DCA 1972) (if on remand [an individual] should prove qualified as a witness, the jury can judge the weight they wish to accord this testimony based upon his age, understanding and the usual factors). See also *Goldstein v. State*, 447 So.2d 903 (Fla. 4th DCA 1984) (jury to evaluate credibility). A mere assertion that evidence will relate to the witnesss credibility will not render evidence concerning a witnesss mental capacity admissible; an appropriate proffer must be made. See *Trainor v. State*, 768 So.2d 1123 (Fla. 2d DCA 2000) (although evidence that witnesss mental capacity affected his ability to tell truth would be admissible, counsels failure to cite such evidence in mental health records rendered those records inadmissible).

Under *F.S.* 90.611, [e]vidence of the beliefs or opinions of a witness on matters of religion is inadmissible to show that the witnesss credibility is impaired or enhanced thereby. See, *e.g.*, *Norquoy v. Metcalf*, 575 So.2d 322 (Fla. 4th DCA 1991) (party testified on direct regarding religious affiliation and great regard for oath he had taken). Although *F.S.* 90.611 prohibits inquiry on matters of religion for the sole purpose of impeaching or enhancing witness credibility, it does not bar inquiry into religious matters when those matters would be relevant to issues in a case. See *Colbert v. Rolls*, 746 So.2d 1134 (Fla. 5th DCA 1999).

5. [5.6] Oath

Each witness must take an oath or affirmation to testify truthfully. See *Willis v. Romano*, 972 So.2d 294 (Fla. 5th DCA 2008) (affirming trial courts refusal to permit witness to testify when witness declined to take the oath for religious reasons); *Murphy v. State*, 667 So.2d 375 (Fla. 1st DCA 1995); *Houck v. State*, 421 So.2d 1113 (Fla. 1st DCA 1982) (trial judge erred in receiving telephoned, *unsworn* testimony of state attorney during suppression hearing). The oath is viewed primarily as a means to impress on the witness the obligation to tell the truth to avoid consequences such as prosecution for perjury. The prescribed oath is, Do you swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth? *F.S.* 90.605(1). In the courts discretion, a child may testify without taking the oath if the court determines the child understands the duty to tell the truth or the duty not to lie. *F.S.* 90.605(2).

Although capable of testifying, a witness may be rendered incompetent if the oath is given by a person not qualified to administer it. *Crockett v. Cassels*, 95 Fla. 851, 116 So. 865 (1928) (deposition inadmissible because commissioner who swore in deponent had not taken oath of office); Atty Gen. Op. 2000-05.

F.S. 90.603(2) provides for the disqualification of a witness who is [i]ncapable of understanding the duty... to tell the truth. If the witness does not understand the nature of the oath, the trial court should instruct the witness. *Harrold v. Schluep*, 264 So.2d 431 (Fla. 4th DCA 1972). The acceptable degree of understanding, however, may be minimal. See *Thomas v. State*, 73 Fla. 115, 74 So. 1, 4 (1917) (witness competent even though ignorant and illiterate). As noted, a child may testify without taking the oath if the court determines the child understands the duty to tell the truth or the duty not to lie. *F.S.* 90.605(2). See, *e.g.*, *Palazzolo v. State*, 754 So.2d 731 (Fla. 2d DCA 2000) (generally acknowledging competency of child witness when child understands duty to tell truth); compare *Delacruz v. State*, 734 So.2d 1116, 1119 (Fla. 1st DCA 1999) (trial court abused its discretion in admitting testimony of minor when there was nothing in the childs testimony that establishes that she understood what it meant to tell the truth; the difference between telling the truth and telling a lie; or what would happen if she did not tell the truth. Nor was there anything in childs testimony from which one might conclude that she was capable of observing and recollecting facts, or of narrating those facts to a jury). For a general discussion of the oath in connection with children, persons with mental disabilities, and adults, see *Simmons v. State*, 683 So.2d 1101 (Fla. 1st DCA 1997).

A witness need not know the penalties for perjury or the specific consequences of lying under oath to understand the nature and obligation of the oath. See *Bell v. State*, 93 So.2d 575 (Fla. 1957). It is sufficient if the witness simply believes something bad will happen to him or her if the witness does not tell the truth. See *Robinson v. State*, 70 Fla. 628, 70 So. 595 (1916) (nine-

year-old witness understood oath to mean dont tell no tale or the devil will catch me, and also understood that it is not right to tell a lie); *State in the Interest of R. R.*, 398 A.2d 76 (N.J. 1979), 6 A.L.R.4th 140 (although infant witness was incapable of understanding divine punishment concept or legal implication of false swearing, infant permitted to testify if committed to speaking truth because of fear of future punishment of *any* kind).

In taking the oath, the witness does not have to acknowledge a belief in a supreme being. *Clinton v. State*, 53 Fla. 98, 43 So. 312 (1907). As noted in 5.5, under *F.S.* 90.611, evidence of the witnesss religious beliefs is inadmissible to either bolster or discredit the witness. See *Colbert v. Rolls*, 746 So.2d 1134 (Fla. 5th DCA 1999).

6. [5.7] Perception Of The Subject Events

A witness must have the ability to perceive accurate sensory impressions, see *F.S.* 90.603(1); *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000) (inability to perceive and remember events will render witness incompetent), but this perception requirement is minimal. In *United States v. Cipriano*, 493 F.2d 26 (5th Cir. 1974), a Spanish-speaking witness with minimal knowledge of English was permitted to testify to the extent that she understood an English conversation she had overheard. Any language difficulties went to weight rather than competency. *Id.* Although the perception requirement is minimal, if the witness simply repeats what others have said or what the witness believes the examiners want to hear, the witness is incompetent. See *Davis v. State*, 348 So.2d 1228 (Fla. 3d DCA 1977); see also *Delacruz v. State*, 734 So.2d 1116 (Fla. 1st DCA 1999) (trial court abused its discretion in admitting testimony of minor when, among other things, there was nothing in childs testimony from which one might conclude that she was capable of observing and recollecting facts, or of narrating those facts to a jury). Age and mental illness are factors affecting the intellectual capacity of a witness and must be considered carefully. See 5.115.12.

In addition to having a minimal ability to perceive, the witness must have personally perceived the matters about which he or she testifies. See *F.S.* 90.604. This means that, before testifying to a fact, the witness should be asked to state that he or she saw, heard, tasted, smelled, or touched the matter. *Serrano v. State*, 15 So.3d 629, 63839 (Fla. 1st DCA 2009) (finding no error in trial courts decision to permit witnesses testimony regarding whether blood or gunshot residue was on their clothing during robbery over objection that question called for expert forensics opinion when the qualifier [to your knowledge] rooted their subject matter within the ken of an intelligent person with a degree of experience). For example, a police officer may not testify about the ownership of a vehicle if the officers determination of ownership was based on the reports of others. *Webb v. State*, 253 So.2d 715 (Fla. 4th DCA 1971). Furthermore, a witness not privy to the negotiations of two contracting parties is incompetent to testify regarding the parties intent. *Airborne Freight Corp. v. Fleming International Airways, Inc.*, 423 So.2d 921 (Fla. 3d DCA 1983).

When a witness perceived only a part of a matter, conversation, or transaction, the witness may testify about the part perceived. *Sylvester v. State*, 46 Fla. 166, 35 So. 142 (1903); see also *Cipriano*. If a witness perceived the matter about which the witness testified, the fact that the witness qualified the testimony affects its weight, not its admissibility. See *Henderson v. State*, 94 Fla. 318, 113 So. 689, 693 (1927) (I *believe* he is the man) (emphasis added).

7. [5.8] Memory

A witness must have the minimal intellectual ability to remember matters perceived. Age and mental illness may affect ones ability to recall. See 5.115.12. If a person who is competent has a failure of recollection, that person becomes incompetent. *F.S.* 90.603(1); *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000); see also *F.S.* 90.803(5) (insufficient memory prerequisite to introduction of recorded recollection); *F.S.* 90.804(1)(c) (failure of memory renders declarant unavailable for hearsay purposes); *T.O. v. Dept. of Children & Families*, 21 So.3d 173 (Fla. 4th DCA 2009) (holding that witness was unavailable because of her lack of memory and that her hearsay statements were admissible only if other corroborative evidence was presented).

Permissible techniques for reviving memory, thus rendering a witness competent, are discussed in 5.495.54. If hypnosis is used in an attempt to revive or enhance memory, the witness is rendered incompetent to testify to the revived or enhanced memory unless the proponent establishes its reliability in a hearing under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), 34 A.L.R. 145. See *Thorp v. State*, 777 So.2d 385 (Fla. 2001); *Bundy v. State*, 471 So.2d 9 (Fla. 1985) (finding hypnotically refreshed testimony per se inadmissible in criminal trial). The previously hypnotized witness, however, is competent to testify to those facts demonstrably recalled before the hypnotic session. *Bundy*. The Florida Supreme Court, in *Bundy*, rejected the position taken by the District Courts of Appeal, First and Fifth Districts, that the dangers of suggestibility inherent in a hypnotic session merely go to the credibility of the witness rather than to the witnesss competency. See *Stokes v. State*, 548 So.2d 188 (Fla. 1989); *Pate v. State*, 529 So.2d 328 (Fla. 2d DCA 1988). In *Morgan v. State*, 537 So.2d 973, 976 (Fla. 1989), the Florida Supreme Court receded from the holding in *Bundy* to the extent it affects a defendants testimony or statements made to experts by a defendant in preparation of a defense. In *Morgan*, the court distinguished between the prohibited use of hypnotically enhanced testimony as direct evidence of establishing the truth of the matter asserted versus a permissible use as a diagnostic tool for establishing a defense such as insanity. (*Bundy* does not preclude the use of hypnosis for purely investigative purposes, 471 So.2d at 19.) The court required that reasonable notice of the hypnosis session be given to the prosecutor and that the session be recorded to ensure compliance with proper procedures and practices. *Morgan*, 537 So.2d at 976.

8. [5.9] Communication And Interpreters

A witness must have the minimal ability to convey what he or she has perceived and must express himself or herself in a rational manner to the trier of fact. See *F.S.* 90.603(1); *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000) (witness will be disqualified if unable to communicate perceived events to jury); *Delacruz v. State*, 734 So.2d 1116, 1119 (Fla. 1st DCA 1999) (trial court abused its discretion in admitting testimony of minor when, among other things, there was nothing in childs testimony from which one might conclude that she was capable of observing and recollecting facts, or of narrating those facts to a jury).

Only a minimal ability to communicate is required for the witness to be competent. See *Kaelin v. State*, 410 So.2d 1355 (Fla. 4th DCA 1982); but see *People v. White*, 238 N.E.2d 389 (Ill. 1968) (nursing home resident who communicated only through raising or lowering knee may have been minimally competent, but effect of deficient communication ability violated defendants fundamental right to cross-examination). Note, too, that the District Court of Appeal, Third District, held that a person under the influence of drugs when tendered as a witness is

incompetent, and this incompetence will result in the witnesss testimony being struck. *Collie v. State*, 267 So.2d 382 (Fla. 3d DCA 1972).

If a witness cannot understand or communicate in English, *F.S.* 90.606(1)(a) authorizes the court to use interpreters. *Bueno v. Secretary, Dept. of Corrections*, 2008 WL 906450 (M.D. Fla. 2008) (finding trial court properly exercised its discretion, upon request for a court-appointed interpreter, in directing Puerto Rican defense counsel to translate for Mexican defendant). Before using an interpreter, the court must exercise its discretion and determine that there is a need for an interpreter and that the interpreter is qualified by experience or study. The interpreter must also take an oath to make a true interpretation of the questions asked and answers given. *F.S.* 90.606(1). See also the following:

Clervil v. McNeil, 2008 WL 4753575, *1314 (S.D. Fla. 2008) (upon a collateral attack, an unsworn interpreter is cloaked with the presumption of regularity, which permits a court to assume that an official or person acting under oath of office will not do anything contrary to his or her official duty);

Chavez-Perez v. McNeil, 2008 WL 450034 (M.D. Fla. 2008) (finding that interpreter must only be sworn in when providing interpretation for individuals serving as witnesses); see also Florida Rule for Certification and Regulation of Interpreters 14.310;

Obando v. State, 988 So.2d 87 (Fla. 4th DCA 2008) (recognizing that failure to swear in interpreter may not be fundamental error when there is no allegation of impropriety or bias as to interpreter or inaccuracy in interpreters translation); and

Kaelin (interpreter for deaf, retarded, cerebral palsy victim sufficiently qualified through experience).

