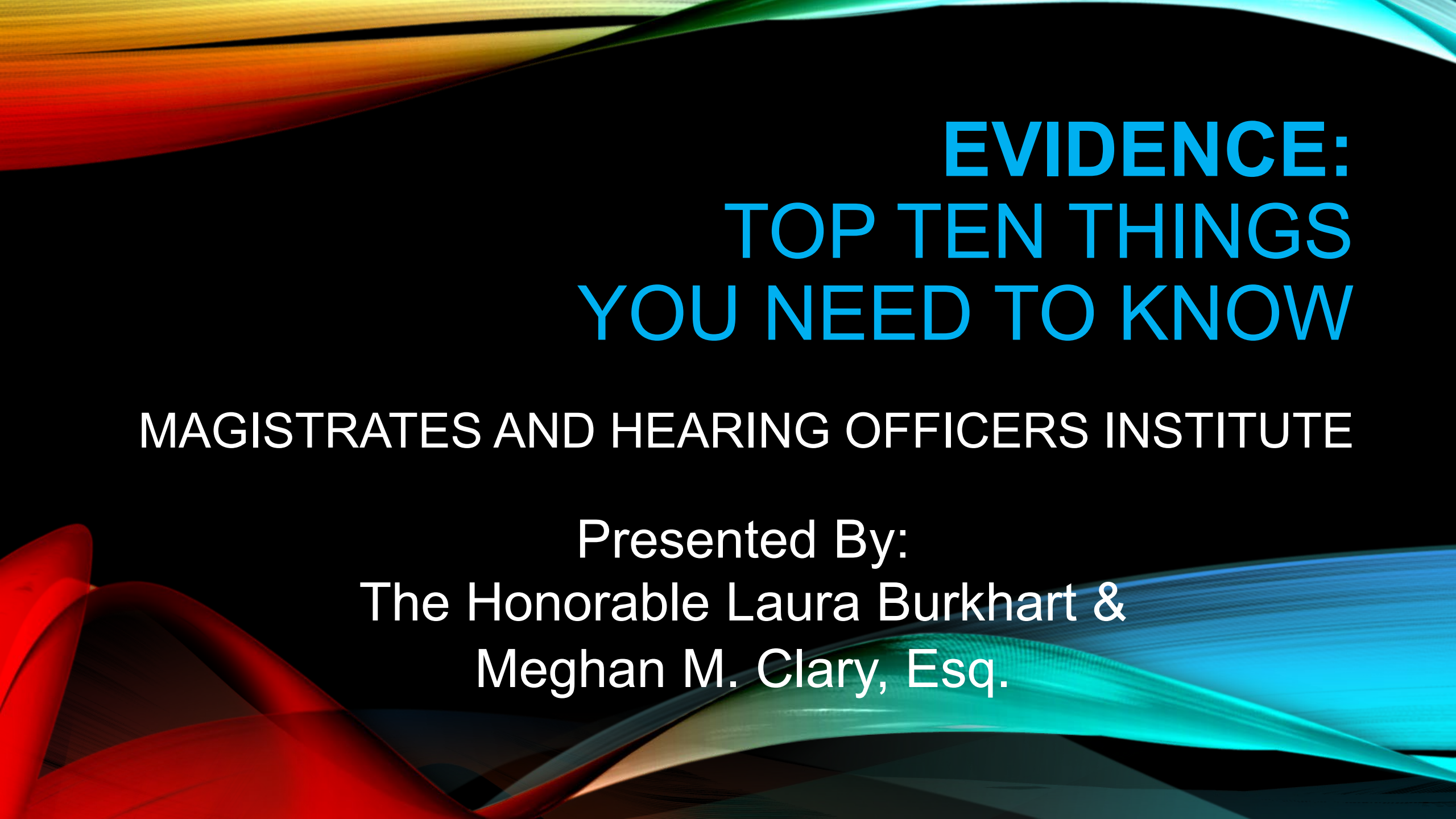




# **EVIDENCE: TOP TEN THINGS YOU NEED TO KNOW**

**MAGISTRATES AND HEARING OFFICERS INSTITUTE**

**Presented By:  
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# TOP 10 THINGS YOU NEED TO KNOW

1. HEARSAY
2. AUTHENTICATION
3. PHOTOGRAPHS & VIDEOS
4. EXPERTS
5. BEST EVIDENCE RULE
6. IMPEACHMENT
7. REFRESHING RECOLLECTION
8. USE OF DEPOSITIONS
9. JUDICIAL NOTICE
10. OBJECTIONS

