



FLORIDA FAMILY LAW AMERICAN INN OF COURT

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EVIDENCE – SELECT TOPICS

Invocation

Stephen A. Smith, Esq.

www.sasmithlegal.com

sasmith@sasmithlegal.com

Mentoring Moment

Michael Duncan, Esq.

Duncan Trial & Mediation

mikeduncan@mikeduncanlaw.com



“

*A wise man proportions his belief
to the evidence.*

David Hume

General Evidence Pointers

Hon. Russell Healey
Circuit Judge



General Evidence Pointer 1

Compile your evidence in a notebook

IMPORTANT - just because you send the notebook to the Court does not mean that it is received in evidence.

Each document or piece of evidence must be offered and admitted into evidence and marked by the Court



General Evidence Pointer 2

**Notice of Exhibits Received at
Trial and/or Exhibit Index.**

**KNOW YOUR JUDGE – review
the Judge's procedures and/or
ask at the pre-trial conference
how the Judge prefers these
matters addressed.**



General Evidence Pointer 3

Zoom – learn how to use technology features such as “share screen” – can make presentations more efficient and save everyone time.

Zoom in Court – How to Share Your Screen (YouTube Tutorial) – check it out:

<https://www.youtube.com/watch?v=FhQNqEkoX2A>.



General Evidence Pointers –Fee Affidavits

Fee affidavit alone is not sufficient where attorneys and costs are contested. See *Yontef v. Copelow*, 294 So. 3d 953 (Fla. 4th DCA 2020)

Detailed billing information must be included.

Fee affidavit and billing detail must be submitted as exhibit.



**General
Evidence
Pointers – Fla.
Stat. 90.801 &
90.802 –
Hearsay – Often
misunderstood**

Lawyer 1: “Objection. Hearsay.”

Lawver 2: “But Judge, it's not offered to prove the truth of the matter asserted.”

Judge: “Okay. What *IS* it offered to prove?”

Lawyer 2: <silence>

**** Additional pointer – remember the exceptions of Fla. Stat. 90.803 (24 total)**



**General
Evidence
Pointers –
Impeachment
using deposition**

Use DIRECT (not leading) question, using the same language you used when asking the question during deposition. Matching the "live" question format to the deposition question format, makes impeachment clear and prevents objection.

See handout for example.



General Evidence Pointers – Serial Impeachment

With multiple points of impeachment, make sure they are all relevant to case issues

Begin impeachment with the smallest point and work up to the most significant point.

By the time you get to the most significant point – after impeachment on smaller issues - the witness will lack credibility on larger issues.

Admission of Text Messages & Social Media into Evidence (Authentication)

Joseph Alvarez, Esq
jalvarez@zisserfamilylaw.com
www.zisserfamilylaw.com

**Hearsay Rule, -
Fla. Stat. 90.802**

**Hearsay
Exceptions –
Fla. Stat.
90.803(2) and
(18)**

Except as provided by Florida Statute, hearsay evidence is not admissible

Text Messages and Social Media Posts are inadmissible hearsay unless an exception applies. Common exceptions used in Family Law and Domestic Violence cases are an admission or excited utterance. *See Fla. Stat. 90.803(2) and (18)(a)*

**Requirement of
Authentication
or identification
– Fla. Stat.
90.901**

To admit a text message or social media post in question, the text or post must be authenticated. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

**Self
Authentication—
Fla. Stat. 90.902
-Outside
evidence of
authenticity as
a condition
precedent to
admissibility is
not required
under this rule.**

- While some evidence may be entered by self authentication, text messages and social media posts are not entered into evidence by self authenticating.
- Meaning, for text messages, authentication is completed by calling one of the parties to the stand to confirm that they sent and/or received the text message at issue and if the copy of the message is an accurate depiction of the original message.
- For social media posts, authentication may be completed by calling the witness who posted the particular social media post (website, photograph, comment, story, like, etc.).

What if a witness denies sending a text message you seek to introduce into evidence?

***Walker v. Harley-Anderson*, 301 So. 3d 299 (Fla. 4th DCA 2020)**

Low threshold to authenticate evidence for admission by appearance, content, substance, internal patterns, or other characteristics in connection with the circumstances

Testimony that a person received a text by itself is not sufficient to authenticate the identity of the person sending the message.

What if a witness denies sending a social media post you seek to introduce into evidence?

***Lamb v. State*, 246 So. 3d 400 (Fla. 4th DCA 2018)**

Just because an item appears online does not make it self-authenticating. You must establish a predicate to its authenticity or establish the truth of its content.