But compare:

Echemendia v. State, 735 So.2d 555 (Fla. 3d DCA 1999) (new trial warranted when interpreters translation mistakenly made it seem as if defendant referred to victim using racial slur); and

Balderrama v. State, 433 So.2d 1311 (Fla. 2d DCA 1983) (defendant prejudiced by use of his brother as interpreter, because (1) brother was not sworn as interpreter, (2) there was no inquiry into brothers qualifications, (3) there was question as to accuracy of translation, and (4) brother, as codefendant, had obvious conflict of interest).

In *State in the Interest of R. R.*, 398 A.2d 76, 85 (N.J. 1979), 6 A.L.R.4th 140, the court held that [a]n interpreter should never be appointed unless *necessary* to the conduct of the case. . . . This is so because no matter how disinterested an interpreter might be, there always exists a possibility that [the interpreter] will inadvertently distort the message communicated by the primary witness.

The court should also determine whether the interpreter is biased, interested, or has a conflict of interest. *Balderrama* (improper to allow codefendant to interpret for Spanish-speaking brother at change of plea hearing). The interpreter should act impartially as a conduit between the trier of fact and the witness and should not prompt, characterize, or embellish the witnesss testimony. *State in the Interest of R. R.*; *State v. McLellan*, 286 S.E.2d 873 (N.C. Ct.App. 1982).

Relatives, friends of a party or victim, or other interested persons should not be interpreters, unless the trial judge is satisfied that no disinterested person is available who would provide an

adequate translation. See *McLellan* (half sister of robbery victim who had speech impediment permitted to interpret, because distinctive speech pattern likely known only to close friend or relative). See also *Balderrama*; *State v. Lee*, 512 A.2d 525 (N.J. Super.Ct.App.Div. 1986), *limited* 787 A.2d 887 (improper to use victim and complaining witness as interpreters for other witnesses before grand jury). If it is necessary to use a friend, relative, or other interested person, the court should remind the interpreter of the oath and of the need for the translation to be accurate. See *Suarez v. State*, 481 So.2d 1201 (Fla. 1986).

F.S. 90.606 was amended in 1985 to add the following:

(1)(b) This section is not limited to persons who speak a language other than English, but applies also to the language and descriptions of any person, such as a child or a person who is mentally or developmentally disabled, who cannot be reasonably understood, or who cannot understand questioning, without the aid of an interpreter.

This amendment seems to reflect preexisting Florida law. In *Kaelin*, a 32-year-old deaf and mentally retarded sexual abuse victim, who suffered from cerebral palsy, had an IQ of 54, and had the sign language skills of an eight-year-old child, was permitted to testify through an experienced interpreter for the deaf, who had worked with the witness for a significant period and had gained special insight and understanding about her manner of communication. The court found that the interpreter had sufficient training and experience and had obtained specialized knowledge and skill that would assist the trier of fact in understanding the witness. See *F.S.* 90.702 (expert witnesses). The fact that others may be more qualified affects the weight to be given the evidence. *Kaelin*.

Proponents of the 1985 amendment to *F.S.* 90.606 suggested that it would allow a friend, parent, or relative to act as an interpreter of special or unique forms of communication used by a child or mentally deficient witness. See Hoffenberg & Skuthan, *Protecting Children in the Courts*, 59 Fla. Bar J. 14 (Oct. 1985). Courts should be reluctant, however, to interpose between counsel and the witness any person who is not impartial and who may become an independent witness. See *State in the Interest of R. R.* (improper for mother of four-year-old sodomy victim to be interpreter when she was also to be witness).

F.S. 90.6063(2) requires the presiding officer in a judicial proceeding to appoint a qualified interpreter for deaf witnesses. *F.S.* 90.6063(4) also requires deaf witnesses to notify the appointing authority of their need for accommodation at least five days before their appearance, but the failure to do so does not relieve the appointing authority of the duty to provide an interpreter. Failure of the deaf person to strictly comply with the requirements of the statute does not constitute a waiver of the right to an interpreter. *Id.*

F.S. 90.6063(5) provides guidance in locating qualified interpreters. The appointing authority has discretion to choose the interpreter after the authority and the deaf person determine that the interpreter can accurately repeat and translate to and from the deaf person. *F.S.* 90.6063(6).

A qualified interpreter must make an oath or affirmation to provide a true translation of the proceedings to the deaf person and to repeat the deaf persons statements, to the best of the interpreters knowledge, in English. *F.S.* 90.6063(7). When an interpreter communicates to a person under circumstances that make the communication privileged, and the recipient of the communication cannot be compelled to testify regarding the communication, the privilege extends to the interpreter. *Id.*

The failure to contemporaneously object to the use of an interpreter at trial will waive the issue for appeal. *Rodriguez v. State*, 664 So.2d 1077 (Fla. 3d DCA 1996).

9. [5.10] Burden To Prove Incompetency

A witness is competent on taking the oath if the witness has personal knowledge of the matter on which the witness speaks, and has the minimal intellectual ability to understand the nature and obligation of the oath and to accurately perceive, remember, and relate the matters of consequence to the tribunal.

A determination of competency is not required unless it is placed at issue in the trial as a result of an objection by counsel. See, *e.g.*, *Lloyd v. State*, 524 So.2d 396 (Fla. 1988); *Z.P. v. State*, 651 So.2d 213 (Fla. 2d DCA 1995); *Griffin v. State*, 526 So.2d 752 (Fla. 1st DCA 1988) (childs competency was placed at issue in each case). The failure to timely object to the competency of a witness will waive the issue on appeal. See *Toussaint v. State*, 755 So.2d 170 (Fla. 4th DCA 2000) (counsels failure to object to competency of child victim meant that victims competency was never placed at issue in case).

The burden of establishing a witnesss disqualification is on the objecting party. *Zabrani v. Riveron*, 495 So.2d 1195 (Fla. 3d DCA 1986); *Hackmann v. Hyland*, 445 So.2d 1079 (Fla. 3d DCA 1984).

B. [5.11] Competency Of Children

At common law, a child under the age of 14 was presumed incompetent to testify. See *Radiant Oil Co. v. Herring*, 146 Fla. 154, 200 So. 376 (1941); *Clinton v. State*, 53 Fla. 98, 43 So. 312 (1907). The presumption of competency created by *F.S.* 90.601, however, reaffirms the elimination of this common-law rule. See *Lloyd v. State*, 524 So.2d 396 (Fla. 1988); *Bowman v. State*, 760 So.2d 1053 (Fla. 4th DCA 2000).

Although the presumption of competency has replaced the presumption of incompetency, it has long been held that intelligence and the ability to understand are the proper tests to determine a childs competency. See *Fuller v. State*, 540 So.2d 182 (Fla. 5th DCA 1989); *Griffin v. State*, 526 So.2d 752 (Fla. 1st DCA 1988). In determining a childs competency as a witness, the Florida Supreme Court held that the trial court must determine whether the child (1) is capable of receiv[ing] a just impression of the facts about which he or she is to testify; (2) is capable of relat[ing] them correctly; and (3) possesses a sense of obligation to tell the truth. *Lloyd*, 524 So.2d at 400; see also *Bell v. State*, 93 So.2d 575, 577 (Fla. 1957) (noting that the child should possess the spiritual and moral consciousness that should be the basic inducement to all witnesses to speak the truth).

The trial court must do more than mere cursory questioning as to the childs ability to correctly and truthfully relate the facts observed. *In re G.S.*, 989 So.2d 1282, 1283 (Fla. 2d DCA 2008) (Questioning that demonstrates a child knows the difference between the truth and a lie does not necessarily establish that a child has a moral obligation to tell the truth); *Black v. State*, 864 So.2d 464, 465466 (Fla. 1st DCA 2003) (trial courts cursory questions . . . insufficient as a matter of law to permit a finding that the child was competent to testify, because [t]he few questions asked regarding the childs ability to observe and recollect facts strongly suggested that she was not, and questioning did not demonstrate that child possessed moral sense of the

obligation to tell the truth); *S.C. v. State*, 837 So.2d 1159 (Fla. 1st DCA 2003) (citing *Lloyd* and *Griffin*); *Seccia v. State*, 689 So.2d 354 (Fla. 1st DCA 1997) (reversing and remanding because trial court failed to make sufficient determination of child witnesss competency). See also *Houston v. McNeil*, 2009 WL 1286286 (N.D. Fla. 2009) (recognizing that, because the competency of a witness to testify is a state law question and the state court found the child competent to testify, witnesss competency was not grounds for habeas corpus relief); *Gonzalez v. Secretary, Dept. of Corrections*, 2009 WL 997240 (M.D. Fla. 2009) (finding counsel was not deficient for failing to object to child testifying without being administered oath when she was first asked about her name, age, school, grade, address, who she lived with, her sisters name, and to explain the difference between truth and lies).

Children are competent if they have sufficient minimal intelligence, regardless of age, to accurately perceive, remember, and relate, and when they have a minimal appreciation of the nature and obligation of an oath. *Cross v. State*, 89 Fla. 212, 103 So. 636 (1925); *Wells v. McNeil*, 2009 WL 2767659, *14 (S.D. Fla. 2009) (finding child was competent to testify, irrespective of whether or not she had a high I.Q. and irrespective of age, when she demonstrated intelligence and ability to accurately recount facts); *Griffin*. As noted in 5.6, if the child understands the duty to tell the truth or not to lie, it is not necessary to administer the prescribed oath. *F.S.* 90.605(2); *Dean v. State*, 355 So.2d 130 (Fla. 1st DCA 1978).

A childs competency is fixed as of the date the child will testify rather than the date on which the facts at issue occurred. *Rivet v. State*, 556 So.2d 521 (Fla. 5th DCA 1990) (citing *Griffin*). In some cases, the court must consider the childs intellectual development in relation to the matters about which the child will testify. Through experience and social conditioning, for example, a very young child may be competent to testify accurately about the Saturday morning cartoon lineup on television, but incapable of testifying accurately about a complex sequence of events or relationships.

Under *F.S.* 90.601, before a child may be declared incompetent and be excluded as a witness, there must be substantial evidence in the record to support the adjudication. *State v. McIntosh*, 475 So.2d 973 (Fla. 4th DCA 1985), *quashed on other grounds* 496 So.2d 120 (trial court improperly excluded child witness when there was no substantial evidence concerning intellectual inability). Even a young child is presumed competent until incompetency is otherwise affirmatively established by substantial evidence. *Begley v. State*, 483 So.2d 70 (Fla. 4th DCA 1986) (five-year-old sexual abuse victim of above-average intelligence was competent to testify); *Fernandez v. State*, 328 So.2d 508 (Fla. 3d DCA 1976) (six-year-old allowed to testify); compare *Black* (five-year-old child found incompetent to testify about events that occurred); *S.C.* (four-year-old child found incompetent).

C. [5.12] Competency Of Mentally Ill Persons

Because no statutory provision specifically excludes from testifying persons who are mentally ill or have been adjudicated incapacitated, they are presumed competent to testify. *Zabrani v. Riveron*, 495 So.2d 1195 (Fla. 3d DCA 1986). Thus, the burden is on the opponent to establish that mental illness precludes the witness from having the threshold ability to understand the oath and to accurately perceive, remember, and relate. In *Zabrani*, a witness who confessed to murder and implicated the plaintiff was subsequently adjudicated not guilty by reason of insanity. The court held that the burden was on the plaintiff to demonstrate that the witness was not competent on the date of the confession.

If a challenge is raised concerning the competency of a witness, the court must consider whether the witness is so affected by mental illness as to be incapable of performing the functions of a witness. See *Hammond v. State*, 660 So.2d 1152 (Fla. 2d DCA 1995). Mental illness, however, even if coupled with a recent adjudication of incapacity, is not conclusive. See *Simmons v. State*, 683 So.2d 1101 (Fla. 1st DCA 1997); *Goldstein v. State*, 447 So.2d 903 (Fla. 4th DCA 1984). The court should also carefully consider the nature of the witnesss mental illness as it relates to the nature of the anticipated testimony. For example, a mentally ill person with a food phobia and a paranoia regarding hospital personnel may be incompetent to testify in an involuntary manslaughter prosecution of a psychiatric nurse accused of using excessive force in feeding a patient. See *People v. McCaughan*, 317 P.2d 974 (Cal. 1957).

The court may consider expert testimony when determining the existence and effects of a witnesss mental illness. See *Kaelin v. State*, 410 So.2d 1355 (Fla. 4th DCA 1982). The courts determination may also be made through personal examination of the witness. *Zabrani*.

