Unedited transcript of

Evidence Admissibility in Family Law Cases: Marital Privilege, Spousal Disqualification, Private Communications & Patient Privilege

from **Evidence Admissibility in Family Law Cases**

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Speaker(s)

Michael P. Judge, Esq., Casner & Edwards LLP, Boston
Hon. Kevin R. Connelly, Probate and Family Court, Commonwealth of Massachusetts, Canton
Julie K. Murphy, Esq., Rico, Murphy, Diamond & Bean LLP, Natick

>>: Well good afternoon, everyone. I'd like to welcome all of you to MCLE's seminar Evidence Admissibility in Family Law Cases. My name is Bruce Richard, I'm a program attorney here at MCLE. I want to thank our faculty panelists, all of whom are volunteers, for their time and commitment to this program. You'll be receiving an email with a link to an evaluation form for this program. We encourage you to take a few moments to complete it. Share what you're learning at today's program via Twitter. Tweet us @mclenewengland. You can also interact with us on Facebook, YouTube and LinkedIn, and we encourage attendees to ask questions throughout the program. It's now my distinct pleasure to introduce the chair for today's program. Julie Murphy is a partner of Rico, Murphy, Diamond & Bean in Natick. Her practice includes all areas of family law, including divorce, paternity, custody and support issues. She also drafts and negotiates prenuptial and postnuptial agreements. Ms. Murphy is also a certified mediator and certified parenting coordinator. Ms. Murphy is trained as an ARC attorney. She's also a member of the Massachusetts Bar Association, Massachusetts Council on Family Mediation, and the Massachusetts Association of Guardians ad Litem. And with that, Julie, I'll turn the program over to you.

>>: Thank you very much, Bruce. I want to thank everyone on my panel for being here today, for taking the time not just to be here today, but to work with me on putting this program together and the meetings that we had, the Zoom meetings that we had, I really appreciate that. So I'm going to introduce the panel that we have today. Today, we have with us the Honorable Jennifer Allen. She is an associate justice of the Probate and Family Court. She sits in the northern division of Middlesex County at the newly opened Lowell Justice Center. Prior to being appointed to the bench, Judge Allen was the founding partner of Catanzaro and Allen and practiced domestic relations in Middlesex, Worcester, Norfolk and Suffolk counties for 22 years. She's a graduate of Brandeis University and Boston College Law School. Thank you for being here, Judge Allen. Today we also have Tiffany Bentley. She is a partner in the private client group of Burns & Levinson in Boston. Her practice includes probate and trust litigation, trusts and estates, divorce, and family law. She is a member of the American Association for Certified Financial Litigators, Greater Boston Fiduciary Law American Inn of Court, and the Massachusetts, Boston and Worcester bar associations. Ms. Bentley is a graduate of the University of Colorado Law School and Curry College. We also have joining us today the Honorable Kevin Connolly, who is a probate and family court justice for the Plymouth Probate and Family Court. He was appointed to the court by former Governor Deval Patrick on May 8, 2013, and was confirmed by the Governor's Council on June 5, 2013. Judge Connolly sat in Middlesex County prior to moving to the Plymouth County Court in 2017. He received his B.A. from Boston College in 1989 and his J.D. from New England School of Law in 1993. He's admitted to practice in Massachusetts, the U. S. Court of Appeals for the First Circuit and the U.S. District Court District of Massachusetts. Judge Connolly is a member of the Boston, Massachusetts and American bar associations. He was an adjunct professor of the Franklin Institute from 1998 to 1999. Also joining us today is Michael Mick Judge, who's a partner at Casner & Edwards in Boston. His practice is concentrated in all aspects of the family field of law. He is a member of the Greater Boston Family Law Inn of Court, the American Academy of Certified Financial Litigators, and the American, Massachusetts, Boston, Norfolk County and Worcester County bar associations. Mick is also a coordinator of the ARC program, the Attorneys Representing Children, in Worcester County. He's a former member of the

Massachusetts Bar Association Family Law Section Council and was a panelist at the 25th annual Massachusetts Bar Association Family Law Conference. Mick is a graduate of New England Law in Boston and University of New Hampshire. We also have joining us today Jennifer Roman, who is stepping in for Amy Vaughn, who was going to be here. Jennifer is a partner at Tracey, Roman & Ramos, PC, where she specializes in family law. Her family law practice includes all aspects of family law, including divorce, complex asset division, custody disputes, prenuptial and postnuptial agreements, and restraining orders. Jennifer is a family law litigator as well as a certified family law mediator and conciliator. She entered private practice after starting her career as an AD in Middlesex County, where she prosecuted major felony cases in both the district and superior courts. She has successfully argued a case of first impression before the SJC and successfully argued a case before the appeals court. She's often seen as an on-camera legal analyst for WBZ, CBS Boston, where she provides in-depth legal commentary on cases of national and local interest. Thank you all for being here today. I'm really looking forward to this. We're going to start with a presentation from Mick Judge, who is covering several topics for us today. And what I would love is if, as we're going through this, as everybody's going through their PowerPoints, I would love for the judges to just jump in, comment, critique, offer stories, you don't have to wait until the end, just feel free to interrupt. I think a dialogue is always much more interesting to the viewers than just us reading from our PowerPoints. So thank you, Mick.

