EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

Presented By:
The Honorable Thomas Coleman,
The Honorable Mariya Weekes &
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EVIDENCE:
TOP 10 THINGS YOU NEED TO KNOW

1. HEARSAY
2. CHILD HEARSAY
3. GUARDIAN AD LITEM
4. AUTHENTICATION OF TEXTS & EMAILS
5. IMPEACHMENT
6. REFRESHING RECOLLECTION
7. PHOTOGRAPHS & VIDEOS
8. BEST EVIDENCE RULE
9. PRESENTATION OF EVIDENCE
10. OBJECTIONS

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#1. HEARSAY

Florida Statutes § 90.801(1)(c) defines hearsay as:

1. An out of court statement (oral, written or non-verbal assertion);
2. Made by a declarant (the person making the statement), other than the statements the declarant makes while testifying at trial; and is
3. Offered into evidence to prove the truth of the matter asserted.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#1. HEARSAY

- **Statements by Testifying Witness -** prior statements of the testifying witness are still HEARSAY unless there is a valid statutory hearsay exception under § 90.803, § 90.804 or is NOT hearsay by statutory definition set forth in § 90.801(2).
- **Statements that are NOT Hearsay by *Florida Statutes* § 90.801(2)**: A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: (a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; ***or*** (c) One of identification of a person made after perceiving the person.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#1. HEARSAY

HEARSAY EXCEPTIONS - AVAILABILITY OF DECLARANT IMMATERIAL

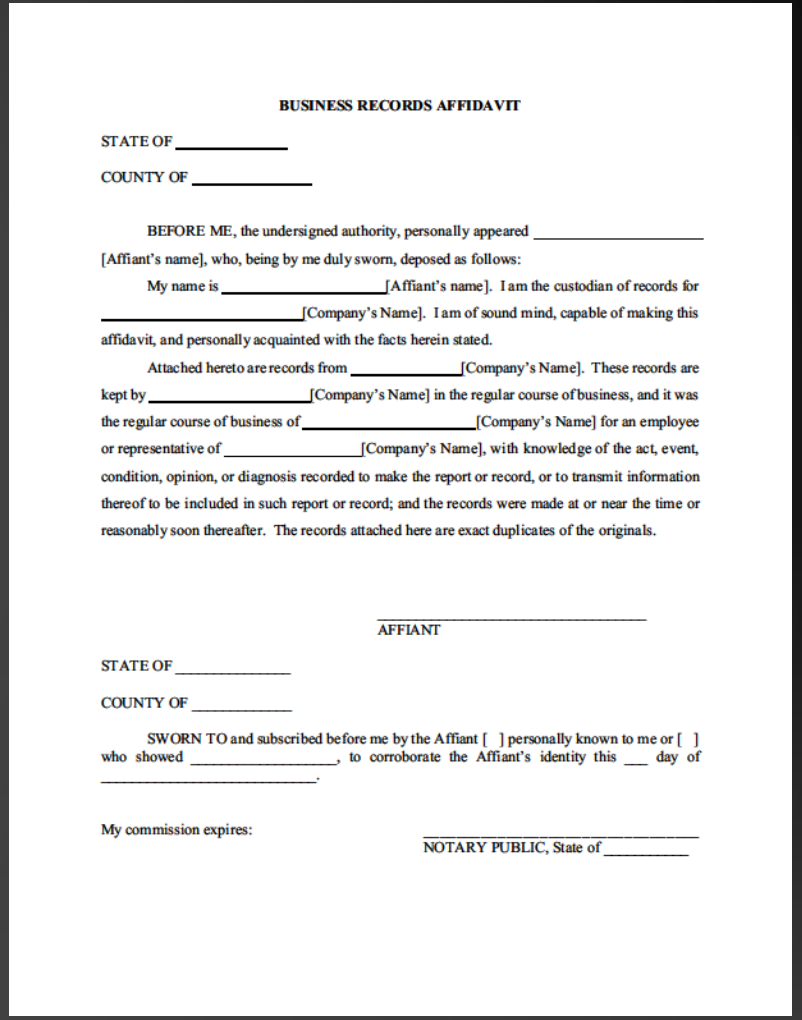
- **Spontaneous Statement** §90.803(1)
- **Exited Utterance** §90.803(2)
- **Then-Existing Mental, Emotional or Physical Condition** §90.803(3)
- **Statements for Medical Diagnosis/Treatment** § 90.803(4)
- **Recorded Recollection** §90.803(5)
- **Business Records** §90.803(6)
- **Records of Vital Statistics** §90.803(9)
- **Records of Religious Organizations** §90.803(11)
- **Marriage Certificates** §90.803(12)
- **Records Affecting Interest in Property** §90.803(15)
- **Market Reports, Commercial Publications** §90.803(17)
- **Admissions** §90.803(18)
- **Reputation as to Character** §90.803(21)
- **Former Testimony** §90.803(22)
- **Child Victim** §90.803(23)
- **Elderly or Disabled Adult Victim** §90.803(24)