Although mental illness may not interfere with the witnesss intellectual ability to testify, the illness may be relevant to the credibility of the witness and the weight to be given to the testimony. See 5.5. Therefore, expert testimony may be admitted regarding the degree to which the witnesss mental illness or condition may affect the witnesss ability to understand the duty to tell the truth or to perceive, remember, and relate with accuracy. See *Goldstein*; compare *Fields v. State*, 379 So.2d 408 (Fla. 3d DCA 1980) (absent proffer that defendant would call expert to render such testimony, question as put forth to minor victim was irrelevant and inadmissible).

D. [5.13] Competency Of Interested Witnesses Dead Persons Statute

F.S. 90.602, the Dead Persons Statute, was repealed by Chapter 2005-46, 1, Laws of Florida, effective July 1, 2005. For a discussion of the history and application of that statute before its repeal, see Chapter 5 of Evidence in Florida (Fla. Bar CLE 6th ed. 2002); see also Ehrhardt, Florida Evidence 602.2 (Thomson/West 2010 ed.).

E. Competency Of Judges

1. [5.14] While Presiding

There is an inherent conflict if a judge assumes the role of witness while maintaining the position of presiding judge. This conflict is resolved by declaring that the judge is incompetent to testify in the case over which the judge is presiding. *F.S.* 90.607(1)(a). No objection by counsel is necessary to preserve the point. *Id*.

To expedite the proceedings, however, if no one else is readily available to testify on a matter, a judge, with the consent of all parties, may testify concerning strictly formal matters. *F.S.* 90.607(1)(b). This rule of incompetency is not implicated when the court judicially notices a fact under the Florida Evidence Code. See *F.S.* 90.201 *et seq.*; Chapter 2 of this manual.

If it is determined that a presiding judge is a material witness, a motion for disqualification of the judge is appropriate. See *Fla.R.Jud.Admin.* 2.330 (formerly *Rule* 2.160); *Rodriguez v. State*, 919 So.2d 1252, 1276 (Fla. 2006) (citations omitted) (rule requires a trial judge to disqualify himself if the judge is a material witness for or against one of the parties to the cause. A material witness is one who gives testimony going to some fact affecting the merits of the cause and about which no other witness might testify); see also *Van Fripp v. State*, 412 So.2d 915 (Fla. 4th DCA 1982), quoting *Wingate v. Mach*, 117 Fla. 104, 157 So. 421, 422 (1934) (trial judge did not err in denying motion to disqualify, because movant failed to demonstrate conclusively that the trial judge possessed relevant information going to some fact affecting the merits of the cause and about which no other witness might testify).

The fact that the judge presided over a prior proceeding in the same case does not make the judge a material witness subject to disqualification. See *Jackson v. State*, 599 So.2d 103 (Fla. 1992); *Enterprise Leasing Co. v. Jones*, 750 So.2d 114 (Fla. 5th DCA 1999), *approved* 789 So.2d 964 (knowledge by trial court of settlement offers, standing alone, should not place reasonable person in fear of not receiving fair trial); *McGauley v. Goldstein*, 653 So.2d 1108 (Fla. 4th DCA 1995). If the judge uses knowledge of testimony and other evidence that was presented in an independent proceeding, the judge becomes a material witness. See *Hooks v. State*, 207 So.2d 459 (Fla. 2d DCA 1968), *receded from on other grounds* 352 So.2d 161 (after defendants acquittal on burglary charge, trial judge conducted violation of probation hearing without taking further evidence; judge relied solely on his conclusions regarding defendants guilt acquired during preceding trial).

During a trial, the judge must avoid comments that may be perceived, directly or indirectly, by the trier of fact as comments on the weight of the evidence, credibility of witnesses, or credibility or guilt of the accused. See *F.S.* 90.106; *Foster v. State*, 778 So.2d 906 (Fla. 2001); *Peek v. State*, 488 So.2d 52 (Fla. 1986); *Lester v. State*, 37 Fla. 382, 20 So. 232 (1896). See also *Brown v. State*, 11 So.3d 428 (Fla. 2d DCA 2009) (recognizing that jury instructions may amount to impermissible judicial comment on the evidence); *Moton v. State*, 659 So.2d 1269 (Fla. 4th DCA 1995) (reversing conviction and remanding because judges examination of witness constituted comment on evidence); 5.27 (discussing limitations on trial courts examination of witness). Compare *Mitsubishi Motors Corp. v. Laliberte*, 2010 WL 2382562, *3 (Fla. 4th DCA 2010) (finding trial courts reference to seat being defective was inadvertent and not calculated to serve as comment on evidence and that any confusion on part of jurors was resolved by curative instruction); *Alexander v. State*, 931 So.2d 946 (Fla. 4th DCA 2006) (although trial judge is precluded from commenting on weight of evidence presented, courts reference to witness as expert was not error, particularly when coupled with instruction to jury that expert testimony should be given same weight as other witness testimony).

2. [5.15] While Not Presiding

Generally, a nonpresiding judge is not precluded from testifying in a proceeding. This is true even if the judge may be testifying about a matter perceived during an earlier proceeding when the judge was presiding. However, a judge is precluded from voluntarily testifying as a character witness. Fla. Code Jud. Conduct, Canon 2B.

If the hearing is an inquiry into the validity of the judges prior finding in a nonjury trial, the judge may be disqualified from testifying about matters that essentially inhere in the findings.

See *Perkins v. LeCureux*, 58 F.3d 214 (6th Cir. 1995) (statement made by sentencing judge 10 years later regarding judges thought processes at time of sentencing must not be considered in habeas proceeding) *superseded by statute on other grounds* 68 M.J. 29; *Ramos v. Weber*, 616 N.W.2d 88 (S.D. 2000). See *F.S.* 90.607(2)(b) and 5.165.21 regarding jurors. See also 5.8 of Professional Liability of Lawyers in Florida (Fla. Bar CLE 4th ed. 2006).

F. Competency Of Jurors

1. [5.16] In General

F.S. 90.607(2)(a) provides: A member of the jury is not competent to testify as a witness in a trial when he or she is sitting as a juror. If the juror is called to testify, the opposing party shall be given an opportunity to object out of the presence of the jury.

This rule must be read in conjunction with *Fla.R.Crim.P.* 3.300 and *Fla.R.Civ.P.* 1.431 so that a juror is not precluded from being examined under oath during voir dire examination about his or her qualifications to serve as a juror. During voir dire, a juror may be examined concerning knowledge of the facts of the case and of the parties and prospective witnesses. Answers revealing such knowledge may lead the parties to exercise their peremptory challenges. See *Rules* 3.350, 1.431(d). If a juror were to be called as a witness by either party, the juror could be challenged for cause. *F.S.* 913.03(11).

During the trial, a juror may be examined by the court outside the presence of other jurors regarding any irregularity that may adversely affect the trial. See *Rolle v. State*, 449 So.2d 1297 (Fla. 4th DCA 1984).

2. Anti-Impeachment Of Verdict Rule

a. [5.17] In General

A juror will not be disqualified to testify about matters occurring during the trial in which the juror sat if the jurors testimony is being offered in a separate proceeding. See *Squaire v. State*, 64 So.2d 916 (Fla. 1953) (grand juror permitted to testify at subsequent trial concerning trial witnesss prior inconsistent statements before grand jury); *State v. Dewell*, 123 Fla. 785, 167 So. 687 (1936). However, if the subsequent proceeding is an inquiry into the validity of the prior verdict, a juror will be incompetent to testify on any matter which essentially inheres in the verdict or indictment. *F.S.* 90.607(2)(b). See also *Green v. State*, 975 So.2d 1090 (Fla. 2008) (denying due process claims without evidentiary hearing when defendant could not demonstrate

juror misconduct because witness pled Fifth Amendment and jurors could not be called to testify to matters that inhered in verdict); *Devoney v. State*, 717 So.2d 501 (Fla. 1998); 5.195.20.

F.S. 90.607(2)(b) codified the prior Florida rule that had been adopted by the Supreme Court of Florida in *Linsley v. State*, 88 Fla. 135, 101 So. 273, 275 (1924):

> The general rule is that affidavits of jurors are admissible to explain and uphold their verdict, but not to impeach and overthrow it. But this general rule is subject to this qualification, that affidavits of jurors may be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room which does not essentially inhere in the verdict itself.

A further prerequisite for a jurors impeachment testimony is that for a juror to be competent, the matter must be overt. See 5.21. A matter is overt if it is susceptible of corroboration or contradiction and therefore not locked within the mind of a single juror. See *Linsley*. Compare *United States v. Eagle*, 539 F.2d 1166 (8th Cir. 1976). This rule, called the Iowa rule, is derived from *Wright v. Illinois & Mississippi Telegraph Co.*, 20 Iowa 195 (1866). See *Marks v. State Road Dept.*, 69 So.2d 771 (Fla. 1954); Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, Ariz.St.L.J. 247 (1977).

Under the *F.S.* 90.607(2)(b) codification of the Iowa rule, a juror may be competent to testify in a proceeding inquiring into the validity of a verdict if the testimony does not concern matters that essentially inhere in the verdict. *Devoney*; *Johnson v. State*, 593 So.2d 206 (Fla. 1992); 5.19. If the matters do essentially inhere in the verdict, the juror will be disqualified. See 5.20. For a discussion of those matters that essentially inhere in the verdict, see *Devoney*; *Maler by & through Maler v. Baptist Hospital of Miami, Inc.*, 559 So.2d 1157 (Fla. 3d DCA 1990), *approved* 579 So.2d 97; 5.20.

b. [5.18] Policy Considerations

The need for finality and the potential for hindsight fabrication by jurors are the reasons for the rule prohibiting the testimony of a juror. See *United States v. Eagle*, 539 F.2d 1166, 1170 (8th Cir. 1976), quoting *Mattox v. United States*, 146 U.S. 140, 148, 13 S.Ct. 50, 36 L.Ed. 917 (1892) (if there were no rule of incompetency, the secret thought of one juror would have the power to disturb the express conclusions of the twelve); 1 McCormick on Evidence 68 (Thomson/West 6th ed. 2006).

A competing policy consideration arises from the fact that the only proof that a verdict was obtained unlawfully may be solely within the knowledge of a juror. See *McDonald v. Pless*, 238 U.S. 264, 268, 35 S.Ct. 783, 59 L.Ed. 1300 (1915) (And, of course, the argument in favor of receiving such evidence is not only very strong, but unanswerable when looked at solely from the standpoint of the private party who has been wronged by such misconduct).

The rule rendering a juror incompetent to testify in the impeachment of the verdict evolved from the absolute proscription in 1785 by Lord Mansfield, in *Vaise v. Delaval*, 99 Eng.Rep. 944 (K.B. 1785), to the more limited rule of incompetency followed in Florida and in federal cases. See *Marks v. State Road Dept.*, 69 So.2d 771 (Fla. 1954); Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, Ariz.St.L.J. 247 (1977). But see Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U.Colo.L.Rev. 57 (1993).

c. [5.19] Matters Not Inherent In Verdict; Juror May Testify

The Florida Supreme Court, in *Marks v. State Road Dept.*, 69 So.2d 771, 774 (Fla. 1954), quoting *Wright v. Illinois & Mississippi Telegraph Co.*, 20 Iowa 195, 210 (1866), explained that matters not essentially inhering in the verdict and about which a juror would be competent to testify include that the witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner. See also *Devoney v. State*, 717 So.2d 501 (Fla. 1998), for a discussion of matters that do not inhere in the verdict.

Jurors may testify if, as a result of inadvertence or mistake, the verdict was not the verdict of any of the jurors. *State v. Blasi*, 411 So.2d 1320 (Fla. 2d DCA 1981) (foreperson signed wrong verdict); but see *Robinson v. MacKenzie*, 508 So.2d 1285 (Fla. 3d DCA 1987) (trial court conducted posttrial evidentiary hearing and quashed verdict; district court reversed and held that verdict based on jurors misapprehension of law not subject to collateral attack).

If information was made known to the jury other than during the legitimate trial process, jurors may testify concerning that matter. See *Russ v. State*, 95 So.2d 594 (Fla. 1957) (during deliberations, juror reportedly related to other jurors material facts not received in evidence that were claimed to be within his personal knowledge); *Snook v. Firestone Tire & Rubber Co.*, 485 So.2d 496 (Fla. 5th DCA 1986) (juror purportedly consulted outside experts and reported results to other jurors during deliberations). See also *Gould v. State*, 745 So.2d 354 (Fla. 4th DCA 1999).

