Family Law Section of BCBA Nuts and Bolts Seminar

EVIDENCE 101

Presented By:
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Common Evidentiary Pitfalls Judges See

1. **Objections**
2. **Hearsay**
3. **Impeachment**
4. **Refreshing Recollection**

Common Evidentiary Pitfalls Judges See

KNOW YOUR OBJECTIONS

- Object
- State your legal objection
- Standing objections
- Failure to object to Evidence constitutes a waiver of the Objection. Rhodes v. State, 638 So. 2d. 920 (Fla. 1994).

Common Evidentiary Pitfalls Judges See

LEGAL OBJECTIONS

1. Objections to Questions

- Calls for irrelevant answer
- Calls for immaterial answer
- Violates the best evidence rule
- Calls for a privileged communication
- Calls for a conclusion
- Calls for an opinion (by an incompetent witness)
- Calls for a narrative answer
- Calls for a hearsay answer
- Leading
- Repetitive (asked and answered)
- Beyond the scope (of direct, cross, or redirect)
- Assumes facts not in evidence
- Confusing / misleading / ambiguous / vague / unintelligible
- Speculative
- Compound question
- Argumentative
- Improper characterization
- Mistakes evidence / misquotes the witness
- Cumulative
- Improper impeachment

Common Evidentiary Pitfalls Judges See

LEGAL OBJECTIONS

2. Objections to Exhibits

- Irrelevant
- Immaterial
- No foundation
- No authentication
- Hearsay
- Prejudice
- Inadmissible matter

3. Objections to Answers

- Irrelevant
- Immaterial
- Privileged
- Conclusion
- Opinion
- Hearsay
- Narrative
- Improper characterization
- Parole evidence
- Unresponsive

Common Evidentiary Pitfalls Judges See

COMMONLY USED HEARSAY

Pursuant to *Fla. Stat*. § 90.801(1)(c), **hearsay** is an out of court statement, oral or written, offered to prove the truth of the matter asserted.

- **Prior Consistent Statements** - are inadmissible as substantive evidence unless they qualify under a hearsay exception. Barber v. State, 576 So. 2d 825 (Fla. 1st DCA 1991)(when a defendant seeks to introduce his own prior self-serving statement for the truth of the matter asserted, it is hearsay and not admissible).
- **Police reports** - are hearsay and may contain hearsay within hearsay. *Florida Statutes* § 90.805 provides that hearsay within hearsay is not excluded under § 90.802, provided each part of the combined statements conforms with an exception to the hearsay rule as provided in Section 90.803 or Section 90.804. Carter v. State, 951 So. 2d 939 (Fla. 4th DCA 2007)(police reports do not fall within business or public records exception to hearsay rule and are inadmissible).
- **Affidavits of third parties** - are hearsay and inadmissible. Witnesses must be present so they can be cross examined.

Common Evidentiary Pitfalls Judges See

CHILD VICTIM HEARSAY

Fla. Stat. § 90.803(23)(a) Unless a child victim's hearsay statement indicates lack of trustworthiness, it is admissible if:

- (1) The court finds in a hearing that the time, content, and circumstance of the statement provide sufficient **safeguards of reliability**; and
- (2) The child either **testifies or is unavailable** as a witness provided there is corroborative evidence of the abuse or offense (unavailability includes substantial likelihood of severe emotional or mental harm in addition to Fla. Stat. § 90.804 factors).

- A.G. v. Dept. Children & Families, 193 So. 3d 1097 (Fla. 4th DCA 2016) (court must hold evidentiary hearing to ascertain the reliability of the out-of-court statements and must make factual findings supported by evidence).
- In determining child witness competency, trial courts must answer three questions:
  - (1) Is the child capable of observing and recollecting facts?
  - (2) Is the child capable of narrating those facts to the court?
  - (3) Does the child have a moral sense of obligation to tell the truth?