>>: Thanks, Julie. Good afternoon, everyone. My name is Mick Judge. Unlike last year's presentation on the evidence admissibility in family law cases, we're going to start with more of a micro view compared to the macro view which we started off with Jennifer Roman last year. Jennifer's going to come in at the end, talked about evidence, relevance, hearsay, etc. I have some pretty discrete topics that I'm going to speak about today, the first topic of which is the marital privilege versus spousal disqualification. Marital privilege is something a lot of us know about, that we learn about in law school, and it's typically relevant in criminal cases. There's certainly a distinction in our area of practice, divorce field, where we typically run into more the spousal disqualification, and there's a lot of differences between the two, though they're can be sometimes pretty

minor, but they're nevertheless very important for all of us to know if we're trying the case in the probate and family court. As you can see on the screen, all of us know what the marital privilege is, it's a spouse cannot be compelled to testify in a trial of an indictment, a complaint or other criminal proceeding brought against the other spouse. The spousal disqualification is actually more broad and more protective. It says that in any proceeding, civil or criminal, a witness cannot - shall not testify as to private conversations with a spouse occurring during their marriage. This is a complete bar, as you can see in the Gallagher v. Goldstein case that's on the screen. Disqualification, unlike the marital privilege, completely bars either spouse from testifying to private conversations with the other. Even when both spouses say we want this communication to be revealed, it still can't. And we will - getting to in a moment what private conversations are, because that's really usually the linchpin as to whether or not a conversation can come in or not, especially in the probate and family court, where one party say well, maybe our minor child or somebody else overheard the conversation. The linchpin is really, what is the definition of private? As it states at the bottom from Gallagher Goldstein is that the contents of the private conversation are absolutely excluded. But the statute is the particular distinction, if the statute does not bar evidence as to the fact that a conversation took place. So if you're trying the case and you want to get in some information as to what your client did or did not do as a result of a conversation, you're not able to get in the specifics of the conversation, but as you're trying the case, you are able to establish that a conversation did happen. You don't get into the substance of the communication, but you can try to get in what your client did as a result of that conversation, which yes, made for an inference as to what was discussed during that time, but you're not disclosing the private details of that conversation, which is sometimes the private communication isn't actually what you're looking to get into evidence. You're looking to describe for the court what your client did as a result of that communication or what their spouse did as a result of that communication, which ultimately is what you're hoping to let the trier of fact know. So now we get into what is private? What would a court deem to be that private communication? So the definition private is a question of preliminary fact for the trial judge, there's no question about that. The marital disqualification does not bar a third person from coming in to testify as to what they heard of that private

conversation, because again, if somebody else overheard it, the judge, the trier of fact can say well, it wasn't a private conversation if there was a third party there, and what did that third party hear? And of course the judge at that time of the trial is also assessing the credibility of that witness, because I'm sure that both judges who are with us have encountered situations where somebody is alleging that they were part of a conversation, and you have, let's say, a husband or a wife testifying that their friend was there, and then you have the other spouse testifying that they absolutely never mind didn't overhear the conversation, maybe they weren't even in the same home, in the same yard, what have you. But that's where it comes down to the judge as the trier of fact to assess the credibility of this third person who's coming in and testifying that the conversation wasn't private. This probably becomes a trickier issue, and I think we'd all be happy to hear from the judges on this issue, is when there's children present. According to Freeman v. Freeman, almost - it's a 100-year-old case - it's for the trial judge to determine whether the conversation was overheard by a child, the children, and whether the children were of sufficient intelligence at the time to pay attention to and understand what was being said, and I'm sure that the judges would say that this probably has something to do with age and maturity of the children. So if either of the judges wanted to sort of enlighten us as to how you would handle that depending upon the age of the child etc.?

>>: Yeah, so it goes to the adage if it ain't broke, don't break it. So the Freeman case goes back to 1921, but I think it's a reasonable standard to apply when you're dealing with whether a child is of that sufficient level of intelligence and maturity to grasp what was being stated between the parties so as to kind of vitiate that disqualification. Like so many other things, it's a fact-specific analysis. Where was the child present? Were they behind - were they know, were they separated by a closed door? What else was going on in the house at the time or in the location at the particular time and if - and that obviously presupposes that the child is of sufficient maturity and age. Is there any type of limitation that the child has that may not be applicable to another child? So it's a fact-specific analysis, but I think it's a reasonable standard just to make sure that that disqualification is preserved to the greatest degree possible and it can't just be undermined loosely.

>>: So just to give some sort of application or some context for how it sort of happens in trial is that if somebody is about to testify regarding a conversation and then there's an objection and it sustains and - you know, in the trial, if you're just then sort of looking at each other and then the judge says, counsel, why don't you give me some more foundation? These are the types of things that we're looking for. So it's not for the judge to say was anybody there or, you know, we're not there to - you know, so when we say we need more, why don't you give me some more? Why don't you lay some more foundation? - these are the things that we're looking for. Were there other people there? And if so, you know, is it - you have to give us the facts and lay the foundation for us to then - for you to survive a further objection on whether or not it was - if the conversation should come in.