Also, if a juror is subjected to threats, extortion, bribery, or other external influences, the matter does not essentially inhere in the verdict. See *City of Miami v. Bopp*, 117 Fla. 532, 158 So. 89 (1934), 97 A.L.R. 1035 (juror threatened to report another juror who had violated court instructions regarding reading of newspaper accounts unless that juror changed his vote); *Brown v. State*, 661 So.2d 309 (Fla. 1st DCA 1995).

d. [5.20] Matters Inherent In Verdict; Juror May Not Testify

The court in *Marks v. State Road Dept.*, 69 So.2d 771, 774775 (Fla. 1954), quoting *Wright v. Illinois & Mississippi Telegraph Co.*, 20 Iowa 195, 210 (1866), stated that matters inhering in the verdict and resulting in juror incompetency are

> that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the jurors breast.

Specific examples of these matters include the following:

The verdict was not unanimous, or a juror did not consent to the verdict. See *State v. Ramirez*, 73 So.2d 218 (Fla. 1954); *Sentinel Communications Co. v. Watson*, 615 So.2d 768 (Fla. 5th DCA 1993); *Florida Dept. of Transportation v. Weggies Banana Boat*, 545 So.2d 474 (Fla. 2d DCA 1989), *disapproved on other grounds* 614 So.2d 1083.

The jurors were mistaken about the courts instruction or the evidence. See *Songer v. State*, 463 So.2d 229 (Fla. 1985) (juror erroneously felt he was limited to statutory mitigating circumstances when he voted for death); *Astor Electric Service v. Cabrera*, 62 So.2d 759 (Fla. 1953) (jurors

improperly included expense in verdict for one plaintiff that was recoverable only by another); *Dempsey-Vanderbilt Hotel v. Huisman*, 153 Fla. 800, 15 So.2d 903 (1944) (jurors improperly conducted investigation during authorized jury view); *Smith v. State*, 330 So.2d 59 (Fla. 1st DCA 1976) (jurors mistakenly believed that verdict rendered was for highest offense).

Certain motives and influences governed the jurors deliberations. See *Maler by & through Maler v. Baptist Hospital of Miami, Inc.*, 559 So.2d 1157 (Fla. 3d DCA 1990), approved 579 So.2d 97 (jurors awarded damages based on sympathy for injured child and fact that hospital had insurance); *Schmitz v. S.A.B.T.C. Townhouse Assn, Inc.*, 537 So.2d 130 (Fla. 5th DCA 1989) (bailiff told jurors that verdict should be in by next day because judge was going on vacation).

3. [5.21] Requirement Of Overtness

A juror is competent to testify about overt acts that might have prejudicially affected jury deliberations. See *Powell v. Allstate Insurance Co.*, 652 So.2d 354 (Fla. 1995) (quashing verdict and remanding for evidentiary hearing on whether racial jokes and statements concerning African-American plaintiff were made by some members of all-white jury); see also *Comer v. Hudson*, 781 So.2d 514 (Fla. 5th DCA 2001) (jurors premature comments on evidence to other jurors during pendency of trial sufficient to warrant juror inquiry). Conversely, a juror will be precluded from testifying when the matter does not concern overt acts or conduct that could be known by someone other than the juror. For example, before being summoned, a juror in a criminal case may know about the defendants prior criminal record and may have formulated an opinion concerning guilt. Voir dire examination may fail to elicit this information. If the juror uses the information in arriving at a verdict without communicating this extraneous information to the other jurors, the juror may not testify to those matters in impeachment of the verdict because the matter is not overt. See *Kelly v. State*, 39 Fla. 122, 22 So. 303 (1897); *United States v. Eagle*, 539 F.2d 1166 (8th Cir. 1976).

A verdict may not be overturned when jurors discuss evidence adduced during trial that the court excluded and instructed the jurors to disregard *unless* there was an express agreement among them to disregard the courts instruction. *Devoney v. State*, 717 So.2d 501 (Fla. 1998). Without an express agreement to ignore the courts instructions, a jurys discussions of excluded evidence inheres in the verdict and may not serve as a basis for reversal.

In *Devoney*, the defendant was charged with DUI manslaughter. The prosecutor crossexamined a witness about the defendants prior driving record. The court struck the testimony and instructed the jury to disregard it. However, the jurys guilty verdict turned in part on the jurors discussion of the excluded driving record. In affirming the guilty verdict, the Florida Supreme Court receded from its opinion in *Wilding v. State*, 674 So.2d 114 (Fla. 1996), a capital case in which the jurors convicted the defendant after expressing concern for their own safety because the defendant had access to their personal information. In *Wilding*, the court held that the jurys discussion of its own safety was an overt act that entitled the defendant to a new trial. In *Devoney*, the court retreated from this position by recognizing the danger of allowing a verdict challenge anytime the jury discusses evidence that has been excluded or matters that otherwise are improper.

G. Competency Of Lawyers

1. [5.22] In General

1. [5.22] In General

Lawyers who serve as both advocate and witness may have a conflict of interest or may prejudice the opposing party, depending on whether the lawyer testifies in opposition to or on behalf of the client. If the lawyers testimony is necessary, this dilemma can usually be resolved by having the lawyer decline the initial representation or withdraw from the existing representation. See generally Rules Reg. Fla. Bar 4-1.7(b), 4-1.16, 4-3.7. When this ethical dilemma exists, the remedy, according to the District Court of Appeal, Second District, is to exclude the attorney as a lawyer in the cause, not to exclude him as a witness. *Williams v. State*, 472 So.2d 1350, 1353 (Fla. 2d DCA 1985), citing *Davison v. First Federal Savings & Loan Assn of Orlando*, 413 So.2d 1258 (Fla. 5th DCA 1982).

2. [5.23] On Behalf Of Client

Except in limited circumstances, a lawyer should not act as an advocate if it is reasonably anticipated that the lawyer will be a necessary witness on behalf of his or her client. Rule Reg. Fla. Bar 4-3.7. See *In re Captran Creditors Trust*, 104 B.R. 442 (Bankr. M.D. Fla. 1989). Because a witness is required to testify from firsthand knowledge and a lawyer is expected to comment on and explain the testimony of witnesses, a lawyer acting in both capacities would likely cause confusion about whether the lawyers statements should be considered as proof or as analysis of proof. See Comment to Rule 4-3.7.

There is a limited exception to the rule against a lawyer acting as both advocate and witness when the lawyers testimony relates to (1) an uncontested matter, (2) a matter of formality not likely to be the subject of conflicting extrinsic evidence, or (3) the nature and value of legal services rendered in the case. See Rules 4-3.7(a)(1)(a)(3); *Beavers v. Conner*, 258 So.2d 330 (Fla. 3d DCA 1972); *Draganescu v. First National Bank of Hollywood*, 502 F.2d 550 (5th Cir. 1974). An exception may also be granted if removal of the attorney would be a substantial hardship to the client. See Rule 4-3.7(a)(4). Compare *Williams v. State*, 472 So.2d 1350 (Fla. 2d DCA 1985).

Merely because an attorney representing a party has knowledge of material facts does not create an opportunity for the opposing party to seek disqualification; the attorney and client may have decided to forgo any testimony in favor of the continued representation. See *Williams v. Wood*, 475 So.2d 289 (Fla. 5th DCA 1985); *Cazares v. Church of Scientology of California, Inc.*, 429 So.2d 348 (Fla. 5th DCA 1983).

3. [5.24] In Opposition To Client

If a lawyer testifies in opposition to a client when the attorney is acting as the clients advocate, an obvious conflict of interest arises that necessitates a withdrawal from representation. See Rules Reg. Fla. Bar 4-1.16, 4-3.7. The attorneys personal interest would be inconsistent with his or her responsibility as an advocate and would inhibit the attorney from arguing to the fact-finder the lack of credibility of his testimony thus affecting his ability to properly represent his client. *Cazares v. Church of Scientology of California, Inc.*, 429 So.2d 348, 350 (Fla. 5th DCA 1983).

Although the lawyer knows facts that may be useful to the clients opponent, this should not create a pretext to remove an unwanted opposing advocate or to prejudicially disrupt the oppositions case. See *Williams v. Wood*, 475 So.2d 289 (Fla. 5th DCA 1985); *Perez v. State*, 474 So.2d 398 (Fla. 3d DCA 1985); *Cazares*.

The party seeking to call the attorney as a witness, thus necessitating the attorneys disqualification as an advocate, has the burden of demonstrating that the testimony is essential; *i.e.*, that there is no other credible evidence available to prove the matter. In addition, the calling party must demonstrate the likelihood that, without the testimony, prejudice to the attorneys client may result. Bare allegations by the calling party are insufficient; they must be corroborated by record evidence. See *Williams*; *Cazares*.

III. EXAMINATION OF WITNESSES

A. [5.25] In General

The Florida Evidence Code recognizes the trial judges inherent right to control the mode and order of interrogation of witnesses and the presentation of evidence. See *F.S.* 90.612(1). Trial judges have wide latitude and broad discretion in these matters. *State v. Ford*, 626 So.2d 1338, 1347 (Fla. 1993); *Chaudoin v. State*, 707 So.2d 813, 815 (Fla. 5th DCA 1998). For example, simultaneous but separate jury trials for codefendants have been approved. See *Minor v. State*, 763 So.2d 1169 (Fla. 4th DCA 2000); *Thompson v. State*, 615 So.2d 737 (Fla. 1st DCA 1993). See also 75 Am.Jur.2d *Trial* 102, discussing the use of multiple juries at a joint trial of codefendants before a single judge. Questioning of witnesses by jurors is also permitted within the discretion of the trial court. See 5.28.

The court can restrict the introduction of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. *F.S.* 90.403. See *Wright v. State*, 19 So.3d 277, 29697 (Fla. 2009) (describing unfair prejudice as an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one and finding this rule of exclusion directed at evidence which inflames the jury or appeals improperly to the jurys emotions); *Honeywell International, Inc. v. Guilder*, 23 So.3d 867, 870 (Fla. 3d DCA 2009) (finding that although letter written from manufacturers employee to asbestos supplier was relevant in workers suit for injuries allegedly sustained from asbestos exposure, portion of letter stating that [m]y answer to the problem is: if you have enjoyed a good life while working with asbestos products why not die from it. Theres got to be some cause, was inadmissible as unfairly prejudicial). To expedite the proceeding and facilitate discovery of the truth, the court may allow or disallow leading questions on direct and cross-examination, *F.S.* 90.612(3), permit the use of narrative examination, *F.S.* 90.612(1)(a)(1)(b), or permit cross-examination beyond the scope of direct, *F.S.* 90.612(2).

F.S. 90.612 requires judges to protect a witness under age 14 from questions that are in a form that cannot reasonably be understood by a person of the age and understanding of the witness. Judges are also required to restrict the unnecessary repetition of questions to such witnesses. *Id.*

The trial judges inherent right to control the mode and order of the interrogation of witnesses and presentation of evidence will not trump the rights of the parties. Thus, an appellate court will reverse if there is a clear abuse of discretion, such as when the court deprives a party of its due process right to call witnesses, *Landers v. Landers*, 429 So.2d 27 (Fla. 5th DCA 1983), or precludes proper confrontation and cross-examination of witnesses, *Rivera v. State*, 462 So.2d 540 (Fla. 1st DCA 1985). See also *Grau v. Branham*, 761 So.2d 375 (Fla. 4th DCA 2000).

B. By Court

1. [5.26] Calling Witnesses

F.S. 90.615(1) provides: The court may call witnesses whom all parties may cross-examine. This is known as the court-witness rule.

The rule is predicated on the principle that justice is best served when the trier of fact is exposed to all relevant evidence, presented in a fair and impartial manner, provided that the evidence is competent, reliable, trustworthy, and not otherwise excludable because of countervailing interests expressed in law, such as constitutional and statutory rights and privileges.

Shere v. State, 579 So.2d 86, 92 (Fla. 1991). Because the court-witness rule is a narrow exception to general witness interrogation rules, the Florida Supreme Court has historically limited its application. *Id.* In *Jackson v. State*, 498 So.2d 906, 909 (Fla. 1986), the court held that court witnesses should be limited to those situations where there is an eyewitness to the crime whose veracity or integrity is reasonably doubted. See also *Perry v. State*, 776 So.2d 1102 (Fla. 5th DCA 2001).

A court may exercise its authority to call witnesses when a witness has become uncooperative, when the moving party does not wish to vouch for the credibility of the witness, or because the party who previously called the witness has been surprised at trial by the testimony given. The consent of both parties is not a requirement for the court to call a witness. *Pomeranz v. State*, 703 So.2d 465 (Fla. 1997).

If the court calls a witness, all parties may cross-examine and impeach the witness. *F.S.* 90.615(1); *Jackson v. State*, 603 So.2d 670 (Fla. 4th DCA 1992); *Chapman v. State*, 302 So.2d 136 (Fla. 2d DCA 1974). However, the court abuses its discretion when a party asks the court to call witnesses, and the court permits otherwise inadmissible evidence to be revealed to the jury. See *Jackson*.