Common Evidentiary Pitfalls Judges See

IMPEACHMENT

THREE C's – (Confirm, Credit and Confront)

Impeachment by prior inconsistent statement is used when a witness remembers a fact, but previously made a different statement about that fact. Impeachment by prior inconsistent statement has three basic steps, which have been described in a number of ways. One of the most popular is the "three Cs," confirm, credit, and confront.

Common Evidentiary Pitfalls Judges See

IMPEACHMENT

Step One: CONFIRM

- Have the witness repeat the testimony from today's hearing that you want to impeach.
- For example:
  - *"There is no question in your mind that the statement you gave today is true?"*
  - *Have you ever given a different answer to the question I just asked you?"*

Common Evidentiary Pitfalls Judges See

IMPEACHMENT

Step Two: CREDIT

- The second step is to credit, or build up, the prior statement. There are two purposes for this step. First, it is to show that the prior statement was more reliable and accurate. Second, it is to establish a foundation that will allow you to use extrinsic evidence of the prior inconsistent statement.
- The means by which you establish the accuracy and reliability of a prior statement depends on the nature of the prior statement. For example, if the prior statement is an oral statement given to a police officer, it is important to emphasize the following:
  - where the witness was when they made the statement;
  - the fact that the witness made the statement right after the event when it was fresh in their mind;
  - the importance of giving police officers accurate information;
  - the witness's desire to give the police accurate information to make sure the right person is arrested; and
  - that the witness did in fact give the police accurate information.

Common Evidentiary Pitfalls Judges See

IMPEACHMENT

… (continued) Step Two: CREDIT

- If, however, the witness made the prior statement in a deposition, you should emphasize slightly different facts:
  - where and when the deposition occurred;
  - the presence of a court reporter;
  - the fact that the witness took an oath to tell the truth and was subject to penalties for perjury;
  - the fact that the witness had an opportunity to read their testimony and ensure it was accurate; and
  - that the witness did in fact confirm their deposition testimony was accurate.

Common Evidentiary Pitfalls Judges See

IMPEACHMENT

Step Three: CONFRONT

- The final step is to impeach the witness with the prior statement. It is critical to use the actual words of the prior statement.
- If you are using a deposition or other transcribed testimony, be sure to let your opposing counsel (and Judge) know the page and line numbers you are reading from.

Common Evidentiary Pitfalls Judges See

Best Tips for Effective Impeachment

- Impeach with only one fact at a time. Keeping it simple allows the judge to understand the difference between the two statements. Impeaching a witness using one fact at a time gives you more opportunities to impeach, which further erodes the credibility of the witness.
- Read the questions and answers verbatim. It is improper to summarize or paraphrase the testimony because the summary is not the witness's actual statement.
- Be mindful of your tone. For example, if you want to show the witness is lying, project a sharp professional attitude and use questions that employ irony, curiosity, or surprise. If you want to show the witness is forgetful, use a more empathetic tone or allow the witness to explain the inconsistent statement.
- Fourth, do not impeach with facts taken out of context.
- Be selective when choosing what facts to use as a basis for impeachment. Not only is extrinsic evidence of a prior inconsistent statement on a collateral matter inadmissible, impeachment on a collateral matter needlessly distracts and undermines the power of your impeachment on more material issues.

Common Evidentiary Pitfalls Judges See

REFRESHING RECOLLECTION

Checklist - Following Questions Must Be Asked:

1. Establish that the witness does not remember the matter. Then ask the following questions:
   - Did you remember this at one time?
   - Is there a document that would refresh your recollection as to . . . ?
   - Would a review of the document assist you in remembering the . . . ?
2. Show the exhibit to opposing counsel.
3. Show the exhibit to the witness and question the witness:
   - Do you recognize this document?
   - Does this document refresh your recollection as to .....?
4. Have the witness review the document. Remove the document:
   - Do you now have an independent recollection of ...?
   - Please answer the question.

