Unedited transcript of

Evidence Admissibility in Family Law Cases: Using Depositions at Trial; Hearsay & Its Exceptions

from **Evidence Admissibility in Family Law Cases**

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Speaker(s)

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>>: So the judges both had to take emergency hearings. Judge Allen said she should be back, and I'm not sure about Judge Connolly but hopefully. So Jennifer is going to give her presentation. And normally without the judges here to weigh in, if the panelists want to weigh in on things that they've observed or experienced to help answer questions until the judges come back, that would be great. So Jennifer, it's all yours.

>>: All right. Thanks. So I'm going to start with the use of deposition transcripts at trial. That's something that we've been talking about, but we haven't really got into the nuts and bolts of how you can use them effectively at trial. For the use of deposition transcripts of trials is governed by Massachusetts Rule of Domestic Relations Procedure No. 32 - three, two. And it basically breaks down into two distinct areas when you can use a deposition at trial. You can use it for a non-party deposition if it was subject to certain restrictions, which I'll talk about. And you can also use it - and this is how I think we mostly think about it - you use it for a party who was previously deposed. And you can use it if it's the party not only for impeachment purposes, but it can also be read into evidence as part of your case in chief. So you can use the other party's own testimony to help establish your client's credibility or to even set the stage for certain incidences that occurred. And I'll talk a little bit more about how you can do that in just a minute. So the use of the non-party deposition testimony - that's governed by Rule 32(d) - as in David - three. And it certainly makes

clear that you can use a non-party deposition transcript for impeachment purposes, but it also says that you can direct evidence - you can use it as direct evidence if the court finds that this third-party witness is unavailable. And so unavailability could be something like they - you know, now at the age of Zoom and our ability to Zoom might be a little bit different, but somebody is out of the country, somebody's having a medical issue and cannot be present for trial. But if the party is located at a distance of 100 miles or greater from that place of trial, that can also be deemed to be unavailable. So you can move to seek to offer their testimony at deposition in at trial. If that's the route you're going to go because you know that this witness is going to be unavailable and you do need his or her testimony at trial, it's a good idea to file a motion in limine with a supporting affidavit as to why the witness is unavailable for trial in advance of the trial. So you're giving the judge and opposing counsel the heads up that this testimony, you know, was going to be coming in through a deposition transcript as opposed to live testimony - also, a good idea, too, because if for some reason the judge does not allow you to introduce this non-party deposition testimony at trial, you're going to know it in advance of trial and you might be able to make alternate arrangements or ask the court to assign you, you know, an extra couple of hours of trial on a different day to secure this particular witness' testimony if you're not successful having it come in through deposition testimony. With regard to a party's deposition - right? - we always think about using that for impeachment purposes. You try to catch them in a lie or an inconsistency, and you put that in front of them. But according to Rule 32(a) - as in apple - one, you can also use the deposition testimony of an adverse party for any purpose during the course of the trial including proving your case, which I think is oftentimes overlooked by us as practitioners. And an example of this might be that you want to pull from an incident that was described at the deposition of your client's spouse. And you read that party - you know, you read the - let's just say you represent the wife. You read the husband's deposition transcript or portion of the transcript into the record and then you can say to your client, you know, you heard that testimony from your husband at the time of the deposition. You can start asking your client, what happened on that day? You know, tell me in your own words, you know, if you agree or don't agree with this - with your husband's testimony about what happened. And so it gives you a foundation to then jump off of and can

streamline your direct examination of your client or even if you're doing it on the cross-examination. You know, maybe that particular testimony from your client didn't come in on direct for some reason, so now you've moved on to the husband's testimony. And you're doing a cross and you want to go back to it, all hope is not lost. If you have that deposition transcript of your client, you know, you can try to backdoor it that way as well and get the, you know, husband's response to certain allegations or testimony that your client had made previously. If you're thinking of using the deposition transcript solely for impeachment purposes, so solely to try to show the court that this person is not telling the truth - that there's a material inconsistency that the court should be thinking about and considering when weighing the evidence - there's a whole series of questions that you can do with a lead in that sort of helps set the foundation for that ultimate gotcha moment. So you usually want to start with - I'm just going to say, Mr. Smith - Mr. Smith, I heard you testified before that you've never missed any parent-teacher conferences or school functions involving your children since they began nursery school, isn't that correct? Yes, you know, that's what I testified to. And now he's getting all, like, yeah, yeah - that's me. I'm a great dad. And there's no question in your mind that you've attended every single event, isn't that correct? Yes. Absolutely. No question. Now remember, this is cross-examination, so you can lead. You couldn't do this with your own client. And Mr. Smith, do you recall being deposed in this matter last year? Yes, I do. And do you recall being in my office on March 5 of 2020 for your deposition? Yes. And you were there with your attorney? Yes, I was. And you recall me asking you questions about your marriage and your family? Yes, I do. And before you answered those questions, you were sworn in to tell the truth? Yes, I was. And you understood that your obligation was to testify truthfully at your deposition? Yes, I understood that. And you read your testimony after the deposition, and you were given the opportunity to make changes, correct? Yes, I was. And you signed deposition transcript after you read it, correct? Yes. Now, Mr. Smith, during that deposition, starting on page 26, you know, you were asked the following questions and gave the following answers, did you not? And now this is where you hook 'em. Because now you can say, well, that time, you know, let's just say he testified that, well, no, he didn't attend parent-teacher conferences because he traveled a lot for work. And his wife always handled that and chose to stay at home, and so that was part of