# #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.**

# #1 – HEARSAY

## Yes, it's Still 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).
- **Documents Produced in Mandatory Disclosure.** 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).

# #1 – HEARSAY

## Wait, Maybe it's NOT Hearsay

- **Not Offered for the Truth of the Matter Asserted.** If the statement is not being offered to prove the truth of the facts in the statement, it may be admissible for another purpose but the purpose for which the statement is being offered must be a material issue in the case.
- **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.

# #1 – HEARSAY

## HEARSAY EXCEPTIONS - AVAILABILITY OF DECLARANT IMMATERIAL

- **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)
- **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)

# #1 – HEARSAY

## *Florida Statutes § 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.

# #1 – HEARSAY

## **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).

# #1 – HEARSAY

## **Business Records Exception**

Landmark Am. Ins. Co. v. Pin-Pon Corp., 155 So. 3d 432 (Fla. 4th DCA 2015)

- In a suit by an insured hotel owner against an insurance company for hurricane damage, the insured hotel owner called the architect as a witness to admit the architect's records into evidence under the business record exception under *Fla. Stat.* §90.803(6).
- The architect's records contained documents from the insured's general contractor, since part of the architect's normal course of business is to obtain a cost analysis for the project from a contractor. The type of documents included as part of the contractor's cost analysis was a cost spreadsheet, subcontractor proposals, subcontractor invoices and governmental permitting documents.
- In attempting to lay the foundation to admit into evidence the contractor's cost analysis through the architect as the architect's business record, the architect testified that these documents were the type of records that his company ordinarily maintained and that these records were kept in the ordinary course of business.

# #1 – HEARSAY

## **Business Records Exception**

... *continued* Landmark Am. Ins. Co. v. Pin-Pon Corp., 155 So. 3d 432 (Fla. 4th DCA 2015)

- However, the architect could not testify as to when the general contractor's documents were made and the architect had no information as to whether the person who made the documents had personal knowledge of the information contained within the record or if the person who made the record received the information by someone who had personal knowledge of the information and was acting in the course of a regularly conducted business activity.
- The appellate court stated that while it was not necessary for the insured hotel owner to call the person who actually prepared these business records, the insured hotel owner failed to show the architect was either in charge of the activity constituting the usual business practice or was well enough acquainted with the activity to give the testimony.
- The mere fact that these documents were incorporated into the architect's file did not bring those documents within the business records exception. You must still lay the foundation for admitting the records into evidence as a business record.

# #1 – HEARSAY

## Business Records Exception

- While a party can certainly subpoena the records custodian to come to the hearing, they can also utilize *Fla. Stat. §90.803(6)(c)* and *§90.902(11)* to admit the 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.**

# #1 – HEARSAY

## ADMITTING BUSINESS RECORDS INTO EVIDENCE VIA A RECORDS CUSTODIAN AFFIDAVIT

- **§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 \_\_\_\_\_

# #1 – HEARSAY

## Child Victim Exception

*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?

# #1 – HEARSAY

## Child Victim Exception

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.

# #1 – HEARSAY

## Child Victim Exception

### 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.)

# #1 – HEARSAY

## Child Victim Exception

### 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. 4<sup>th</sup> 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. 4<sup>th</sup> DCA 1994).
  - Statements by the perpetrator. Delacruz v. State, 734 So. 2d 1116 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> DCA 1991).

