Avoiding Evidentiary Pitfalls: Foundations for Success

Raising the Bar 2021

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Literally

Avoid:	Keep away from or stop oneself from doing something
Pitfall:	a hidden or unsuspected danger or difficulty
Evidence:	the available body of facts or information indicating whether a belief or proposition is true or valid

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Foundations for Success

- Understand your case – factually and legally
- Research statutory and decisional law to support admission of evidence
- Identify each foundational element required for admission of evidence
- Prepare to meet the proof burden for each element of every claim or affirmative defense
- Prepare to rebut evidence offered by proponent
- Offer facts that support the foundational elements required for admission
- An exhibit may only be admitted into evidence ***after*** a full evidentiary foundation is established.

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Preparation Breeds Confidence

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What is relevant?

- Court is limited by issues raised within the pleadings and notice provided for evidentiary hearings; pleadings dictate relevancy
  - Court is without jurisdiction to hear and determine matters which are not the subject of appropriate pleadings and notice. *Voorhees v Voorhees*, 204 so.3d 75 (4th DCA, 2016)
  - Due process violation to deny motion without evidentiary hearing where facts are disputed. *Sawaya v. Thompson,* 204 so.3d 586 (4th DCA, 2016)
  - Due process to deny a party the opportunity to present witnesses, cross examine witnesses or present closing argument. *Bielling v Bielling*, 188 So.3d 980 (1st DCA, 2016) where court continued trial but entered final judgment during interim.

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Trial Exhibits

- **Admissible Exhibits**
  - Evidentiary rules require "*authentication or identification*" - the item must be what the proponent claims it to be. Witnesses lay the foundation for the admission of evidence and exhibits at trial.
  - The proponent of the evidence must establish *the connection between the exhibit and the act, event, or transaction*. This is called "authentication" or "identification," and is satisfied when an exhibit's proponent produces sufficient evidence to support a finding that the item is what the proponent claims it to be and is in the same condition as when it was first seized.

Admissibility Requires

- Exhibit must be reliable, which means that it must have underlying probative value; and
- Exhibit must be relevant, which means that it must tend to prove or disprove a matter of consequence
  - Even reliable and relevant evidence may be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or needless presentation of cumulative evidence." Fla. Stat. § 90.403

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Admitting Exhibit into Evidence

- Proponent of the exhibit (e.g., a photograph, a letter, financial records) must lay the evidentiary foundation before exhibit is admissible; foundation is dictated by evidentiary rules and case law

Laying foundation:

Call the Witness: Evidentiary foundations can usually be made with only one witness, but at times more than one witness may be needed
Mark the Exhibit for Identification: Premark exhibits prior to hearing
Identification/Authentication: Have the witness identify or authenticate the exhibit
Offer the Exhibit: Once the foundation has been made, offer the exhibit into evidence

Foundational questions include non-leading questions such as: "who," "what," "where," "when," "why," "which" and "how." Let your witness do the talking.

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Business Records

Fla. Stat. § 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.

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Business Records

- Business records are an exception to hearsay 90.803(6), established through factual predicate or "a certification or declaration" 90.803(6)(a)
- Business records produced through mandatory disclosure must have proper foundation for admission at trial. (*washburn v. washburn*, 42 Fla. L. weekly d243 (4th dca 2017)
- Elements of business records: The records were made at or near the time of the occurrence or from information transmitted by a person with knowledge; was kept in the course of regularly conducted activity; and was made as a regular practice in the course of a the regularly conducted activity.

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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).

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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. The architect testified that these documents were the type of records that his company normally maintained.
  - 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 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.

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Business Records

How to Offer Business Records into Evidence

- **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.

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

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Business Records

- **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 _____

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Charts and Summaries

Fla. Stat. § 90.956

"When it is not convenient to examine in court the contents of voluminous writings, recordings, or photographs, a party may present them in the form of a chart, summary, or calculation by calling a qualified witness. The party intending to use such a summary must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the data from which the summary is compiled available for examination or copying, or both, by other parties at a reasonable time and place. A judge may order that they be produced in court."