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#1. HEARSAY

BUSINESS RECORDS EXCEPTION

- §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



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 _____

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#1. HEARSAY

Yes, it's STILL Hearsay!

- **Self Serving Hearsay. S**tatements previously made by a party and offered by that same party are still hearsay absent a valid 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.** Carter v. State, 951 So. 2d 939 (Fla. 4th DCA 2007) (officer's police report, which contained victim's sworn statement concerning incident, did not fit within business or public records exception to hearsay rule).
- **Documents Produced in Mandatory Disclosure Are Hearsay.** Washburn v. Washburn, 211 So. 3d 87 (Fla. 4th DCA 2017) (bank records produced in mandatory disclosure are not automatically admissible into evidence; proponent of evidence must still demonstrate a proper exception to hearsay).

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#2. CHILD HEARSAY

Fla. Stat. § 90.803(23)(a) Unless a child victim's hearsay statement indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less 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 other 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).

- 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?

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#2. CHILD HEARSAY

Who is Making the Statement *and* What is the Statement Describing?

- The exception applies to children who are victims and does not apply to statements by children who are witnesses and not victims.
- The exception applies to statements of the declarant-child describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child.

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#2. CHILD HEARSAY

Is the Statement Reliable?

- Court must hold evidentiary hearing to ascertain the reliability of the out-of-court statements and must make factual findings supported by evidence A.G. v. Dept. Children & Families, 193 So. 3d 1097 (Fla. 4th DCA 2016).
- Court's have considered the following when ascertaining reliability of statement:
  - time of the incident relative to the time of the statement
  - statement was spontaneous
  - statement consisted of a child-like description of the act versus use of terminology unexpected of a child of similar age
  - child was still emotionally affected by the situation when the child reported it
  - lack of motive to fabricate
  - making of the statement to a number of people and not only to parent alleging abuse by other parent
  - mental competence of the child
  - ability of the child to distinguish reality from fantasy
  - whether the statements were vague and partially contradictory
  - the possibility of improper influence on the child by participants in a domestic dispute

Charles W. Ehrhardt, 1 *West's Fla. Practice Series* section 803.23 (2021 ed.)

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#2. CHILD HEARSAY

No Testimony – You Must Offer Other Corroborating Evidence of Abuse

- Corroborating evidence is "[e]vidence that differs from but strengthens or confirms what other evidence shows." Perrault v. Engle, 294 So. 3d 373 (Fla. 4th DCA 2020).
  - Physical evidence that a child has been abused. Id.
  - Doctor's medical opinion that child was exhibiting signs of sexual abuse. Zmijewski v. B'Nai Torah Congregation of Boca Raton, 639 So.2d 1022 (Fla. 4th DCA 1994).
  - Statements by the perpetrator. Delacruz v. State, 734 So. 2d 1116 (Fla. 1st DCA 1999) (admission by perpetrator that he could have accidentally touched the child).
  - Similar fact evidence of other crimes, wrongs or acts. Jones v. State, 728 So. 2d 788 (Fla. 1st DCA 1991).

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#2. CHILD HEARSAY

No Testimony – You Must Offer Other Corroborating Evidence of Abuse

- *Insufficient* Corroborative Evidence:
  - Other hearsay statements made by the child-declarant concerning the abuse. R.U. v. Dept of Children & Families, 777 So. 2d 1153 (Fla. 4th DCA 2001) (must be evidence derived from a source other than the child victim's own statements).
  - Child's pantomime describing the abuse in response to request to show what happened. Perrault, 294 So. 3d at 377 (non-verbal conduct of child intending to be an assertion is still hearsay and is still the child-declarant's statements describing abuse, which is not other corroborative evidence).
  - Counselor's testimony she found child to be reliable and trustworthy is not corroborative evidence since a witness cannot vouch for the credibility of the child. Id. at 378.
  - Testimony that the child was touching himself while watching television fell short of other corroborative evidence where testimony indicated mother observed the behavior, she was not alarmed, and that such behavior is normal. Id. at 377.