Fed.R.Evid. 614 is the counterpart to *F.S.* 90.615. It has been argued in the federal context that the court may have a duty to call witnesses who have pertinent, noncumulative, and significant knowledge if the parties decline to do so. See *United States v. Karnes*, 531 F.2d 214 (4th Cir.

1976); 1 McCormick on Evidence 8 (Thomson/West 6th ed. 2006). But see *Buchanan v. State*, 95 Fla. 301, 116 So. 275 (1928) (not abuse of discretion to refuse to call court witness).

2. [5.27] Questioning Witnesses

F.S. 90.615(2) provides that [w]hen required by the interests of justice, the court may interrogate witnesses, whether called by the court or by a party. The prefacing qualification, which does not appear in the comparable federal rule, indicates that the courts authority to interrogate witnesses should be used cautiously. Compare Fed.R.Evid. 614(b). If the court interrogates a witness in a manner that assumes the role of an advocate, through inflections or factual content, the questioning is improper. See *Williams v. State*, 143 So.2d 484 (Fla. 1962); *Rahme v. State*, 474 So.2d 1236 (Fla. 5th DCA 1985).

In Florida, the court may ask questions to clarify issues, but should not appear to favor a party or lose neutrality. *Watson v. State*, 190 So.2d 161 (Fla. 1966); *Williams*; *J. F. v. State*, 718 So.2d 251 (Fla. 4th DCA 1998); *Martens v. State*, 517 So.2d 38 (Fla. 3d DCA 1988); *Perkins v. State*, 438 So.2d 873 (Fla. 1st DCA 1983). If a court interrogates a witness, the jury should be cautioned not to consider the courts questioning as a comment on the credibility of the witness or the merits of the case. See *Clark v. State*, 122 Fla. 310, 165 So. 44 (1936); *United States v. Karnes*, 531 F.2d 214 (4th Cir. 1976). The courts examination of witnesses becomes an abuse of discretion only when it appears that the judge departs from neutrality or expresses bias or prejudice in his comments in the presence of the jury. *Poe v. State*, 746 So.2d 1211, 1214 (Fla. 5th DCA 1999), quoting *Watson*, 190 So.2d at 165.

Discouraging active participation by the court in the presentation of testimony is consistent with *F.S.* 90.106, which prohibits a judge from summing up the evidence or commenting on the credibility of a witness, the weight of the evidence, or the guilt of the accused. The very status of the judge as interrogator inevitably means that the answers given by the witness will assume an importance in the mind of the jurors otherwise lacking if counsel had instead asked the questions. See *Moton v. State*, 659 So.2d 1269 (Fla. 4th DCA 1995) (reversing conviction and remanding because judges examination of witness constituted comment on the evidence). Moreover, extensive participation by the trial judge, such as excessive questioning of witnesses, may amount to usurping the functions of counsel and may constitute an abuse of the discretion and latitude of the court, with resultant injury to the rights of a party or parties. *Bumby & Stimpson, Inc. v. Peninsula Utilities Corp.*, 169 So.2d 499 (Fla. 3d DCA 1964).

If there is a question about whether a judges remarks can be construed as a comment on the veracity of a witness, a new trial should be granted. *Acosta v. State*, 711 So.2d 225 (Fla. 3d DCA 1998); *Robinson v. State*, 161 So.2d 578 (Fla. 3d DCA 1964). But see *Bumby & Stimpson, Inc.* (judges extensive questioning of plaintiffs witnesses was harmless error when case was taken from jury on entry of directed verdict). The content and tenor of the interrogation, not its extent, establish an abuse of discretion. See *Sims v. State*, 184 So.2d 217 (Fla. 2d DCA 1966) (fact that trial judges questioning of witness equaled that of both parties did not establish abuse).

In *Acosta*, the court held that the trial judge impermissibly damaged the defendants case by commenting on elements of the crimes charged on which conflicting testimony had been presented. The judges comments constituted reversible error.

C. [5.28] By Jurors

Interrogation of witnesses by jurors, although rare, is permissible in Florida and is becoming more prevalent. *Ferrara v. State*, 101 So.2d 797 (Fla. 1958). See also *Coates v. State*, 855 So.2d 223 (Fla. 5th DCA 2003) (acknowledging permissive use of juror questioning in carefully controlled environment); *Henderson v. State*, 792 So.2d 641 (Fla. 1st DCA 2001) (same); *Tanner v. State*, 724 So.2d 156 (Fla. 1st DCA 1999) (same).

In 1999, the Florida Legislature enacted a Jurors Bill of Rights, which, among other things, requires judges to allow jurors in civil trials to submit written questions directed to the witnesses. *F.S.* 40.50(3). At that time, the ability to ask questions did not extend to jurors in criminal trials. In October 2007, however, the Florida Supreme Court adopted certain of the provisions relating to juror questions and, effective January 1, 2008, incorporated them into both the Florida Rules of Civil Procedure and the Florida Rules of Criminal Procedure. *In re Amendments to the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, the Standard Jury Instructions in Civil Cases, and the Standard Jury Instructions in Criminal Cases Implementation of Jury Innovations Committee Recommendations*, 967 So.2d 178 (Fla. 2007).

In civil proceedings, the right of jurors to submit written questions directed to a witness or the court is mandatory. Questions are to be submitted only after all counsel have concluded their questioning of a witness. *Fla.R.Civ.P.* 1.452(a). Juror questions must be in writing, unsigned, and submitted to the bailiff, who then delivers them to the judge. *Rule* 1.452(b). The judge then reads each question to counsel outside the presence of the jury. The judge must allow counsel to see the written questions and must provide counsel the opportunity to object to any question.

A jurors right to submit written questions in a criminal proceeding is at the judges discretion. *Fla.R.Crim.P.* 3.371(a). The procedure in a criminal trial is similar to that of a civil trial in that the question is submitted in writing, considered by the court, and read to counsel outside the jurys presence. However, unlike in civil trials, counsel in criminal trials are expressly permitted to ask follow-up questions. Furthermore, if a juror question is disallowed for any reason, the jury must be advised not to discuss that fact with any other juror and not to hold it against either party. *Rule* 3.371(b).

D. By Attorneys

1. Direct Examination

a. [5.29] In General

The attorney of the party calling a witness conducts the first examination. This is the direct examination and its scope is relevancy. Examination by all other parties is known as cross-examination. Although the permissible scope of direct examination is expansive, there are limitations on the permissible style of interrogation.

b. [5.30] Narrative Form Of Interrogation

If a witness is examined in an open-ended fashion, such as, Tell the jury what you know, the witnesss undirected reply will generally be a narrative. This form of interrogation avoiding specific questions has the advantage of being expedient. If the witnesss answers are directed to the jury and the witness is intelligent and personable, it can be an effective manner of eliciting testimony. The problem with a narrative examination is that the witness may testify in a manner that contravenes the rules of evidence before opposing counsel can stop the narrative and make an objection. The Florida Supreme Court has long recognized the discretion of the trial court to permit this style of interrogation. See *Mann v. State*, 23 Fla. 610, 3 So. 207 (1887).

c. Leading Questions On Direct

(1) [5.31] General Rule

(2) [5.32] Hostile Witnesses

(3) [5.33] Adverse Party Witnesses

(1) [5.31] General Rule

A leading question is one in which the answer desired by the examiner is suggested to the witness. The fact that the question may be answered yes or no is not determinative. *Florida Motor Lines Corp. v. Barry*, 158 Fla. 123, 27 So.2d 753 (1946); *Murrell v. Edwards*, 504 So.2d 35 (Fla. 5th DCA 1987); *Porter v. State*, 386 So.2d 1209 (Fla. 3d DCA 1980). The test is whether the question, in the context in which it is asked, is likely to prompt a favorably disposed, eager-to-please, or unscrupulous witness to adopt the answer suggested regardless of its truth.

Until 1995, leading questions on direct examination were not authorized in Florida. Current Florida law is consistent with federal law. See Fed.R.Evid. 611(c). *F.S.* 90.612(3) provides:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witnesss testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Federal courts have interpreted Rule 611(c) as a matter of discretion for the trial judge. See *Rodriguez v. Banco Central Corp.*, 990 F.2d 7 (1st Cir. 1993); *Haney v. Mizell Memorial Hospital*, 744 F.2d 1467 (11th Cir. 1984); *Ellis v. City of Chicago*, 667 F.2d 606 (7th Cir. 1981).

(2) [5.32] Hostile Witnesses

F.S. 90.612(3) provides that [w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. Hostility must be demonstrated through the use of nonleading questions. A hostile witness is one who, through his or her demeanor during interrogation, demonstrates hostility toward the direct examiner, the party represented by the direct examiner, or both. *Wolcoff v. State*, 576 So.2d 726 (Fla. 4th DCA 1991); *Erp v. Carroll*, 438 So.2d 31 (Fla. 5th DCA 1983). It is not *what* the witness says regarding the merits, but *how* it is said that determines hostility.

A hostile witness may be impeached, even by the party calling the witness. *F.S.* 90.608.

(3) [5.33] Adverse Party Witnesses

In Florida civil cases, a party may call the opponent and use leading questions on direct examination. *F.S.* 90.612(3). The witness is automatically considered both hostile (permitting leading questions) and adverse (permitting contradiction and impeachment). See *Pulcini v. State*, 41 So.3d 338 (Fla. 4th DCA 2010); *Medina v. Variety Childrens Hospital*, 438 So.2d 138 (Fla. 3d DCA 1983); *Parker v. Miracle Strip Boat & Motors Headquarters, Inc.*, 341 So.2d 197 (Fla. 1st DCA 1977).

An adverse party witness is a person aligned in the pleadings in opposition to the calling party, including officers, directors, or managing agents of public or private corporations, partnerships, or associations. See *Parker*. A managing agent need not be an officer or general manager, but may be the agent or representative managing in connection with a particular matter under consideration. See *Tucker Bros., Inc. v. Menard*, 90 So.2d 908 (Fla. 1956) (construction companys supervisor at job site); *Gross Builders, Inc. v. Powell*, 441 So.2d 1142 (Fla. 2d DCA 1983). However, a mere agent or employee of a corporate party is not included in the definition of adverse party. See *Parker* (mechanic for defendant repair shop).

Courts have extended the label of adverse party witness to those persons who, although not aligned in the pleadings in opposition to the calling party, occupy an adverse position to the calling party. See *Botte v. Pomeroy*, 497 So.2d 1275 (Fla. 4th DCA 1986); *Medina*; *Smith v. Fortune Insurance Co.*, 404 So.2d 821 (Fla. 1st DCA 1981); *Young v. Metropolitan Dade County*, 201 So.2d 594 (Fla. 3d DCA 1967). However, Florida courts have extended the classification only to persons on whose conduct the liability of a named party was dependent in tort (see *Young*) or in contract (see *Smith*).

F.S. 90.612(3), like its federal counterpart Fed.R.Evid. 611(c), specifically authorizes leading questions on direct examination of witnesses identified with an adverse party. Under the federal rules, a witness identified with the adverse party is automatically treated as hostile, even without a demonstration of a hostile demeanor and a preliminary determination by the court. See Advisory Committee Notes to Rule 611(c). The federal rules provide no guidance as to how the witness is identified with the adverse party. When the direct examiner calls an employee, *Perkins v. Volkswagen of America, Inc.*, 596 F.2d 681 (5th Cir. 1979), a close family member, *United States v. Hansen*, 583 F.2d 325 (7th Cir. 1978), or a friend, neighbor, or club or organization associate of the adverse party, those persons may be presumed hostile, thereby authorizing their interrogation on direct examination by leading questions.

2. Cross-Examination

a. [5.34] As A Right

Cross-examination is an examination by a party who did not call the witness. The opportunity for cross-examination is an absolute right, not a privilege. *Coco v. State*, 62 So.2d 892 (Fla. 1953). See also *Coxwell v. State*, 361 So.2d 148 (Fla. 1978); *Oakes v. State*, 746 So.2d 510 (Fla. 5th DCA 1999). In criminal cases, the right to engage in cross-examination of adverse prosecution

witnesses is implicit in the accuseds constitutional right to confront the accuser. See *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). See also Art. I, 16(a), Fla. Const.; *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982); *Gardner v. State*, 530 So.2d 404 (Fla. 3d DCA 1988).

The United States Supreme Court has stated that because cross-examination helps to ensure the accuracy of the truth-determining process, its denial or significant diminution calls into question the ultimate integrity of the fact-finding process. *Chambers*, 410 U.S. at 295, quoting *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969).