>>: And I'd also add that, you know, there have been many occasions - I'm sure Judge Allen has seen this as well, as have counsel - that there's testimony that's offered that is subject to the marital disqualification but no objection is raised. And so I don't find it's my place unless things are getting really out of control and that there's a wholesale discussion about a conversation between a husband and wife that otherwise should be disqualified. But if that just - if that objection is not raised, then that testimony is in as evidence, and it can't be - we can't play catch up without objection after the facts.

>>: If I could ask just one follow-up question. How would you handle a situation where you have one party testifying that this communication between spouses was not disqualified because they are aware that a child heard it in the other room? How do you - how do we as advocates get into evidence, evidence that a child actually heard something without calling that child as a witness, which I'm sure the court wouldn't want to be having children paraded in as witnesses? How do we get in to evidence that one party, a husband or wife, was aware that the child overheard the conversation?

>>: If it comes down to an assessment of credibility 'cause I suspect that in the context of putting foundation in, the party offering the testimony would

want to say that there was a child that was within close proximity was able to hear and understand what the conversation was about. And so those basic observations to me would be satisfactory for purposes of assessing whether the disqualification would apply of an instance or whether there was an exception to it in that particular instance.

>>: I think that you have to draw out facts up to so what was happening immediately prior to the statement and where the child was. They obviously need to know how old the child was. I'm assuming I would know that already in the context of these types of trials. But the - assuming it's, you know, their child, the - and if you know where the child was, what they were doing immediately prior. So is there context there that can be drawn out through facts and some testimony as to, you know, what they were doing. Were they paying attention? And, you know, assumably - so at some - you know, there's - I'm going to have received some information as to that child already, but you would have to put some foundation in as to where they are, what the proximity is and what was happening as this conversation was occurring. And if the answer is I don't recall, then you're in trouble.

>>: I'm sure similar to having, you know, the disqualified communication - if there's nobody else present, it would probably be important to you as judges to know what the child did as a result of - you can't disclose the hearsay with the child, but maybe the child reacted a certain way as a result of this conversation. They ran out of the house, ran down the street, neighbor saw, and I'm sure that would be important as well.

>>: Yep.

>>: So moving beyond just the definition of private, there are some certainly some limitations to disqualification, disqualified communications. The disqualified communication only applies to oral conversations. It does not apply to written communication. So that's why I am sure plenty of you have, if not all of you, have warned clients about what they put in writing, what they put in text messages, e-mails, direct messages all of the millions of ways people communicate now. Because those communications do come back to haunt you. And I'm sure the judges have both had trials

where you have reams full of e-mail communications. If it's in writing, it is not disqualified. And also - you know, I also cited the case for you here, Sampson v. Sampson, where it talks about that spouse was not barred from testifying that that conversation took place and, as a result, that he or she did something. So that's the case where that what I was talking about earlier generates from. There's - even though certain communications would otherwise be deemed disqualified, there are - as you're going to hear throughout today's presentation when it comes to evidence, there are exceptions to that. And here are some of the exceptions that take certain otherwise disqualified communications out of that so-called protection. First is we see a lot of criminal cases involving - it's put as - that words that are constituting or accompanying abuse, threats of assault, which the other spouse is the victim. Cited a couple of cases for you. We see those a lot as practitioners if you're representing somebody maybe at a divorce trial or something akin to a probate and family court matter. But we see it more maybe into 209A cases where somebody will jump up and try to object and say this disqualifies communication. But if those words fall within the statutory definition of not being disqualified, make sure you're familiar with that. Also, complaints - this doesn't really typically come up as much in the divorce field. But complaints and exclamations of pain and suffering are not private conversations. Here's some others. I had actually a nine-day trial up in Essex over the first one, a proceeding arising out of or involving a contract between spouses in a case of - a divorce case with a hybrid ancillary superior court action over whether or not a separation agreement that the parties had entered into several years before and it lived by the terms of that agreement. The parties - we were able to get into evidence the details and communications surrounding the negotiation of this separation agreement that has a clause in there that said this is a Massachusetts binding contract. So that's certainly an exception to the disqualification. And you see the other ones here are proceeding to establish paternity or to modify or enforce a support order, prosecution for nonsupport, desertion, neglect of parental duty, child abuse proceedings, of course, as well as criminal proceedings in which is a spouse has been charged with a crime against another spouse. Of course, that also raises the issue, and that brings us back to the marital privilege. A couple more exceptions of this puzzle of disqualification that all of us should be aware of especially if we suggested earlier any new handle matters involving

209A's or prevention orders. We have violation of - as well as a motion to vacate orders that are already in place. A violation of any of those as an exception to the spousal disqualification, declaration of a deceased spouse - if the court finds that it was made in good faith and upon personal knowledge - so like, Attorney Bentley, I'm sure some of you do some probate court work as well - probate matters I should say and then a criminal proceeding in which a private conversation reveals a bias or motive on the part of the spouse who's testifying against his or her spouse. The next privilege that we want to - actually before we move on to the psychotherapist patient privilege, anything, Judge Connelly or Judge Allen, you want to add for the participants today from a practical standpoint of you come up for either a motion hearing or evidentiary hearing a trial before you? Because I think all of us are familiar with the fact that you have a motion hearing, especially in light of the circumstances we're all facing where somebody is - gets up there, and they're arguing a motion of the temporary order, and they're saying, you know, but Mom here said this, or Dad here said that. Is it - should we as lawyers for the opposing party be interrupting an oral argument and a motion hearing and saying hold on, hold on? That's a disqualified communication? Or do you take it and say this is a non-evidentiary hearing. I'm just taking it for what it's worth as part of a motion argument?

