

So, consistent with due process, this is how a party obtains hearing time on a motion and sets it for hearing:

1. A party files a motion in a case and then calls the court's Judicial Assistant and requests hearing time.
2. A judge is assigned thousands of cases. At last count this judge has an assignment of about 7,000 cases that are currently open or subject to being reopened. Many motions are filed in each of these cases every day. The judge has no way of knowing or keeping track of all of the motions filed every day. Many motions are filed and never noticed for hearing so they are never ruled on. Only motions that are set for hearing by a party and noticed for hearing by a party are heard and ruled on.
3. The judge's Judicial Assistant gives hearing time on a "first come, first served" and "when time is available" basis. It is much like making an appointment with a dentist. The dentist gives a patient an appointment when the time is available on his calendar. However, unlike a dentist's receptionist setting up appointments, the court's Judicial Assistant must depend on the party to declare how much time the party needs for the hearing.
4. In both situations, however, the dentist and the judge control the calendar. The patient and the party do not control the calendar. The judge controls his calendar through his Judicial Assistant, who is well trained and experienced with hearings in family cases. The judge does not get involved with setting hearings, just as the dentist does not set his appointments.
5. From experience, the court's Judicial Assistant knows that in general a party calling for hearing time underestimates the time required for the hearing on the motion. Almost all hearings in family cases are evidentiary hearings and evidentiary hearings are lengthy. It is the responsibility of the party requesting hearing time to ask for enough time on the court's calendar

so that **both sides** can be heard on the motion. This is a fundamental due process: **both sides** must be heard on the motion. **So the time the movant requires to present the motion must be doubled by the movant when requesting hearing time in order to allow the opponent equal time.**

6. The court's Judicial Assistant does not know how much time will be required for a hearing on any motion. It is the responsibility of the party requesting hearing time to know how much time is needed and to request the correct amount of time and then double it.

7. Since the hearing is most likely an evidentiary hearing, the time required must include time for (a) opening statements; (b) testimony by witnesses; and (c) cross examination of the witnesses; and (d) closing arguments. **Cross examination and opening statements and closing argument of the movant and the opponent are included in the one-half of the time the movant requests for the hearing.**

8. If the time requested expires before both sides have been heard, then the court must continue the matter to a future date, a date that the party must obtain from the court's Judicial Assistant. The court cannot rule on a motion until both sides have had an equal opportunity to be heard.

9. Again, fundamental due process requires that both sides are entitled to equal time on any motion. So, the party requesting hearing time **must double** the time requested so the other side has the same amount of time to present its witnesses and have them cross examined.

The Supreme Court of Florida has issued Rules of Court. This is what the Florida Rules of Court provide:

Rule 12.440. Setting Action for Trial

(a) “ ... the court ... shall enter an order setting the action for trial.”

Rule 1.100. Pleadings and Motions

(a) “There shall be a complaint or when so designated by a statute or rule, a petition and an answer to it. ...”

(b) “An application to the court for an order shall be by motion ...”

Rule 1.110. General Rules of Pleading

(b) “A pleading which sets forth a claim for relief ...”

Rule 1.140(f) Motion to Strike. “A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time.”

Case law has applied these rules:

In *Merrigan v. Merrigan*, 947 So.2d 668 (Fla. 2d DCA 2007), a final judgment was entered after “a hearing” held before the magistrate pursuant to an order entered by the court that referred the wife’s petition for dissolution to the magistrate and scheduled “a hearing” before the magistrate. Both parties appeared at that “hearing” on the wife’s petition but it turned out to be “an abbreviated trial” on the merits of her petition. No trial order was entered pursuant to Rule 12.440(a) by either the judge or the magistrate. The appellate court ruled that the court’s order of referral that noticed a hearing “did not fairly apprise the Husband that the hearing would result in a final judgment. ... This notice also failed to comply with the procedures required by Florida Rule of Family Law Procedure 12.440(a) for setting a trial or final hearing. This alone merits reversal. ... the procedures in this case were clearly insufficient to provide appropriate notice and an opportunity to be heard on the significant contested issues...”

See, e.g., *Teelucksingh v. Teelucksingh*, 21So.3d 37 (Fla. 2d DCA 2009): “... the court

itself was required to enter an order setting the action for trial; ..." *and Bisel v. Bisel*, 165 So.3d 833 (Fla. 4th DCA 2015), in which the appellate court reversed a judgment for the former husband because the former husband mailed the former wife a "notice of hearing," which turned out to be the trial on the merits of her supplemental petition and the trial court never entered a trial order pursuant to Rule 12.440.

In *Bennett v. Ward*, 667 So.2d 378 (Fla. 1st DCA 1995) the trial judge entered a judgment of foreclosure at a hearing noticed pursuant to a "notice of hearing" served by counsel and not a trial held pursuant to a trial order entered by the judge under Rule 1.440. The appellate court said that "noncompliance with [Rule] 1.440 can be raised ... by motion" pursuant to Florida Rule of Civil Procedure 1.540, and that "[s]trict compliance with Florida Rule of Civil Procedure 1.440 is required and failure to do so is reversible error." (*Citations omitted.*)

So, from these rules and this case law we see that pleadings must be set for trial by a trial order and motions are noticed for hearing by a party obtaining hearing time from the court's Judicial Assistant.

Therefore, Mr. X's "Notice of Hearing" in which he said the court would hear the wife's pleading is a nullity. A pleading is a claim for ultimate relief in the case. All pleadings are set for trial, if they are not otherwise disposed of before trial, for instance, by a motion for summary judgment. Trials are set by court orders. Pleadings cannot be heard and decided by a notice of hearing sent by counsel. A judgment based on a pleading that was heard and decided at a hearing noticed by counsel is a void judgment. This is, again, fundamental due process, that is, the process that is required by the Florida Rules of Court. Therefore, the court will not hear a pleading on a notice of hearing sent by counsel. A trial judge cannot violate fundamental concepts of due process.

However, Mr. X's "Notice of Hearing" that notices a motion for hearing is not a nullity. It notices a motion for a hearing. Presumably, the movant estimates the parties can conclude their

opening statements, direct testimony, cross examination and closing arguments in 90 minutes because Mr. X requested 180 minutes for the hearing.

Concerning Mr. Y's "Motion to Strike," there is no authority in the Florida Rules of Court for a "motion to strike" a notice of hearing. A motion to strike is allowed to strike "redundant, immaterial, impertinent, or scandalous matter from any pleading ..." A "notice of hearing" is not a "pleading." A "pleading" in a family case is a petition and an answer to it. F.S. §61.043(1): A proceeding for dissolution of marriage ... shall be commenced by filing ... a petition ..."

The husband's "Motion to Strike," therefore, is surplusage in the court file. By court rules and case law, Mr. X's attempt to notice a petition for hearing is a nullity. There is no need to strike nullities from the court file. Rather, an opponent appears at the hearing and asks the court to adhere to fundamental concepts of due process, as expressed in the Florida Rules of Court and the case law.

For the foregoing reasons, the husband's "Motion to Strike" is not ruled on. There is no need to rule on it. It is surplusage.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
X, Esq., and Y, Esq.