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#3. GUARDIAN AD LITEM

- **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).

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#3. GUARDIAN AD LITEM

Guardian Litem's Testimony

1. Hearsay: GAL cannot testify to hearsay unless there is an exception to the hearsay rule.
2. 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. Section 61.20 states the court may consider the information contained in the study in making a decision on the parenting plan and the technical rules of evidence do not exclude the study from consideration.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#4. AUTHENTICATION

- *Fla. Stat.* §90.901: "Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."
- Evidence may be authenticated by "examination of its appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances." Walker v. Harley-Anderson, 301 So. 3d 299 (Fla. 4th DCA 2020).
- Authentication for the purpose of admission is "a relatively low threshold that only requires a prima facie showing that the proffered evidence is authentic." Id.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#4. AUTHENTICATION

TEXTS & EMAILS

- You must lay a foundation to address the authentication of the writing.
- Mere testimony that the person received the text message or email is insufficient to establish authentication. You need to present other factors to the court to circumstantially authenticate the text. Walker v. Harley-Anderson, 301 So. 3d 299 (Fla. 4th DCA 2020).
- Even where messages are not obtained by device, electronic communications, like other traditional communications, "may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances." *Id.*
- **What other evidence can you offer to the court to authenticate the writing if you have not obtained the declarant's device?**
  - ✓ The phone number or email address is the declarant's phone number or email address.
  - ✓ The messages appear to be from the phone numbers that match the phone numbers in the phone bills.
  - ✓ When the witness replied to the email, the reply function of witness's email system automatically put the declarant as the sender.
  - ✓ Other witnesses confirmed that in phone conversations the declarant made the same statements.
  - ✓ The writing discloses information which is likely known only to the purported author.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#4. AUTHENTICATION

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 and ask:

- 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.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#4. AUTHENTICATION

Emails & Letters: 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.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

PRIOR INCONSISTENT STATEMENTS

***Fla. Stat.* §90.608** - You can use impeachment to show the witness is not credible.

- To be inconsistent, a prior statement must either directly contradict or be materially different from the testimony at trial. Pearce v. State, 880 So. 2d 561 (Fla. 2004).

- Case law provides that the argument for impeaching the witness isn't necessarily that the prior statement is true and the in court statement is false, but that because the witness made two different statements concerning a material fact, the fact finder should not place great weight on the in court testimony. Wingate v. New Deal Cab Co., 217 So. 2d 612, 614 (Fla. 1st DCA 1969).

- There is no requirement that the impeaching prior statement be made under oath. Garcia v. State, 816 So. 2d 554, 561 (Fla. 2002); See Minus v. State, 901 So. 2d 344 (Fla. 4th DCA 2005) (evidence of witness's statements in letters to party was admissible because they were inconsistent with witness's in court testimony).

- The prior inconsistent statement that is being offered under §90.608 is not hearsay because it is not being offered for the truth of the matter asserted. Elmer v. State, 114 So. 3d 198, 202 (Fla. 5th DCA 2012).

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

PRIOR INCONSISTENT STATEMENTS

***Fla. Stat.* §90.614 – Prior Statements of Witnesses**

- If the prior statement is reduced to a writing, then upon motion of the adverse party, the court must order the statement be shown to the witness and the contents disclosed to him/her.
- With the exception of admissions by a party opponent under §90.803(18), extrinsic evidence of the witness's prior inconsistent statement is inadmissible unless the witness is first given the opportunity to admit, explain or deny the prior statement. Counsel must lay a foundation asking the non-party witness about the time, place and person to whom the statement was allegedly made. Pearce v. State, 880 So. 2d 561, 569-570 (Fla. 2004).
- If the non-party witness denies making the statement or does not distinctly admit to making the prior inconsistent statement, extrinsic evidence is admissible. Pearce, 880 So. 2d at 569-570.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

PRIOR INCONSISTENT STATEMENTS

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

- Before the witness is questioned about the prior inconsistent statement, a proper foundation must be laid.
- 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.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