what she did. And he went off and did his job. So now you've just - you've set the stage. You've clued the judge in very clearly where you're going and why you're going there, so the judge knows you're not just wasting time. And you can really hone in on the emphasis of - at what point in time were you telling the truth? Were you telling the truth a year ago at your deposition or are you telling the truth now? So that can be a really powerful way to impeach somebody. The thing that I find about deposition transcripts is that they can get pretty voluminous. And it can be hard to weed through it when, you know, you're kind of done the deposition. Now you're getting in this trial mode. But it's so important to go through those deposition transcripts again and make some type of, you know, log or some, you know, some flagging of the important evidence issues that you think may come up again at trial so that you can be prepared to do this kind of impeachment and sort of, you know, have in the back of your mind - wait a minute. That's not consistent with what Mr. and Mrs. Smith testified to in their deposition. I need to make sure I have that transcript available to me and ready to go. Just as a trial tip - I usually put my deposition transcript into a separate binder for trial, and then that's the hard copy that I mark up and put little sticky notes on so that way, in the moment of trial, I've got it there and it's not loose papers. I can just flip right to the page and already have the document sort of highlighted and ready to go. I see that Judge Connelly is back. Judge, I don't know if you want to weigh in on anything about, you know, about the use of depositions at trials or how you've seen them used effectively or maybe not used effectively at trial. And Judge Allen's back too. Great - she can weigh in as well.

>>: Yes, and sorry about that. I believe Judge Allen had to step out for emergencies as well. So the - I have seen, both in my practice and now since I've been on the bench, seen deposition transcripts used a number of times during trial, and I think it can be very effective. Jennifer, you had suggested that you can build your own case with the other party's transcript - deposition testimony - from the transcript. That's, I think, a good way of leading your client without leading your client into your client's story or side of events. Just as one practical tip that I've seen. So I've seen the question and answer based on the deposition transcript done a couple of different ways. What I've found to be the most effective is for the attorney to read the question and the answer, itself, as opposed to doing a little bit

of back and forth. So the witness has the transcript in front of him or her. And as opposed to reading the question and then asking the witness - and what did you reply? And, you know, some witnesses lose their - lose the spot on the page, and it becomes a little bit unwieldy or cumbersome. Whereas, to me, an attorney can say, and I asked you, you know, where were you on such and such a date? And your answer was - I was at Home Depot. And it comes in in a better rhythm so that you kind of keep the attention. It keeps my attention when it's presented that way. But I do agree. I think the lead up with the foundation prior to that and getting the admissions that, yes, I was sworn. You know, all of the information that you present as a foundation and then leading to that question that drives home the point that you're trying to establish can be - it can be somewhat dramatic. I think it's very good.

>>: I would agree. Absolutely. And you know I'm mindful and not, you know, so far from being on that side of the bench that I don't - I mean, this is like, you know, you're - what you're - why you're there. It's like you are litigators and you want to do this. And, you know, it's sort of what you've been dreaming of is to have these moments with your - with people on the other side of cases and I want people to be able to flesh out their cases that way. I absolutely agree that to put it in deposition transcripts and with the attorney reading it and saying I read that correctly. Yes? Yes. You know, rather than having them fumble around with lines and that you will always have people who, you know, sort of know what you're trying to do and they'll read it wrong and then I have to get involved. Or, you know, or they tend to lose their place or they, you know, what - you know, they play their game. So have you read it in and just have them confirm that you read it correctly and read the answer and you read it correctly and go from there. And so, you know, I give a lot of latitude for that. I think it is quite effective. But also don't overuse it. I want to hear from people. I always tell people I - in custody cases I really want to hear from the parents. Those are the most compelling and the GAL is the most compelling testimony.

>>: And just to follow up on that. You know, the image of the visual, the attorney's literally now standing next to the witness and pointing down to the page. At times they start talking to each other in inaudible tones so that, you know, the record's running. You have no idea what they're talking

about to each other trying to identify the right passage. So it just it comes in so seamlessly when an attorney reads the question and the answer. And to Judge Allen's point, confirms did I read that correctly? Yes, you did.

>>: Just make sure you bring, you know, all - many copies so that you don't have to stand over them and when the court loses my copy, I have another one. All of that.

