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INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

## [Florida Supreme Court: Failure to Timely Move for Mistrial After an Objection to Attorney Misconduct Is Sustained Waives Motion for New Trial on That Basis Absent Fundamental Error](#)

December 23, 2010 by [Eric L. Lundt](#)

Resolving an express conflict between the District Courts of Appeal, the Florida Supreme Court held that when a party objects to instances of attorney misconduct during trial, and the objection is sustained, the party must also timely move for a mistrial in order to preserve the issue for a trial court's review of a motion for new trial. If the issue is not preserved in this manner, the conduct may still be subject to fundamental error analysis.

[Ramiro Companioni, Jr. v. City of Tampa, 35 Fla. L. Weekly S738a](#) (.pdf)

In the underlying case, Plaintiff sued the City of Tampa for personal injuries. Throughout the trial, the City objected to several instances of misconduct on the part of Plaintiff's counsel. Although the objections were sustained, the City did not move for a mistrial. After judgment was entered in favor of Plaintiff, the City moved for a new trial alleging that the cumulative effect of opposing counsel's misconduct throughout trial deprived it of a fair trial. The trial court found that although Plaintiff's counsel's conduct was so pervasive and prejudicial that it impaired the City's right to a fair trial, the City had not moved for a mistrial and the conduct was not so extreme that "it would undermine the public's confidence in the judicial system," and on that basis denied the City's motion. The City appealed to Florida's Second District Court of Appeal, which reversed the denial of a new trial based on the holding that the City's contemporaneous objections to the misconduct were sufficient. The Second District did not reach the separate issue of whether the complained of misconduct constituted fundamental error. Because the Second District's holding was in direct conflict with other appellate courts in Florida, the Florida Supreme Court accepted discretionary review.

The Court analogized the need for moving for a mistrial with the contemporaneous objection rule:

"...failure to alert the trial judge that an error may be incurable results in delay and wastes judicial resources, especially if the error complained of occurs early on in the proceedings. In cases such as the instant case where the trial judge sustains an objection, the trial judge is not put on notice that any further action is needed. Without a request for mistrial or a curative instruction, the trial judge presumes that the objecting party has been satisfied that the error has been cured."

As such, the Court quashed the Second District's decision and remanded the case for consideration of whether the trial court abused its discretion in denying a new trial under a fundamental error analysis.