>>: You know, my thought is that I guess it depends ultimately. If it's a substantive issue and it's information that would tend to have an impact on how I view the requested relief at that time, that I'd probably say I don't want to hear any of that, or I would certainly entertain an objection for that on that basis. And that goes also with any written submissions if it includes anything that purports to be a conversation between husband or wife without any of the applicable exceptions, then I would certainly entertain a motion to strike a portion of the pleading itself.

>>: Thank you.

>>: So basically, the saying that if it's a written document that's being provided to me receiving a motion that's a verified one or that has a lot of substance to it, if - I certainly will entertain motions to strike. I do often, though, push back sometimes when counsel are getting very animated and

saying, you know, this is hearsay. It is not admissible, you know, in a first hearing and do saying often that it's a non-evidentiary hearing, and it's just for a temporary order, and I try and have people focus more on, you know, what we're doing there that day and, you know, whether it's maintaining status quo or just putting in temporary orders and that there would be - and remind them that there will be an opportunity at some point in the future if they need it to have an evidentiary hearing on the issue. So usually, I find it's more just that they're objecting to satisfy 'cause their client is upset. And so I really need to just sort of neutralize the situation. But I think that if there is a voluminous paper filing, then certainly I would entertain motions to strike so that the record is prepared properly that way.

>>: Great. Thank you, both. The next privilege that I was asked to speak about is the psychotherapist patient privilege. Again, most of us are familiar with that. Certainly, this does arise in the probate and family court context, sometimes more frequently than I'm sure all of us would like. But the black letter law so to speak is that is that a patient shall have a privilege of refusing to disclose and of preventing a witness from disclosing any communication were ever made between the patient and a psychotherapist relative to a diagnosis and treatment of the patient's mental or emotional condition, which is a little bit broader in Massachusetts, in the Commonwealth, than in other states because we also - this privilege extends to marital therapy, family therapy and even just consultation with a psychotherapist in contemplation of such therapy. There's certainly no limitation on the privilege, and that's what I'd like to address today. The privilege does not protect the facts of the hospitalization or treatment or the dates or the purpose of the hospitalization or treatment. So oftentimes, if there's a need for it, we will issue subpoenas to certain hospitals and typically get the motion to quash the subpoena in an argument before the court on either - ask for their subpoena to be quashed in its entirety or that there be an (inaudible) inspection. Sometimes you then end up with the appointment of a special master for discovery to deal with the issue. But the one thing that if you're just looking to prove the fact that the hospitalization or that there were certain dates that they went to the hospital, somebody may deny that they have an alcohol problem and one person says well I know my husband or my wife went to the hospital on this date after being arrested for OUI, and

they say no I didn't, well, maybe there's a way to narrowly tailor your subpoena to show that they were admitted to the hospital. You get a copy of the medical bill - that's not necessarily an upside. Well, it wouldn't be in many respects because - unless they were treated by a psychotherapist. But just oftentimes, if somebody is in that bad of a condition, the hospital will have somebody who is qualified as a psychotherapist - and we'll get into that in a moment - come down and see the patient, and those records would be privileged. But the fact that the person just went to the hospital or saw a psychotherapist, that's not necessarily a privileged record. And sometimes if that's all you're looking to do, make sure that you narrowly tailor your - either your subpoena or the argument when you get before the court 'cause a lot of times, we are presented - at the outset of a case, you file any motion with temporary orders, you get an opposition to that, or they deny everything. And you've been - if you narrowly tailor it, you can avoid this - this fight of this conflict. It's very important for all of us to understand what a psychotherapist actually is - giving you the statute here. But for this privilege to apply, the patient must be treating or having a consultation in contemplation of such therapy where the person actually qualifies as a psychotherapist. There's lots of people out there who hold themselves out as different types of mental health professionals, but they don't have - they don't qualify within the statute as a psychotherapist. And it is specific. There - just be aware that certainly if it's a psychologist and they're trained, or even doctors who have substantial training within a certain field can qualify, but there are plenty of people out there who don't. And that's an easy way to be victorious and not in a motion to quash that. This is where the sort of rubber meets the road when you get into the probate and family court because a lot of times, these issues - they don't really come up when you're dealing with the division of assets. If there's no children involved, sometimes those types of records aren't really that relevant to the court or relevant as to how they're going to be dividing up marital assets. But when there's children involved, there are exceptions to the privilege. The first one I have is certain types of child custody or adoption cases. Somebody goes into court and asks - and says, well, I want to see the psychotherapist patient or otherwise psychotherapist patient published records of my spouse and/or of the child for a certain reason. And often, they haven't put these there. This is typically addressed with the appointment of a special purpose guardian ad litem if you have a child custody fight. And then you

also have certain cases where there's child abuse or neglect and DCF is involved. And there's a statute allowing DCF to have - to seek to obtain those types of records, which obviously is up before the trier of fact in the probate and family court. Maybe if Judge Connelly and Judge Allen want to weigh on and how they deal with this - the issue of the psychotherapist patient privilege when you're dealing with child custody and adoption cases that come before you. Is it just - typically, you have a primary GAL and then the special purpose GAL?