# #1 – HEARSAY

## Child Victim Exception

### 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. 4<sup>th</sup> 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.

## #2 – 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. 4<sup>th</sup> 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.

# #2 – AUTHENTICATION

## TEXTS & EMAILS

- A party 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. They must present other factors to the court to circumstantially authenticate the text. Walker v. Harley-Anderson, 301 So. 3d 299 (Fla. 4<sup>th</sup> 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.

# #2 – AUTHENTICATION

## TEXTS & EMAILS

- **What other evidence can they offer to the court to authenticate the writing if they 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.

# #2 – AUTHENTICATION

## How to Lay a Foundation to Offer Texts/Emails 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?
- Does [the recipient/sender] have a cell phone OR email address?
- How do you know?
- Do you know the [the recipient/sender]'s cell phone number OR email address?

**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 OR email?
- Does that document/photograph accurately reflect the text OR email that you received on [date/time]?
- How do you know that this is a text OR email from [the sender]?
- Is that [the sender]'s phone number/contact information?

**Move the text message OR email into evidence.**

# #3 – 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)

# #3 – 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).

# #3 – 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.

# #3 – 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. 4<sup>th</sup> 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.

## #4 – EXPERTS

### Expert Testimony - *Fla. Stat. § 90.702*

- An expert is one possessed of special knowledge or skill about the subject upon which he or she is called to testify if it will assist the trier of fact in understanding the evidence or in determining a fact in issue. *Fla. Stat. § 90.702*.
- A witness qualified as an expert 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 a product of **reliable principles**; and
  - (3) the witness has **applied the principles and methods reliably to the facts** of the case.

## #4 – EXPERTS

### **Basis of Opinion Testimony by Expert** *Fla. Stat. § 90.704*

- If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.
- Facts or data upon which expert opinion are based may be derived from three possible sources:
  - (1) firsthand observation of the witness,
  - (2) presentation of evidence at the trial, and
  - (3) presentation of data to the expert outside of court and other than by his own perception.

# #4 – EXPERTS

## History of Daubert & Frye

- The Frye standard was adopted in 1923 under the case of Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923). This standard looks at whether the basis for the expert's opinion gained general acceptance in the particular field to which it belongs.
- In 1993, the U.S. Supreme Court held in Daubert v. Merrell-Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) that “general acceptance” was one of multiple factors the court may analyze in deciding whether expert evidence is reliable under Federal Rule of Evidence 702. The U.S. Supreme Court held trial judges must focus on the principles and methodologies used by the experts rather than the conclusions. Thus, the U.S. Supreme Court held in Daubert that Rule 702 no longer used the “general acceptance standard” and instead, Rule 702 was meant to be flexible and broader, giving the trial judge the gate keeping role.

# #4 – EXPERTS

## History of Daubert & Frye

- In 1999, the U.S. Supreme Court expanded the reach of Daubert to all expert testimony, not just scientific expert testimony in Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137 (1999).
- In 2013, *Fla. Stat.* § 90.702 was amended by the Florida Legislature to mirror Federal Rule of Evidence 702, which followed the standard set out in Daubert. While there was a brief period of time thereafter that the Florida Supreme Court rejected the Daubert standard and upheld the Frye standard, in 2019 the Florida Supreme Court changed course and adopted Daubert under *In re Amendments to Florida Evidence Code*, 44 Fla. L. Weekly S170 (Fla. May 23, 2019).
- So that it is clear, **Florida Courts are to apply the Daubert standard** when considering the admissibility of expert evidence, which is set forth in § 90.702

