

I. TRIAL OBJECTIVES

Introduction. To be successful in trial, you should know your Rules like the back of your hand. A trial attorney must be able to understand the Rules of Evidence and know how to use them. Failure to fully understand the Rules will place your client at a disadvantage and it helps your opponent while aggravating the judge in your case. The best way to learn the Rules is to read them, then apply what you have learned. This outline discusses some of the Evidence Rules, cases and trial objections that you should familiarize yourself with before starting trial.

A. Rulings on Evidence. Florida Statutes Section 90.104, DeLuca v. State, 384 So.2d 212 (Fla. 4th DCA 1980), rev. den. 389 So.2d 1108 (Failure to object at trial contemporaneously with admission of contested evidence is waiver of right to appellate review of issue).

B. Judicial Notice. Florida statutes Sections 90.201-90.207, McDaniels v. State, 388 So.2d 259 (Fla. 5th DCA 1980) (Judicial notice may be taken of matters that are commonly known, but may not be used to dispense with proof of essential facts that are not judicially cognizable); Carson v. Gibson, 595 So.2d 175 (Fla. 2nd DCA 1992) (Stipulation alone does not provide evidentiary basis for judicial notice of evidence not otherwise properly before the court).

C. Presumptions. Florida Statutes Sections 90.301-90.304, Insurance Co. of State of Pa. v. Guzman's Estate, 421 So.2d 597 (Fla. 4th DCA 1982) (Presumptions that affect the burden of producing evidence facilitate determination of issues and negate the necessity of proof absent contradictory evidence).

D. Relevant Evidence and Admissibility of Certain Types of Evidence. Florida Statutes Sections 90.401-90.410, Howard v. State, 616 So.2d 484 (Fla. 1st DCA 1993) (Relevancy determinations are within trial court's discretion and absent clear abuse of discretion such rulings will not be overturned).

E. Privileges. Florida Statutes Section 90.501-90.510, State v. Castellano, 460 So.2d 480 (Fla. 2d DCA 1984) (Privileges in Florida are no longer creatures of judicial decision; rather, they are statutorily limited).

F. Witnesses Who May Testify; and Exclusion of Witnesses. Florida Statutes Section 90.601-90.616, Baker v. State, 674 So.2d 199 (Fla. 4th DCA 1996) (Competency of witness to testify is determination left to sound discretion of trial court, and absent abuse of discretion, trial court's decision will not be disturbed).

G. Expert Witnesses. Florida Statutes Sections 90.701-90.706, State v. DuPont, 659 So.2d 405 (Fla. 2d DCA 1995)(Expert may base opinions on facts which are not necessarily admissible evidence, but expert witness may not be used as a conduit to introduce otherwise inadmissible hearsay).

H. Hearsay. Florida Statutes Sections 90.801-90.806, Peterka v. State, 640 So.2d 59 (Fla. 1994) (Hearsay rule prevents admission of out-of-court statements to prove fact through extrajudicial statements, but out-of-court statement may be admitted for a purpose other than proving truth of matter asserted if statement is relevant to prove a material fact and is not outweighed by any prejudice).

I. Authentication and Introduction of Documents and Photographs. Florida Statutes Sections 90.901-90.954, Mills v. Barker, 664 So.2d 1054 (Fla. 2d DCA 1995) (Authentication or indemnification of evidence is required as condition precedent to its

admissibility; evidence may be authenticated either by using extrinsic evidence or by showing that it meets requirements for self-authentication).

J. Public Records. Florida Statutes Section 90.955, Tuten v. Gazan, 18 Fla. 751 (Fla. 1882) (Certified copies of public records and papers lawfully kept in the office of the Secretary of State are admissible without evidence as to the whereabouts of the originals).

II. FLORIDA EVIDENTIARY TRIAL OBJECTIONS

A. **AMBIGUOUS**. Confusing question in that it is capable of being understood in more than one sense. Fla. Stat. §90.612(1).

B. **ARGUMENTATIVE**. (a) Counsel's question is really argument; or (b) excessive quibbling with witness. Fla. Stat. §90.612(1).

C. **ASKED AND ANSWERED**. Unfair to allow counsel to emphasize evidence through repetition. Fla. Stat. §90.612(1).

D. **ASSUMES A FACT NOT IN EVIDENCE**. Fact not testified to but contained in the question. Fla. Stat. §90.104(2); 90.612(a).