>>: Never happens. All right. I'm going to segue now, unless, Julie there are any questions. I'm going to segue on to a whole different topic which is hearsay and hearsay exceptions and try to build off of what the presenters sort of commented on before. And just look at it from a little bit more of a detailed perspective. So this was put together, it was a collaborative effort between Amy Vaughn and myself. So Amy wasn't able to be here today, so I stepped in to help her out. So the important thing to know is, you know, where hearsay can be found in the rules. Because the concept of hearsay itself, you know, hearsay is a principle. I think was all drilled into our heads in law school. But the exceptions to hearsay are really where the, I think, the really interesting evidentiary issues can come up. And you can really get - if you really think about it and plan in advance and anticipate what the evidentiary issues may be, you can really help streamline the presentation of your case and avoid evidentiary stumbling blocks at trial if you've thought about these issues in advance and know where you're - where you might fall down on hearsay and know what the exceptions are so you can get around hearsay issues. So Section 801 defines hearsay as a statement that the declarant had made that - not while testifying. It's sort of a statement that's made outside of the court and it's being offered for the truth of the matter asserted. And that's always the key is that, you know, a party - a witness can say something, but if it's just - if it's not being offered for the truth of the matter, then it doesn't matter. It wouldn't be hearsay. So you really got to be thinking about what is being offered here and why is it being offered? So give this example of Alex testifying at trial about how she discovered that her spouse was having an affair. And she talks about - she starts to testify about her neighbor who says he saw a neon blue pickup truck parked in Alice's driveway on Tuesday and Wednesday morning while Alice was away at work. And even gives her a report of what the plate numbers are. Ted not able to testify

later on, he's an unavailable witness. And so under these circumstances, you know, just on this alone, Alex can't testify to what Ted told her. Right? On a face value. That's hearsay. However, if you can fit in Ted's statements to her under a hearsay exception, Alex may be able to testify about what her neighbor told her. So just keep that in mind as we sort of go forward with this. Because I'm going to get to that in a little bit, but I'm using that sort of as an example. Sometimes it helps just to have a visual of what's going on, at least for me. So going back to this concept of hearsay that, you know, it's not going to be hearsay if it's not being offered for the truth of the matter asserted. It's also not going to be deemed to be hearsay if it meets one of these conditions - that it was it was a declarant witnesses prior statements. So they made this statement previously and it was subject to cross-examination and being subject to cross-examination ties into the deposition transcripts that we used. Right? You know, you're always asked - if it's your witness being deposed, you're always given the opportunity to ask questions of your client. You may choose not to, for obvious reasons, but if it's a third-party witness you may want to ask some questions at the deposition. And, you know, that's why being able to use the transcript down the road can become so powerful because you have had that opportunity. They were subject to cross-examination. So this prior witness statement can be used if it's inconsistent with their testimony at trial, i.e., in a deposition and it was, you know, and the prior statement was made under oath, it wasn't coerced and it's more than just a mere confirmation or denial of an allegation that's being made by an interrogator. Or it identifies a person as someone the declarant perceived earlier. So for example, you're asking them to identify what that individual looks like that you found you learned was in your spouse's bed, do you see that person in this courtroom today? You often see this in criminal trials, right? Do you see the person that you saw on that night entering the store when the alarms were blazing? Do you see that person in the courtroom today? And inevitably they point to the defendant. And other statements that would not be hearsay are statements of an opposing party. So that party opponent's statement - if it's an admission or a statement that's being offered against the opposing party and it was made by the party, it was a statement that was manifested or adopted or believed to be true by the party. It was made by a person who is authorized to make a subject on the matter or to make statements on behalf of that declarant or it's made by an employee or an

agent. We also get into the concept of like a coconspirator or a joint venture which can sometimes come into play in divorce cases because if you're looking at a situation of an affair and there's this allegation of dissipation of assets, you might sort of have this joint venture theory going on that they're sort of - they're collaborating together to dissipate the marital estate. I've never seen it used, but I'm just sort of saying, like, it could be an interesting way of trying to get around some of these hearsay exceptions under the right circumstances. And it's important to remember that conduct can be a substitute for words. So a person's conduct can be testified to, you know, behaviors that were observed. And that can be really powerful when getting testimony, you know, for the court to hear. What was being observed, what was happening, what was going on around that moment particularly if you're talking about incidences of abuse or you have a custody case and, you know, one of the witnesses or a party can testify how the child was cowering behind a parent while the spouse, you know, the other parent is screaming at your client. That can paint are really compelling picture of what's happening in the moment without actually having, you know, any testimony come in about what a child said or didn't say or what, you know, the third party witness may have said or not said. So this is all talking about testimonial, you know, true human words, right? And now we're getting into such an era with computer records. There was talk before about text messages and emails and how might you use those effectively at trial. And so that sort of raises the issue of our computer records in and of themselves hearsay? And the answer to that is kind of - it depends. Computer records that contain a statement may be hearsay if it's something that would sort of input by a person. So if it's just a computer generated or a computer stored data, that's not considered hearsay. But if it contains some type of communitive information from a data processor or from an individual, an email, for example, there could be totem pole hearsay in an email, right? Bobby told me that you told her, you know, blah, blah, blah. Then you've got sort of an issue there about whether or not that whole email is admissible or not. So some examples of computer records that are deemed to be non-hearsay are cellular telephone call logs, automatically generated bank withdrawal records. So if your client has a deposit slip or a withdrawal slip, that's not deemed to be hearsay, it's deemed to be admissible as a computer record. Or log in records from an internet service provider. So if you subpoena AOL or you