PRIOR INCONSISTENT STATEMENTS

Step One: CONFIRM

- Have the witness repeat the testimony from today's hearing that you want to impeach. You are locking the witness into the statement he/she made.
  - "On direct, you testified to _____?" *or*
  - "There is no question in your mind that the statement you gave today about _____ is true?
- Make the witness either commit *or* back off from the statement.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

PRIOR INCONSISTENT STATEMENTS

Step Two: CREDIT

- The second step is to credit, or build up, the prior statement.
- This is especially important if you prefer the earlier statement, as you want to show that the prior statement was more reliable and accurate.
- Also, you want to credit the prior statement to establish a foundation that will allow you to use extrinsic evidence of the prior inconsistent statement.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

PRIOR INCONSISTENT STATEMENTS

Step Two: CREDIT

- If the witness made the prior statement in a deposition, you should emphasize the following 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 witness did tell the truth during her deposition testimony;
  - 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.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

PRIOR INCONSISTENT STATEMENTS

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.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

PRIOR INCONSISTENT STATEMENT

Prior Deposition Testimony

- **Confirm**: Ma'am, you just testified …., is that your testimony?
- **Credit**: Have the deposition transcript in you hand, tabbed and ready to go.
  - "You had your deposition taken on 1/1/19?"
  - "A court reporter was present at your deposition?"
  - "You were sworn in to tell the truth?"
  - "And you did tell the truth on that date?"
- **Confront**: After you have set the foundation for the impeachment, direct the court and opposing counsel to the page and line of the deposition and then you should ask the witness the following question:
  - "And during your deposition, you were asked the following question and you gave the following answer."
  - At this point, you should read the question previously asked and the answer given by the witness in the deposition.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

TIPS FOR EFFECTIVE IMPEACHMENT OF PRIOR INCONSISTENT STATEMENTS

- Impeach with only one fact at a time. Keeping it simple allows the fact finder 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.
- Do not impeach with facts taken out of context.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

TIPS FOR EFFECTIVE IMPEACHMENT

OF PRIOR INCONSISTENT STATEMENTS

- 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.
- To determine whether an issue is collateral so that evidence is inadmissible to contradict the answer of the witness, you must look to whether the impeaching evidence would be admissible for any purpose other than contradiction, and there are two types of evidence that pass this test:

  (1) evidence that is relevant to independently prove a material fact or issue; and

  (2) evidence that would discredit a witness by pointing out the bias, corruption or lack of competency of the witness.

  Lawson v. State, 651 So. 2d 713, 715 (Fla. 2d DCA 1995).

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#5. IMPEACHMENT

IMPEACHMENT - PRIOR INCONSISTENT STATEMENTS

But I Want Prior Statement ADMITTED as Substantive Evidence….

Fla. Stat. §90.801(2)(a) – Prior Inconsistent Statement Under Oath

- A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition.
- Therefore, if a prior statement meets the requirements of 90.801(2)(a), it may be admissible as substantive evidence and in the traditional use for impeaching the credibility of the declarant.
- Section 90.801(2)(a) recognizes the realistic problem that occurs when the fact finder believes the prior statement was made and was true, because it is difficult for the fact finder to limit the use of the statement only to assess the credibility of the declarant. Therefore, §90.801(2) allows the prior inconsistent statement to be admissible as substantive evidence to prove the truth of the matter asserted.

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#6. REFRESHING RECOLLECTION

What Happens When the Witness Doesn't Recall?

- The inability of a witness to recall a fact or event while testifying at trial is not inconsistent with a prior statement asserting that fact or statement, *unless* the lack of recollection is fabricated.
- Therefore, when a witness does not recall a fact during trial *yet* he/she previously recalled that fact in a prior statement, you can only IMPEACH the witness on that fact where a foundation is laid that the witness's inability to recall that fact is fabricated.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#6. REFRESHING RECOLLECTION

What Happens When the Witness Doesn't Recall?