E. **AUTHENTICATION LACKING**. Proof must be offered that the exhibit is in fact what it is claimed to be. Fla. Stat. §90.901.

F. **BEST EVIDENCE RULE**. If rule applies, original document must be offered or its absence accounted for. If contents of document are to be proved, rule usually applies. Fla. Stat. §90.952.

G. **BEYOND SCOPE** (of direct, cross direct, etc.) Question unrelated to preceding examination by opposing counsel.

H. COMPOUND. More than one question contained in the question by counsel. Fla. Stat. §90.612(1).

I. CONCLUSION. Except for an expert, witness must testify to facts within personal knowledge. Fla. Stat. §90.604; §90.701.

J. CONFUSING AND UNINTELLIGIBLE. Unfamiliar words disjointed phrases or questions confuse facts or evidence. Fla. Stat. §90.612(1).

K. COUNSEL TESTIFYING. Counsel is making a statement instead of asking a question. Fla. Stat. §90.605.

L. CUMULATIVE. Repeated presentation of the same evidence by exhibits or by more witnesses. Fla. Stat. §90.612(1) §90.403.

M. FOUNDATION LACKING. No proper foundation for testimony or exhibit. Fla. Stat. §90.604; §90.612(1).

N. IMPEACHMENT BY IMPROPER MEANS. Methods of impeachment are limited and specific. Fla. Stat. §90.608.

O. IMPROPER CHARACTERIZATION. Counsel's question or witness's response has characterized a person or conduct with unwarranted argumentative, impertinent or conclusionary language. Fla. Stat. §90.404-405; §90.612(1).

P. IRRELEVANT. Would not tend to prove or disprove a material fact. Motion to strike may be appropriate. Fla. Stat. §90.401.

Q. LEADING. Form of question tends to suggest answer. Fla. Stat. §90.612(3).

R. MISQUOTING WITNESS. Counsel's question misstates prior testimony of witness. Fla. Stat. §90.104(2).

S. NARRATIVE. Question is broad or covers such a large time period would allow witness to ramble and preserve hearsay or irrelevant evidence. Fla. Stat. §90.104(2); §90.612(1).

T. OPINION. Lay opinion which beyond the scope permitted by Fla. Stat. §90.701; personal knowledge lacking of expert witness has not been qualified such. Fla. Stat. §90.604; §90.701-702.

U. PREJUDICE OUTWEIGHED PROBATIVE VALUE. The probative value of the evidence is far outweighed by the prejudicial effect of the evidence. Must apply to exhibits as well as testimony. Fla. Stat. §90.403.

V. PRIVILEGED. Answer would violate valid privilege (lawyer-client, husband-wife, clergyman, etc.) Fla. Stat. §90.502-506.

W. SPECULATION AND CONJECTURE. Question allows witness who lacks personal knowledge to guess. Fla. Stat. §90.604, §90.701.

X. UNRESPONSIVE. Answer includes testimony not called for by the question. Especially applicable to voluntary response by hostile witness. Fla. Stat. §90.612(1); §90.104(2).

Y. HEARSAY. The following section Y 1-32 summarizes the relevant portions of the NITA Florida Evidence Code With Objections, 4th Edition handbook, by Davenport and Hirsch.

1. HEARSAY: GENERALLY

Response (Rule 90.801):

- The statement is not being offered for the truth of the matter asserted.

Instead, it is offered to show the statement was made. The making of the statement in question is relevant to show:

- The effect on a person who heard the statement, or
- A prior inconsistent statement, or
- An operative legal fact or a verbal act, or
- The knowledge of the declarant.

2. HEARSAY: NON-HEARSAY PRIOR STATEMENTS

Responses (Rule 90.801(2)(a)-(c)):

- The statement is inconsistent with the testifying witness's trial testimony, and was given under oath at an earlier proceeding or at a deposition, or

- The statement is consistent with the testifying witness's trial testimony, offered to rebut an express or implied charge of recent fabrication, or improper influence or motive, or

- The statement by the testifying witness is one of identification of a person based on perception.

3. HEARSAY WITHIN HEARSAY

Response (Rule 90.802, 803, 804, 805):

- Both statements are admissible because each either comes within a hearsay exception or is non-hearsay.

4. HEARSAY EXCEPTION: ABSENCE OF ENTRY IN BUSINESS RECORDS

Response (Rule 90.803(6)-(7)):

- A business record exists, pursuant to Rule 90.803(6), and
- The matter not recorded is of a kind for which a record would regularly be made and preserved, and

- The source is trustworthy.