subpoena some other - Firefox or some other type of service provider to try to see, you know, IP addresses or when emails were sent because you're concerned that an email that was purportedly sent by your client - your client's denying they ever sent it and you're trying to get your arms around what's really going on here. Those records could be admissible and they're not considered hearsay. Computer stored records may be considered hearsay when, as I mentioned, when make may record information that's been generated by a human or that they're maintained on a computer that includes human statements. So for example, emails, online posts and word processing files, all of those things can be deemed to be hearsay. But records may also be hybrid. So you might have some computer stored information on there, like metadata or date and time stamp, as well as some human input information that would be hearsay. So what I always think of that's most relevant I think in our world is text messages. You have a chain of text messages with date and time stamp. The date and time stamps are computer generated. And that would not be considered hearsay and that may be all that you really need for whatever you're trying to prove. But if you want to have the communication, the written words come in, too, as evidence, you're going to need to either establish that it's not hearsay and you're certainly going to - if you can establish it's not hearsay or it meets an exception to the hearsay rule, you're going to need to lay the proper foundation for the court knows and understands that your text message that you're trying to introduce is an accurate and complete record. One way that I've been dealing with this issue of text evidence and email evidence - it's kind of - it's really dry to do, but it's a lot better doing it in a deposition than trying to do it at trial. If I just - anything that I have for my client, I think, I may use at trial or I may want to use I just address it in a deposition. Is this an email that you sent to, you know, to your wife? Is this the text message that you sent to your wife? And is this the correct date and time that you sent it? Do you remember that? Because you'll be surprised, you know? Some people will speak to you, oh, I don't remember. I don't remember, and, you know, you know it's not accurate. But a lot of people will just own up to it in that moment because they're not really expecting it. And if you can get them to admit at deposition that this is, in fact, a complete and accurate text message that they sent to the other party, well, now you've just crossed off your list an issue of foundation and evidentiary issue at trial. Because then they're not going to

argue the doctrine of completeness, you know, if you can say this is a complete and accurate text chain. You're not going to try to say that they didn't actually send this text message that it must have been some computer-generated text using their phone number or that your client deleted part of the text and just let pick - cherry picked. Like, if you can have that deposition and deal with this kind of evidentiary issues before trial, it makes your trial go a lot faster and a lot smoother, which is always a good thing. And, I know, that the judges weighed in before about, sort of, how they would use text - you know, when they might admit text messages or when they may not admit text messages depending on what the evidence is. So now when we get to talk about, OK, you have something that's hearsay and you're trying to figure out if it fits under a hearsay exception. You need to be thinking about preliminarily very - two very basic things. Is the witness available? Or is the witness not available? Because then that opens up a different door for what hearsay exceptions may be available to you. If - so Section 803. It outlines the exceptions to hearsay that are regardless of the availability of a witness. So these exceptions are available. Doesn't matter if the witness is available to testify and will be testifying or the witness is over 100 miles away and they're not available. In these things - these kinds of hearsay exceptions, I think - I tried to pick the ones that, I think, we see the most in our types of cases or that you can be thinking about that maybe are underused. So an excited utterance is one that, I think, is really underused in our situation, particularly when we're talking about, like as I mentioned, like with an abuse case and you're painting a picture of what's going on and the child is under stress and is blurting something out. If you can establish that in that moment you get the third party, you know - the non-testifying party under a significant amount of stress such that - and the statement was being made in the moment under the stress of the exciting event, it's not - you can get it in under a hearsay exception. So your - a neighbor hears screaming, hears things smashing. They're nervous. They don't know what's going on. They don't know who's yelling or screaming so they go out of their apartment or their home and they see two people outside. They're neighbors so they both - they know both of them - yelling and screaming, and they see blood running from somebody's face. You know, the neighbor's freaking out, doesn't know what to do, thinks I'm going to call 911. So in that moment when they're calling 911, you know, you've got this excited utterance or

