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Matrimonial Series #3: Evidence in Matrimonial Trials

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SUFFOLK ACADEMY OF LAW

EVIDENCE IN MATRIMONIAL LITIGATION - UPDATE & INTERACTIVE EVIDENCE

March 21, 2016

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CONTENTS

I.	ATTORNEY-CLIENT PRIVILEGE	4
II.	ATTORNEY WORK PRODUCT	5
IV.	PHYSICIAN-PATIENT PRIVILEGE	6
V.	PSYCHOLOGIST-CLIENT PRIVILEGE	6
VI.	MARITAL PRIVILEGE	7
VII.	COMINGLED PROPERTY – OVERCOMING PRESUMPTION	7
IX.	EFFECT OF CPLR 3122-a	8
X.	ESI CASES	8
XI.	SPOLIATION OF EVIDENCE	11
XII.	POWERS AND LIMITATIONS OF COURT	12
XIII.	TELEPHONIC TESTIMONY	13
XIV.	ADVOCATE-WITNESS RULE	13
XV.	FIFTH AMENDMENT PRIVILEGE	14
XVI.	IMPEACHMENT BY TREATISE	14
XVII.	IN CAMERA WITH CHILD	15
XVIII.	WITNESSES	16
XIX.	PRESUMPTIONS	17
XX.	CROSS EXAMINATION BY BAD ACTS	17
XXI.	COLLATERAL EVIDENCE RULE	18
XXII.	INTERPLAY OF COLLATERAL EVIDENCE RULE AND CROSS EXAMINATION OF PRIOR BAD ACTS	19
XXIII.	ADMISSIONS	20
XXIV.	DECLARATION AGAINST INTEREST	20
XXV.	JUDICIAL NOTICE	20
XXVI.	JUDICIAL IMMUNITY	21
XXVIII.	EXPERT TESTIMONY – PROFESSIONAL RELIABLE HEARSAY	21
XXIX.	OTHER ASPECTS OF HEARSAY	24
XXX.	EXPERT TESTIMONY	26
XXXI.	FRYE STANDARD	27
XXXII.	EXCITED UTTERANCES	28
XXXIII.	BUSINESS RECORD RULE	28
XXXIV.	PRIOR CONSISTENT STATEMENTS	29

XXXV. PRIOR INCONSISTENT STATEMENTS 30
XXXVI. HANDWRITING 30
XXXVII. AUDIO RECORDING 30
XXXVIII. BEST EVIDENCE RULE 31
XXXIX. PAST RECOLLECTION RECORDED 31
XL. HABIT & CUSTOM; ACKNOWLEDGMENT CLAUSE 32
XLI. MISSING WITNESS CHARGE 32
XII. EAVESDROPPING 33
XIII. BURDEN OF PROOF 34

I. ATTORNEY-CLIENT PRIVILEGE

A. Survives Death

1. The attorney-client privilege survives the death of the client. *In re Hersh*, 40 M3d 1211(A), 975 NYS3d 366 (Surr. Ct., Qns Co., 2013); *Mayorga v. Tate*, 302 AD2d 11, 752 NYS2d 353 (2d Dept. 2002)

B. Existence of attorney-client relationship

1. Father and brother of wife in divorce proceeding, who were both attorneys, failed to establish that attorney-client relationship existed between them and wife, and thus requested correspondence in subpoenas was not privileged based on such attorney-client relationship; although father and brother claimed to have helped wife select counsel, and brother helped her understand certain financial documents, father and brother were not matrimonial lawyers, neither appeared in the divorce proceedings, and they failed to state specific legal tasks they performed, or legal advice they provided, on wife's behalf. Even if correspondence requested in subpoenas in divorce proceeding was privileged based on attorney-client relationship between wife and her prior matrimonial counsel, that privilege was waived because communications were "copied to, sent to, or authored by" wife's brother and father, who were not wife's counsel, and brother and father failed to show that they were acting as wife's agent when communicating with her prior counsel. *Nacos v. Nacos*, 124 AD3d 462, 1 NYS3d 90 (1st Dept. 2015)

C. Deposition of Opposing Counsel

1. Before a party will be permitted to depose opposing counsel, that party must show: (1) that no other means exist to obtain the information than to depose opposing counsel; (2) that the information sought is relevant and non-privileged; and (3) that the information is crucial to the preparation of the case. *Q.C. v. L.C.,* 47 M3d 600, 5 NYS3d 810 (Supreme Court, Westchester Co., 2015, Ecker, J.)