Business Records

Business Records Exception to Hearsay

Florida Statutes § 90.803 (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.—

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

Business Records

How to Offer Business Records into Evidence

1. **Testimony of the Records Custodian**

Fla. Stat. §90.803(6)(a): the party offering the business record into evidence must lay the necessary foundation:

- The record was made at or near the time of the event;
- The record was made by, or from information transmitted by, a person with knowledge;
- The record was kept in the course of a regularly conducted business activity; and
- It was the regular practice of that business activity to make such record.

Business Records

How to Offer Business Records into Evidence

Here is how to lay the foundation:

1. Are you familiar with the documents that have been marked as Exhibit "X" for identification?
2. Can you identify these documents?
3. Is it [Bank of America's] business practice to prepare these types of records?
4. Were these records prepared in the ordinary scope of the business of [Bank of America]?
5. Were these records prepared by someone with knowledge?
6. Were they prepared at or about the time the matters reflected in the records occurred?
7. Where were these documents retrieved from?
8. Is it a regular part of [Bank of America's] business to keep and maintain records of this type?
9. Are these documents the type of documents that would be kept under [Bank of America's] custody or control?

Move the business records into evidence

Business Records

- The records custodian cannot testify as to the contents of business records that are not admitted into evidence. Cardona v. Nationstar Mortg., LLC, 174 So. 3d 491 (Fla. 4th DCA 2015) (employee's testimony about the contents of bank business records was hearsay when the records were not offered into evidence, and employee's only knowledge was based upon his prior review of business records on his computer which he did not bring)
- It is not necessary for the proponent of evidence to call the person who actually prepared the business records. The records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the foundation. Landmark Am. Ins. Co. v. Pin-Pon Corp., 155 So. 3d 432, 442 (Fla. 4th DCA 2015).
- If the individual making the record does not have personal knowledge of the information, then the information must be supplied by an individual who does have personal knowledge of the information and who was acting in the course of a regularly conducted business activity. Landmark Am. Ins. Co. v. Pin-Pon Corp., 155 So. 3d 432, 441 (Fla. 4th DCA 2015).

Business Records

Landmark Am. Ins. Co. v. Pin-Pon Corp., 155 So. 3d 432 (Fla. 4th DCA 2015)

- In a suit by an insured hotel owner against an insurance company for hurricane damage, the insured hotel owner called the architect as a witness to admit the architect's records into evidence under the business record exception under *Fla. Stat.* §90.803(6).
- The architect's records contained documents from the insured's general contractor, since part of the architect's normal course of business is to obtain a cost analysis for the project from a contractor. The type of documents included as part of the contractor's cost analysis was a cost spreadsheet, subcontractor proposals, subcontractor invoices and governmental permitting documents.
- In attempting to lay the foundation to admit into evidence the contractor's cost analysis through the architect as the architect's business record, the architect testified that these documents were the type of records that his company ordinarily maintained and that these records were kept in the ordinary course of business.

Business Records

…*continued* - Landmark Am. Ins. Co. v. Pin-Pon Corp., 155 So. 3d 432 (Fla. 4th DCA 2015)

- However, the architect could not testify as to when the general contractor's documents were made and the architect had no information as to whether the person who made the documents had personal knowledge of the information contained within the record or if the person who made the record received the information by someone who had personal knowledge of the information and was acting in the course of a regularly conducted business activity.
- The appellate court stated that while it was *not* necessary for the insured hotel owner to call the person who actually prepared these business records, the insured hotel owner failed to show the architect was either in charge of the activity constituting the usual business practice or was well enough acquainted with the activity to give the testimony.
- The mere fact that these documents were incorporated into the architect's file did not bring those documents within the business records exception. You must still lay the foundation for admitting the records into evidence as a business record.