under the stress of seeing this trauma unfold in front of them and they don't have time in theory to massage the details or the facts or to manipulate them any way. So excited utterances - we use them a lot. Like, in criminal cases they're used a lot, particularly when a witness domestic violence case where a party is going to assert their spousal privilege and not testify. You know, you want - you always are looking to other ways that you can prove your case without the party actually testifying. And if you can establish that there was some, sort of, exciting event that would have placed, you know - and that the statement made would have qualified as an excited utterance, you can get that - you know, you can get testimony from a police officer from a third party about what was being said at that time. Then existing emotional or physical condition. This is a here - another hearsay exception. So if it's a discussion about, you know, there's issue of mental health in a custody case, and there's some testimony about one of the parties, sort of, being maybe not quite well and you're trying to establish, you know, what was going on. What was this person thinking or feeling? And there's, you know, statements about, well, in that moment the third party is saying, well, I'm feeling dizzy. I'm feeling faint or, I think, I feel, like, you know, voices are talking to me and there's a wolf chasing me (laughter). You know, just some really crazy stuff. You know, if in under normal circumstances, you know, that may not come in for whatever reason because of the hearsay statements, you know you can get that in as well. Statements for purposes of medical diagnosis or treatment. We've talked about this. Those statements are not considered hearsay. A past recollection recorded is not hearsay. Business Records, as Mick talked about, is not hearsay. And hospital records may contain hearsay or may be subject to a privilege, but if they're maintained pursuant to general law chapter 111, Section 70 and properly subpoenaed they may not - you'll probably be able to get the bulk of them in. Then there's 16 other exceptions that are spelled out in rule 803 that just - if you're interested go and look to them. An interesting note - because most jurisdictions do recognize this but we don't - Massachusetts does not recognize the present sense impression. So that's just something to be aware of. I know, it's often taught in other jurisdictions and certainly in law school, but we don't recognize it here. If you have a witness who's unavailable, you have different hearsay exceptions available to you. So example for why a witness may be unavailable could be something as simple as a privilege at

trial, whether it's a fifth amendment privilege right against self-incrimination or spousal disqualification, patient-therapist privilege, physician-patient-therapist privilege. All those reasons could make a witness unavailable to you. Another reason could be that the person cannot be present or testify at the trial because of a death or if a then-existing infirmity, physical illness or mental illness. And the third option is that they're absent from the trial or hearing and the statements' proponents has not been able to procure the declarant's attendance by process or other reasonable means. So, for example, you've tried to subpoena this person and they're just not - you can't track them down. You just don't know where they went to. Or you had subpoenaed the person but they still didn't show up - you have the option of just asking the court to issue a case and issue an arrest warrant for this person to procure their testimony at trial. Or you can say to the court I don't need - I don't necessarily need, you know, you to issue a warrant for this person to come in because I already have deposition testimony or I already have somebody else who can testify to what was said or, you know, what that person observed. So if your witness is not available you're more restricted in terms of the types of hearsay exceptions that you have. And if you, sort of, think about it from a public policy standpoint it makes sense. When the witness is not available to cross-examination you're starting to get farther away from being able to challenge the credibility and the accuracy of the statement, and the farther away you get from that the more nervous we get and the more nervous fact-finders get. Because we want - you know, the whole background that you got behind hearsay exceptions is that there is some inherent reliability to that statement because it was made to secure medical treatment, because it was made in the moment of an excited - exciting event, because it was previously recorded testimony and it was subject to cross-examination. All of those things, sort of, start to give these hearsay exceptions more reliability, but when you don't have a witness available you're getting further away from that ability to cross-examine, which is every person's right to do. And so you need to be more discreet about what exceptions might be available to you. So if you have a witness who's not available for any number of reasons your options are the prior record a testimony then you can use it as under the hearsay exception. If it's a statement against interest, the statement of personal history, then you can use those things. Testimony - it, sort of, can be used if it was given as a witness at a trial or a hearing or

a lawful deposition whether it was given in this proceeding or a different one and it's now being offered against a party who had an opportunity and similar motive to develop it by direct cross or redirect examination. Again, keeping the - keeping it as close to reliability as you can knowing that you don't have the witness available to testify. I might talk a little bit more about what some of these types - break down what some of these exceptions would be. So a statement against interest, again, and it applies when the witnesses...

>>: Jennifer, can I just actually pause you one second? 'Cause, I know, the judges had turned their cameras on, and it would be interesting to hear what they had to say about the unavailability of witnesses.

>>: Or anything else.

>>: So, Joan.

>>: (LAUGHTER)

>>: Oh, fine. Fine.