# #4 – EXPERTS

## Daubert Challenge

- It is incumbent upon the *challenging party* to timely raise a Daubert objection as soon as the party is reasonably aware of the basis for it, and to request a hearing before the court. Rojas v. Rodriguez, 185 So. 3d 710 (Fla. 3d DCA 2016). This allows the judge to perform its gatekeeping role, as Daubert contemplates a gatekeeping function, not a gotcha. Booker v. Sumter Cnty. Sheriff's Off./N. Am. Risk Servs., 166 So. 3d 189, 193 (Fla. 1<sup>st</sup> DCA 2015).
- Absent “exceptional circumstances,” an untimely Daubert motion *should not be considered and failure to timely bring the objection before the court constitutes a waiver*. Rojas, 185 So. 3d at 712.
- Once it's determined an objection is timely raised, court must then determine if the objection was sufficient to put opposing counsel on notice *and* have the opportunity to address any perceived defect in the expert's testimony. Booker, 166 So. 3d at 192.
- Proper *motion must* (1) *identify the source, substance and methodology of the challenged testimony and* (2) *be supported by conflicting expert testimony and literature*. If it is not, the court must decline to hear the motion. Booker, 166 So. 3d at 193.

# #4 – EXPERTS

## Daubert Challenge

- If a proper motion is filed, the court must perform its gatekeeping function, Perry v. City of St. Petersburg, 171 So. 3d 224, 225 (Fla. 1<sup>st</sup> DCA 2015).
- However, court has broad discretion in determining how to perform its gatekeeping function. Kumho Tire Co., 526 U.S. at 152. Examples include: rule on papers only; hearing with argument; evidentiary hearing or defer ruling until the time of trial.
- The burden of proof to establish the admissibility of expert's testimony is on the proponent of the testimony, and that burden is a preponderance of the evidence. Booker, 166 So. 3d at 193 n.1.
- The standard of review by the appellate court regarding the trial courts admission or exclusion of expert testimony is an abuse of discretion. Booker, 166 So. 3d at 194 n.2.

# #4 – EXPERTS

## Ruling on a Daubert Challenge

- Relevant evidence is presumed admissible under the rules. In line with this, Daubert was designed to admit expert testimony that would have otherwise been inadmissible under Frye standard. Permits the admission of novel scientific evidence, if reliable.
- Exclusion of expert testimony is the exception rather than the rule.
- “Qualifications” – expert must demonstrate knowledge beyond the understanding of the average person. Based on knowledge, skill, experience, training or education.
- “Relevance and Helpfulness” – closely tracked standard. It must help the trier of fact.
- “Fit” – Does the reliable methodology fit the facts and data in the case in a way that educates or assists the trier of fact in deciding a dispute at issue? No ipse dixit of the expert (because I said so).
- “Reliable Methodology” – weigh the factors. Not all factors apply in each case or have to be weighed equally. Court should examine the methods, not the conclusions. The proponent is not required to show that the opinion is correct, but only that more likely than not, the opinion is reliable. If the attack is on the accuracy of the results but not the methodology used, it goes to the weight of the evidence, not the admissibility and becomes a question for the trier of fact. If the opinion is not based on facts within the case, it shows unreliability.

# #4 – EXPERTS

## Disclosure of Facts or Underlying Expert Opinion

### *Fla. Stat. § 90.705*

- Unless otherwise required by the Court, an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data.
- The reasonableness of an expert's reliance on this data may be questioned on cross-examination. § 90.704.

Note: While experts may rely upon inadmissible evidence, the Supreme Court of Florida has given trial lawyers the following warning in Dufor v. State, 69 So. 3d 235 (Fla. 2011), stating “we hasten to remind attorneys and judges that the rules of evidence must be applied before the substance of any document may be admitted for consideration by the trier of fact.” Id. at 255.

# #5 – 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.

# #5 – 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**.

# #5 – BEST EVIDENCE RULE

## COMMON MISUNDERSTANDINGS WITH BEST EVIDENCE RULE

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. 4<sup>th</sup> 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).”

# #6 – IMPEACHMENT

## PRIOR INCONSISTENT STATEMENTS

**Fla. Stat. §90.608** - Impeachment can be used 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. 1<sup>st</sup> 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).