>>: So I appoint special GALs all the time. Generally, if there's going to be any - there's a regular GAL, regular GAL appointed, I bring that question up and allow in my orders for the parties to bring it before me administratively if they wish or for the GAL to come back and ask for that if they wish also 'cause...

>>: Is that as a relief to both the child and the party?

>>: Yeah, so...

>>: The GAL convert...

>>: ...Either - like, I try and - you know, I - just as a general proposition, I try it and allow access back to me to get - to keep the case on track, like so - not opposite - just far afield what we're talking about, but I don't like cases that, like, linger and linger and linger and you're waiting for, you know, our motion dates and our status dates are so far out that it's - you know, we're months down the road, and they have an issue that needs to be resolved. So in any event, the - so I administratively will, if there's - if it's a joint request, or I can mark it up quickly for a special GAL to be appointed, I do it all the time. And I really think it's the best way for there to be a - an unbiased, well evaluated look at the competing interests. So - and I think that most - I think that special GAL reports that I've seen are - have all been excellent.

>>: Yeah, and...

>>: And they can turn them over quickly, so it can happen. You know, it

can happen within two or three weeks.

>>: Agreed. I think the narrow focus of a GAL appointment on the issue of the privilege is really helpful I would say almost to a number of the reports that I've gotten. And it's spelled out very clearly as to why the GAL has reached the decision he or she reached, and so it's extremely helpful to me. The other context in which this has come up with me is in temporary order said where a therapist is actually subpoenaed and the records were subpoenaed for an evidentiary hearing, so the availability of the GAL obviously is not there. And under those circumstances, if there is a reasonable allegation that one of the parties is not suitable to be in a caregiving role for the child or children, then I'm required to take a look at those materials in camera and then make a determination as to whether the information contained in those records significantly bears on the suitability of that parent to be in a caretaking role. So the - as much as I prefer it a GAL do a thorough investigation into the issue, there have been situations where I've been required to undergo that other alternative process and make the decision on my own.

>>: Thank you another scenario where - in which this typically arises and we end up in court - this just what Judge Connelly just raised, is you have a motion for temporary order. Say you file a motion for temporary orders on behalf of your client maybe even make it verified to do an affidavit in support, and you make the claim that they're - your client's spouse is suffering from some type of medical disability that requires their (inaudible) treated by a psychotherapist. And they filed their opposition, and they attached a letter from their psychotherapist, which typically reveals more than should be disclosed. And it's not just I've seen the patients on these dates. It goes down, and it actually, oftentimes, will disclose privileged - otherwise privileged information. How should we handle that? Is it, judges? Do we - do you typically just strike it, or do we say now that privilege is so-called waived by the therapist and clearly by the patient because they've attached it to their publicly available pleading?

>>: So I'd say a couple of things. First of all, I would definitely not entertain the letter if there's a reasonable objection to it. So if a contained substantive information about the - just beyond whether there was a

psychotherapist who was engaged, but if it goes into the nature of the treatment and any of the substantive determinations within that treatment protocol, then I would certainly strike that letter as - I'll call it a letter from the therapist. And as to your comment, Mick, which is a good one about this now being a publicly inspectable record - once it's docketed, it is part of the record, so I think then it has to be followed with a motion to impound because otherwise, if that's not impounded it's - to your point, it's absolutely subject to public inspection.

>>: Thank you.

>>: So just to speak a little bit - again, it's a little off topic. But to speak to that issue of bringing in letters from therapists - it is a terrible idea I would say in my courtroom certainly. Because it is something that has come from a child therapist where they are revealing the child's - you know, if the therapist is - if you have a therapist that is writing clearly privileged information and the other parent doesn't know about this and they just show up that - some day on - with that letter, you can anticipate that I'm going to enter a sua sponte order that the child is not going to treat with that therapist anymore, which I have done and - because I think that it is - clearly, the therapist is either unaware of their responsibilities or, in the context of a contested parenting issue, they are so closely aligned that they would provide this, that they - that things have gone very far afield of their responsibilities professionally on a number - in a number of ways. So I would, as a best practices issue, suggest respectfully that those letters never be brought into the courtroom if I don't think they're going to garner the favor that you may think that they are going to. And it certainly is going to be - immediately going to start appointing some neutrals to investigate what's going on with respect to the therapist or - and/or have the child enroll with somebody else that's recommended, either through the pediatrician or found by the other parents or something, you know, where they try and get things back on track on a more neutral footing.

