

NUTS AND BOLTS EVIDENCE

PRESENTED BY:

The Honorable Lorena V. Mastrarrigo

The Honorable Jessica Marra

Meaghan K. Marro

Introduction of Evidence

STEP 1: Mark for Identification purposes

- Do this with the clerk prior to trial.

STEP 2: Show Opposing Counsel

- “Your Honor, I’m showing opposing counsel what has been previously marked as Defense Exhibit A for identification purposes...”



Introduction of Evidence

STEP 3: Show the Witness

- “Your Honor, may I approach the witness?”
- “I’m now showing the witness what has previously been marked as Defense Exhibit A for identification purposes.”

STEP 4: Lay the Proper Foundation

- **Do** – “Witness _____, do you recognize this?”
- **What** – “What is it?”
- **How** – “How do you recognize it?”

Introduction of Evidence

STEP 5: Foundation Questions for Different Types of Evidence

- **Photographs**
 - “Is this a fair and accurate representation of the object/scene at the time of the incident?”
- **Real Evidence**
 - “Is this in the same or substantially similar condition as it was at the time of the incident?”

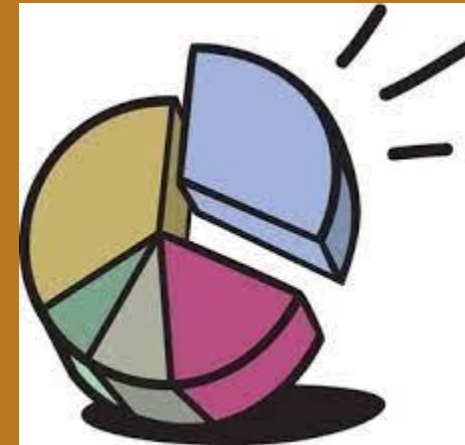
Introduction of Evidence

- **Demonstrative Evidence**

- “Will this aid and assist you in your testimony today?”

- **Diagrams**

- “Does this diagram depict a certain area/object?”
 - “Are you familiar with that certain area/object?”
 - “How are you familiar with this area/object?”
 - “In your opinion, is this diagram an accurate depiction of that area or object?”



Introduction of Evidence



STEP 6: Enter Into Evidence

- “Your Honor, I am now offering what has been previously marked as Defense Exhibit A into evidence as Defense Exhibit 1.”
- The Judge will then ask if Opposing Counsel has any objections.

Impeachment

STEP 1- CONFIRM

- SIR, YOU ON DIRECT YOU TESTIFIED THAT__CORRECT?
- BUT YOU'VE TESTIFIED DIFFERENTLY THAN THAT?

STEP 2- CREDIT

- YOU GAVE A DEPOSITION IN THIS CASE?
- I WAS PRESENT, CORRECT? (if applicable)
- THE OPPOSING COUNSEL WAS PRESENT, CORRECT? (if applicable)
- A COURT REPORTER WAS PRESENT, CORRECT?
- BEFORE WE STARTED YOU SWORE TO TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, CORRECT?
- JUST LIKE YOU DID HERE TODAY?