- Elements:
  - The original documents are voluminous & cannot be conveniently examined in court
  - The original documents have been made available to the opposing party
  - The documents would be admitted into evidence
  - The chart or summary is fair and accurate

- Tip: If you did not provide advance notice of intent to use summary, may still argue no substantial harm or prejudice if opposing party already in possession of documents.

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Get out! I told you I have a zoom hearing!

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Writing, Recording, or Photograph

Fla. Stat. § **90.951 Definitions.**—For purposes of this chapter:

(1) "Writings" and "recordings" include letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photo stating, photography, magnetic impulse, mechanical or electronic recording, or other form of data compilation, upon paper, wood, stone, recording tape, or other materials.

(2) "Photographs" include still photographs, X-ray films, videotapes, and motion pictures.

(3) An "original" of a writing or recording means the writing or recording itself, or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print made from it. If data are stored in a computer or similar device, any printout or other output readable by sight and shown to reflect the data accurately is an "original."

"**Duplicates**": Admissible to the same extent as originals unless: a *genuine question is raised about the authenticity of the original* or any other document or writing or it would be unfair under the circumstances to admit the duplicate in lieu of the original. *Fla. Stat*. § 90.953.

BEST EVIDENCE RULE: *Fla. Stat*. § 90.953 Preference for original when original at issue

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Social Media Records

- IS THE EVIDENCE RELEVANT? (defined by pleadings) Fla. Stat. § 90.401
- IS THE EVIDENCE CONDITIONALLY RELEVANT? *Fla. Stat*. § 90.105
  - Prima facie evidence to support a finding of preliminary fact
- IS THE EVIDENCE UNFAIRLY PREJUDICIAL? *Fla. Stat.* § 90.403
- IS THE EVIDENCE A WRITING, RECORDING, OR PHOTOGRAPH? *Fla. Stat* § 90.951 (original or duplicate)
- If Writing, is there a hearsay problem? Purpose, substantive evidence v. impeachment
- With all forms of evidence, reliability is a key factor for admission

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Social Media Records

- **Permissible Use**
  - Nucci v. Target Corp., 162 So. 3d. 146, 153-54 (Fla. 4th DCA 2015)
    - In a slip and fall action, photographs in plaintiff's Facebook account were discoverable when request was limited to photographs relevant to plaintiff's damages claim. "[P]hotographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established.")
  - Root v. Balfour Beatty Construction, LLC, 132 So.3d 867 (Fla. 2d DCA 2014)
    - Social media records were discoverable but only records limited to the cause of action and not personal information irrelevant to the pending claims.

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Social Media Records

- **Permissible Use**
  - Wright v. Morsaw, 232 So. 3d 10 (Fla. 4th DCA 2017)
    - In a hit-and-run civil claim, defendant allegedly drove recklessly while intoxicated after leaving a bar. He "posted" about the accident on social media, and hid the vehicle he had been driving before seeking its repair. Defendant objected that an order requiring him to provide signed written authorizations for release of Facebook, Instagram and Snapchat information violated his Fifth Amendment privilege against self-incrimination because the records sought are communicative and could furnish "last link" in criminal prosecution also pending.
      - When a movant lodges a Fifth Amendment privilege objection to the disclosure of certain records, the trial court "must exercise its discretion and determine whether it is reasonably possible that answers to either interrogatories or deposition questions could evoke a response forming a link in the chain of evidence which might lead to criminal prosecution."
      - The Fifth Amendment privilege protects both individuals as well as their records. However, it does not shield every kind of incriminating evidence. Rather, it protects only testimonial or communicative evidence, not real or physical evidence which is not testimonial or communicative in nature.