Business Records

2. **Certification:** Obtain records directly from non-party rather than through discovery from opposing party and utilize *Fla. Stat.* §90.902(11) and §90.803(6)(c) to admit business records into evidence through a certification or declaration from the records custodian.
   - §90.803(6)(c) - A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.
   - §90.902(11) - An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:

     (a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;

     (b) Was kept in the course of the regularly conducted activity; and

     (c) Was made as a regular practice in the course of the regularly conducted activity,

     provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

BUSINESS RECORDS AFFIDAVIT

STATE OF ____________

COUNTY OF ____________

BEFORE ME, the undersigned authority, personally appeared ____________ [Affiant's name], who, being by me duly sworn, deposed as follows:

My name is ____________ [Affiant's name]. I am the custodian of records for ____________ [Company's Name]. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

Attached hereto are records from ____________ [Company's Name]. These records are kept by ____________ [Company's Name] in the regular course of business, and it was the regular course of business of ____________ [Company's Name] for an employee or representative of ____________ [Company's Name], with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the report or record, or to transmit information thereof to be included in such report or record; and the records were made at or near the time or reasonably soon thereafter. The records attached here are exact duplicates of the originals.

____
AFFIANT

STATE OF ____________

COUNTY OF ____________

SWORN TO and subscribed before me by the Affiant [ ] personally known to me or [ ] who showed ____________, to corroborate the Affiant's identity this ___ day of ____________.

My commission expires:

____
NOTARY PUBLIC, State of ____________

SOCIAL MEDIA, TEXTS & EMAILS

Evidentiary Issues to Consider:

- **Authentication** – Fla. Stat. §90.901 addresses the authentication of evidence
  - Evidence is authenticated where the evidence is sufficient to support a finding that the matter in question is what its proponent claims.
  - There is no specific list of requirements to authenticate evidence, as each piece of evidence is evaluated on its own merits.
  - Court may consider the following when authenticating evidence: appearance, content, substance, internal patters or other distinctive characteristics taken in conjunction with the circumstances. It can also be authenticated by using extrinsic evidence.
- **Hearsay** – the writing must be admissible under one of the statutory hearsay exceptions

Note: It is not the judge's responsibility to raise the hearsay objection sua sponte and if hearsay is not raised, the evidence is admissible absent some other valid legal objection. See Rhodes v. State, 638 So. 2d 920 (Fla. 1994).

SOCIAL MEDIA RECORDS

Sublet v. State, 442 Md. 632 (2015) The court recognized three common approaches to authenticating social media posts:

- Admission of the Author: The easiest method of authentication would be to ask the purported author if they created the profile and if they are the author of the post.
- Forensic Examination: A second approach to authentication is to conduct a forensic examination of the computer hard drive and internet history of the person who allegedly created the profile to determine whether that computer was used to originate the post at issue. This requires an expert.
- Subpoena: The third of the non-exhaustive means of authentication was to obtain information directly from the social networking website, which would link together the profile and the entry to the person, or persons, who had created them.

Practical Tip: Take the author's deposition before the hearing to have the author authenticate the social media post, text, letter, etc.

TEXT MESSAGES

Symonette v. State, 100 So. 3d 180 (Fla. 4th DCA 2012) Photographs of text messages between get-away-driver and defendant-robber from defendant's phone were sufficiently authenticated and admissible hearsay evidence as admissions where:

1. Extrinsic evidence offered by testimony of get-away-driver about texting defendant and circumstances surrounding law enforcement's procurement of defendant's phone and taking photographs of the text messages was sufficient to show the matter in question is genuinely what the State claims.
2. Text messages between defendant-robber and get-away-driver were admissions as defendant's own statements offered against him.

TEXT MESSAGES

Text Messages - How to Lay a Foundation to Offer Texts into Evidence

- Do you have a cell phone?
- What is your phone number?
- Do you regularly receive and send text messages on your cell phone?
- Does [the recipient/sender] have a cell phone?
- How do you know?
- Do you know the [the recipient/sender]'s cell phone number?

After marking exhibit and showing it to opposing counsel, show the witness the text/email

- Do you recognize the document? What is it?
- Do you recall that text?
- Does that document/photograph accurately reflect the text that you received on [date/time]?
- How do you know that this is a text from [the sender]?
- Is that [the sender]'s phone number/contact information?