5. HEARSAY EXCEPTION: ABSENCE OF PUBLIC RECORDS OR ENTRY

Response (Rule 90.803(10)):

- A public agency or office regularly makes and preserves records of a particular kind of matter, and
- The document is self-certifying pursuant to Rule 90.902, and
- A diligent but unavailing search of such records failed to disclose a record, report, statement, data compilation, or entry, that no such entry exists.

6. HEARSAY EXCEPTION: ADMISSIONS

Response (Rule 90.803(18)):

- The statement was made by the party opponent, or
- The statement was made by a person and was adopted by the party opponent as the party's own, and thus, is a vicarious admission of the party opponent, or
- The statement was made by an agent authorized to speak on behalf of a party opponent, and thus, is a vicarious admission of the party opponent, or
- The statement was made by an agent or servant of the party opponent concerning a matter within the scope of the declarant's agency or employment, and was made during the existence of the declarant's agency or employment, and thus, is a vicarious admission of a party opponent, or
- The statement was made by a co-conspirator of the party opponent during the course of the conspiracy and in furtherance of the conspiracy, and thus, is a vicarious admission of the party opponent.

7. HEARSAY EXCEPTION: EXCITED UTTERANCE

Responses (Rule 90.803(2)):

- The statement is admissible as an excited utterance pursuant to Rule 90.803(2).
- I have shown through the testimony of (insert name of witness) that the statement relates to a startling event or condition, and was made while the declarant was under the stress or excitement caused by the event or condition.

8. HEARSAY EXCEPTION: FAMILY RECORDS

Responses (Rule 90.803(13)):

- This statement is admissible as a family record pursuant to Rule 90.803(13).
- I have shown through the testimony of (insert name of witness) that this is a statement of fact concerning personal or family history, contained in a family Bible, genealogy, or the like.

9. HEARSAY EXCEPTION: FORMER TESTIMONY

Responses (Rule 90.803(22)):

- The statement is admissible as former testimony pursuant to Rule 90.804(2)(a).
- I have shown through the testimony of (insert name of witness) that:
 - The declarant is unavailable pursuant to Rule 90.804(1), and the statement is testimony given at another hearing of the same or different proceeding, or in a deposition in the course of the same or a different proceeding, and
 - The party against whom it is offered had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

10. HEARSAY EXCEPTION: JUDGMENT OF PREVIOUS CONVICTION

Response (Rule 90.610):

- This statement is evidence of a final judgment entered after a trial or upon a guilty plea adjudging a person guilty of a crime punishable by either death or imprisonment for more than one year or a crime involving dishonesty or a false statement regardless of the punishment.

11. HEARSAY EXCEPTION: MARKET REPORTS AND COMMERCIAL PUBLICATIONS

Response (Rule 90.803(17)):

- This statement is admissible as a market report or commercial publication pursuant to Rule 90.803(17). I have shown the document is a market quotation, tabulation, list, directory, or other published compilation, which is generally used and relied upon by the public or persons in particular occupations.

12. HEARSAY EXCEPTION: MARRIAGE, BAPTISMAL, And SIMILAR CERTIFICATES

Response (Rule 90.883(12)):

- This statement is admissible as a marriage, baptismal, or similar certificate pursuant to Rule 90.803(12). I have shown through the testimony of (insert name of witness) that:

- This is a statement of fact contained in a certificate which shows the maker performed a marriage or other similar ceremony, and

- Was made by a clergyman, public official, or other person authorized by law or the practices of a religious organization to perform the act certified, and

○ Which purports to be issued at the time of the act or within a reasonable time thereafter.

13. HEARSAY EXCEPTION: PUBLIC RECORDS and REPORTS

Response (Rule 90.803(8)):

- The document is a record, report, statement, or data compilation, of a public office or agency setting forth the activities of the office or agency, or
- The records (etc.) are of a public office or agency setting forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or
- The document is an affidavit containing the results of a test of the defendant's blood and/or breath to determine its alcohol content.

14. HEARSAY EXCEPTION: RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY

Response (Rule 90.803(14)):

- The statement is admissible as a record of a document affecting an interest in property pursuant to Rule 90.803(14). I have shown through the testimony of (insert name of witness) that this is a record of a public office, and an applicable statute authorizes the recording of documents of that kind in such office.