- Look at whether the witness's inability to recall a fact is GENUINE or FABRICATED:
  - **Genuine**: where witness had previously testified during pre-trial deposition to 4 incidents of abuse but at trial, she testified to only 3 incidents of abuse and acknowledged on cross there was a 4th indicated but she could not recall all the details of the 4th incident on the witness stand, cross examining attorney did not lay a foundation to show witness's failure to recall was fabricated, and only foundation laid was witness had a lack of memory which was insufficient for impeachment. Espinoza v. State, 37 So. 3d 387, 388 (Fla. 4th DCA 2010).
  - **Fabricated**: trial court did not abuse discretion in permitting examining attorney to impeach witness with prior statements which were "truly inconsistent" because the testimony of lack of memory was that of a witness "who appears to be fabricating." Pulcini v. State, 41 So. 3d 338, 347 (Fla. 4th DCA 2010).
- Herein lies the confusion among lawyers between impeachment and refreshing recollection. While the prior statement may **not** be offered for impeachment if the lack of memory doesn't appear to be fabricated, the examining attorney may show the witness the prior statement in an attempt to refresh the memory of the witness!

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#6. REFRESHING RECOLLECTION

Fla. Stat. § 90.613

- If a witness testifies that he/she has no present recollection of a particular fact or event, counsel may show the witness a writing or other item to refresh the witness's memory on that fact or event because the witness has demonstrated the need to have his/her memory refreshed.
- Then, if after reviewing the document, the witness's memory is jogged and now recalls that particular fact or event, the witness may testify to that fact or event from his/her present memory.
- However, when a witness testifies at trial that a certain fact or event did occur, it is improper to show the witness a writing by attempting to utilize *Fla. Stat.* § 90.613 refreshing recollection. That is because the witness's testimony is based upon his or her present memory and the witness's memory does not need to be refreshed. Rather, the attorney would be showing the inconsistent document to impeach the witness.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#6. REFRESHING RECOLLECTION

Fla. Stat. § 90.613

1. Establish that the witness does not remember the matter. Then ask:
   - At some point in time, did you remember …?
   - Is there a document that would refresh your recollection as to . . . .?
   - Would a review of this document assist you in remembering the matters that we are discussing today?
2. Show the exhibit---which has been marked for identification---to opposing counsel, approach the witness with permission from the judge and show the exhibit to the witness:
   - I am handing you a document which was previously marked for identification as Exhibit "G." Please review it and tell me if it helps you remember.
3. Have the witness review the document & remove the document (no reading from the document):
   - Does this document refresh your recollection as to …..? Do you now recall what happened?
4. Repeat the question

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#7. PHOTOGRAPHS & VIDEOS

***Fla. Stat.* §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. §90.951(3)
- A "**Duplicate**" includes a counterpart by means of photograph, including enlargements and miniatures. §90.951(4)

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#7. PHOTOGRAPHS & VIDEOS

- 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) (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).

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#7. PHOTOGRAPHS & VIDEOS

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. Relevant 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.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#7. PHOTOGRAPHS & VIDEOS

How to Lay a Foundation for Photographic Evidence

1. Mark the exhibit for identification.
2. Show the exhibit to opposing counsel and the witness.
3. Establish the basic foundational issues by identifying the photograph, make the exhibit relevant, and authenticate the photograph: I'm showing you what has been premarked 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 a fair and accurate representation?"
5. Move photograph into evidence.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#7. PHOTOGRAPHS & VIDEOS

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** – This is not a basis to exclude a video, but it goes to weight and credibility.
- **Audio** – Watch out for hearsay since the admissibility of audio portion of a video should be determined separately from the video portion. A timely objection must be made.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#8. BEST EVIDENCE RULE

- ***Fla. Stat.* § 90.952 Requirement of Original** - requires original writing, recording or photograph in order to prove the contents of the writing, recording or photograph.
- ***Fla. Stat.* § 90.953 Admissibility of Duplicates** - provides a duplicate is admissible to the same extent as an original unless:

1. The document or writing is a negotiable instrument as defined in § 673.1041, a security as defined in § 678.1021, or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment.
2. A genuine question is raised about the authenticity of the original or any other document or writing.
3. It is unfair, under the circumstance, to admit the duplicate in lieu of the original.