Move the text message into evidence.

LETTERS/EMAILS

Letters/Emails: How to Lay a Foundation to Offer Letters/Emails into Evidence

- If sent to your client by another party: Prove that the signature on the letter or email address is authentic, belonging to that party.
  1. Have the exhibit marked.
  2. Show the exhibit to opposing counsel.
  3. Show the exhibit to the witness and question the witness:
     - Do you recognize this letter?
     - Have you seen it before?
     - Do you recognize the signature or email address?
     - Have you seen the signature or email address before?
     - Under what circumstances?
     - Whose signature or email is it?
  4. Move the letter into evidence.

LETTERS/EMAILS

How to Lay a Foundation to Offer Letters/Emails into Evidence

- If sent by your client to another party: Prove that the party received the letter or email.
  1. Have the exhibit marked.
  2. Show the exhibit to opposing counsel.
  3. Show the exhibit to the witness and question the witness:
     - Do you recognize this letter or email?
     - Did you have anything to do with the preparation of this letter or email?
     - When did you prepare it?
     - What did you do with it after you prepared it?
     - Was the letter or email ever returned to you?
  4. If using a copy, have client identify that it is a true and accurate copy.
  5. Move the letter/email into evidence.

Photographs & Video Surveillance

***Florida Statutes* §90.951:** the definitions section of the Evidence Code provides:

- **"Photographs"** include still photographs, X-ray films, videotapes, and motion pictures. §90.951(2)
- An "**Original**" of a photograph includes the negative or any print made from it.
- A "**Duplicate**" includes a counterpart by means of photograph, including enlargements and miniatures.

Photographs & Video Surveillance

- **Photographs**, when properly authenticated, are admissible if relevant to prove a material fact.
- **Videos** are admissible on the same basis as still photographs.
- A foundation must be introduced to show the photograph, video or image is a **fair and accurate representation** of the scene it depicts.

Photographs & Video Surveillance

- Any witness with knowledge that it is a **'fair and accurate representation'** may testify to the foundational facts**; the photographer need not testify.**
  - Hillsborough County v. Lovelace, 673 So. 2d 917 (Fla. 2d DCA 1996) "The trial court improperly refused to admit photographs without the photographer's testimony."
  - City of Miami v. McCorkle, 145 Fla. 109, 199 So. 575 (1940) "Witness could authenticate photograph even though he did not take the photograph, was not present when they were taken, and did not know who took them."

Photographs & Video Surveillance

Silent Witness Theory - in the absence of the testimony of a witness with knowledge, the surrounding circumstances may be sufficient for the court to find that the photograph is a fair and accurate representation of a material fact.

- Wagner v. State, 707 So. 2d 827, 831 (Fla. 1st DCA 1998), Videotape of drug buy was properly admitted even though no person testified that it was fair and accurate representation of the drug buy. [R]elevant photographic evidence may be admitted into evidence on the 'silent witness' theory when the trial judge determines it to be reliable, after having considered the following:
  1. Evidence establishing the time and date of the photographic evidence;
  2. Any evidence of editing or tampering;
  3. The operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product;
  4. The procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and
  5. Testimony identifying the relevant participants depicted in the photographic evidence.

Photographs & Video Surveillance

Steps to laying foundation and introducing photo as evidence

1. Mark the exhibit for identification
2. Show the exhibit to opposing counsel and the witness
3. Establish the basic foundations by identifying the photograph, make the exhibit relevant, and authenticate the photograph: I'm showing you what has been marked as exhibit A, Do you recognize this? What is exhibit A? How do you recognize it?
4. Establish the Evidentiary foundation, magic question, "Is it's a fair and accurate representation?" and if its demonstrative add the question, "Will it assist in explaining your testimony or will it assist the court to understand your testimony?
5. Move photograph into evidence

Photographs & Video Surveillance

Prepare for Objections:

- Best Evidence Rule *Fla. Stat.* § 90.952 - This rule requires that when the contents of a writing, recording or photograph are being proved, an original must be offered unless a statutory excuse for the lack of an original exists. If an excuse cannot be shown, the testimony of a witness and other secondary evidence about the contents of the original is inadmissible.
  - Dyer v. State, 26 So. 3d 700 (Fla. 4th DCA 2010) (error to allow store manager to testify to contents of surveillance tape which showed defendant shoplifting DVDs when the surveillance tape had not been introduced).
  - Harris v. State, 755 So. 2d 766 (Fla. 4th DCA 2000) (photograph used by the witness to explain the witness's testimony was not subject to the best evidence rule).
- Video or Photo Enhancement or Editing – So long as it is a true and accurate representation, it goes to the weight of the evidence, not the admissibility.
- Technical imperfections – not a basis to exclude a video but goes to weight and credibility.
- Admissibility of audio portion of a video should be determined separately from the video portion. A timely objection must be made – watch out for hearsay.

GUARDIAN AD LITEM

Fla. Stat. §61.401, §61.402 and §61.403

- In an action for dissolution of marriage or for the creation, approval, or modification of a parenting plan, if the court finds it is in the best interest of the child, the court may appoint a GAL to act as next friend of the child, investigator or evaluator, not as attorney or advocate.
- In actions that involve an allegation of child abuse, abandonment, or neglect, which allegation is verified and determined by the court to be well-founded, the court must appoint a GAL for the child.
- The GAL shall be a party to any judicial proceeding from the date of the appointment until the date of discharge.
- A person appointed as GAL must be either: (1) certified by the GAL Program; (2) certified by a not-for-profit legal aid organization; *or* (3) an attorney who's a member in good standing of The Florida Bar.
- The GAL shall file a written report which may include recommendations and a statement of the wishes of the child. The report must be filed and served on all parties at least 20 days prior to the hearing at which it will be presented unless the court waives such time limit.

GUARDIAN AD LITEM

Guardian Ad Litem – Powers & Authority:

- GAL is a party and may be present for depositions, hearings and other proceedings without counsel.
- The GAL may interview the child, witnesses, or any other person having information concerning the welfare of the child, subject to conditions set by the court. The conditions should be laid out in the order appointing the GAL.
- GAL may address the court and make written or oral recommendations to the court, but the GAL must have **legal counsel** to do the following:
  1. May file such pleadings, motions, or petitions for relief as the GAL deems appropriate or necessary in furtherance of the guardian's function.
  2. Participate in all depositions, hearings, and other proceedings in the action (i.e. asking witnesses questions), and compel the attendance of witnesses.
  3. Petition the court for an order directed to person or entity (i.e. doctor, hospital) which provides the GAL is allowed to inspect and copy any records and documents which relate to the parents or child or other household members; however: (a) all parties must have notice and there must be a hearing on this request; (b) parents, child or other household members may still object to request by raising statutory patient privilege and right to privacy. S.C. v. Guardian Ad Litem, 845 So. 2d 953 (Fla. 4th DCA 2003).
  4. Request the court to order expert examinations of the child, the child's parents, or other interested parties in the action, by medical doctors, dentists, and other providers of health care including psychiatrists, psychologists, or other mental health professionals.