15. HEARSAY EXCEPTION: RECORDED RECOLLECTION

Response (Rule 90.803(5)):

- This statement is admissible as recorded recollection pursuant to Rule 90.803(5). I have shown through the testimony of (insert name of witness) that it is a memorandum of record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable him or her to testify fully and accurately,

and was made or adopted by the witness when the matter was fresh in the witness's memory so as to reflect that knowledge correctly.

16. HEARSAY EXCEPTION: RECORDS OF REGULARLY CONDUCTED ACTIVITY (Business Records)

Responses (Rule 90.803(6)):

- Memorandum, report, record or data compilation,
- Recording acts, events, conditions, opinions, or diagnoses,
- Made at or near the time the acts or events took place,
- By or from information transmitted by one with personal knowledge of the event or act,
- Where such record is kept in the course of regularly conducted business activities, and
- It was the regular practice of the business to make such a record.

For computer-generated records, repeat the above steps and add:

- The computer and the program used are generally accepted in the field,
- The computer was in good working order at relevant times, and
- The computer operator possessed the knowledge and training to correctly operate the computer.

17. HEARSAY EXCEPTION: RECORDS OF RELIGIOUS ORGANIZATIONS

Response (Rule 90.803(11)):

- This statement is admissible as a record of a religious organization pursuant to Rule 90.803(11). I have shown through the testimony of (insert name of witness) that the statement is one of personal or family history, and is contained in a regularly kept record of a religious organization.

18. HEARSAY EXCEPTION: RECORDS OF VITAL STATISTICS

Response (Rule 90.803(9)):

- This out-of-court statement is admissible pursuant to Rule 90.803(9) as a record of a vital statistic in that it is a record regarding a vital statistic which records a report made to a public official required by law to keep such record.

19. HEARSAY EXCEPTION: REPUTATION AS TO CHARACTER

Response (Rule 90.803(21)):

- This statement is relevant because it is admissible as reputation as to character pursuant to Rule 90.803(21). I have shown through the testimony of (insert name of witness) that this is a statement of reputation of a person's character within the witness's community.

20. HEARSAY EXCEPTION: REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY

Response (Rule 90.803(20)):

- This statement is admissible as a statement of reputation concerning boundaries or general history pursuant to Rule 90.803(20). I have shown through the testimony of (insert name of witness) that:

- This statement is a statement of reputation concerning boundaries in a community,

- Arising before the controversy, as to boundaries of, or customs affecting, lands in the community, or

- As to events of general history important to the community or state of nation in which located.

21. HEARSAY EXCEPTION: REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY

Response (Rule 90.803(19)):

- The statement is admissible as a statement of reputation concerning personal or family history pursuant to Rule 90.803(19). I have shown through the testimony of (insert name of witness) that this is a statement of reputation among family members of one's family, (or among one's associates, or in the community) concerning a person's adoption, birth, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history.

22. HEARSAY EXCEPTION: REQUIREMENT OF UNAVAILABILITY FOR RULE 90.804 HEARSAY EXCEPTIONS

Response (Rule 90.804(1)-(2)):

- The out-of-court statement meets (insert the appropriate Rule 90.804(1) description).
- The declarant is unavailable because declarant:
 - Is exempted from testifying concerning the subject of the statement by ruling from the court on the ground of privilege, or
 - Persists in refusing to testify concerning the subject of the statement despite a court order to do so, or
 - Testifies to a lack of memory on the subject of the statement, or
 - Is unavailable to testify at the hearing because of death or illness, or
 - Is absent from the hearing and I have been unable to procure his or her attendance through process or other means.

23. HEARSAY EXCEPTION: SPONTANEOUS STATEMENT

Response (Rule 90.803(1)):

- This statement is admissible as a spontaneous statement pursuant to Rule 90.803(1). I have shown through the testimony of (insert name of witness) that the statement describes or explains an event or condition, and was made while the declarant was perceiving the event or condition, or immediately thereafter.

24. HEARSAY EXCEPTION: STATEMENT AGAINST INTEREST

Response (Rule 90.804(2)(c)):

- This statement is admissible as a statement against interest pursuant to Rule 90.804(2)(c). I have shown through the testimony of (insert name of witness) that the statement was made by a declarant who is now unavailable pursuant to Rule 90.804(1), and

- Was at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or

- So far tended to subject the declarant to criminal or civil liability,

or

- To render invalid a claim by the declarant against another, and

- That a reasonable person in the declarant's position would not have made this statement unless he or she believed it to be true, and

- (If the statement tends to expose the declarant to criminal liability and is offered to exculpate the accused) corroborating circumstances clearly indicate the trustworthiness of the statement.

