



EVIDENCE:

A **NUTS AND BOLTS** **LOOK**

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METHODS TO INTRODUCE EVIDENCE



1. Judicial Notice - 90.201-207, Fla. Stat.
2. Authentication and Identification (Foundations) - 90.901-903, Fla. Stat.
3. Hearsay Exceptions - 90.803, Fla. Stat. (availability of declarant immaterial)
90.804, Fla. Stat. (declarant unavailable)
4. Stipulation
5. Witness - 90.601-616, Fla. Stat.
6. Expert Witness - 90.701-706, Fla. Stat.
7. Summaries – 90.956 Fla. Stat.

AUTENTICATION + ADMISSIBILITY + RELEVANCE

JUDICIAL NOTICE



Mandatory Judicial Notice – 90.201, Fla. Stat. (“shall”)

1. Decisional, constitutional and statutory law of US and Florida.
2. Florida rules of court and rules of US courts adopted by US Supreme Court.
3. Rules of US Supreme Court and US Courts of Appeal.

No notice or filing requirements

JUDICIAL NOTICE

Permissive Judicial Notice 90.202, Fla. Stat. (“may”)



1. Special and local acts and resolutions of US Congress and Florida Legislature.
2. Decisional, constitutional and statutory laws of all state and federal jurisdictions.
3. Contents of Federal Register.
4. Laws of foreign nations.
5. Official actions of legislative, executive and judicial branches of US or any state.
6. Records of any Florida, US or state courts.
7. Rules of court of any Florida, US or state court.
8. Florida municipal and county charters (printed or certified).
9. Rules promulgated and published by Florida governmental agencies.
10. Florida municipal and county ordinances and resolutions.
11. Facts not subject to dispute because they are generally known.
12. Facts not subject to dispute because easily determined from sources whose accuracy cannot be questioned.
13. Official seals of US, Florida and state governmental agencies and departments.

AUTHENTICATION AND IDENTIFICATION OF EVIDENCE



90.01-90.954, Fla. Stat.

1. Required as a condition precedent to admissibility of evidence.
2. Requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

ESTABLISH APPROPRIATE EVIDENTIARY FOUNDATION

1. Mark document/item for identification purposes.
2. Show witness is familiar with the document/item that you are attempting to admit into evidence.
3. Have the witness authenticate the document/item.
4. Establish that the document/item is what it purports to be.
5. Demonstrate relevance of document/item to the case.
6. Move document/item into evidence.

STEPS – ADMITTING EVIDENCE



1. Mark document/item for identification purposes.
2. Show witness is familiar with the document/item that you are attempting to admit into evidence.
3. Have the witness authenticate the document/item.
4. Establish that the document/item is what it purports to be.
5. Demonstrate relevance of document/item to the case.
6. Move document/item into evidence.

STEPS – ESTABLISH FOUNDATION BUSINESS RECORDS



1. Are you familiar with “Exhibit __ Marked for Identification” (business record)?
2. Is it your company’s business practice to prepare this type of record?
3. Was this record prepared in the ordinary scope of the business of your company?
4. Was this record prepared by someone with knowledge of the event/act reflected in the record?
5. Was this record prepared at or about the time the matters reflected in the records occurred?
6. Was this document stored after it was prepared?
7. Where was this document retrieved from?
8. Is it a regular part of the business to keep and maintain records of this type?
9. Is this document/record the type that would be kept under your custody and control?
10. Move document/record into evidence.

STEPS – ESTABLISH FOUNDATION RECORDING



1. Have you had the opportunity to hear the voice of Mr./Ms. _____ before?
2. How many times have you heard his/her voice?
3. Tell us how you are familiar with Mr./Mrs. _____'s voice?
4. Have you heard the recording marked as Exhibit “___” for identification?
5. Do you recognize the voice in the recording?
6. To whom does the voice belong?
7. Move the recording into evidence.

STEPS – ESTABLISH FOUNDATION PHOTOGRAPH



1. I am showing you what has been marked as Exhibit “___” for identification.
2. Do you recognize what is shown in this photograph?
3. Are you familiar with the scene (person, place, product, etc.) portrayed in this photograph?
4. How are you familiar with the scene portrayed in the photograph?
5. Does the scene portrayed in the photograph fairly and accurately represent the scene as you remember it on (date in question)?
6. Move the photograph into evidence.

(Remember: Witness does not have to be the person who took the photograph!)

STEPS – ESTABLISH FOUNDATION LETTER OR WRITING



1. Are you familiar with the signature of Mr. /Mrs. _____ (person who signed the letter)?
2. How are you familiar with Mr./Mrs. _____'s signature?
3. Show the witness what has been marked Exhibit “___” for identification.
4. Do you recognize the signature at the bottom of this letter?
5. Whose signature is this?
6. Move the letter into evidence.

