



Raising the Virtual Bar

I Object...For Some Reason!?

Presented By:

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I Object...For Some Reason!?

1. Objections
2. Hearsay
3. Impeachment
4. Authentication
5. Relevance

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KNOW YOUR OBJECTIONS

- Object
- State your legal objection
- No speaking objections!
- Failure to object to Evidence constitutes a waiver of the Objection. Rhodes v. State, 638 So. 2d. 920 (Fla. 1994).

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

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

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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.

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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?

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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.

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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?”*

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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.

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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.

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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.

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Should you Object to Improper Impeachment?

▶ **Did the attorney impeach with one fact?**

You should 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.

▶ **Did the attorney read the question and answer verbatim?**

The attorney needs to 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.

Business Records

Objections to Consider

- ▶ 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)
- ▶ 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). But, 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).

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.

SOCIAL MEDIA, TEXTS & EMAILS

Objections 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 patterns 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).

Photographs & Video Surveillance

Objections to Consider:

- ▶ 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.