>>: So I - so I get the point, albeit what I'd like to say is in general is that when you're thinking about hearsay and you're putting testimony in and their objections are flying and it's hot and very tense, remember that the, sort of, one, sort of, basic principle with respect to hearsay is that there needs to have been, as attorney Roman said, there needs to be the ability to, sort of, test the testimony. So if there had been an opportunity for cross-examination - and obviously the rules are the rules, but if there's - when you're thinking about it in the moment if there's been a - if there is an ability to cross-examine or there has been an ability to cross-examine or there has been an ability to test that evidence in some fashion, generally it's being take - it's taken out of hearsay. And that's just, sort of, the general proposition. And so if your - the client, as I recall, generally thinks that anything that anybody ever said ever at any time in the past is hearsay and they want you to be objecting to that. It's useful to explain to them that if they have - if they're the other parent - assuming it wasn't during a marriage - that they had said something and they're there that most likely

that that's going to get tested. You know, they're gonna be able to - that testimony is going to come in and then that person is there and they can be tested on cross-examination. As far as - and I don't know what to really say about witnesses not being available. What do you - was there a question specifically, Julie?

>>: No, it's just, I think, it's such an interesting concept that you've taken somebody's deposition or you have statements and they are unavailable for a variety of reasons. And then attorney Roman was talking about not being able to - you know, that the court will become nervous because they really can't test those facts. And I was just wondering if you had opinions in general on the unavailability of witnesses and how you would treat that? And, I recognize, it's probably a case-by-case basis.

>>: Yeah, I mean...

>>: I would look at the availability of the deposition transcript as - and particularly as Jennifer mentioned earlier in her prior remarks that the opportunity to cross-examine at the time of the deposition, to me, allows for the statements to come in because they have theoretically been tested whether somebody is chosen to or elected not to cross-examine. They were available for cross-examination. So to me just the mere absence of the witness to me does not pose a problem if the other conditions are met and that the opportunity to cross-examine was made available to the other party.

>>: Thank you.

>>: So you - when you have a statement against interest, again, the notion of the reliability behind the company is not to say something that's going to hurt themselves. That's just from the general rule. So this is, sort of, you know, the concept behind this is that a party would have - a reasonable person would have only said this in the moment they wished it to be true because when it was made it was so contrary to the declarant proprietary or pecuniary interests that it had. So we had the tendency to validate their claim to get someone else versus to expose the declarant's civil or criminal liability. So not one that, I think, comes up very often in family law cases,

but it is for sure something to be thinking about, particularly if you have a third party witness who seems to be changing their story on (inaudible) from what, you know, you understood them to - they maybe said you on the phone previously. Maybe you didn't depose them, but you talked to them on the phone. And, you know - or they gave a written statement to the police or to, you know, to your client. Our clients tend to like to go out, I think, collect all these letters from their neighbors and their friends who are going to say how great they are and expect that you're going to be able to use it at at trial and you're really not. So, you know, you've got to really, sort of, think about what evidence you need to get to need to pull it together. That's client specific. A statement of personal history is not - when a witness is not available it's not considered hearsay either, which that's specifically it's a very narrow section and it's really relating to the birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, even though they declare him or herself had no way of acquiring that knowledge. It's sort of - if it's, sort of, like that, well, I literally, like, you know, was told that was my mom or my dad or that was my auntie by marriage. Like, you know, I, sort of, just accepted it as true and passed along like them. You also - we deal a lot within family law with totem pole hearsay - it's not necessarily excluded. The totem pole hearsay is when hearsay is layered on itself. We had heard previously about the abuse of hospital records, let's say, or a GAL report. That is going to include hearsay in it, and then, sort of, taking a look at that hearsay and figuring out how we're - you know, is there an exception to it? How reliable is that statement? You know, we rely heavily on GALs to report what the children are reporting about their, you know, family and what's going on in their family. And that's often - that's really the only way the court's going to hear from the child unless there's our counsel who's advocating on behalf of the child, but is still not able to testify on the behalf of the child. So oftentimes in GAL reports we see this where we get, you know, moms reporting that the child said this or a mom's reporting that the dad said this to the child. The child then reported it to her. There's a couple of layers of hearsay there that you just need to be mindful of and to just be thinking about that thing. And, you know, you have to assess it from both the standpoint of you may want that information in, but you may also not want that information in. So it's important to look at it from both sides to figure out if there's a way for you to get it in if you want it to be in or for a way for you to

exclude it. And now that - an example of this we often get showed in for hearsay when there's a police report because they are from information from third parties who might be on the scene are reporting what another person told them and that other person may be a party. It may not be a party. And so, you know, think about the use of the police reports as well and how you can use them. And, I find, in addition to it the judges have to see it at evidence. I find that whether or not you can get a police report in at trial truly depends on your judge and what, you know, what you're really trying to use it for. Because, yes, it's a business record, but it does contain oftentimes hearsay and it may be totem pole hearsay and you don't always have we don't know the status of the third party witnesses. So, sort of, curious here how would - what the judges are looking to see if somebody's trying to keep a police report as part of evidence at trial?

>>: Jennifer, that actually leads into a question for the judges that was asked. Can a series of police reports be certified by the keeper of records and admitted as business records?