SELF AUTHENTICATION OF DOCUMENTS



Self Authentication – Fla. Stat. 90.902

1. Sufficient guarantees of genuineness to be admitted in evidence.
2. However, Document will NOT be allowed if another objection applies (Hearsay)

Examples include

- | | |
|--|--|
| <ol style="list-style-type: none">(1) Public document bearing seal with signature of custodian attesting to authenticity of seal.(2) Public document without seal but with signature of official affixed in official capacity.(3) Official foreign document or record attested to by person in official capacity and accompanied by a final certification.(4) Certified copy of official document or record entry authorized and actually recorded and certified by custodian.(5) Books, pamphlets, or other publications purporting to be issued by governmental authority. | <ol style="list-style-type: none">(6) Printed materials purporting to be newspapers or periodicals.(7) Inscriptions, signs, tags or labels affixed in course of business indicating ownership, control or origin.(8) Commercial papers to extent provided in Uniform Commercial Code.(9) Any signature, document or other matter declared by Legislature to be genuine.(10) Any document properly certified under the law of the jurisdiction where certification was made.(11) Original or duplicate under certification of Section 90.803(6). |
|--|--|

CERTIFICATION OF DECLARATION



Certification of Declaration in Lieu of Record Custodian Testimony – Fla. Stat. 90.803(6)(c)

1. In lieu of having a records custodian testify, using a “Declaration of Records” instead.
 - Must be done with “reasonable written notice”
 - Must make evidence/document available for inspection with sufficient advanced notice
2. If opposing party wants to object:
 - Must be made before “trial”
 - Motion must be ruled upon BEFORE “trial”
 - If motion is granted, foundation must be established

HEARSAY 90.801(1), FLA. STAT.



HEARSAY is:

1. A statement (an oral or written assertion; or, conduct intended as an assertion;
2. Other than one made by the declarant (person who makes a statement) while testifying at trial or hearing;
3. Offered for the truth of the matter asserted.

HEARSAY 90.801(1), FLA. STAT.

OBJECTION

OBJECTION! HEARSAY... or is it.

1. Is it...
 - a) Out of court statement,
 - b) Offered in court?
 - c) For the truth of the matter asserted?
2. Exceptions...
 - a) Effect on the listenser
 - b) Impeachment
 - c) Declarant's state of mind
3. Other exemptions or exceptions...
4. Offer of Proof?... (It technically applies to Family Cases)



OFFER OF PROOF – FLA. STAT.

90.104(1)(B) AND FLA.FAM.LAW.R. 12.450



It allows you:

1. Opportunity to present evidence to judge
2. Presents judge opportunity to evaluate the evidence and reconsider ruling
3. Generally necessary to preserve error in excluding evidence.

How can you provide “Offer of Proof”?

1. Present testimony of the witness in whole or part;
2. Mark for identification and explain document or evidence; or
3. Narrative by counsel of what the proof would show

Reversible error to refuse to allow proffer of testimony or evidence reasonably related to issues at trial and/or necessary for appellate review.

Fehringer v. State, 976 So.d 1218 (Fla. 4th DCA 2008)

HEARSAY EXCAMPLES



1. **Police Reports:** Generally contain statements by third persons of their recollection of events to an officer. These may also contain hearsay within hearsay. Police reports are not business records or public records for the purpose an exception to the hearsay rule.
2. **Affidavits of Third Parties:** Witness affidavits contain statements that are not admissible and the witness must be present to testify and be cross examined.
3. **Voicemail or E-mail from Non-Party:** Unless an exception applies, a voicemail or an e-mail from a non-party is likely inadmissible hearsay.
4. **Statements by a child's teacher:** Unless an exception applies, statements by a child's teacher that could impact timesharing are likely inadmissible hearsay.

NON-HEARSAY STATEMENTS 90.801(2), FLA. STAT.



Statement is NOT Hearsay if

1. Declarant testifies at hearing or trial AND
 - a) Is subject to cross-examination AND is
 1. Inconsistent with trial testimony and given under oath, subject to perjury, at a trial, proceeding or deposition; **OR**
 2. Consistent with declarant's testimony and offered to rebut charge of improper influence, motive, or recent fabrication; **OR**
 3. One of identification of a person after perceiving the person.