D. Confidential Communication – Expectation of Confidentiality

1. A fundamental requirement of the attorney-client privilege is a showing that the client intended the communication with counsel to be. The privilege depends on whether the client had a reasonable expectation of confidentiality under the circumstances. As long as there was a reasonable expectation of confidentiality, e-mail communications between client and attorney are, like any other communication between client and attorney, protected by the attorney-client privilege. *Crocker C. v. Anne R.*, 49 M3d 1202(A) (S.C.t,, Kings Co., 2015, Sunshine, J.)

E. Exception – Common Interest Doctrine

1. Common-interest doctrine is an exception to the rule that the presence of a third party at a communication between attorney and client will render the

communication non-confidential. *U.S. Bank N.A. v. APP Intl. Fin. Co.*, 33 AD3d 430, 823 NYS2d 361 (1st Dept. 2006)

2. Under this doctrine, a third party may be present at the communication without destroying the attorney-client privilege if the communication is for the purpose of furthering a nearly identical legal interest shared by the client and the third party. Pending or reasonably anticipated litigation is not a necessary element of the common-interest doctrine. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 124 AD3d 129, 998 NYS2d 329 (1st Dept. 2014)

F. Crime-Fraud Exception

1. Attorney-client communication privilege (CPLR § 4503[a][1]) and the privilege for work product prepared in anticipation of litigation (CPLR § 3101[d][2]), may give way to an adversary's need for discovery when they involve client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct. *Stevens v. Cahill*, 19 NYS3d 863 (N.Y. Sur.Ct. 2015, Mella, J.)

G. Fiduciary Exception

1. The fiduciary exception to the attorney-client privilege, with respect to communications between a trustee and the trust's attorney, is based on the theory that when a trustee seeks legal advice in executing his or her fiduciary duties, he or she is acting ultimately on behalf of the beneficiaries of the trust and, accordingly, cannot cloak his or her actions from them, the attorney's real clients. The fiduciary exception to the attorney-client privilege does not apply to the attorney work-product doctrine. *Nama Holdings, LLC v. Greenberg Traurig LLP*, 133 AD3d 46, 18 NYS3d 1 (1st Dept. 2015)

II. ATTORNEY WORK PRODUCT

A. Audio recording of interview that plaintiff conducted with defendant prior to commencement of medical malpractice action did not constitute attorney work product, absent showing that recording contained elements of opinion, analysis, theory, or strategy. Mere fact that narrative witness statement is transcribed by attorney is not sufficient to render statement protected attorney work product. *Geffner v. Mercy Med. Ctr.*, 125 AD3d 802, 4 NYS3d 283 (4th Dept. 2015)

III. *IMPERMISSIBLE USE OF ATTORNEY FOR CHILD*

A. Court properly denied father's application to compel the testimony of the attorney for the child. *Gennard v. Guido*, 108 AD3d 709, 970 NYS2d 55 (2d Dept. 2013)

B. Family Court erred in basing its belief that the father was an untreated sex offender when the source of the belief was information provided by the attorney for the child that was based on evidence outside the record, which the father challenged, and there was no evidence presented as to whether a lack of treatment would be detrimental

to the children. Family Court improperly relied upon the attorney for the children as both an investigative arm of the court and advisor. *William O. v. Michele A.,* 119 AD3d 990, 988 NYS2d 299 (3d Dept. 2014)