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#8. BEST EVIDENCE RULE

COMMON MISUNDERSTANDINGS WITH BEST EVIDENCE RULE

- Best Evidence Rule generally applies when: (1) a person is testifying about the contents of a writing, document or photograph and fails to introduce the writing, document or photograph into evidence; and/or (2) a person is seeking to exclude a duplicate or photocopy because the origin of the copy is in doubt.
- For example, if witness testifies "my payroll records show…," one objection that can be raised is the best evidence rule, since the witness's payroll records are the best evidence to produce the contents of his/her payroll records.
- When an original has been admitted into evidence, oral testimony about its contents is not prohibited. Lamb v. State, 246 So. 3d 400, 411 (Fla. 4th DCA 2018) (trial court did not error in admitting testimony of witness regarding contents of social media post where image of post was admitted into evidence). In other words, the purported legal objection "Best Evidence - The Document Speaks for Itself" is NOT a Valid Evidentiary Objection. As stated in Miller v. Hozlman, 240 F.R.D. 1 (D.C. Cir. 2006):

  "It is astonishing that the objection that a document speaks for itself, repeated every day in courtrooms across America, has no support whatsoever in the law of evidence. If, for example, a document has been admitted into evidence and a witness is asked to read from it, that the same information can be secured from the fact finder reading the document is certainly not grounds for objection to the witness reading from it. There is no difference whatsoever between the [fact finder] reading it for itself or the witness reading it to them. (Internal citations omitted)."

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#9. EFFECTIVE PRESENTATION OF EVIDENCE

