

ITEM 1.07 | REQUIRED DUE PROCESS AND FINDINGS OF FACT

The trial court must hold a hearing and give the disobedient party the opportunity to be heard. Therefore, it is reversible error to award sanctions before the hearing on the motion to compel takes place.⁴¹ By the same token, striking a party's pleadings before the deadline for compliance with discovery requires reversal.⁴²

If the trial court dismisses an action or enters a default as a sanction for discovery violations, a finding that the violations were willful or deliberate must be made.⁴³ If the offending party is represented by counsel, detailed findings must be included in the order, as delineated in *Kozel v. Ostendorf*.⁴⁴ If the order does not contain such findings, it will be reversed.⁴⁵ Kozel findings are not required unless the recalcitrant party is represented by counsel.⁴⁶

It is reversible error to dismiss a case for discovery violations without first granting the disobedient party's request for an evidentiary hearing. The party should be given a chance to explain the discovery violations.⁴⁷

Important and fundamental aspects of discovery abuse and efforts to sanction or correct it, are that the underlying court order (compelling a discovery response) or process (e.g., a subpoena, whether issued by the court or an attorney "for the court"), must be clear and unambiguous, properly issued, and properly served. A court can only enforce an order compelling conduct (e.g., providing discovery or enjoining one to or not to do something) when the order is clear, because otherwise, the concept of violating it (which requires a specific intent to violate the order/process) becomes far too murky to meet due process requirements.⁴⁸ Further, issuance and service of the court order/process must be proper, for otherwise, that paper is nothing more than an invitation, as only through properly issued and served process does the court obtain jurisdiction over the person from whom action is sought (and without jurisdiction there can be no "enforcement").

Discovery sanctions should be "commensurate with the offense."⁴⁹ It has been held that the striking of pleadings for discovery misconduct is the most severe of penalties and must be employed only in extreme circumstances.⁵⁰ The Fourth District further found in *Fisher*:

The striking of a party's pleadings is justified only where there is "'a deliberate and contumacious disregard

of the court's authority.'" *Barnett v. Barnett*, 718 So. 2d 302, 304 (Fla. 2d DCA 1998) (quoting *Mercer*, 443 So. 2d at 946). In assessing whether the striking of a party's pleadings is warranted, courts are to look to the following factors:

1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for the noncompliance; and 6) whether the delay created significant problems of judicial administration.

Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993). The emphasis should be on the prejudice suffered by the opposing party. See *Ham v. Dunmire*, 891 So. 2d 492, 502 (Fla. 2004). After considering these factors, if a sanction less severe than the striking of a party's pleadings is "a viable alternative," then the trial court should utilize such alternatives. *Kozel*, 629 So. 2d at 818. "The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation" and "[t]his purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal" or the striking of a party's pleadings. *Id.*⁵¹

The failure to make the required findings in an order requires reversal.⁵²

In *Ham v. Dunmire*,⁵³ the Florida Supreme Court held that participation of the litigant in the misconduct is not required to justify the sanction of dismissal. Relying on its prior decision in *Kozel v. Ostendorf*,⁵⁴ the court held that the litigant's participation, while "extremely important," is only one of several factors which must be weighed:

[A] litigant's involvement in discovery violations or other misconduct is not the exclusive factor but is just one of the factors to be weighed in assessing whether dismissal is the appropriate sanction. Indeed, the fact

that the *Kozel* Court articulated six factors to weigh in the sanction determination, including but not limited to the litigant's misconduct, belies the conclusion that litigant malfeasance is the exclusive and deciding factor. The text of the *Kozel* decision does not indicate that litigant involvement should have a totally preemptive position over the other five factors, and such was not this Court's intent. Although extremely important, it cannot be the sole factor if we are to properly administer a smooth flowing system to resolve disputes.

However, the Court reversed the dismissal in the case before it, finding that the attorney's misconduct (and the prejudice to the opposing party) did not rise to the level necessary to justify dismissal under the *Kozel* test.

Trial Lawyers Section of the Florida Bar
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Footnotes

⁴¹ *Joseph S. Arrigo Motor Co., Inc. v. Lasserre*, 678 So. 2d 396, 397 (Fla. 1st DCA 1996) (reversing an award of \$250 in sanctions where the award was entered before the motion hearing).

⁴² *Stern v. Stein*, 694 So. 2d 851 (Fla. 4th DCA 1997).

⁴³ *Rose v. Clinton*, 575 So. 2d 751 (Fla. 3d DCA 1991); *Zaccaria v. Russell*, 700 So. 2d 187 (Fla. 4th DCA 1997).

⁴⁴ 629 So. 2d 817 (Fla. 1993).

⁴⁵ *Zaccaria v. Russell*, 700 So. 2d 187 (Fla. 4th DCA 1997).

⁴⁶ *Sukonik v. Wallack*, No. 14-2197 (Fla. 3d DCA 2015).

⁴⁷ *Medina v. Florida East Coast Rwy.*, 866 So. 2d 89 (Fla. 3d DCA 2004), appeal after remand and remanded, 921 So. 2d 767 (2006).

⁴⁸ See generally, *Powerline Components, Inc. v. Mil-Spec Components, Inc.*, 720 So. 2d 546, 548 (Fla. 4th DCA 1998); *Edlund v. Seagull Townhomes Condominium Assoc., Inc.*, 928 So. 2d 405 (Fla. 3d DCA 2006); *American Pioneer Casualty Insurance Co. v. Henrion*, 523 So. 2d 776 (Fla. 4th DCA 1988); *Tubero v. Ellis*, 472 So. 2d 548, 550 (Fla. 4th DCA 1985).



⁴⁹ *Drakeford v. Barnett Bank of Tampa*, 694 So. 2d 822, 824 (Fla. 2d DCA 1997); *Cape Cave Corporation v. Charlotte Asphalt. Inc.*, 384 So. 2d 1300, 1301 (Fla. 2d DCA 1980), appeal after remand, 406 So. 2d 1234 (1981).

⁵⁰ *Fisher v. Prof'l. Adver. Dirs. Co., Inc.*, 955 So. 2d 78 (Fla. 4th DCA 2007).

⁵¹ *Fisher*, 955 So. 2d at 79-80.

⁵² See *Bank One, N.A. v. Harrod*, 873 So. 2d 519, 521 (Fla. 4th DCA 2004) (citing *Fla. Nat'l Org. for Women v. State*, 832 So. 2d 911, 914 (Fla. 1st DCA 2002)); see also *Carr v. Reese*, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001) (holding that trial court's failure to consider all of the factors as shown by final order requires reversal).

⁵³ 891 So. 2d 492 (Fla. 2004).

⁵⁴ Cited *supra*