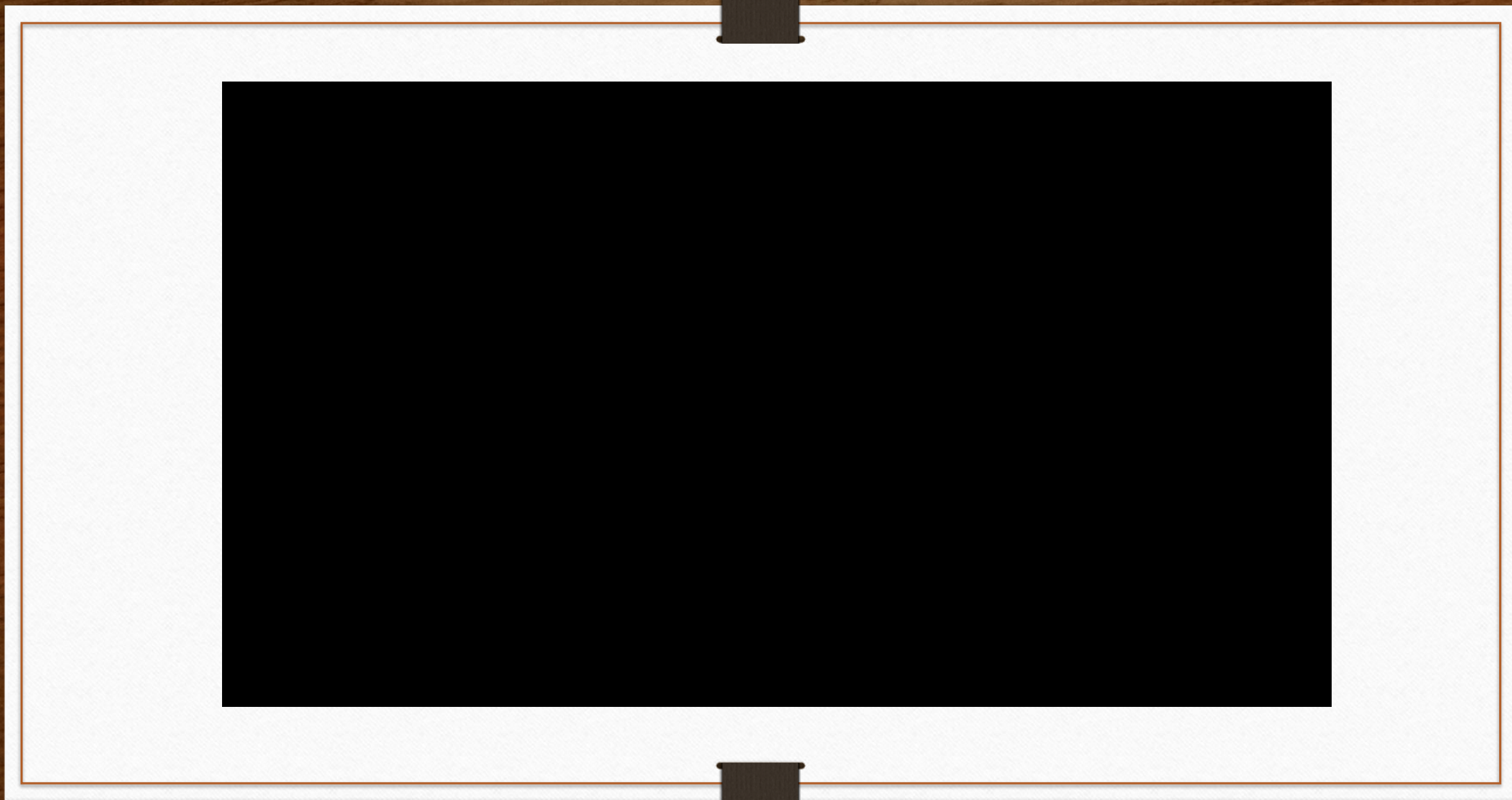
Impeachment

STEP 3- CONFRONT

- Ask the court to allow you to approach (opposing counsel/witness)(Lay your record as to what you are doing leading up to CONFRONTing the witness with their statement)
- SIR, I AM HANDING YOU THE TRANSCRIPT OF YOUR DEPOSITION. PLEASE READ PAGE ___, LINES ___ TO YOURSELF. LOOK UP WHEN YOU ARE DONE.
- ON THAT DAY I ASKED YOU ___AND YOU ANSWERED ____, CORRECT?

OPTIONAL STEP- CONSOLIDATE AND COMPARE

- THAT IS THE OPPOSITE OF/VERY DIFFERENT FROM/NOT THE SAME AS...
_____.



Why do we make objections


To exclude
testimony




To Exclude a witness or
physical evidence

To preserve the record for Appeal

How do we object?

- Stand up and object firmly. • Say “Objection” or “I object”
 - Make sure everyone hears you
- 

- Make your objection clear and complete
 - Object timely at the time of the issue
- 

- State all possible grounds for objection
- Make sure you get a ruling on your objection

COMMON OBJECTIONS

Asked and Answered

Argumentative

Beyond Scope

Compound

Counsel Testifying

Conclusion

Lack of Foundation

Hearsay

Irrelevant

Improper Impeachment

Improper Opinion

Narrative

Unresponsive

Speculation

Asked and Answered



§90.612(1)

Counsel is being repetitious in his/her question with the witness

Argumentative



- §90.612(1)
- Arguing with the witness
- Counsel demanding that the witness agree with his statement of facts