C. Attorney for subject child in custody proceeding improperly advocated for temporary change in custody without having conducted complete investigation, thereby requiring remittitur to Family Court for *de novo* hearing and new determination on parents' separate custody petitions; attorney's application was based solely on his discussion with father and child's day care provider, which was located near father's residence, and he did not speak to mother or child's other day care provider closer to mother's residence. *Brown v. Simon*, 123 AD3d 1120, 1 NYS3d 238 (2d Dept. 2014)

IV. PHYSICIAN-PATIENT PRIVILEGE

A. Criminal Defendant

1. Allowing defendant's psychiatrist to testify concerning defendant's admission that he abused an 11-year-old child violated the physician-patient privilege in prosecution for predatory sexual assault against a child, where defendant made the admission for purpose of treatment for depression and suicidal ideation. Regardless of whether a physician is required or permitted by law to report instances of abuse or threatened future harm to authorities, which may involve the disclosure of confidential information, it does not follow that such disclosure necessarily constitutes an abrogation of the evidentiary privilege a criminal defendant enjoys under the physician-patient privilege. McKinney's CPLR 4504(a). *People v. Rivera,* 25 NY3d 256, 11 NYS3d 509, (2015)

B. HIPPA

1. The Family Court erred in overruling the mother's objection to the testimony of her other daughter's treating physician about his treatment of that child on the ground that the Privacy Rule standard of the Health Insurance Portability and Accountability Act of 1996 (hereinafter HIPAA) for disclosure of her other daughter's medical information was not met (see 45 C.F.R. 164.512 [e][1][i], [ii]). The mother's other daughter was not a party to the proceeding, and permitting her treating physician to testify in violation of HIPAA directly impaired the interest protected by the HIPAA Privacy Rule of keeping one's own medical records private. As such, the Family Court should have sustained the mother's objection to this testimony. *Brown v. Simon*, 123 AD3d 1120, 1 NYS3d 238 (2d Dept. 2014)

V. PSYCHOLOGIST-CLIENT PRIVILEGE

A. Subject Matter in Issue

1. In an action to declare the validity of a marriage and for damages stemming from an alleged fraudulent misrepresentation that the parties were never

married, statements of the parties when they met jointly with a registered psychologist for counseling were not protected by the psychologist- client privilege. By statute, CPLR 4507, the psychologist- client privilege is placed on the same basis as an attorney – client privilege. As such, the privilege is waived where the client places the subject matter of the privileged communication in issue or where invasion of the privileges is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information. The attorney-client privilege may be waived as to co-clients where they subsequently enter into adverse litigation. *Jackson K. v. Parisa G.,* NYLJ, 9/25/15, S.Ct., N.Y Co., Drager, J.

VI. MARITAL PRIVILEGE

A. Although husband's letter to wife providing a reasonable inference of his guilt with respect to his sexual conduct with a child constituted a communication to which the marital privilege applied, where the criminal activity divulged by the communication is directed at a child of the marriage, the privilege is extinguished. *People v. K.S.*, 44 M3d 545, 991 NYS2d 242 (S.Ct., Bronx Co., 2014, Hunter, Jr., J.)

B. The marital privilege was never designed to forbid inquiry into the personal wrongs committed by one spouse against the other and thus does not apply here, as defendant's statements were not prompted by trust or confidence in the marital relationship, but, instead, constituted threats of criminal activity directed at the wife. Accordingly, wife could testify that Husband threatened to burn the house down. *People v. Howard*, 129 AD3d 1654, 12 NYS3d 708 (3d Dept. 2015)

C. In criminal prosecution, testimony of defendant's wife was not barred by the marital privilege as the testimony by a spouse with regard to observations and communications that constitute mere "daily and ordinary exchanges" between spouses are not subject to the protections of the marital privilege, as they are not communications that would not have been made but for the absolute confidence in, and induced by, the marital relationship. *People v. Rodriguez*, 135 AD3d 1181, 23 NYS3d 1181 (3d Dept. 2016)