25. HEARSAY EXCEPTION: STATEMENT IN ANCIENT DOCUMENTS

Response (Rule 90.803(16)):

- This statement is admissible as a statement contained in an ancient document pursuant to Rule 90.803(16). I have shown through the testimony of (insert name of witness) that the statement is contained in a document in existence twenty years or more, the authenticity of which is established.

26. HEARSAY EXCEPTION: STATEMENT OF CHILD VICTIM

Response (Rule 90.803(23)):

- This statement is admissible as a statement of a child victim under Rule 90.803 (23). The child is 11 years old or younger and the statement describes child abuse or neglect. Notice has been given to the defendant of at least ten (10) days and the court has held a hearing outside the jury's presence on the admissibility of the statement.

27. HEARSAY EXCEPTION: STATEMENT IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY

Response (Rule 90.803(15)):

- This statement is admissible pursuant to Rule 90.803(15) as a statement in a document affecting an interest in property. I have shown through the testimony of (insert name of witness) that:

- The statement is contained in a document purporting to establish or affect an interest in property.

- That the matter stated was relevant to the purpose of the document, and

- That dealings with the property since the document was made have not been inconsistent with the truth of the statement or the purpose of the document.

28. HEARSAY EXCEPTION: STATEMENT OF PERSONAL OR FAMILY HISTORY

Response (Rule 90.804(2)(d)):

- The statement is admissible as a statement of personal or family history pursuant to Rule 90.804(2)(d). I have shown through the testimony of (insert name of witness) that:

- The declarant is now unavailable pursuant to Rule 90.804(1), and the statement concerns the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated.

29. HEARSAY EXCEPTION: STATEMENT FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

Response (Rule 90.803(4)):

- This statement is admissible as a statement for purposes of medical diagnosis or treatment pursuant to Rule 90.803(4). I have shown through the testimony of (insert name of witness) that the statement was made:

- For purposes of medical diagnosis or treatment, and was made for describing medical history, or

- For describing past or present symptoms, pain, or sensations, or

- For describing the inception or general character of the cause or external source thereof and was reasonably pertinent to diagnosis or treatment.

30. HEARSAY EXCEPTION: STATEMENT UNDER BELIEF OF IMPENDING DEATH

Response (Rule 90.804(2)(b)):

- The statement is one made under belief of impending death pursuant to Rule 90.804(2)(b). I have shown through the testimony of (insert name of witness) that the statement:

- Was made by a declarant who is now unavailable pursuant to Rule 90.804(1), and

- Is offered in a criminal or civil action or proceeding, and

- Was made by a declarant while believing that his or her death was imminent, and

- Concerns the cause or circumstances of what the declarant believed to be his or her impending death.

31. HEARSAY EXCEPTION: THEN-EXISTING MENTAL OR EMOTIONAL CONDITION

Response (Rule 90.803(3)):

- This statement is admissible as a statement of a then-existing mental or emotional condition pursuant to Rule 90.803(3). I have shown through the testimony of (insert name of witness) that the statement:

- Is of the declarant's then-existing state of mind, emotions, or sensation, and

- It is offered to prove the declarant's state of mind or emotion which is at issue, or

- It is offered to prove or explain acts of subsequent conduct of the declarant, and

- It does not include a statement of after-the-fact memory or belief offered to prove the fact remembered or believed, or
- Even though it is a statement of memory or belief, it relates to the execution, revocation, identification, or terms of declarant's will.

32. HEARSAY EXCEPTION: THEN-EXISTING PHYSICAL CONDITION

Response (Rule 90.803(3)):

- This statement is admissible as a statement of a then-existing physical condition pursuant to Rule 90.803(3). I have shown through the testimony of (insert name of witness) that the statement:

- Is of the declarant's then-existing physical condition, and
- It is offered to prove the declarant's physical sensation which his at issue, or
- It is offered to prove or explain acts of subsequent conduct of the declarant, and
- It does not include a statement of after-the-fact memory or belief offered to prove the fact remembered or believed, or
- Even though it is a statement of memory or belief, it relates to the execution, revocation, identification, or terms of declarant's will.