>>: Thank you. Thank you both, Judges. I'm going to briefly touch upon - and I'm not going to read the slides - about how to get these medical records, to the extent that you have them, into evidence. The statute's right here, in General Law Chapter 233, Section 79G. I would just like to point

out a couple aspects of this. Just generally speaking, if you want to get in some medical records, this is the procedure in which you do it. It's right in the statute. You obtain the medical records. You have to provide it to the other side more than 10 days in advance of the date you're seeking to admit them into evidence. You provide an affidavit prior to the hearing to the clerk with evidence - with an affidavit that you've done, and I'll give an example in just a moment. And you attach a copy of the Green Card from the Certified Mail Return Receipt Requested. And you provide that. That comes in for certain reasons, and I'll address those in a moment. But under the statute right here, I've bold and highlighted down at the bottom the reason that these - the reasons for which these medical records can come into evidence. I won't read them, but it really goes to the necessity, the diagnosis, the prognosis and the opinion of the treating physician as to the proximate cause of certain things. Now, go to the next slide here. So here's a copy of the letter that you provide to the other lawyer, giving them notice that you are seeking to enter them into evidence. But I want you to know, as practitioners, that doesn't mean that the medical records come in for all purposes. If there's hearsay in this - and I'm not going to step on Jen Roman's toes here because I think she's going to address some of this - but be wary. The medical records don't just come in for any purpose at all. There can't - you can raise objections if your opposing counsel is seeking to do that. Maybe Judge Allen can comment upon this at the end here. But don't anticipate showing up to the first day of trial, the other side has produced these records, they've served them upon you, and they want to put them into evidence and Judge Allen says, OK, well, they complied with 79G - or Judge Connelly says, OK, they've complied. Attorney Judge, what are you looking to do? And I say, well, I want to strike all the hearsay. And you've got a day or two of trial, and you've got three or four hundred pages of medical records here, as I've put from Brockton Hospital, you're not going to sit there? The judge is not going to sit there and let you go through these records and highlight two, three hundred pages and have a fight - address it at a motion in limine. You know well in advance. They've put in their pretrial conference memo that they're going to be introducing medical records of your client. Or if you're going to be the proponent of those medical records, let the judge know. Let them know that this is what you seek to put in, and maybe the judge has a motion in limine hearing in advance of the trial, at the trial status conference, etc., where you know

you're going to have to spend some time. The way I typically do it is I will assemble those records. I will - if - I will get the records from the other side, hopefully more than 10 days in advance of trial. You know that they're coming. It's in the pretrial conference memo. Highlight the portions that - with a highlighter that you want to have stricken from the record, that you maintain are hearsay. If you have a dispute, that's what your trial - motion in limine can be heard at the trial status conference. The judge can hear it - hear the motion, then consider it in camera. Here's the letter. Here's the affidavit. One thing that I'd like to point out in the affidavit is - and I've had this issue come up before. The statute says that you have to give it not less than 10 days before the introduction of same into evidence. Some people take the position that that has to be the first day of trial. It could be the 10th day of trial, that if you're not going to introduce them into evidence on the 10th day of trial, maybe you don't have to do it until not less than 10 days before the 10th of trial. Good luck getting that by Judge Allen if you haven't complied with her trial order as to, one, you're supposed to have those books prepared and maybe the Judge Allen or Judge Connelly if you can comment upon how we, as practitioners, could go about handling this matter so that we don't waste, frankly, judicial resources in going forward with a smooth trial.

>>: So to your point just a moment ago, Mike, my trial order requires at least 60 days prior to the first day of trial that all exhibits be exchanged, whether contested or uncontested, and then marked accordingly. And so unless there was some significant, material, emergent circumstance that arose after that point in time, then I'd need to have a really clear understanding as to why these exhibits - I mean, when we're talking about some type of custody matter, divorce matter, then the case probably has been pending for a year or two, if not longer. So there's ample opportunity to size up what you're going to need to put your case in. If that includes medical records, and I don't see any reason that over that length of a - length of time during the case - while the case is pending, that those - that there couldn't have been a determination well in advance of that 60-day deadline that there is going to be a need to introduce medical records and that those could have been requested in sufficient time to comply with that order. So if there's a motion to strike and there's no emergent circumstance, I'm probably going to strike them.

>>: So I have a pretty lengthy trial order that I - you know, for each case that I mark for trial, which I spend some time on trying to figure out the correct timing as we approach the trial date for things to be exchanged, for witnesses to be exchanged and records. And it requires forethought by the counsel and cooperation and collaboration. And the dates I put in there, not a suggestion - sort of, to quote Judge McSweeny, they're not suggestions, they're orders. And that being said, if somebody files in advance a motion for leave to move that date two or three days, of course I'm going to allow that. Of course. Because I see that people are paying attention and trying to comply. But if it's a day off, you're not going to get the same consideration. And the trial order tracks when you're supposed to give your exhibits to each other - a full list and then - and on a day - some days later, you narrow the list. And then there's always a trial status conference where you can always bring motions in limine, motions to strike. So read the trial order, I guess, is my advice (laughter).

>>: Perfect. Thank you.

>>: Lays it out.