The purposes of cross-examination, as set forth by the Florida Supreme Court, are to weaken or disprove the case of ones adversary and to test the recollection, veracity or prejudice of the witness, or to expose the impossibility of his testimony. *Louette v. State*, 152 Fla. 495, 12 So.2d 168, 174 (1943).

In *Sanders v. State*, 707 So.2d 664, 667 (Fla. 1998) (citations omitted), the court held that a trial judge has broad discretion in determining limitations to be placed on cross-examination. . . . However, limiting cross-examination in a manner that precludes relevant and important facts bearing on the trustworthiness of testimony constitutes error.

Although the opportunity for cross-examination is an absolute right, the Confrontation Clause does not guarantee a criminal defendant the absolute right to face-to-face confrontation of witnesses testifying against him or her. *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). The guarantee exists to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 837, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). In *Harrell v. State*, 709 So.2d 1364 (Fla. 1998), the court held as a permissible exception to the guarantee the use of a live satellite transmission for a witness who lived in another country and was unable to appear at trial. See also *Glendening v. State*, 536 So.2d 212 (Fla. 1989) (child sexual abuse victims videotaped testimony did not violate defendants right to confrontation).

b. [5.35] Scope

F.S. 90.612(2) provides that cross-examination of a witness is limited to the subject of the direct examination and matters affecting the credibility of the witness. To this extent, *F.S.* 90.612(2) codifies the earlier common law. See *Padgett v. State*, 64 Fla. 389, 59 So. 946 (1912).

Although cross-examination is limited to matters elicited on direct examination, Florida courts have interpreted the restriction to allow great leeway. The cross-examiner may interrogate in a manner that brings forth testimony to explain, modify, contradict, rebut, clarify, supplement, or place into context facts testified to on direct examination. See *Pace v. State*, 596 So.2d 1034 (Fla. 1992); *Christopher v. State*, 583 So.2d 642 (Fla. 1991). In *Chandler v. State*, 702 So.2d 186, 196 (Fla. 1997), quoting *Geralds v. State*, 674 So.2d 96, 99 (Fla. 1996), the Florida Supreme Court reiterated its long-standing rule that cross examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief.

For example, when a fingerprint expert testified on direct examination to lifting latent fingerprints from a murder weapon, rolling the defendants known prints, and sending the latent

and known prints to the FBI laboratory for analysis, the defendant should have been entitled to inquire on cross-examination whether the witness independently compared the latent and known prints and, if so, what conclusions were drawn. *Coco v. State*, 62 So.2d 892 (Fla. 1953). See also *Pace*; *Zerquera v. State*, 549 So.2d 189 (Fla. 1989).

Under a rule of competency or a rule of privilege, the proponent may preclude a witness from testifying about certain matters. However, if the proponent calls and examines a witness concerning part of a conversation, transaction, or matter that otherwise would have been privileged, the opponent on cross-examination cannot be precluded from inquiring about the remainder by the assertion of the privilege, the rule of competency, or an objection that the cross-examination exceeds the scope of the direct. See *Christopher*; *Embrey v. Southern Gas & Electric Corp.*, 63 So.2d 258 (Fla. 1953). See also *F.S.* 90.107 and 90.507, which reflect the philosophy of precluding misleading partial disclosures.

Although the rule limiting cross-examination to the scope of direct is interpreted broadly, it is a limitation. See *Jones v. State*, 440 So.2d 570 (Fla. 1983), in which the testimony on direct examination was limited to an eyewitness account of events occurring in an apartment before a police officer arrived. Cross-examination was properly limited to events occurring during that span of time. Because the eyewitnesss statements to police were not elicited on direct examination, the defendant had no right to cross-examine and interrogate on these matters. There was no indication that the statement made by the witness to the police was inconsistent with the witnesss direct testimony concerning events that occurred before the police arrived. If that had been the case and this examination was proffered, the result in *Jones* would have been different because the inquiry would have properly gone to the question of the witnesss credibility. See *Williams v. State*, 472 So.2d 1350, 1352 (Fla. 2d DCA 1985) (It is error to limit the scope of cross-examination in a manner that keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony).

Likewise, in *Slocum v. State*, 757 So.2d 1246 (Fla. 4th DCA 2000), the trial court was correct in precluding cross-examination of a police officer about his role in the interrogation of a suspect in an unrelated homicide. The court held: To have stepped into the quicksand of the other homicide case would have sunk this trial into litigation over the myriad details of a completely unrelated homicide. *Id.* at 1251. The trial courts exclusion of the cross-examination was therefore upheld.

A judge is given broad discretion to limit cross-examination, *Sanders v. State*, 707 So.2d 664 (Fla. 1998), and is likewise given discretion to permit inquiry into additional matters on cross-examination, *F.S.* 90.612(2). See also *Atlantic Coast Line R. Co. v. Watkins*, 97 Fla. 350, 121 So. 95 (1929); *Yates v. State Farm Mutual Automobile Insurance Co.*, 746 So.2d 1161 (Fla. 4th DCA 1999). But see *Penn v. State*, 574 So.2d 1079 (Fla. 1991) (matters outside scope of direct examination that tend to prove defense theory must be brought out on direct examination of defendants witnesses); *Smith v. State*, 7 So.3d 473 (Fla. 2009) (recognizing that judges determination to allow or disallow questioning on cross-examination is not subject to review unless determination is clearly erroneous); *Love v. State*, 971 So.2d 280, 28586 (Fla. 4th DCA 2008), quoting *Smith v. State*, 404 So.2d 167, 169 (Fla. 1st DCA 1981) (Although a trial judge has the discretion to control the mode, order, and scope of cross-examination under section 90.612(1), Florida Statutes (2006), such discretion is constrained by a defendants right to confront adverse witnesses).

A defendant who testifies in a criminal case waives the privilege against self-incrimination to the extent that the defendant may be cross-examined as any other witness. *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1972), *vacated in part on other grounds* 408 U.S. 941; *Davis v. State*, 342 So.2d 987 (Fla. 3d DCA 1977). With respect to restrictions on post-arrest silence, see *Zerega v. State*, 260 So.2d 1 (Fla. 1972); *Washington v. State*, 388 So.2d 1042 (Fla. 5th DCA 1980); *Davis*. In a criminal case, a defendant cannot be cross-examined about the decision to invoke his or her *Miranda* rights. See *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

Whenever a witness takes the stand, the witness ipso facto places his or her credibility in issue. *Mendez v. State*, 412 So.2d 965 (Fla. 2d DCA 1982). Thus, cross-examination into matters that may affect the jurys assessment of the witnesss credibility is appropriate. *F.S.* 90.612(2). Examination of credibility is not limited to jury trials. *Clark v. State*, 567 So.2d 1070 (Fla. 3d DCA 1990) (reversing trial courts denial of opportunity for defendant to cross-examine key witness in bench trial). Note, however, that a witness cannot be impeached before he or she testifies, because credibility will not yet be at issue. *Erp v. Carroll*, 438 So.2d 31 (Fla. 5th DCA 1983). A hearsay declarant who does not testify at trial can still be impeached by any evidence that would be admissible for that purpose if the declarant had testified as a witness. See *F.S.* 90.806. Evidence of a statement or conduct of the declarant that is inconsistent with the declarants hearsay statement is admissible, regardless of whether the declarant has been afforded an opportunity to deny or explain it. *Id*.

On cross-examination, one may explore the likelihood that the witness is testifying in bad faith or is purposely misrepresenting facts. Inquiring into the witnesss former criminal history, *F.S.* 90.610, exploring the witnesss bias, *F.S.* 90.608(2), or revealing the witnesss prior inconsistent statements on material disputed facts, *F.S.* 90.608(1), may be appropriate. Also, a witnesss credibility may be challenged by showing that the witness is testifying inaccurately, although in good faith. Inquiry into matters revealing a defect in the ability of the witness to accurately perceive, remember, and relate matters testified to is appropriate. *F.S.* 90.608(4). See Chapter 6 of this manual.

c. [5.36] Leading Questions

F.S. 90.612(3) provides: Ordinarily, leading questions should be permitted on cross-examination. Leading questions are common on cross-examination because a witness testifying on behalf of another party is usually not predisposed to favor the cross-examiner and is not likely to adopt suggested answers, regardless of their truth.

In some circumstances, such as when a witness has been called as an adverse party witness, the cross-examination can resemble the direct examination of a friendly witness. In this situation, the trial court should limit interrogation on cross-examination to nonleading questions. See *Erp v. Carroll*, 438 So.2d 31 (Fla. 5th DCA 1983). But see *Brookbank v. Mathieu*, 152 So.2d 526 (Fla. 3d DCA 1963).

IV. SEQUESTRATION OF WITNESSES

A. Rule

1. [5.37] History And Purpose

The rule of sequestration of witnesses is considered an effective device for promoting witness accuracy and truthfulness. *Knight v. State*, 746 So.2d 423 (Fla. 1999); *Lott v. State*, 695 So.2d 1239 (Fla. 1997); *Wright v. State*, 473 So.2d 1277 (Fla. 1985). See generally 6 Wigmore on Evidence 18371842 (Little, Brown & Co. 3d ed. 1981, 2007 Supp.). The purpose of the rule is to avoid the coloring of a witnesss testimony by that which he has heard from other witnesses who have preceded him on the stand. *Odom v. State*, 403 So.2d 936, 941 (Fla. 1981), quoting *Spencer v. State*, 133 So.2d 729, 731 (Fla. 1961). See also *Wright*; *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982).

Florida did not have a formal witness sequestration law until 1990, but the courts followed Fed.R.Evid. 615, which contains this procedure. See, *e.g.*, *Wright*; *Steinhorst*; *Bova v. State*, 410 So.2d 1343 (Fla. 1982), *affd* 858 F.2d 1539.

Floridas sequestration statute, *F.S.* 90.616, provides that, on the request of a party or on its own motion, a court may order witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses. However, a witness may not be excluded if the witness is a party who is a natural person, is the designated representative of a party that is not a natural person in a civil case, or is a person whose presence is shown by the partys attorney to be essential to the presentation of the partys cause. *F.S.* 90.616(2)(a)(2)(c). Trial courts have wide discretion to determine which witnesses are essential. *Knight*; *Strausser v. State*, 682 So.2d 539 (Fla. 1996) (not abuse of discretion to allow court-appointed mental health expert to be present in courtroom during defendants examination, when main issue was defendants sanity at time of alleged murder). Experts are often exempted from the rule of sequestration. *Polanco v. McNeil*, 2010 WL 3027798 (S.D. Fla. 2010).

A witness may not be excluded in a criminal case if the witness is the victim, the victims next of kin, the parent or guardian of a victim who is a minor, or the lawful representative of such person. *F.S.* 90.616(2)(d). However, the witness may be excluded if the court determines that the witnesss presence is prejudicial. *Id*.

2. [5.38] Excluding Witnesses From Courtroom

If a party demands witness sequestration, the court must exclude the witness. *F.S.* 90.616. The court may also exclude witnesses on its own motion. *Id*. Once the rule is invoked, it is the attorneys responsibility to inform and to keep from the courtroom all persons who may be called as witnesses. Even when a witness has violated the sequestration rule, the determination of whether that witness will thereafter be permitted to testify is within the sound judicial discretion of the trial court. *Polanco v. McNeil*, 2010 WL 3027798, *11 (S.D. Fla. 2010) (under federal

law, a state trial courts refusal to exclude witnesses from the courtroom until they testify is not a denial of due process).

The rule of sequestration does not apply to the accused in a criminal case, *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), or to the parties in civil litigation. When the party in a civil case is not a natural person, the designated representative of the party may be exempt from the rule. *Goodman v. West Coast Brace & Limb, Inc.*, 580 So.2d 193 (Fla. 2d DCA 1991). Compare *Black v. Sears, Roebuck & Co.*, 621 So.2d 712 (Fla. 4th DCA 1993).

Witnesses whose presence is essential to the presentation of a case include experts and law enforcement officers. *Knight v. State*, 746 So.2d 423 (Fla. 1999); *Strausser v. State*, 682 So.2d 539 (Fla. 1996); *Burns v. State*, 609 So.2d 600 (Fla. 1992). But see *F.S.* 92.54(3), which provides for the use of closed-circuit television for the testimony of a child abuse victim or persons with mental disabilities and specifies that a person who, in the opinion of the court, contributes to the well-being of the child or person with mental retardation *and who will not be a witness* in the case may be in the room during the recording of the testimony [emphasis added].