III. IMPEACHMENT OF A WITNESS

One of the most effective ways of impeaching a witness at trial is through the use of depositions and inconsistent statements. Unfortunately, many trial attorneys do not know how to properly impeach using depositions and inconsistent statements. This results in embarrassing situations for those attorneys. This section describes the proper

method to impeach witnesses on the stand by the use of depositions and inconsistent statements.

A. Depositions

When a witness makes a statement in trial that is inconsistent with his or her deposition testimony, you should first highlight the question that was answered differently at trial. Make sure that the trial testimony being impeached is a direct inconsistent statement with the depositions given before trial. You should then ask the following questions:

1. Do you remember having had your deposition taken on (state the date)?
2. Do you remember that a court reporter was present at your deposition?
3. Do you remember having been sworn in to tell the truth?
4. Did you tell the truth on that date?
5. (if applicable) Do you remember having your attorney present at your deposition?

After you have set the foundation for the impeachment, then you should ask the witness the following question: “Do you remember having been asked the following question and your giving the following answer.” At this point, you should read the question previously asked and the answer given by the witness in the deposition.

B. Use Of Inconsistent Statements In Documents

A similar method may be used to impeach a person using an inconsistent statement in a document such as an affidavit, sworn statement, letter, etc. The trial

attorney should first highlight the inconsistent trial testimony that will be impeached. Next, the lawyer should identify and authenticate the document that will show the inconsistent statement given by the same witness. In order to establish the foundation necessary to impeach an individual with the use of an inconsistent statement, the witness should be asked the following questions:

1. Do you remember having given a statement to (person) regarding how the accident occurred?
2. Did you give that statement freely?
3. Who was present when you gave your statement?
4. When was the statement given?

The witness should then be shown the exhibit and asked the following question:

I show you what has been marked as Plaintiff's Exhibit "A" for identification. Is this a copy of your sworn statement?

Finally, read the relevant portion of the statement that directly contradicts the trial testimony of the witness.

Impeachment through the use of depositions or documented inconsistent statements should be accomplished in an organized fashion and should be performed smoothly and directly. The relevant pages and sections of the deposition should be marked and highlighted beforehand so as not to fumble through pages, lose momentum, or lose control of the witness.

There is nothing more impressive than to see an attorney properly impeach a witness through the use of inconsistent statements in documents or in a deposition. It is a

very simple procedure to learn and, once mastered, will prove to be an effective means of cross-examining even the most “dangerous” witness at trial.

IV. IMPEACHMENT WITH AUTHORITATIVE TREATISES

An effective way of cross-examining expert witnesses is through the use of an authoritative treatise. This method of cross-examination is specifically authorized by Fla. Stat. Sect. 90.706 which states:

Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness if the expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative, or, notwithstanding nonrecognition by the expert witness, if the trial court finds the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative and relevant to the subject matter.

The first step towards using a treatise for cross-examination is to establish the foundation for its authority. This is accomplished by either having the expert witness, another expert in the case, or the Court recognize the author of the treatise, periodical, book, dissertation, pamphlet, or other writing in question to be authoritative. Myron v. Doctors General Hospital, Ltd., 23 Fl. L.W. D105, D109 (Fla. 4th DCA 1997). Factors that the Court may consider in making its determination include the sworn statements of the other experts in the case that the materials are authoritative. Kirkpatrick v. Wolford, 23 Fl. L.W. D166, D167 (Fla. 5th DCA 1997); Chesterton v. Fisher, 655 So.2d 170 (Fla. 3d DCA 1995). You need not prove by a preponderance of the evidence that the literature is indeed authoritative. Kirkpatrick, 23 Fl. L.W. at 167. When the Court finds competent evidence that the materials are authoritative it should permit their use. Id.

In preparing for trial, you should read all articles, books, and journals that are related to your opposing expert's field. Effective research will likely produce published positions from authoritative sources that are contrary to the opposing expert's position. Also, making use of your own expert as a valuable resource in obtaining materials will ease the preparation necessary for the cross-examination of your opposing expert.

V. DOCUMENTARY EVIDENCE

Before documentary evidence may be introduced, certain foundations must be established. You may have the best "proof" in the world, but if it is not admitted evidence, it might as well not exist at all.

Regardless of the type of evidence, whether records, bills, photographs, letters, diagrams, or charts, you must lay the proper foundation before the documents may be introduced as evidence. This article offers some suggestions on how to establish the proper foundation for the admission of different types of evidence.