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Social Media Records

- **Other Approaches**
  - Griffin v. State, 19 A.3d 415 (Md. App. 2011) (Contents of social media page could be authenticated by testimony that the person authored by the person and that the contents were hers.)
    - Information that only identifies the date of birth and a face in a photograph on a social media website that purports to reflect the creator and author of the post is insufficient.
    - Electronically-stored information is easily susceptible to abuse and manipulation, it requires greater scrutiny of 'the foundational requirements' than letters or other paper records, for purposes reliability.
  - Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012) The court analyzed social media posts through the lens of authenticating email communications, text messages or internet chat room communications.
    - The electronic evidence was admissible "when found to be sufficiently linked to the author so as to justify submission to the jury for its ultimate determination of authenticity." This approach underscores, the notion that all evidence is conditionally relevant.

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Social Media Records

➢**Other Approaches**

- 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.
  -
  - 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.
  - 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.

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When you miss the hearsay exception…

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Photographs

- Photographs, when properly authenticated, are admissible if relevant to prove a material fact. Adams v. State, 28 Fla. 511, 10 So. 106 (1891) (”A map, plan or picture, whether made by hand of man or photography, if verified as a true representation of the subject about which testimony is offered, is admissible in evidence…”

- The foundational steps for the admission of a photograph are:
  1. Ask whether the witness is familiar with the object, person, or site relevant to the case
  2. Ask the witness to look at the object, person, or site depicted in the photograph
  3. Ask the witness whether the photograph “is a **fair and accurate depiction or representation** of” or “is the same as” or “is a correct representation of” the object, person, or site at the time relevant to the lawsuit (
  4. Offer the exhibit into evidence

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Video and Audio Recordings

- 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.”
- 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.

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Video and Audio Recordings

- Bryant v. State, 810 So. 2d 532 (Fla. 1st DCA 2002) Silent witness theory to authenticate surveillance image.) Authentication of a result by evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result. This method of authentication may be used when the accuracy of a result depends on a process or system which produces it.
- Lerner v. Halega, 154 So. 3d 445, 447 (Fla. 3rd DCA 2014) Still photographs taken from surveillance tapes which were identified as images of a person were not admissible when the underlying surveillance images were not authenticated by the silent witness theory or by testimony of a person who observed the mated depicted in the tapes.

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Video and Audio Recordings

- **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)

Subject to the 403 balancing test, look for "unduly prejudicial" i.e. use of large number of gruesome photos, when a limited number would be adequate may lead to a finding that a larger number is inadmissible.

Video Enhancement – Goes to the weight of the evidence, not the admissibility. Video or Photo is edited (so long as it is a true and accurate representation) – goes to the weight of the evidence, not admissibility.

Technical imperfections – not a basis to exclude a video but goes to weight and credibility.

Questions of the perspective of where a photo was taken, the type of camera, the quality of the lens, lighting, use or non-use of filters can all be introduced to attack the weight to be given to the photograph.

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.

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Photographs & Recordings

- 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 jury to understand your testimony?
  5. Offer to move the photo into evidence
  6. Publish the photograph

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Video and Audio Recordings

- Steps to **laying foundation and introducing a recording**: the recording device, the recording itself (the tape or electronic file); the participant(s) and the transcript of the recording (if transcribed)

- **The recording device:** As to the recording device, establish that it was capable of recording the conversation, and the operator knew how to operate the device
- **The recording:** As to the recording itself, establish that it is authentic, complete, and correct; establish that there have been no additions, deletions, or changes in the recording; and identify the speakers on the recording
- **The participant(s):** Identify the persons heard on audio or observed in video
- **The transcript:** If the recording is transcribed, it must be a fair and accurate transcription of the conversation
- The recording can be authenticated by anyone with knowledge of the voice(s) heard on the recording or persons depicted in the video.
- **Fair and accurate depiction is the standard**

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Text Messages & Emails

Text Messages & Emails- How to Lay a Foundation to Offer Records into Evidence

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

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

Possible Evidentiary Objections & How to Address Them

- Authentication
- Hearsay

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Guardian Ad Litem

Evidentiary Issues to Consider

- **Guardian ad Litem's Report** - 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).