HEARSAY EXCEPTIONS 90.803

Availability of the Declarant is immaterial



- (1) Spontaneous statement.
- (2) Excited utterance.
- (3) Then-existing mental, emotional or physical condition.
- (4) Statement made for medical diagnosis or treatment.
- (5) Recorded recollection.
- (6) Business records (includes certification).
- (7) Absence of entry in records of regularly conducted activity.
- (8) Public records and reports.
- (9) Records of vital statistics.
- (10) Absence of public record or entry.
- (11) Records of religious organizations.
- (12) Marriage, baptismal and similar certificates.
- (13) Family Records
- (14) Record of Document affecting interest in property
- (15) Statements in documents affecting interest in property.
- (16) Statements in ancient documents.
- (17) Market reports and commercial publications.
- (18) Admissions.
- (19) Reputation concerning personal or family history.
- (20) Reputation concerning boundaries or general history.
- (21) Reputation as to character.
- (22) Former testimony.
- (23) Statement by child victim with physical/emotional/mental developmental age of 11 or less.
- (24) Statement of elderly or disabled person describing abuse, neglect, etc.


HEARSAY EXCEPTIONS – 90.804 FLA. STAT.



DECLARANT IS UNAVAILABLE

1. “Unavailable” 90.804(1)
 - (a) Exempted by court ruling on ground of privilege;
 - (b) Persists in refusing to testify;
 - (c) Lacks memory to testify effectively; BUT...
 - (d) Dead or physical or mental illness or infirmity; or,
 - (e) Absent despite process. BUT...

BUT DOES NOT QUALIFY as “unavailable” if the absence or claim of lack of memory is caused by the “proponent of the evidence”



HEARSAY EXCEPTIONS – 90.804 FLA. STAT.



DECLARANT IS UNAVAILABLE

1. If declarant is deemed “unavailable:”
 - (a) Former testimony
 - (b) Statement made under belief of impending death
 - (c) Statement against pecuniary, proprietary or penal interest
 - (d) Statement of personal or family history
 - (e) Statement on same subject matter (“Dead Man’s Statute”)

COMMON HEARSAY EXCEPTIONS

(FLA. STAT. §90.803)

Spontaneous Statement

- A spontaneous descriptive statement
- Must describe or explain an event or condition at the time it happens or immediately thereafter

Excited Utterance

- A statement made about an event or condition while the declarant was under the stress or excitement of what occurred
- Requires stress or excitement at the time

Mental, Emotional or Physical Condition

- A statement about the declarant's then-existing statement of mind, emotion or physical condition
- Cannot be a statement about another person
- Only to prove state of mind, emotion or physical condition

SPONTANEOUS STATEMENT



A police officer walks into a home where there is a domestic disturbance. One party accuses the other of throwing a laptop at them. The person who threw the laptop immediately reacted stating “I didn’t mean to hit her with it.”




EXCITED UTTERANCE



Two drivers are in a car crash and a witness is a passenger in one car. The witness jumps out of the car, screaming at her driver “He may have run a red light, but you were texting!”

This statement is made with excitement at the height of stress as the parties were just in a car crash.




MENTAL, EMOTIONAL, OR PHYSICAL CONDITION



- A couple is divorcing and one spouse co-owns a small business. The business is not doing well, and the parties dispute the cause. The spouse that owns the business testifies that her business partner stated at their meeting that she was recently diagnosed with cancer and hasn't been able to focus on work lately.

The business partner's statement is a statement describing her physical condition (cancer diagnoses) and her mental or emotional state (inability to focus on work).



COMMON HEARSAY EXCEPTIONS

(FLA. STAT. §90.803)

Business Records

- Memo, report, record, etc. kept in the regular course of business
- Requires authenticating testimony or a business records affidavit

Public Records

- Record, report, written statement, etc. kept by public offices or agencies describing activities of the office or agency, or matters observed as part of their duty
- Does not include police reports

Vital Statistics

- Birth records; death records; marriage records
- Kept by public office

BUSINESS RECORDS

- In a divorce proceeding, the parties have one child who plays travel hockey. The travel hockey program keeps attendance records of all practices because unexcused absences from practice leads to missed playing time.
- The parties' child complains to the GAL that she has had less playing time recently. It turns out one parent often disregards practice. The other parent learns of this and seeks to introduce the attendance records into evidence.

The records are admissible either with a records custodian testifying to their authenticity or a business records affidavit.



PUBLIC RECORDS

- Parties dispute who paid the real estate taxes of a property jointly owned by them for the past 5 years.
- The county tax collector's office records the identity of the party who pays taxes each year and it is reflected on a "paid bill."
- One party to the dispute seeks to introduce the tax collector's "paid bill" for the subject property.

This is admissible as a hearsay exception because the "paid bill" is a report regularly kept by the county tax collector, a public official (or office).