In 1992, *F.S.* 90.616(2)(d) was added to implement Article I, 16(b), of the Florida Constitution concerning victims rights, which grants crime victims or their legal representatives [t]he right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused. Thus, the right of a victim, or other person listed in the statute, to be present during a trial can be overridden by a defendants right to a fair trial. *Gore v. State*, 599 So.2d 978 (Fla. 1992); *Cain v. State*, 758 So.2d 1257 (Fla. 4th DCA 2000).

3. [5.39] Preventing Exposure To Extraneous Facts

When issuing an order to exclude prospective witnesses, the court should instruct the witnesses (or direct the attorneys to do so) that, when not testifying, they should not discuss their testimony or the case with any person other than the attorneys for the parties. On request, the court should take precautions to ensure that prospective witnesses, during their exclusion from the courtroom, are not exposed to extraneous factual accounts of the case from any source. See *Acevedo v. State*, 547 So.2d 296 (Fla. 3d DCA 1989); *Zamora v. State*, 361 So.2d 776 (Fla. 3d DCA 1978). The court should also instruct the prospective witnesses not to allow others to discuss the case in their presence. Furthermore, prospective witnesses should be cautioned to avoid media accounts of the case. See Weinstein & Berger, Weinsteins Evidence Manual 10.06[02] (Matthew Bender & Co. 1987, 2007 Supp.). See also *Atkinson v. State*, 317 So.2d 807 (Fla. 4th DCA 1975) (illustration and discussion of instruction).

Although attorneys should be exempted from these proscriptions, their interviews of prospective witnesses should not circumvent the rule or its underlying purpose to prevent the shading and coloring of testimony. See *Woodruff v. State*, 360 So.2d 49 (Fla. 1st DCA 1978); *Ali v. State*, 352 So.2d 546 (Fla. 3d DCA 1977) (attorneys group interviews of prospective witnesses cited as violation of rule of sequestration). See also *Thompson v. State*, 507 So.2d 1074, 1075 (Fla. 1987), which suggested that an attorney may advise, calm, and reassure witnesses without violating the ethical rule against coaching witnesses.

The attorneys liberty to discuss the case with prospective witnesses should not be used in a manner calculated to produce false testimony. See Rule Reg. Fla. Bar 4-3.4(b). For example,

giving a prospective witness a copy of his or her deposition to refresh recollection does not frustrate the purpose of the rule of sequestration. See *Ali*. However, giving prospective witnesses reports, statements, depositions, or a daily copy of the testimony of other persons frustrates the purpose of the rule and should constitute a violation. See *Baker v. Air-Kaman of Jacksonville, Inc.*, 510 So.2d 1222 (Fla. 1st DCA 1987) (finding no abuse of discretion in trial courts allowing expert witness to testify when exposure to trial transcripts did not substantially change his testimony).

A prospective witnesss exposure to media accounts of the case was found to be a violation of the rule of sequestration in *Wright v. State*, 473 So.2d 1277 (Fla. 1985) (newspaper), and *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982) (radio). Discussing the case with persons attending the trial or others may be a violation of the rule. See *Odom v. State*, 403 So.2d 936 (Fla. 1981).

The procedure for determining whether a violation has occurred and, if so, the remedy or sanction that should be imposed, is discussed in 5.415.46.

4. [5.40] Prohibiting Witness From Discussing Case

In addition to the requirements discussed in 5.385.39, if a recess is called during a witnesss testimony, the court may order the witness not to discuss the case or the witnesss testimony with anyone, including the lawyers and parties. See *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). In addition to preventing the shaping and coloring of testimony, this more stringent limitation on a testifying witness during a recess seeks to prevent improper attempts to influence the testimony in light of the testimony [the witness has] already given. *Id*. at 87. An effective cross-examination could be frustrated before its conclusion if the witness is advised by counsel and prepared for the resumption of the attack. See *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). The power of the court to control the mode and order of the interrogation of witnesses . . . to . . . [f]acilitate . . . the discovery of the truth is authority to impose this more stringent restriction on a testifying witness. *F.S.* 90.612(1)(a).

However, if a witness is also the accused in a criminal case, the propriety of instructing the testifying witness/party not to discuss his or her testimony or the case with his or her lawyer has been questioned as an infringement of a defendants right to counsel. *Thompson v. State*, 507 So.2d 1074 (Fla. 1987); *Bova v. State*, 410 So.2d 1343 (Fla. 1982), *affd* 858 F.2d 1539. See *Perry*; *Geders*. See also *McFadden v. State*, 424 So.2d 918 (Fla. 4th DCA 1983); *Recinos v. State*, 420 So.2d 95 (Fla. 3d DCA 1982). The court must consider the purpose of the consultation, including the length of the recess and whether there is a need for the recess other than to discuss the accuseds testimony, as well as whether prohibition of the consultation will significantly deprive the accused of an opportunity to consult regarding other matters.

In criminal cases, when the period of a recess during an accuseds testimony is significant, such as overnight, and there is a need for consultation with the accuseds attorney other than to prepare for resumed cross-examination, the preclusion of this consultation is a denial of the accuseds right to assistance of counsel. See *Geders*.

If the trial judge prohibits consultation when the interruption of the accuseds testimony is brief and the only purpose of the consultation is to discuss the accuseds testimony, no constitutional violation will be found. *Perry* (15-minute recess). In *Perry*, the United States Supreme Court did

not specify the duration of an improper recess, but stated that the recess must be brief to avoid a constitutional violation.

Florida decisions before *Perry* finding a constitutional violation from the prohibition of consultation with counsel, regardless of the length of the recess during an accuseds testimony, should be examined in light of *Perry*. However, even if the delay during the accuseds testimony is significant and the prohibition of consultation is a constitutional violation, this violation may be rendered harmless. See *McFadden* (trial judges offer to extend holiday recess to allow consultation rendered error harmless). Compare *Amos v. State*, 618 So.2d 157 (Fla. 1993).

Florida courts have not considered whether a court may preclude party witnesses from consulting with their attorneys during a recess in testimony in civil cases. The court in *Bova*, 410 So.2d at 1345, stated:

We stress that a defendant in a criminal proceeding is in a different posture than a party in a civil proceeding or a witness in a civil or criminal proceeding. Right-to-counsel protections do not extend to civil parties or witnesses and the trial judges actions in the instant case would have been proper if a civil party or witness had been involved.

If the limitation is for a substantial time and the need for consultation with the lawyer more pressing, a limitation might not be appropriate. This significant proscription may deprive even a civil party of the right to due process. See Weinstein & Berger, Weinsteins Evidence Manual 10.06[2] (Matthew Bender & Co. 1987, 2007 Supp.).

B. Violation Of Rule And Sanctions

1. [5.41] In General

If the rule of sequestration of witnesses has been invoked and a purported violation is brought to the judges attention, the judge should conduct an inquiry to determine whether a violation has occurred. See *Ali v. State*, 352 So.2d 546 (Fla. 3d DCA 1977); *Atkinson v. State*, 317 So.2d 807 (Fla. 4th DCA 1975).

If a violation is found, the court should make further inquiry concerning the appropriate remedy or sanction, if any, that should be imposed. *Odom v. State*, 403 So.2d 936 (Fla. 1981); *Del Monte Banana Co. v. Chacon*, 466 So.2d 1167 (Fla. 3d DCA 1985); *Ali*. Selection of the appropriate sanction is within the discretion of the trial judge. *Zamora v. State*, 361 So.2d 776 (Fla. 3d DCA 1978).

Sections 5.425.46 discuss some of the alternatives available to the court after it has determined that a violation of the rule of sequestration of witnesses has occurred.

2. [5.42] No Sanction Or Remedy

When the court finds the violation of the rule of sequestration insignificant, nonprejudicial, and inadvertent, it may decide to impose no sanction or remedy. See *Del Monte Banana Co. v. Chacon*, 466 So.2d 1167 (Fla. 3d DCA 1985); *Zamora v. State*, 361 So.2d 776 (Fla. 3d DCA 1978). See also *Rowe v. State*, 120 Fla. 649, 163 So. 22 (1935).

3. [5.43] Admonishment Of Witness Or Attorney

When the violation of the rule of sequestration is insignificant but a witness or counsel is found culpable, an admonishment may be appropriate. See *Zamora v. State*, 361 So.2d 776 (Fla. 3d DCA 1978).

4. [5.44] Contempt

Witnesses, attorneys, or other persons who willfully violate a trial courts order may be found in contempt of court and punished accordingly. See *Holder v. United States*, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1893); *Dumas v. State*, 350 So.2d 464 (Fla. 1977); *Rowe v. State*, 120 Fla. 649, 163 So. 22 (1935). Although the sanction of contempt punishes the wrongdoer, it does not overcome any prejudice resulting from the misconduct.

5. [5.45] Impeachment

If the court determines that a violation of the rule of sequestration has occurred regarding a prospective witness, the judge may permit that witness to testify but allow the adversely affected party to cross-examine the witness regarding the rule violation in an attempt to discredit the witness. See *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982); *Odom v. State*, 403 So.2d 936 (Fla. 1981); *Atkinson v. State*, 317 So.2d 807 (Fla. 4th DCA 1975).

A courts prior determination of a violation and approval to cross-examine the witness regarding the violation are necessary prerequisites to the lawyers attempt to discredit the witness. *Del Monte Banana Co. v. Chacon*, 466 So.2d 1167 (Fla. 3d DCA 1985). Compare *Williams v. Moran Towing & Transportation Co.*, 504 So.2d 27 (Fla. 4th DCA 1987). However, when a violation has occurred and there is a likelihood that the witnesss testimony may have been influenced, and the witness is permitted to testify, it would probably be an abuse of discretion to preclude the adversely affected party from cross-examining the witness about the violation.

In criminal cases involving prosecution witnesses, denial of the right to cross-examine violates the Sixth Amendment. See, *e.g.*, *Lee v. State*, 422 So.2d 928 (Fla. 3d DCA 1982). Compare *A. McD. v. State*, 422 So.2d 336 (Fla. 3d DCA 1982).

6. [5.46] Excluding Witness Or Striking Testimony

Excluding a witness and striking that witnesss testimony are severe sanctions and should be used sparingly. They should be imposed only if the court has determined that a violation has occurred and that the subject witnesss testimony has been substantially affected. In addition, the court should determine that the violation occurred as a result of the bad-faith complicity of a party or the attorney producing the witness. See *Wright v. State*, 473 So.2d 1277 (Fla. 1985); *Dumas v. State*, 350 So.2d 464 (Fla. 1977). In criminal cases in which defense witnesses are sought to be

excluded, satisfying these criteria is required to avoid contravening the accuseds Sixth Amendment right to compulsory process. *Wright*; *Dumas*. But see *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

In determining whether questioned testimony was substantially affected, the Florida Supreme Court enunciated this stringent test: [W]hether the testimony of the challenged witness was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been had he not heard testimony in violation of the rule. *Steinhorst v. State*, 412 So.2d 332, 336 (Fla. 1982). It appears that this test should be applied to only the material, controverted testimony of the witness. Florida courts have found reversible error when trial courts have excluded criminal defense witnesses without first inquiring about the complicity of the defendant or the defendants attorney. *Atkinson v. State*, 317 So.2d 807 (Fla. 4th DCA 1975). However, when the court has inquired and found that the testimony is substantially affected, and the violation resulted from the complicity of the accused or counsel, the exclusion of defense witnesses has been upheld. *Showers v. State*, 364 So.2d 848 (Fla. 2d DCA 1978).

If the court excludes a witness because of a violation of the rule of sequestration and the proponent of the witness fails to proffer the substance of the excluded testimony, the error, if any, is not preserved for appellate review. *Romano v. Palazzo*, 83 Fla. 243, 91 So. 115 (1922); *Woodruff v. State*, 360 So.2d 49 (Fla. 1st DCA 1978).

V. REFRESHING RECOLLECTION OF WITNESS

A. [5.47] In General

If a witness suffers a failure of recollection concerning matters perceived, this disability renders the witness incompetent to testify to those matters unless the witnesss memory is revived. See *F.S.* 90.603(1), 90.604. There are techniques to revive memory that is lost temporarily. For example, the interrogator can suggest facts to the witness in a leading question to jar the witnesss memory so that the witness may then testify from present recollection. See 5.48. The attorney can also give the witness a memory-refreshing item that, after being used, may induce the witnesss independent present memory of facts perceived. See 5.515.54. If these techniques are unavailable, crucial testimony may be lost, or the testimony given may be incomplete or mistaken. See *Lobree v. Caporossi*, 139 So.2d 510 (Fla. 2d DCA 1962).