- **Guardian Ad Litem's Records** - 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 guardian ad litem'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).

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Psychotherapist/Patient Privilege

S.C. v. GAL, et al., 845 So.2d 953 (4th DCA 2003)

Minor children have the right to assert psychotherapist/patient privilege to the discovery of their therapeutic records.

Relying on *In re T.W.,* 551 So.2d 1186 (Fla.1989) the court held:

The supreme court further recognized that in order to outweigh the minor's privacy rights, the interest must be "compelling," and where a compelling state interest is found, the state must choose the least intrusive or restrictive means of furthering that interest.

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Child Victim Hearsay Statements

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 Fl Stat 90.804 factors).
  - *Court must make findings of fact on the record to support ruling

A.G. v. Dept. Children & Families, 193 So.3d 1097 (4th DCA 2016)

- Trial 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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Police Records

Evidentiary Issues to Consider - Hearsay

- 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).

What can the Police Officer Testify to?

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Modes of Impeachment

Not substantive proof of underlying elements; evidence suggests untrustworthiness

- **Planned**
  - Non-Character based – Perception, Narration, Sincerity, Memory, Bias (Core matters) Fla. Stat. § 90.608
  - Character Based Impeachment (collateral v. Core Matters)
    - Reputation for Truthfulness Fla. Stat. § 90.609
    - Prior Convictions Fla. Stat. § 90.610
    - Acts of untruthfulness Fla. Stat. § 90.608
- **Unplanned** (Rule of 3 cs – Commit, Credit, Confront)
  - Prior Inconsistent statements Fla. Stat. § 90.608 & § 90.806

In order to impeach a witness's testimony with their deposition the question asked at trial must be the exact same question asked in the deposition. If you ask a different question you will likely get an objection. The foundation is as follows:

- Do you remember that your deposition was taken on _____?
- A court reporter was present?
- I was there?
- Your attorney was there?
- You took an oath to tell the truth?

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Refreshing Recollection and Recollection Recorded

- **Fla. Stat. 90.613 Refreshing Recollection**: Cannot remember on the stand, then attempt to refresh recollection with anything so witness can testify from memory
- **Fla. Stat. 90.803 (5) Recorded Recollection**: If the witness, after reading the document still cannot remember, then the lawyer may be permitted to read the statement into the record. In order to use this exception, you must lay the proper foundation: (1) lack of present memory, (2) a record or memo concerns a matter about which the witness once had knowledge, (3) that it was made by the witness when the facts in the record were fresh in the witness's memory and (4) it reflects that knowledge correctly. This does not require that that the witness's memory is totally exhausted. The document may be read into the record.
- **Refreshing Recollection Steps**:
  - First, confirm that the witness does not remember.
  - Second, ask if there is something that might help them remember.
  - Third, show the witness the document and ask the witness to read it silently and to look up or let you know when they are finished.
  - Fourth, once the witness has finished reading the document take it back or have the witness turn it over.

Fifth, ask the witness if her memory has been refreshed. If it has, ask the original question again. If the witness still does not remember ask the witness to read it as past recollection recorded.

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Impeachment by Prior Inconsistent Statement

- **Fla. Stat. 90.614 Witness Prior Statement:** In order to impeach a witness's testimony with their deposition the question asked at trial must be the exact same question asked in the deposition. If you ask a different question you will likely get an objection. The foundation is as follows:
  - Do you remember that your deposition was taken on _____?
  - A court reporter was present?
  - I was there?
  - Your attorney was there?
  - You took an oath to tell the truth?
  - Do you remember having been asked the following question and giving the following answer?
  - To admit extrinsic evidence of statement, witness must be afforded opportunity to explain statement.

TIP: You cannot impeach someone by confronting them with an inconsistent statement and asking them if it refreshes their recollection. If you have not established a lack of memory there is nothing to refresh and this of course is not impeachment.