A. Business Records:

1. You should ask the following questions in order to lay the foundation for business records to be admitted into evidence and considered an exception to the hearsay rule:

- a. Are you familiar with Exhibit "A" (business records) for identification?
- b. Is it your company's business practice to prepare these types of records?
- c. Were these records prepared in the ordinary scope of the business of your company?

- d. Were they prepared by someone with knowledge?
- e. Were they prepared at or about the time the matters reflected in the records occurred?
- f. Were these documents stored after they were prepared?
- g. Where were these documents retrieved from?
- h. Is it a regular part of your business to keep and maintain records of this type?
- i. Are these documents of the type that would be kept under your custody or control?
- j. Move the documents into evidence.

2. See Fla. R. Evid. §90.803(6).

B. Tape Recordings:

- 1. You should ask the following questions in order to lay the foundation for tape recordings to be admitted into evidence:
 - a. Have you had the opportunity to hear the voice of Mr. X before?
 - b. How many times have you heard his voice?
 - c. Tell us how you are familiar with Mr. X's voice?
 - d. Have you heard the recording marked as Exhibit "B" for identification?
 - e. Do you recognize the voice?
 - f. To whom does the voice belong?
 - g. Move the recording into evidence.

C. Photographs:

1. You should ask the following questions in order to lay the foundation for photographs to be admitted into evidence:

a. I am showing you what has been marked as Exhibit “C” for identification. Do you recognize what is shown in this photograph?

b. Are you familiar with the scene (person, product, etc.) portrayed in this photograph?

c. How are you familiar with the scene portrayed in the photograph?

d. Does the scene portrayed in the photograph fairly and accurately represent the scene as you remember it on (date in question)?

e. Move the photograph into evidence.

D. Authenticating a Letter:

1. You should ask the following questions in order to authenticate a letter:

a. Are you familiar with the signature of Mr. Smith (person who signed the letter)?

b. How are you familiar with Mr. Smith’s signature?

c. Show the witness what has been marked Exhibit “D” for identification.

d. Do you recognize the signature at the bottom of this letter?

e. Whose signature is this?

f. Move the letter into evidence.

E. Diagrams:

1. You should ask the following questions in order to lay the foundation for diagrams to be admitted into evidence:

a. I am showing you what has been marked as Exhibit “E” for identification. Are you familiar with the area located at 16th Street and 12th Avenue in Dade County, Florida?

b. How are you familiar with this area?

c. Based on your familiarity with the area, can you tell us whether the scene depicted in this diagram fairly and accurately represents the area as you recall it on the date in question?

d. Move the diagram into evidence.

F. Refreshing Recollection:

1. To refresh an individual’s memory on a particular matter, you should first establish that the witness does not remember that matter. Then ask the following questions?

a. Did you at some time remember this?

b. Did you at any time prepare a document setting out what happened?

c. Would a review of this document assist you in remembering the matters that we are concerned about today?

d. I am handing you what has been marked Exhibit “F” for identification.

e. Please review it and tell me if it helps you to remember.

- f. Does that document refresh your recollection?
- g. Do you now have an independent recollection of the facts?
- h. Tell us what happened.

G. Authenticating Handwriting in a Document:

1. You should ask the following questions in order to authenticate a handwritten document:

- a. Are you familiar with the handwriting of Mr. Smith?
- b. How are you familiar with Mr. Smith's handwriting?
- c. I show you what has been marked Exhibit "G" for identification.
- d. Do you recognize the handwriting in this document?
- e. To whom does it belong?
- f. Move exhibit into evidence.

2. If you are "stuck" in attempting to introduce documentary evidence at trial and do not remember how to do it, just recall the basic steps necessary to establish an evidentiary foundation:

- a. Show that the witness is familiar with the document that you are attempting to admit into evidence.
- b. Have the witness authenticate the document.
- c. Establish that the document is what it purports to be.
- d. Demonstrate the document's relevance to the case.

e. After you have accomplished the above steps, chances are that you have laid the proper foundation for the exhibit to be admitted into evidence. You should then boldly offer it as your next exhibit in the case.

Many experienced attorneys often stumble at trial when attempting to admit documents into evidence. It is important to review the necessary foundation before starting trial so that your presentation will go smoothly. You may consider putting a copy of this article in your notebook to refresh your recollection as needed.

VI. CONCLUSION

To be truly in control in trial, you must learn to master the Rules of Evidence. Once you learn how to effectively use the Rules of Evidence, you will be empowered in the courtroom and will be able to enjoy the confidence of knowing that you are able to take on any evidentiary challenge.