# #6 – 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.

# #6 – 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.

# #6 – 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**.

# #6 – IMPEACHMENT

## PRIOR INCONSISTENT STATEMENTS

### Step Two: CREDIT

- The second step is to credit, or **build up**, the **prior statement**.
- This is especially important if they are trying to show that the prior statement was more reliable and accurate.
- Also, if they are trying to use the prior inconsistent statement as extrinsic evidence, they need to credit it so establish a foundation for its admission.

# #6 – IMPEACHMENT

## PRIOR INCONSISTENT STATEMENTS

### Step Two: CREDIT

- If the witness made the prior statement in a deposition, the following facts should be emphasized:
  - 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.

# #6 – 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.
- Proper procedure would be to alert opposing counsel and the Court of the page and line number before.

# #6 – IMPEACHMENT

## PRIOR INCONSISTENT STATEMENT

### Prior Deposition Testimony

- **Confirm:** Ma'am, you just testified . . . ., is that your testimony?
- **Credit:** With the deposition transcript in hand and ready, they should ask:
  - “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 they have set the foundation for the impeachment, they should direct the court and opposing counsel to the page and line of the deposition and then 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.

# #6 – IMPEACHMENT

## TIPS FOR EFFECTIVE IMPEACHMENT OF PRIOR INCONSISTENT STATEMENTS

- Extrinsic evidence of a prior inconsistent statement on a collateral matter is inadmissible.
- 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).

# #6 – 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**.

# #7 – 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, *they can only IMPEACH* the witness on that fact where a foundation is laid that the witness's inability to recall that fact is fabricated.

# #7 – 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 4<sup>th</sup> indicated but she could not recall all the details of the 4<sup>th</sup> 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. 4<sup>th</sup> 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. 4<sup>th</sup> 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!**

# #7 – 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.

# #7 – REFRESHING RECOLLECTION

## **Fla. Stat. § 90.613 – Procedure to refresh recollection**

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 let me know once you are finished.
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**

## #8 – USE OF DEPOSITION TESTIMONY

- **Rule 12.330(a):** At the trial or on the hearing of a motion, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition.
- **12.330(a)(1):** Any deposition maybe used for impeachment.
- **12.330(a)(2):** The deposition of a party may be used by an adverse party for ***any*** purpose.
- **12.330(a)(3):** The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) the witness is dead; (B) the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; (C) the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (E) on application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

# #9 – JUDICIAL NOTICE

- Judicial notice generally applies when there is no need for counsel to introduce evidence of the specific fact, and the judge may dispense with the introduction of evidence by taking judicial notice of such a fact. Therefore, the fact may be established without formal proof being offered.
- A party may ask the Court to take judicial notice of the matters enumerated in *Florida Statutes* Sections 90.201, 90.202 and 90.2035.
- The procedure to be followed when judicial notice of a fact is taken is set forth in 90.203, 90.2035 and 90.204.

# #9 – JUDICIAL NOTICE

## **Mandatory Judicial Notice**

A court is required to take judicial notice of the matters set forth in §90.201. Section 90.201 states a court shall take judicial notice of:

- (1) Decisional, constitutional, and public statutory law and resolutions of the Florida Legislature and the Congress of the United States;
- (2) Florida rules of court that have statewide application, its own rules, and the rules of United States courts adopted by the United States Supreme Court;
- (3) Rules of court of the United States Supreme Court and of the United States Courts of Appeal.

# #9 – JUDICIAL NOTICE

## Compulsory Judicial Notice

**§90.202** court may take judicial notice of the following matters, to the extent that they are not embraced within 90.201:

- (1) Special, local, and private acts and resolutions of the Congress of the USA and of the Florida Legislature.
- (2) Decisional, constitutional, and public statutory law of every other state, territory, and jurisdiction of the USA.
- (3) Contents of the Federal Register.
- (4) Laws of foreign nations and of an organization of nations.
- (5) Official actions of the legislative, executive, and judicial departments of USA, and of any state, territory, or jurisdiction of USA
- (6) Records of any court of this state or of any court of record of the USA or of any state, territory, or jurisdiction of the USA.
- (7) Rules of court of any court of this state or of any court of record of the USA or of any other state, territory, or jurisdiction of USA.
- (8) Provisions of all municipal and county charters and charter amendments of this state, provided they are available in printed copies or as certified copies.
- (9) Rules promulgated by governmental agencies of this state which are published in the Florida Administrative Code or in bound written copies.
- (10) Duly enacted ordinances and resolutions of municipalities and counties located in Florida, provided such ordinances and resolutions are available in printed copies or as certified copies.
- (11) Facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court.
- (12) Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.
- (13) Official seals of governmental agencies and departments of the USA and of any state, territory, or jurisdiction of the USA.

# #9 – JUDICIAL NOTICE

## Compulsory Judicial Notice

- A court SHALL take judicial notice of any matter in § 90.202 when a party requests it and (1) gives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare and meet the request; and (2) furnishes the court with sufficient information to enable it to take judicial notice of the matter. *Fla Stat. § 90.203*
- The notice requirement of 90.203 is not to be read as requiring that notice be given in the pleadings; the statute only requires that the notice be timely and written and that proof of it be filed with the court.
- Judicial notice may be requested before the trial, although a Rule 1.370 request for admission may more frequently be employed. A request to notice may also be made during the trial so long as opposing counsel has an adequate opportunity to respond. In addition, judicial notice may be taken in proceedings subsequent to the trial.

# #9 – JUDICIAL NOTICE

## Don't Forget About Hearsay

- Judicial notice may not be used as a method of avoiding the application of the hearsay rule which excludes particular out-of-court statements that are offered to prove the truth of the matter asserted. Holt v. Calchas, LLC, 155 So. 3d 499, 507 (Fla. 4th DCA 2015) (holding that “[a]lthough the trial court could take judicial notice of the court file, the rules of evidence, including hearsay rules, still applied to the information contained within the court file”).
- But, the Court may take judicial notice of indisputable facts under 90.902(12) even though it could be based on consulting hearsay documents.

# #9 – JUDICIAL NOTICE

## **Web Mapping, Global Satellite Imaging Sites, Internet Mapping Tools**

- A court may take judicial notice of an image, map, location, distance, calculation, or other information taken from a widely accepted web mapping service, global satellite imaging site, or Internet mapping tool, if such image, map, location, distance, calculation, or other information indicates the date on which the information was created.
- A party intending to offer such information in evidence at trial or at a hearing must file notice of such intent within a reasonable time or as defined by court order. The notice must include a copy of the information and specify the Internet address or pathway where such information may be accessed and inspected.
- This section does not affect, expand, or limit standards for any matters that may otherwise be judicially noticed.

***Fla Stat. § 90.2035***

# #9 – JUDICIAL NOTICE

## **Web Mapping, Global Satellite Imaging Sites, Internet Mapping Tools**

### **Objections**

- A party may object to the court taking judicial notice of the image, map, location, distance, calculation, or other information taken from a widely accepted web mapping service, global satellite imaging site, or Internet mapping tool within a reasonable time or as defined by court order.
- In civil cases, there is a rebuttable presumption that information sought to be judicially noticed under this section should be judicially noticed. The rebuttable presumption may be overcome if the court finds by the greater weight of the evidence that the information does not fairly and accurately portray what it is being offered to prove or that it otherwise should not be admitted into evidence under the Florida Evidence Code.
- If the court overrules the objection, the court must take judicial notice of the information and admit the information into evidence.

*Fla Stat. § 90.2035*

# #10 – OBJECTIONS

## OBJECTIONS TO QUESTIONS

- Calls for Irrelevant Answer
- Violates the Best Evidence Rule
- Calls for a Privileged Communication
- Calls for a Legal 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
- 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

# #10 – OBJECTIONS

## Objections to **Exhibits**

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

## Objections to **Answers**

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



# THANK YOU

*The Honorable Laura Burkhardt &  
Meghan M. Clary, Esq.*