>>: So the police reports in come in business records would be - so my response is going to dub - is going to address, I think, both Jennifer's remarks and the question, I hope. You know, my thought is that I want information that's going to be helpful overall to my sorting through what this - what the situation is and so many times a police report will contain hearsay information. I'm generally - if it's presented in the proper form and it's been listed as an exhibit and it has a certification accompanying it, then I'm going to allow it in and probably just give it the weight that, I think, is appropriate - certainly subject to an argument that it's inappropriate or that if one party wants to bring the reporting officer in to testify they can do that as well. But the report itself to me is going to be helpful, but for limited purposes. I'm going to understand that it's based on some of the - it's a report of what somebody else told this person and it might give me a point of reference, but it's not necessarily going to be something giving a ton of weight in the final analysis of the issue.

>>: All right.

>>: Thank you.

>>: Yeah, that was really helpful. The other thing to be thinking about - and I don't want to, you know, have to go over stuff that I remember the other presenters' covering already. The thing that you want to be thinking about are, how do you get in documents and other nontestimonial evidence? I think we have the best evidence rule, right? You want to make sure that what you're producing is your best evidence. But there are also certain documents pursuant to Section 902 which are self-authenticating. So those would be public records, newspapers and periodicals. A notarized document is self-authenticating and certified records are self-authenticating. So what that means from a practical standpoint is you don't need to go lay the foundation that fits in, you know, the true and accurate, you know, document that sign and such and such date. It's sort of presumed if it's notarized that it's a true and accurate document, and it's presumed that if it's certified it should be accurate. Get this record. So just using police reports as an example, you know, you can have the police report, but you want to make sure you have a certified certification when you keep of the records. A lot of times the client brings you the police report because they just went to the police station and got it or requested it. But in order to be able to introduce it and avoid other issues at trial you want to have - you want to have those records coming to you directly from the police department with a certification from the keeper of the records that they're true and accurate copies and that that those are the reports that are being shared with prior accounts of the opposing counsel prior to trial are pursuant to your trial order so that you don't run into an issue. And I have had that come up before at trial where police reports all came from six different police departments. Like, four or five of them have the certificate from the keeper of the records and one department didn't give me the certificate and I didn't realize it, you know? So just always double-check that. Make sure that if you even know the records are coming in make sure you have that certification from the keeper of the records from wherever you're doing it 'cause it may become an issue for you at trial. You know, again, being mindful of privileges and disqualifications. You know, we talked about the spousal altercation earlier and when it does not apply. The - Tiffany had talked about, you know, using expert witnesses at trial. And so I wanted to, sort of, talk about the other side of it - admissibility of a nonexpert opinion as it regards value. You know, we, I think - so, I think -

I'm curious if the judges would be - generally speaking, the judges want to hear from a professional if there's a dispute about value of a piece of property or a piece of real estate. But a lay person, you know, an owner of a property could testify as to what base of the value of their property is. You know, that is permissible. It may not be the smartest thing (laughter), but, you know, it could be admissible. You also want to think about, you know, sometimes, I think, we all - our go-to is to get a real estate appraiser, but sometimes, you know, a realtor might be a better evaluator of what's going on in the market. It could be a unique property that you're talking about that may limit its marketability in that particular market. You may want to have, you know, a real estate broker come in to talk about what makes it unique and why that might impact marketability. Personal property appraiser versus your client. Again, your client can testify what they paid for, for a certain piece of furniture, but when they've been sitting on it for 10 years that couch is not worth what they paid for it. And so think about using a personal property appraiser. The other thing that came up at trial that I was going to say is that the husband - everybody came to life. The husband had a personal property appraisal done and basically everything that he can find in the former marital home that's left. And it was like - and the report must have been 60 pages long, and he had the guy visiting every day. And what came up during the trial, my client's sitting next to me and he's testifying about this, that and the other thing, the husband had actually had the personal property appraiser appraise gifts that were given to her by her own family members rather the things that were given to him - to her by him, as well as gifts that he had given to her. So just because somebody produces a personal property appraisal with 15 different items on it - suck it up - get your client and ask them, what is this? Where is this from? Is this a family heirloom that's been passed down from generation to generation? Because you don't know unless you ask, and you could inadvertently start having all this testimony about I'll get you a piece of jewelry that is actually fifth generation in your client's family or something like that, where a judge might go no, this is an inherited asset. I'm not going to include it in the estate. So be mindful about those issues too. And always, always be assessing. Your client might feel adamant they don't want to pay the $600 for a real estate appraisal and they can talk about the value of the home, but who's going to have the most credibility in front of the judge? It's who's going to be able to give the most objective

and therefore reliable opinion of value for...