B. [5.48] Leading Questions

Through leading questions, facts can be suggested to the witness that may prompt the witness to recall temporarily forgotten matters. On direct examination, the general rule is that except as may be necessary to develop the witnesss testimony, leading questions are disfavored. *F.S.* 90.612(3). See 5.31.

If the attorney is unable to elicit the testimony through nonleading questions, the attorney should be allowed to ask a few peripheral, leading questions to refresh the witnesss recollection. See *Sylvester v. State*, 46 Fla. 166, 35 So. 142 (1903) (pre-Evidence Code case condemning use of

leading questions that suggested vital, inadmissible former testimony to witness in jurys presence; less leading and suggestive approach could have been attempted to refresh recollection). For example, a prosecutor on direct examination should not ask the witness, Do you recall the defendant saying to you after his arrest, I killed him, and I dont care what happens to me? Instead, the prosecutor should inquire in a more circumspect manner, such as: Do you recall arresting the defendant at Masons Bar and transporting the defendant to the police station?

C. Refreshing Recollection Technique

1. [5.49] Theory

The theory of the technique of refreshing recollection is that if the witness is made aware of a certain thing (a memory-refreshing item), it may spur the witnesss memory to enable the witness to testify from present recollection. When used in this way, the memory-refreshing item is not evidence, but an aid to the witness. If its use is successful, the evidence is the testimony of the witness concerning present recollection. If the technique is unsuccessful in reviving the present memory of the witness, the witness is incompetent regarding that matter. *K.E.A. v. State*, 802 So.2d 410 (Fla. 3d DCA 2001). Unless the memory-refreshing item satisfies the criteria for admission under *F.S.* 90.803(5) (recorded recollection), or is otherwise admissible, it cannot be introduced. See *Middleton v. State*, 426 So.2d 548 (Fla. 1983); *Hernandez v. State*, 31 So.3d 873 (Fla. 4th DCA 2010) (recognizing that when proper foundation is laid, tape-recorded statement may qualify as recorded recollection); *Polite v. State*, 41 So.3d 935 (Fla. 5th DCA 2010) (finding that plain reading of the statute would allow admission of the statement so long as the state presented evidence (from any source) sufficient to support a finding that the statement was made when the matter was fresh in the witness mind, and that it was accurate).

2. [5.50] Predicate

The potential for abuse is greater when using the refreshing recollection technique than when using leading questions. Only a few peripheral facts may be suggested by leading questions. However, entire testimony may be suggested by disclosing the contents of a memory-refreshing item. Therefore, as a predicate for use of the refreshing recollection technique, the witness should demonstrate a good-faith lapse of memory. Otherwise the device could be used as a ruse to allow the attorney to suggest testimony. See *Claussen v. State, Dept. of Transportation*, 750 So.2d 79 (Fla. 2d DCA 1999); *Oliver v. State*, 239 So.2d 637 (Fla. 1st DCA 1970), *quashed on other grounds* 250 So.2d 888 (prosecutors refreshing recollection of witness exposed jury to inadmissible evidence, although error was harmless); *United States v. Jimenez*, 613 F.2d 1373 (5th Cir. 1980) (prosecutor should have prefaced agents testimony with showing that witness needed to review report to revive recollection).

Some authorities do not agree on the need for the witnesss good-faith lapse of memory as a predicate. See 1 McCormick on Evidence 9 (Thomson/West 6th ed. 2006). See also Graham &

Glazier, Handbook of Florida Evidence 613.0 at 546 (Michie/Lexis Law Publishing 2d ed. 1996, 2000 Supp.).

3. [5.51] Memory-Refreshing Item

Because the memory-refreshing item is not evidence but is an aid to the witness, there is no issue of its reliability. Therefore, what is used to attempt to spur memory is immaterial. *Volusia County Bank v. Bigelow*, 45 Fla. 638, 33 So. 704 (1903). If the memory-refreshing item is a writing, it need not be written by the witness nor be the original. See *Garrett v. Morris Kirschman & Co.*, 336 So.2d 566 (Fla. 1976) (use of tax form written by employer to refresh employees memory about earnings). See also *R. A. B. v. State*, 399 So.2d 16 (Fla. 3d DCA 1981). *Garrett* reaffirms cases holding that concerns of reliability and admissibility are misplaced as applied to memory-refreshing items used solely to refresh recollection, *Davis v. State*, 47 Fla. 26, 36 So. 170 (1904); *Forester v. Norman Roger Jewell & Brooks International, Inc.*, 610 So.2d 1369 (Fla. 1st DCA 1993), and implicitly rejects cases that are concerned with the memory-refreshing items reliability and admissibility, *Lobree v. Caporossi*, 139 So.2d 510 (Fla. 2d DCA 1962); *Chaudoin v. State*, 118 So.2d 569 (Fla. 2d DCA 1960). However, reliability is considered in the inquiry concerning when a writing was made. *Middleton v. State*, 426 So.2d 548 (Fla. 1983); *Volusia County Bank* (closer in time to event, more reliable written recollection will be). See also *Great Atlantic & Pacific Tea Co. v. Nobles*, 202 So.2d 603 (Fla. 1st DCA 1967).

The memory-refreshing item need not be admissible independently. *Garrett*; *Forester*. See also *United States v. Ricco*, 566 F.2d 433 (2d Cir. 1977) (illegal wiretap used to refresh recollection). The Florida Supreme Court in *Garrett*, however, cautions:

> As a corollary to the rules allowing such wide latitude in the choice of writings as mnemonic aids, the writings used to prompt recollection are not necessarily admissible in evidence themselves. If a writing is admissible independently, its use to spur a witness memory does not disqualify it, but [if it is not independently admissible] it cannot come into evidence on the coattails of the testimonial recollection it sparks.

Id. at 569.

4. Procedure

a. [5.52] Using Memory-Refreshing Item

b. [5.53] Item Used While Testifying

c. [5.54] Item Used Before Testifying

a. [5.52] Using Memory-Refreshing Item

Once the predicate is established that the witness has a good-faith memory loss, the proponent may present to the witness an item that may provoke the witnesss memory. Because the use of the memory-refreshing item under this technique is not evidence, the item should be shown only to the witness and its contents should not be revealed to the jury. For example, if the item is a writing, it should be given to the witness to read silently; it should not be read by the attorney to the witness in the presence of the jury. *Oliver v. State*, 239 So.2d 637 (Fla. 1st DCA 1970),

quashed on other grounds 250 So.2d 888. If it is a tape recording, it should be played for the witness outside the presence of the jury. *Hill v. State*, 355 So.2d 116 (Fla. 4th DCA 1978).

If the memory-refreshing item revives the witnesss memory, the item should be withdrawn from the witness, who will then testify from present memory. If the matters refreshed are complicated or detailed and the witness needs to refer to the item repeatedly, the witness may be permitted to retain the item and set it aside until needed again. However, the court must determine that the witness is testifying in good faith from present recollection and not parroting the memory-refreshing item. If the witness is parroting and has no independent memory, he or she is incompetent regarding the matter and is simply a conduit for the improper introduction of the memory-refreshing item. See *Davis v. State*, 348 So.2d 1228 (Fla. 3d DCA 1977); *Great Atlantic & Pacific Tea Co. v. Nobles*, 202 So.2d 603 (Fla. 1st DCA 1967).

b. [5.53] Item Used While Testifying

F.S. 90.613 provides:

When a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or, in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.

The Florida Evidence Codes requirement of production on request of the opposing party, when the memory-refreshing item is used while testifying, is consistent with previous Florida cases. See *Allen v. State*, 243 So.2d 448 (Fla. 1st DCA 1971); *Minturn v. State*, 136 So.2d 359 (Fla. 3d DCA 1962).

In *Pare v. State*, 656 So.2d 602 (Fla. 1st DCA 1995), the defendant chose to take the stand on his own behalf, using notes to refresh his memory. The trial judge did not err in allowing the prosecutor to review the notes used to refresh the defendant witnesss memory on cross-examination. A defendant who chooses to testify on his own behalf is not treated differently than any other witness, and all rules that apply to witnesses also apply to a defendant on the stand. *Booker v. State*, 397 So.2d 910 (Fla. 1981).

Because the policy of nondisclosure of the contents of the memory-refreshing item is for the opponents protection, *F.S.* 90.613 allows the opponent to waive this protection and disclose the contents on cross-examination. The opponent may also introduce the item into evidence as nonhearsay to attack the credibility of the witness. The court should give an instruction limiting the jurys consideration of the memory-refreshing item to the issue of the witnesss credibility. See *F.S.* 90.107.

F.S. 90.613 provides that the proponents refusal to produce the memory-refreshing item when ordered by the court will result in striking the testimony refreshed by the item. Nothing in the rule suggests that this is the exclusive remedy. If there is a willful and bad-faith refusal, contempt

may be appropriate. When the testimony stricken is extremely prejudicial and the jury is unlikely to adhere to a cautionary instruction to disregard it, a mistrial may be appropriate.

F.S. 90.613, requiring production of the memory-refreshing item when used by the witness *while* testifying, applies even when the item is used during the deposition of the witness, unless the item is protected by privilege. *Proskauer Rose LLP v. Boca Airport, Inc.*, 987 So.2d 116 (Fla. 4th DCA 2008) (denying motion to compel documents used to refresh memory of witness in preparation for deposition; although court could have allowed inspection by adverse party if documents had not been privileged, documents were exempt from disclosure as work product in that effect would be to disclose to opponent which documents petitioners counsel thought were most relevant); *Merlin v. Boca Raton Community Hospital, Inc.*, 479 So.2d 236 (Fla. 4th DCA 1985). See Saltzburg, Martin & Capra, 3 Federal Rules of Evidence Manual 612.02[10] (Matthew Bender & Co. 9th ed. 2006). Compare *City of Denison v. Grisham*, 716 S.W.2d 121 (Tex. App. 1986), with *S & A Painting Co. v. O.W.B. Corp.*, 103 F.R.D. 407 (W.D. Pa. 1984).

c. [5.54] Item Used Before Testifying

Although *F.S.* 90.613, unlike its counterpart Fed.R.Evid. 612, is silent regarding the production of the memory-refreshing item when used by the witness *before* testifying, Florida common law provides a consistent discretionary rule. In *Kimbrough v. State*, 219 So.2d 122 (Fla. 1st DCA 1969), the court adopted the position that, if a witnesss present recollection was refreshed by the use of papers or memoranda out of court before the witness testified, the witness is not obliged to produce the memory-refreshing items to allow the opposing party to make an inspection, unless the court in its discretion orders otherwise. See *Merlin v. Boca Raton Community Hospital, Inc.*, 479 So.2d 236 (Fla. 4th DCA 1985); *Marshall v. State*, 321 So.2d 114 (Fla. 1st DCA 1975); *Williams v. State*, 208 So.2d 628 (Fla. 3d DCA 1968). Compare Rule 612(2).

The court has discretion to require production of the memory-refreshing item even when it is used before testifying. However, courts have not delineated factors to be considered in the exercise of discretion or in evaluating whether there has been an abuse of discretion. See *Proskauer Rose LLP v. Boca Airport, Inc.*, 987 So.2d 116, 117 (Fla. 4th DCA 2008) (recognizing that although there is no statutory obligation to produce documents witness uses prior to testifying, trial court may allow inspection by opposing party unless documents are otherwise privileged); *Watkins v. Wilkinson*, 724 So.2d 717 (Fla. 5th DCA 1999); *Merlin*; *Marshall*; *Williams*.

If fundamental fairness, due process, and, in criminal cases, the accuseds constitutional right of confrontation require the production and use, on cross-examination, of a memory-refreshing item used by the witness immediately after taking the oath and while testifying, these considerations should apply when the same item is given to the witness immediately before taking the oath. Under those circumstances, precluding the production of the item used before testifying may constitute an abuse of discretion. However, a rule that would require the production of every item a witness consulted before testifying would be unwise and unworkable. Therefore, when a request is made for the production of a document or other item used by the witness before trial to refresh his or her memory, the court should consider factors such as:

the nature of the proceeding (civil or criminal);

the nature and importance of the witness and the testimony on which the witness was refreshed;

whether the facts on which the witness was refreshed are disputed and subject to corroborating or contradicting evidence;

the extent to which the item was used to refresh the witnesss recollection;

when the item was used (for example, months ago, or after the trial or hearing had begun and the rule of sequestration had been invoked);

the nature of the item used (for example, whether the item was the witnesss own prior statement or the statements of others); and

whether the item is otherwise privileged. See *Merlin* (notes consulted by party/deponent before deposition and made by party in contemplation of seeing attorney were privileged and not discoverable by opponent).

See *Watkins*; *Merlin*; *Marshall*; *Williams*.