TIP: Be prepared. If you believe impeachment of a witness may occur, have the relevant pages and sections of the deposition or other document marked and highlighted.

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Spontaneous Statement and Excited Utterance

- **Fla. Stat. 90.803 (1) Spontaneous Statement**: a spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.
  - A startling event is not necessary for a statement to be admissible under this exception, but it must be made at the time of, or immediately following the declarant's observation of the event or condition described.
- **Fla. Stat. 90.803 (2) Excited Utterance**: a statement or excited utterance relating to a startling event or condition made while the declarant was sunder the stress of excitement caused by the event or condition.
  - The elements to admit excited utterance are as follows:
  - There must be an event startling enough to cause nervous excitement;
  - The statement was made before there was time to contrive or misrepresent and
  - The statement must be made while the person is under the stress of excitement caused by the event.

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Rule of Completeness

Fla. Stat. 90.108 (1): When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

- The purpose of this rule is to avoid the potential for creating misleading impressions by taking statements out of context. The rule is not absolute, and the correct standard is whether in the interest of fairness, the remaining portions of the statements should have been contemporaneously provided. See Ramirez v. State 739 So.2d 568 (Fla. 1999).

TIP: If the court rules your document to be inadmissible, first try to offer it in under another exception to the hearsay rule. If you feel that the Judge is wrong, and you have a case handy provide it. If all of your efforts are unsuccessful, ask that the document be marked for identification. That way you may try with another witness but if not, at least it is in the record for appellate purposes.

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Judicial Notice

Compulsory – Decisional & Statutory law (Fla. Stat. 90.201)

Discretionary – 13 categories (set forth in Fla. Stat. 90.202) including: Records of any court of this state; facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court & accuracy cannot be questioned

Discretionary – Fla. Stat. 90.202 becomes compulsory when written notice provided & sufficient proof (fl stat 90.203)

The facts cannot reasonably be disputed *Maradie v Maradie*, 680 So.2d 538 (1st DCA 1996)

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Do's and Don'ts

- DO
  - Stipulate to the admissibility of evidence well before trial preserving time to issue witness subpoena's
  - Judicial Notice on evidence that cannot reasonably be disputed – look for prior court proceedings
  - Consider how to arrange your order of proof before trial so that the evidentiary foundation for the admission of exhibits will facilitate full use of each exhibit by each witness
  - When dealing with audio recordings, prepare a fair and accurate transcription of each recording identifying the date of the conversation and the names associated with the voices. Submit the tape and transcription to the opposing counsel and propose a stipulation to allow their use at trial
  - When dealing with a large number of related exhibits (e.g., business records), prepare a summary chart to facilitate admission of voluminous records, disclose the summary chart and its supporting exhibits to opposing counsel well in advance of trial
  - Ask about judicial preferences on exhibits and foundational elements (e.g., does the judge want all exhibits marked in a particular way, does the judge want the examining lawyer to request permission to approach a witness with an exhibit, does the judge want the exhibits passed to the jury at a particular time in the witness's examination, etc.).

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Do's and Don'ts

- DON'TS
  - Wait until the day before your evidentiary hearing to consider the admissibility of your evidence
  - Hand a group of similar exhibits (e.g., photographs) to the witness all at once when laying their evidentiary foundation unless it is a composite exhibit; Have the witness lay the foundation for each exhibit, then offer the group of similar exhibits into evidence at the same time
  - When dealing with a police report as a public document, do not offer into evidence witness statements made by third parties and memorialized in the report. Such statements generally do not qualify as an exception to the hearsay rule. However, the police officer's own observations and activities at the scene and memorialized in the police report generally do qualify as an exception to the hearsay rule and may be admissible.
  - When dealing with past recollection recorded, do not offer the exhibit into evidence. Instead, mark the exhibit for identification and read the relevant portion of the writing to the jury.

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When the Presentation is Over

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