>>: Put in a copy of a standard affidavit that you'd use if you needed to submit the Green Card to the clerk. I'll go through the next couple of topics rather quickly because I know I'm running out of time - little long-winded. Use of electronic communications - I've sort of already dealt with this, which is these are not disqualified communications. Certainly there may be other reasons why somebody would object to them. But if you're dealing with emails and text messages, all judges deal with them differently. One thing I think that you're going to need to show the court is that this is confirming circumstances. You're going to need to show that it originated from you or was received by you from the other party, that they were the originating person or that they received it. You show them what your email address is. You show them how long you've used that email address. You show the other side. If you have your phone and it was a text message, if somebody's objecting saying that it wasn't actually sent from your phone or received by the other party, you can have your phone with you if you keep them. So these are some of the questions that you go through, what just

raised. You also have issues of the doctrine of completeness, which is - you need to make sure that if somebody is objecting to the fact that there were other emails or other communications that aren't included as an exhibit and you would need those for context, they can raise that - they can certainly raise that issue. If you're complying with Judge Connelly or Judge Allen's trial order, which, as they both just said, is extensive, you'll know well in advance. You'll have those communications and you can fill in the gaps. Here's an example right here. You have an email. You have your client come in to testify the to and the from and those are the emails that they used, that was the date. But you see here it says the subject - and it has RE next to spousal support. That means they were responding to something. So if John's lawyer objects to this coming in on the doctrine of completeness, the judge may say, well, this is - looks like John was responding to something Jane said. And if John's lawyer is going to say, well, hey, you should see what Jane - know that in advance. Don't say I'm going to need another day. You've had the exhibit, as Judge Connelly said, 60 days before. So be prepared. Come in. Have the document. It's not going to be disqualified as a disqualified communications. Maybe for other reasons. Don't get caught up on failure to comply with the doctrine of completeness by objecting - saying you want this in but what your client, Jane, wrote to John isn't coming in. The last part...

>>: Actually, Mick, can I just stop you for one second?

>>: Yeah.

>>: If you could just go back to the previous slide, if you could talk for a moment - and I'd love to hear from the judges. The first thing if you could talk about is - I know that we've talked about this in the past, at past seminars and in conversations, that you send out, in your discovery, your request for production of documents, all emails, all text messages, everything that you want. And if they don't produce that, I know you use that opportunity, when you're pulling these in, to say you can't object because you didn't produce the documents. So if you could take a moment and talk about that. And the second thing that you and I have talked about in the past is these software programs and these companies that you can now upload text messages to to get complete printouts and, in some

cases, get them certified. If you could talk about that for a moment, and I'd be interested to hear from the judges if they've dealt with that and how they feel about that. Yeah. Really, it's a great question. You and I have spoken about this a few times. I guess I would turn it over to the judges. How do you handle that? If you have reams and reams of texts and somebody, you know, we can't subpoena them from the cellphone companies, we can't subpoena Verizon. They're going to say we've got the last seven days at best. But somebody's downloaded some software, they've downloaded all of their texts off their phone because they're not going to put their phone into evidence. Would you take an affidavit from a tech company who's downloaded two years of text messages and said these are a true and accurate copy of the text messages that I pulled from Mick Judge's cellphone and his communications with Julie Murphy?

>>: I think that - well, can I just step back one second because I just wanted to say one thing. So the new 2021 Mass guide to evidence, which just came out, has a new section in it, Section 1119, which is all digital evidence. And it has a new section that provides guidance regarding what judges and litigants and counsel have to do with respect to authentication of digital evidence and what the court should be looking for, and it actually is very interesting to read. So it gives a lot more guidance to all of us involved on what the judges should require and, to some extent, sort of not necessarily be so demanding about. And it also speaks to self-represented litigants, as well. And obviously the need to - I don't know if I want to use the word assist - but to be understanding of their, you know, often inability to understand the rules. So the - so I do want to have everybody, you know, look at that section because I think it's going to give some further guidance for this type of evidence coming in. I would absolutely consider and hear arguments about whether or not I would take a large amount of documents and a certification as a business record essentially that it is what they have done and what they - the methodology they've gone through. So I would certainly - I wouldn't not - I'll permit them to the counsel to make that argument to me. I'd want to hear what the objection was to it, obviously, and what the countervailing argument was.

>>: So my concern as to accepting a certificate of some company that purports to be able to capture the full history of text messages between

two parties is that I don't know enough about the company or the person who's certifying this. So to me, it would be incumbent upon the party who's offering that to bring that person in or a representative from the company to actually testify as to the process by which that is done. Because it seems to me - it goes beyond just a matter of recordkeeping. It goes into the technology that's used to adequately and accurately capture a history of text messages. So I would actually want to hear about the process itself to then make a determination that it's a reliable process. And then from there, if it seems reasonable, then, again, if it's relevant information, sure. It comes into evidence. But then I get to another point. I'll choose bank records, for example. That even though the documents may be admitted into evidence, if there are reams and reams of paper, I need counsel to direct me to the relevant provisions within those pages because to sit and flip through, say, three, four hundred pages of texts and this day and age, obviously can be well in excess of that - probably the point trying to be driven home by the offering party will be lost in the volume of paper. So whether it's a chart or something of that nature which says, you know, page 98 through pages - pages 98 to 102 are the pages I really want you to zero in on. So that part of it, to me, is just a mechanical element of the actual trial process is very helpful to me.

>>: Yeah. Thank you, Judge Connelly and Judge Allen. The impracticality that the - that I think - what you're both pointing out is something that talks about the reliability. Judge Allen said she'd want to hear from - Judge Connelly would need to know some information about the process. I mean, I'd want to know, as well, if the certification includes just what they're able to pull off the person's phone or if they were able to back it up or something. Because we all know that you can easily delete certain portions of a text chain from your phone. So if the company is only saying they're taking what's off the phone and the other - and the opposing party or the objecting party is saying there were other communications in there, it sounds like both judges would want to hear that. And if the other - if the objecting party is serial deleter and they don't have proof, maybe there's something else that would show. And I know, Jen Roman, you have a lot on this, as well - experience so...