>>: And for you - you raise an interesting point there. I'd love to hear from the judges on it. In today's real estate market right now, we know that houses are going for much more in a bidding war than they have previously. I'm seeing appraisals continue to come back conservatively, but I'm seeing that when things actually go on the market, people are paying 70,000, $100,000 above asking price, waiving inspections, and I guess my question would be - to your point, Jennifer - in those situations, judges, are you still preferring to hear from an actual real estate appraiser, are you interested in what a market analysis might have to say, given the current climate?

>>: So my answer might be yes. And what I mean by that is that I think the qualifications of an appraiser are helpful to put the proper fundamentals of getting to a value on paper and as a reliable number. But to your point, Julie, I think in situations such as we have right now in the market, which can be really competitive, having somebody on the ground who sees on a day-to-day basis what the market is doing to come in and maybe supplement an appraised value would be very helpful, because then you have what's going on in real time as information that would be helpful to get a real handle on what is either a potentially stale appraisal or something that is worthy of being supplemented. It brings to mind at some level, there was an auto dealership broker who was heavily relied upon by a lot of attorneys that I work with and attorneys that I have used on a couple of occasions in cases where dealerships were part of the marital estate, and he wasn't a certified appraiser, but many attorneys hired him, and some in a lot of cases hired him jointly to get a solid number on the value of the dealership, because he was so familiar on a day-to-day basis with what auto dealerships traded for and sold for. And so although he didn't have the same qualifications as a certified business appraiser, his reputation and his knowledge of the market on the ongoing real-time basis was extremely valuable and was given a lot of weight.

>>: I think that this dovetails from what we were talking about with experts and making sure that you pay attention and properly communicate to the judge what the expert is testifying to, the same thing with non-expert

opinions and expert opinions. It has to be very specific as to what they are testifying to, and make sure that the testimony remains survive a lot of objections, remains within that. So I never want a market analysis. I don't - it's not the same as a real estate appraisal. If you want to have a real estate appraisal, you would need a real estate appraiser. If you want a realtor to come in, I'm not going to take testimony on the value of property, but I may take testimony on market conditions, and I might take testimony on their expertise or their opinion on a certain town or area or neighborhood or even street and what they - and you have to be a little bit careful about speculation - but what their opinion is relative to what would happen if the house was put on the market. So if you're trying to defeat an appraisal, that's one way to have the house sold. Personal property appraisers I have no use for (laughter). I don't know. I don't - especially a personal property appraisal, unless there's something really unique about this family's personal property, I'm going to give it to a master, and if they can't agree on it, then everything's going to get liquidated, but thank you. The other thing I wanted to mention about experts is - so you can get - you know, we talked about how you might get your expert report in. And I think something to think about, too, is that you may not want that expert report in because you may be challenging the expert's qualifications. I (unintelligible) a case where the medical practice was being valued. I had my own medical value expert. The other side (unintelligible) using somebody who I just didn't think had the credentials to give an opinion as to medical evaluation, although I thought that he was very credentialed in the area of business practice valuation. And so I didn't agree to have his report come in uncontested. Instead, I challenged his credentials. You know, after I did the bar gear on credentials to not stipulate. And then, you know, ultimately because he was qualified as a business valuation expert but not a medical practice valuation expert - and I remember Judge Allen, Judge talking about that court. You're going to stipulate the credentials of an expert, be really mindful of what you're stipulating to. And make sure that it's in fact what their credentials are. Because in my particular case, it made a big difference, you know, in terms of ability. Just maneuver with proper information in the report not to have it come into evidence because it's without issue. So something to think about, too, is you'll often be (unintelligible). How can I get in in? How can I get it in? But you might be able to chose the, how do I get - keep it out and what grounds do I have for

keeping certain evidence out? So always be mindful depending on which side you're on and what the issues are - might take a different approach to it. And those kinds of issues are really good to deal with in motions in limine and or motions to preclude. I have a case coming up now where we did a motion to preclude because the father failed to produce certain documents that were requested of him. And we're having that first - the child status conference, which is, you know, still 30 days before trial. So if I'm not successful on that, then I know what I need to do extra at trial. And if I am successful, then I know what I don't need to worry about at trial. So - and, you know, you'll have those decisions early enough. Don't change up your child strategy if you need to. But you need to be mindful of what your potential evidentiary pitfalls or challenges may be before you get to that point. you can take advantage of that and get it back, as well, in advance of trial - similarly with the motion to strike or motion - other motions in limine. You know, I find (unintelligible) guess what Judge Allen and Judge Connelly have to say. But I find expert interrogatories are not adequately responded to - or not responded to them a timely manner, file your motion in limine to preclude that expert from testifying because, you know, we have these rules for a reason. And if they're not being followed, my experience is if you've raised it at trial and you're right, it wasn't complied like a sufficient disclosure, that the judges will preclude that testimony from coming in. It's not trial by ambush. So I think that was all that I had on this, Julie. So thank you to Amy Bond. I'll send it right back to her. She did a lot of work on this, too, so...

>>: Thank you very much. And we're going to go back to Mick.