VITAL STATISTICS

- Two parties are divorcing, and over the course of litigation, one party discovers their “spouse” was previously married to another person and 2 days after their marriage, that other person was deported. There is no record of a the “spouse’s” divorce or annulment of the prior marriage.
- The discovering party seeks to introduce the marriage record of the prior marriage at a hearing. The marriage record is a vital statistic.

IMPEACHMENT – FLA. STAT. 90.608



Any party, including party calling the witness, may attack credibility of a witness by:

1. Introducing statements of the witness which are inconsistent with the witness's present testimony.
2. Showing that the witness is biased.
3. Attacking the character of the witness in accordance with sections 90.609 and 90.610.
4. Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified.
5. Proof by other witnesses that material facts are not as testified to by the witness being impeached.

IMPEACHMENT – FL. FAM LAW R P 12.330



- Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness or for any purpose permitted by the Florida Evidence Code.

STEPS – IMPEACHMENT USING A DEPOSITION



Do you remember having had your deposition taken on (date)?

Do you remember that a court reporter was present at your deposition?

Do you remember having been sworn to tell the truth?

Did you tell the truth during that deposition?

You were asked the following question and you gave the following answer?

(do not ask if the witness remembers the statement; it is whether the statement was made—not the witness's memory—that is the issue)

Reference page/line numbers and read the question previously asked and answered at deposition

RECORDED RECOLLECTION – FLA. STAT.

90.803

- Witness must be incapable of recalling pertinent facts as to which witness had first-hand knowledge.
- Cannot attempt to refresh memory unless witness indicates inability to recall the fact or information at issue.
- Writing or items used to refresh recollection is NOT evidence itself, but the testimony is
- The writing or item need NOT be admissible; also no need to comply with authentication, foundation, hearsay or best evidence rules.

RECORDED RECOLLECTION – FLA. STAT. 90.803 BUT...

Opposing Party:

- **Must be shown document or item for inspection upon request.**
- **May request in camera review redaction of matters not related to subject matter of testimony**
- **May use document or item for cross-examination of witness.**
- **May be move the documents or item into evidence**

STEPS – REFRESHING RECOLLECTION



1. Did you at some time remember this matter?
2. Did you at any time prepare a document setting out what happened?
3. Would a review of that document assist you in remembering the matters today?
4. I am handing you what has been marked as “Exhibit __ for Identification.”
5. Please review it and tell me if it helps you to remember. (witness reads document silently to refresh memory; then returns document to counsel)
6. Does the document refresh your recollection?
7. Do you now have an independent recollection of the facts? (if has present memory, witness provides testimony from revived memory)
8. Tell the Court what happened.

PRIVILEGES



Fla. Stat. 90.501 - Unless provided in Chapter 90, any other statute, or Constitution of US or Florida, no person in a legal proceeding has a privilege to:

1. Refuse to be a witness.
2. Refuse to disclose any matter.
3. Refuse to produce any object or writing.
4. Prevent another from being a witness, from disclosing any matter, or from producing any object or writing.


PRIVILEGES

1. Professional journalist privilege. 90.5015, Fla. Stat.
2. Lawyer-client privilege. 90.502, Fla. Stat.
3. Fiduciary lawyer-client privilege. 90.5021, Fla. Stat.
4. Psychotherapist-patient privilege. 90.503, Fla. Stat.
5. Sexual assault counselor-victim privilege. 90.5035, Fla. Stat.
6. Domestic violence advocate-victim privilege. 90.5036, Fla. Stat.
7. Husband-wife privilege. 90.504, Fla. Stat.
8. Clergy communications privilege. 90.505, Fla. Stat.
9. Accountant-client privilege. 90.5055, Fla. Stat.
10. Trade secret privilege. 90.506, Fla. Stat.



PRIVILEGES - WAIVER



- **Fla. Stat. 90.507** - Waiver of privilege by voluntary disclosure.
 - **Fla. Stat. 90.508** - Privileged matter inadmissible if statement compelled erroneously by the court or made without opportunity to claim privilege.
 - **Fla. Stat. 90.510** - In any civil case which party claims a privilege to a communication necessary to adverse party, the court, upon motion, may dismiss the claim for relief or the affirmative defense to which the privileged testimony would relate. Court may engage in an in camera inquiry as to the privilege.
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“ALL RELEVANT EVIDENCE IS
PREJUDICIAL.”



—**MULLEN V. PRINCESS ANNE VOLUNTEER FIRE
CO., 853 F. 2D 1130, 1134 (4TH CIR. 1988)**



THANK YOU!!!



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HONORABLE MENTION

- **JASON HABER, ESQ.**
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