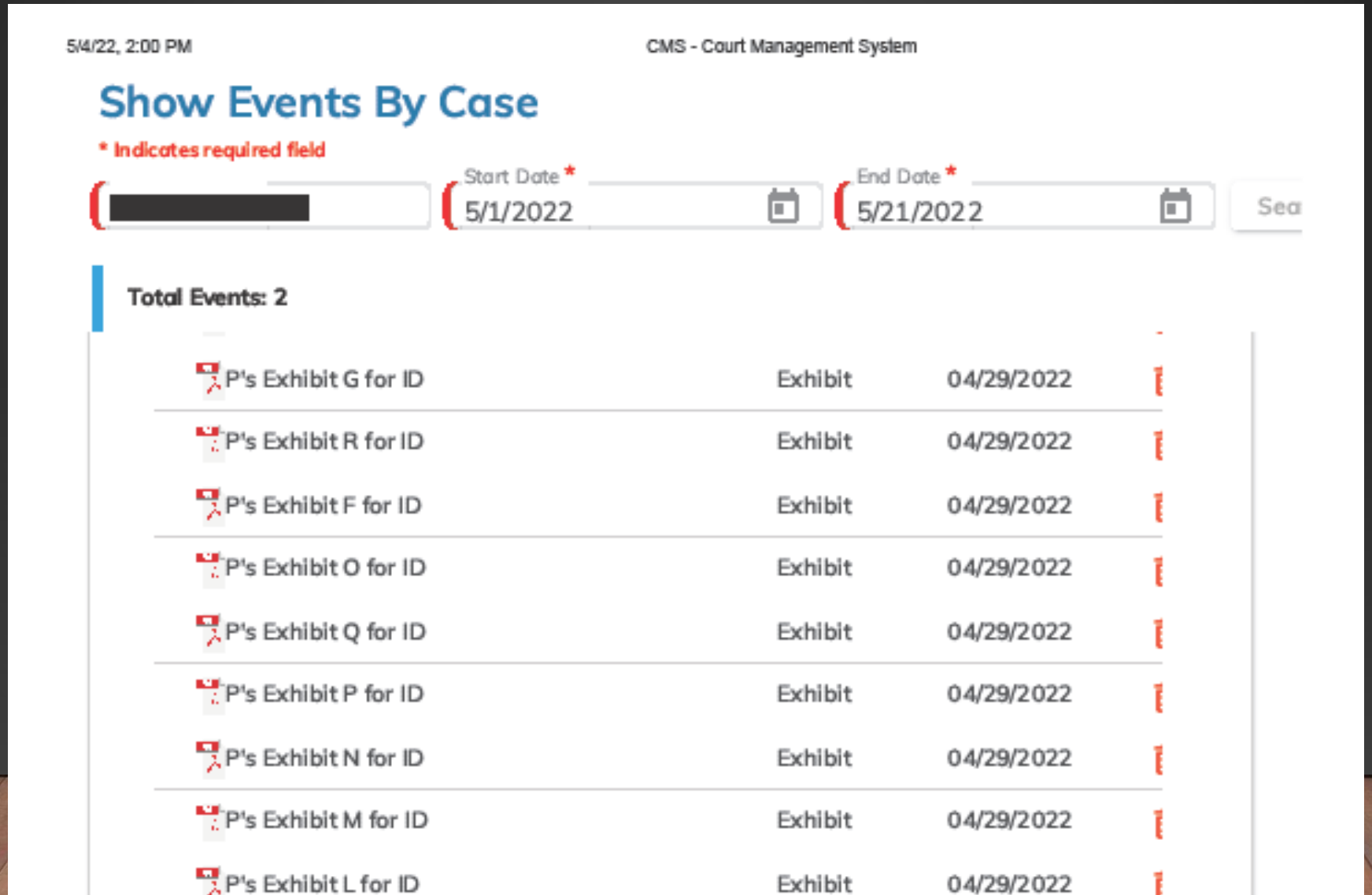
EXHIBITS

- Prepare an Exhibit Log.
- Review your judge's divisional instructions to see how your judge wants exhibits pre-marked.
- Meet with opposing counsel to go over potential exhibits.
- Bate stamp exhibits.

Marked for Identification #	Document Offered Into Evidence	Offered by Mother	Offered by Father	Admissibility of Exhibit Jointly Agreed Upon	Exhibit Not Agreed to & Legal Objection	Trial Exhibit #
A	Final Decree of Divorce	X			Father Objects - Relevancy	FW-1
B	Father's Petition to Modify Parent-Child Relationship and Emergency Request for Temporary Restraining Order (Texas 1/25/13)	X			Father Objects - Relevancy	FW-2
C	Father's First Amended Motion to Modify the Parent-Child Relationship and Motion for Enforcement of Possession or Access and Order to Appear dated 1/30/13	X			Father Objects - Relevancy	FW-3
D	Respondent's Original Answer dated 2/22/13	X			Father Objects - Relevancy	
E	Mediated Settlement Agreement dated 8/23/13	X	X	X		FW-4
F	Agreed Order in Suit to Modify Parent-Child Relationship dated 3/18/14	X	X	X		FW-5
G	11/16/15 texts between Mother and Father				Father Objects - Authentication	FW-10
H	Texas Police Department CFS Report		X		Mother Objects - Relevancy & Hearsay	
I	Order on Motion for New Trial dated 5/23/14	X	X	X		FH-8
J	Text message between Mother and Father 7/28/17		X		Mother Objects - Inadmissible Settlement Negotiations/Offer to Compromise	FH-19

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#9. EFFECTIVE PRESENTATION OF EVIDENCE



EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#9. EFFECTIVE PRESENTATION OF EVIDENCE

OFFERING EXHIBITS INTO EVIDENCE

- Hand the document to opposing counsel, then ask to approach the witness, and then hand the document to the witness and identify what is being provided:
  - "I am handing to the witness records which were previously marked for identification purposes only as Petitioner's Exhibit "B."
- Ask the witness to identify the document and establish the relevancy of this document:
  - "Do you recognize this? What is it? How do you recognize it?"
- Offer the document into evidence:
  - "Your honor, the records that were previously marked for identification as Petitioner's Exhibit "B" are being offered into evidence as Petitioner's Exhibit 2."

*****Have any legal research you need on hand in the event of an anticipated objection to the document*****

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#10. LEGAL OBJECTIONS

- Object & State Your Legal Objection
- No Speaking Objections
- Standing Objections
- Failure to Object to Evidence Constitutes a Waiver of the Objection. Rhodes v. State, 638 So. 2d. 920 (Fla. 1994).
- But Remember, Not Every Objectionable Question Warrants an Objection!

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#10 – LEGAL OBJECTIONS: QUESTIONS

- Calls for Irrelevant 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
- Asked and Answered / Repetitive
- Lack of Foundation
- Beyond the Scope (Direct, Cross, or Redirect)
- Assumes Facts Not in Evidence
- Confusing / Misleading / Ambiguous / Vague
- Speculative
- Compound Question
- Argumentative
- Improper Characterization
- Misstates Evidence / Misquotes the Witness
- Cumulative
- Improper Impeachment
- Counsel Testifying

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#10 – LEGAL OBJECTIONS: EXHIBTS

- Irrelevant
- No Foundation
- No Authentication
- Hearsay
- Prejudice

EVIDENCE: TOP 10 THINGS YOU NEED TO KNOW

#10 – LEGAL OBJECTIONS: ANSWERS

- Irrelevant
- Privileged
- Conclusion
- Opinion
- Hearsay
- Narrative
- Improper Characterization
- Parole Evidence
- Unresponsive

THANK YOU

The Honorable Thomas Coleman,
The Honorable Mariya Weekes &
Meghan M. Clary, Esq.