GUARDIAN AD LITEM

Evidentiary Issues to Consider – Guardian Ad Litem's *Report*

- **Hearsay** - While *Fla. Stat.* §61.403(5) provides the GAL report must be filed with the court, §61.403 does not provide the GAL report is automatically placed into evidence. If the report contains hearsay, then those statements are inadmissible. Scaringe v. Herrick, 711 So. 2d 2014 (Fla. 2nd DCA 1998). Further, courts have held that a GAL report constitutes hearsay if it is offered to prove the truth of the contents of the report. *See* Lewis v. Department of Health and Rehabilitative Services, 670 So. 2d 1191 (Fla. 5th DCA 1996) (trial court is required to apply the rules of evidence and GAL report is hearsay); C.J. v. Department of Children and Families, 756 So. 2d 1108 (Fla. 3rd DCA 2000)(error for trial court to make findings based upon GAL report as report is inadmissible hearsay).
- **Confidentiality** - While there is no privilege between a GAL and Witness's communication, *Fla. Stat.* §61.404 is, in essence, a statutory privilege that provides the GAL shall maintain as confidential all information and documents received from any source identified in *Fla. Stat.* 61.403(2),and may not disclose such information or documents except in the GAL's discretion, in a report to the court or as directed by the court. Metcalfe v. Metcalfe, 655 So. 2d 1251 (Fla. 3rd DCA 1995) (affirmed trial court's denial of discovery requests to GAL based upon argument that §61.404 denied the husband's due process rights since GAL's report lists all of the witnesses interviewed, and parent was free to interview or depose all of these individuals).

GUARDIAN AD LITEM

Evidentiary Issues to Consider - Guardian Litem's Testimony

- **Hearsay**: GAL cannot testify to hearsay unless there is an exception to the hearsay rule.
- **Fact Witness**: While GAL can make recommendations to the Court as to what is in the best interests of the child, GAL cannot give conclusions.

Practical Tip: To avoid some of these evidentiary issues, consider requesting a social investigation under *Fla. Stat*. § 61.20, as opposed to a Guardian Ad Litem under *Fla. Stat*. §61.403.

Social Investigation

***Fla. Stat.* §61.20**

- Where the parties cannot agree to a parenting plan, the court may order a social investigation and study concerning all pertinent details relating to the child and each parent.
- The social investigator shall furnish the court and the parties a written report, including a written statement of facts found in the social investigation on which the recommendations are based.
- The social investigation shall be conducted by qualified staff of the court, a child-placing agency licensed pursuant to s. 409.176; a psychologist licensed pursuant to chapter 490; or a clinical social worker, marriage and family therapist, or mental health counselor licensed pursuant to chapter 491. If a certification of indigence based on an affidavit filed with the court pursuant to s. 57.081 is provided by an adult party to the proceeding and the court does not have qualified staff to perform the investigation and study, the court may request that the Department of Children and Families conduct the investigation and study.

Social Investigation

What you need to know about a Social Investigation:

- *Fla. Stat*. §61.20 actually states the "technical rules of evidence" do not apply! The written report is entered into evidence despite hearsay.
- However, the written report must be first provided to the parties so each party is given the opportunity to introduce evidence that might rebut the conclusions and recommendations in the report.
- The independent psychological evaluation process in a disputed parenting plan matter is intended to avoid the privilege invasion that would result from disclosing past records. However, if a party voluntarily gives a past psychological record to the social investigator, that party waives the psychotherapist-patient privilege as to that record. Also, statements made to the investigator are not privileged. Zarzaur v. Zarzaur, 213 So. 3d 1115, 1119-1120 (Fla. 1st DCA 2017).
- Make sure you read the order appointing the social investigation since a party is *not* required to voluntarily disclose their prior psychological records so be sure you object if it requires the party to disclose prior records. Zarzaur, 213 So. 3d at 1120.
- The court only has the authority to order the psychological records over the objection of a party if the record is relevant and timely to the issue of that party's *then-present* fitness as a parent (i.e. a situation where there is a calamitous event such as attempted suicide during the pending action). Koch v. Koch, 961 So. 2d 1134 (Fla. 4th DCA 2007) (where mother was a recovering alcoholic, her prior substance abuse treatment records were protected by the psychotherapist patient privilege as her alcoholism does not rise to the level of an event or condition to overcome the statutory privilege). Further, none of the records may be disclosed to the opposing party unless the court determines this as to each record after holding an in camera inspection. Zarzaur, 213 So. 3d at 1120.

THANK YOU

The Honorable Tarlika Navarro and Meghan M. Clary, Esq.