It may be *frivolous* to argue that a copy of an online post/document can be admitted without any predicate to establish the authenticity or to establish the truth of its content.

Rule of Completeness & Judicial Notice

Michael Duncan, Esq.

Duncan Trial & Mediation

mikeduncan@mikeduncanlaw.com



**Rule of
Completeness –
Fla. Stat.
90.108(1)**

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



**Rule of
Completeness –
Fla. Stat.
90.108(1)**

Text messages, emails, other writings.

Objective – avoid misleading the finder of fact. *Robinson v. C.S.X. Transp., Inc.*, 103 So. 3d 1006 (Fla. 5th DCA 2012); *Harden v. State*, 87 So. 3d 1243 (Fla. 4th DCA 2012).

IMPORTANT – Rule of Completeness does NOT warrant exclusion of evidence – it simply means a party may request that fairness dictates the admission of the complete statement (even if it includes hearsay). *See Harden*



**Judicial Notice –
Fla. Stat. 90.201
through 90.204**

Know the distinctions between 90.201 (what the court SHALL judicially notice), 90.202 (what the Court MAY judicially notice), and what the court shall take judicial notice of pursuant to 90.203.

Note provisions of 90.204, particularly 90.204(2), (3) and (4).



Judicial Notice – Fla. Stat. 90.201 through 90.204

IMPORTANT - documents from other legal actions are not admissible simply because they are part of a court file somewhere. See, e.g., *BDO Seidman, LLP v. Banco Espirito Santo Int'l*, 38 So. 3d 874 (Fla. 3d DCA 2010) (“Inadmissible evidence does not become admissible because it is included in a judicially noticed court file.”); *Dufour v. State*, 69 So. 3d 235 (Fla. 2011).

IMPORTANT - If a judge takes judicial notice, the materials taken notice of must be made a part of the record. *In re Adoption of Freeman*, 90 So. 2d 109 (Fla. 1956).



Judicial Notice – Fla. Stat. 90.201 through 90.204

SUGGESTION 1 – File Request for Judicial Notice in advance of hearing – preferably prior to pretrial conference.

SUGGESTION 2 – Attach all documents you wish judicially noticed to the request and include within marked exhibits.

SUGGESTION 3 – Prior to making request, review documents to assure do not include inadmissible material.

SUGGESTION 4 – After court takes judicial notice, formally move noticed materials into evidence.

Psychotherapist Privilege

Molly Lewis Sasso, Esq.

Sasso & Guerrero

www.familylawyerjax.com

molly@familylawyerjax.com



Psychotherapist Privilege – Fla. Stat. 90.503(2)

Patient is privileged

“[T]o refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis³ made, and advice given, by the psychotherapist in the course of that relationship.”



Psychotherapist Privilege – Fla. Stat. 90.503(2)

Privilege does not attach to “communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense.” Section 90.503(4)(c).

In other words, this exception is based on patient’s intentional decision about their claim or defense.



Psychotherapist Privilege – Fla. Stat. 90.503(2)

**Two additional exceptions not involving
patient's voluntary actions:**

**Section 90.503(4)(a) - exception for
communications relevant to a
proceeding to “compel hospitalization”**

**Section 90.503(4)(b) - exception for
communications “made in the course of
a court-ordered examination of the
mental or emotional condition of the
patient”**



Psychotherapist Privilege – Fla. Stat. 90.503(2)

Simply because timesharing or custody at issue does not mean that a parent has put their mental health (i.e., implicating Section 90.503(4)(c). *Leonard v. Leonard*, 673 So. 2d 97 (Fla. 1st DCA 1996).

Allegations of mental instability by one spouse, nor denials of those allegations by the other spouse, are enough to trigger Section 90.503(4)(c) and supplant the privilege. *See Leonard*.



Psychotherapist Privilege – Fla. Stat. 90.503(2)

Note that some courts have found that in the instance of “calamitous events” during custody disputes – such as suicide attempt by a parent, or a suicide threat and a voluntary commitment by a parent during a pending custody dispute - that the parent’s mental health becomes at issue and that the psychotherapist-patient privilege does not apply See *O’Neill v. O’Neill*, 823 So. 2d 837 (Fla. 5th DCA 2002); *In re D.K.*, 780 So. 2d 301 (Fla. 4th DCA 2001); *Miraglia v. Miraglia*, 462 So. 2d 507 (Fla. 4th DCA 1984); *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. 3d DCA 1977).

Toast



Amber Donley, Esq.

www.donleylawfirm.com

ardonley@donleylawfirm.com