Beyond Scope

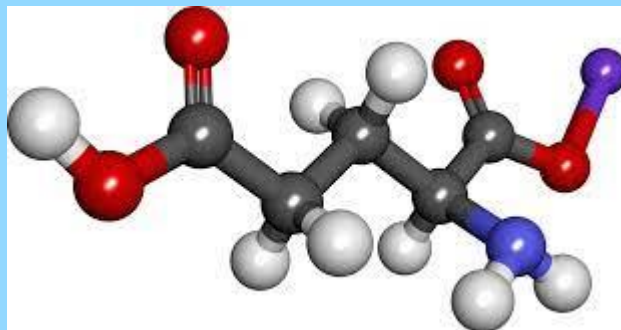
- §90.612(2)

- The examination of a witness is limited to the subject matter of examination by the opposing counsel or to credibility



Compound

- §90.612(1)
- More than one question is included in Counsel's question



Counsel Testifying



- §90.605
- Opposing counsel is making a statement instead of asking a question



Conclusion



- §90.604
- Except for an expert, witness must testify
To facts within personal knowledge
 - Conclusions are for the jury.



Lack of Foundation

- §90.901
 - Authentication or identification of evidence is required as a condition precedent to its admissibility
 - Failure to lay proper predicate for testimony or exhibit.
- (Be prepared to explain what foundational requirement is missing)

Irrelevant



- §90.401
- Does not tend to prove or disprove a material fact.

Improper Impeachment

- §90.608
 - Methods of impeachment are limited and specific
 - You will get this when not following the steps we discussed above

Expert Opinion

- §90.702
- If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an **opinion** or otherwise, if:
 - (1) The testimony is based upon sufficient facts or data;
 - (2) The testimony is the product of reliable principles and methods; and
 - (3) The witness has applied the principles and methods reliably to the facts of the case.

Speculation

- §90.604

- It allows a witness that lacks personal knowledge to guess about something
(except for Experts)



- Calls for conjecture; allows witness
who lacks personal knowledge
to guess

Hearsay

- §90.801

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



Hearsay

- Self Serving Hearsay - statements 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).
- 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).

**** Also, watch out for Double Hearsay Within Records****

Hearsay

**BUT IF IT IS OFFERED FOR THE TRUTH OF THE MATTER ASSERTED,
HOW DO I GET IT IN EVIDENCE?**

-
- Spontaneous Statement §90.803(1)
 - Excited 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)
 - 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)
 - Records Affecting Interest in Property §90.803(15)

Business Records



Business Records Exception

§90.803(6)

- an exception to hearsay for “Records of Regularly Conducted Activity” (as we call it – the Business Records Exception)
 1. The record was made at or near the time of the event at issue
 2. By someone with knowledge;
 3. The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
 4. Making the record was a regular practice of that business to make a record whenever that activity occurs.

Business Records Exception

- A witness 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).

Business Records Exception

1. Provide the business, provider or entity that you wish to have authenticate your records a proper “Business Records Affidavit” with the subpoena for records to this entity so that they may fill it out, sign and notarize prior to sending you the requested records.
2. Upon receipt of a proper signed and notarized “Business Records Affidavit”, serve reasonable written notice of that intention upon every other party, and

Business Records Exception

4. 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.
5. 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.

Common Evidence in Family Law Trials

- **Financial Records** (i.e. bank statements, mortgage, pay stubs, W-2s). Financial records produced by a party in discovery are not automatically admissible in court. *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). However, you may utilize the business records exception under Fla. Stat. §90.803(6) to admit the records into evidence.
- **Text Messages & Emails.** Not only do you have to address hearsay, but you must address authentication. However, authentication is a relatively low threshold and will go to the weight of the evidence. *Walker v. Harley-Anderson*, 301 So. 3d 299 (Fla. 4th DCA 2020) (“examination of its appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances”).

Common Evidence in Family Law Trials

- **Police Reports.** 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).
- **School Records.** While school records are admissible under Fla. Stat. § 90.803(6), watch out for layers of hearsay within the records, and you may need to offer a valid hearsay exception. E.C. v. State, 675 So. 2d 192 (Fla. 4th DCA 1996).

Common Evidence in Family Law Trials

- **Summaries and Charts-** § 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.”

Common Evidence in Family Law Trials

- **Summaries and Charts-** Elements:
 1. The original documents are voluminous and cannot be conveniently examined in court
 2. The original documents have been made available to the opposing party
 3. The documents would be admitted into evidence
 4. The chart or summary is fair and accurate
 5. Timely written notice was given to the parties
 6. Summary and originals or duplicates of data made available for examination or copying or both.