>>: Yeah. And I just wanted to jump in and just comment, too, on this

notion of deleting texts and the reliability of text messages because now there's so many new websites and apps out there that actually can allow a person to send a fraudulent text. So if your client's telling you, I did not send that text, I know it came from my phone number because that's what it says on this side of it. I did not send that. You kind of got a look at that a little bit more than just being like yeah, yeah, right. Because, you know, there are there are new apps and different types of programs where people can send a text to make it seem like it's coming from my phone number when it's not coming from my phone number. And same with email. They can set up these fake emails that makes it look exactly like it's coming from Jennifer Roman's email and it's going to Mick Judge and I never sent it. So there is some, you know, I think that's sort of an issue that we all need to be aware of, too, is just the ability to use technology in a malicious way or nefarious way and that text messages and emails are not as reliable as we may have once thought they were. You know, it's sort of there are ways to manipulate that.

>>: Thank you, Jennifer. The last part is the ARC program, which a lot of us have heard from and I'm sure a lot of us are already participants in. I, as Julie stated earlier, am the coordinator of the ARC program in Worcester County. I find it to be a fantastic program. We - if you don't know, what you do is you become an advocate for a child and you represent the child. Our model is that we typically like to have the child age 7 or older, but certainly there's exceptions to that. Based upon the child's age, particularly their maturity, their reason why it typically becomes involved is one parent comes in and says the child is telling me this, the other person comes in and says, well, the child is telling me just the opposite, they're telling me this. You become involved and you meet with your minor child client, you say - you establish a rapport with them and you find out what they actually want. And you become an advocate for their - what they believe is in their best interests. You take that to the judge. I can tell you that in the several years I've been involved with it now, it has been fantastically rewarding for me, personally. If any of you haven't noticed, our way of practicing law is a little bit different. And I know some people in the past have always been reluctant to take that nasty Mass Pike out to Worcester. It's a much different process now. You meet with a lot of times your minor child client over Zoom, obviously, or court hearings are over Zoom. I have found that

in about 95% of the cases that I'm involved with as an ARC attorney, it usually ends up being one court hearing, maybe two at best. Which all of us probably heard a few nightmares where you end up putting in 100 or 200 hours and, you know, it goes into full trial and everything. I can tell you that's few and far between. There are ways to handle, in my opinion, at least out of Worcester being an ARC attorney because you do not take the stand, you are just an advocate. So how do you get your client's point of view across in Worcester? The judges are - very often will, if I file a motion for my child to be interviewed by probation, you skip the guardian ad litem process and your - even set up an interview. Your child client is interviewed by probation and you have a probation officer come in and testify as to the substance of your client's communications with them. It - oftentimes, you don't, frankly, get to that point. I've only had that two or three times where I've gone to trial on it. The vast majority of the time you're able to communicate your client's needs and desires. And oftentimes it's not even what one parent or the other parent thought, it's somewhere in the middle. And you work with the other - the attorneys representing both of the parties to fashion a resolution that works both for the parties and for your client. I don't know if I have another slide on it. Talked about that. Training is the - people ask me all the time how do I go about training. Just send me an email. If you want to become involved in the ARC program, please just send me an email. We're doing the trainings over Zoom now. Jeff Melick typically is in charge of doing the training. We had one about nine months ago and I think we had about 40 or 50 people on there. If you are - you don't have to train in every different county. If you're trained once you can participate in our program in any county. And you can feel free to call me whether it's Worcester County or outside of Worcester County. I usually field between five and 10 calls a week on my cell phone from attorneys who are in the ARC program representing people as to how to navigate a certain issue. I can tell you that the judges in Worcester, and I'm sure Judge Connelly and Judge Allen rely upon and are pleased with the program, but I can tell you the judges up in Worcester County are very grateful for all the attorneys who are involved. I know Tiffany Bentley, who is on the panel, is an ARC attorney up in Worcester, as well, and she and I receive emails from Kathy Brown or Alicia Doherty probably on a weekly or bi-weekly basis asking for more. You only - we only ask that you take one. If you want to take five or 10 a year, it's up to

you. We just ask that you take one. And I know I certainly take a lot more than one and I believe attorney Bentley has taken far more than one per year on average. So that's my little pitch on the ARC program and that's how we go about doing it, so. I think that's the end of my presentation for today. Judge Connelly and Judge Allen, thank you greatly for all your input on my questions.

>>: Gladly. And Mick, I'll just follow up on your comments briefly. The ARC program is a tremendous program and, you know, there have been the cases that do end up going to trial after lengthy litigation, but they are few and far between. And the vast majority of the cases where I have ARC counsel involved, their input and assistance - and I know it's not necessarily the rules to settle the case, but it just seems like the nature of the position is - lends to a conversation about how to bring the case to a close. Consider taking into consideration the information the child provides. That's a great benefit to us.

>>: Thank you, Mick. That was amazing, thank you.