VII. COMINGLED PROPERTY – OVERCOMING PRESUMPTION

A. Plaintiff rebutted the presumption that the commingled separate property is now marital property by establishing that her transfer of her separate funds into a marital checking account for 95 days was merely a convenient means of transferring her separate funds into her trust account. Moreover, the marital checking account in which the funds at issue were commingled was held only in plaintiff's name. *Terasaka v. Terasaka*, 130 AD3d 1474, 13 NYS3d 740 (4th Dept. 2015)

VIII. MARITAL PROPERTY; MARITAL RESIDENCE; PRESUMPTION

A. *Yerushalmi v. Yerushalmi*, --AD3d--, 2016 N.Y. Slip Op. 00969 (2d Dept. 2016)

1. Domestic Relations Law § 236(B)(1)(c) defines marital property as "all property acquired by either or both spouses during the marriage and before the ... commencement of a matrimonial action, regardless of the form in which title is held." Since the marital residence was purchased by the parties during their marriage, using marital funds, it is presumed to be marital property . The fact that title had been transferred to the QPRT (Qualified Personal Residence Trust), allegedly for estate planning purposes, while the parties continued to reside at the marital residence, was, under the circumstances here, insufficient to rebut the presumption. Consequently, the Supreme Court erred in determining that the marital residence was not marital property and should have granted that branch of the plaintiff's motion which was to direct the defendant to remove the marital residence from the real estate market and enjoin him from selling or transferring the marital residence.

B. cf. *Perdios v. Perdios*, 135 AD3d 840, 24 NYS3d 680 (2d Dept. 2016)

1. The Supreme Court properly determined that 99% of the Essex Building, LLC (acquired during the marriage), was owned by the Perdios 2003 Irrevocable Family Trust and therefore was not marital property subject to equitable distribution

IX. EFFECT OF CPLR 3122-a

A. "Defendants contend that the court erred in denying their request at the commencement of trial to admit all of plaintiff's medical records in evidence pursuant to CPLR 3122-a (c). According to defendants, the records were automatically admissible because plaintiff raised no objection within 10 days of trial. Plaintiff's failure to object within 10 days before the trial waived any objection plaintiff had to the admissibility of the records as business records (*see* CPLR 3122-a [c]; 4518 [a]), but he did not waive any objection to their admissibility based on other rules of evidence. *Siemucha v. Garrison*, 111 AD3d 1398, 1400, 975 NYS2d 518 (4th Dept. 2013)

X. ESI CASES

A. ESI Preservation; Spyware

1. Where husband installed spyware on the wife's iPhone and then used that spyware to monitor his wife's communications, including more than 200 privileged emails with her attorney, the court held that a negative inference and/or the production of the opposing parties computers was mandated, with the court reserving the right to impose harsher sanctions, depending on the results of the forensic computer inspection, with the preclusion of evidence being a possible partial sanction. As the husband invoked the Fifth Amendment regarding all questions surrounding purchases of spyware and whether he used it to intercept the wife's privileged communications, the only way to ascertain whether the husband actually violated the wife's attorney client privilege was to be able to review the documents and data records on her husband's computing

devices. *Crocker C. v. Anne R.*, 49 M3d 1202(A) (Supreme Court, Kings Co., 2015, Sunshine, J.)

B. Duty to Preserve

1. As defendants were on notice of a credible probability that they would become involved in the subject litigation, their failure to take active steps to halt the process of automatically recording surveillance video and preserve it for litigation constituted spoliation of evidence and the proper remedy was not striking defendant's answer, but to impose an adverse inference charge at trial. *Suazo v. Linden Plaza Associates,* 102 AD3d 570, 958 NYS2d 389 (1st Dept. 2013)

2. *Zubulake* (93 AD3d 33) establishes a federal spoliation standard applicable to discoverable ESI materials; once a party reasonably anticipates litigation, it must issue a litigation hold and suspend its routine document destruction policy; Non–ESI evidence destruction is governed by State common-law spoliation rules, unless the destruction is caused by refusal to comply with a discovery order or a willful failure to disclose, in which case CPLR 3126 would govern. *Strong v. City of New York,* 112 AD3d 15, 973 NYS2d 152 (1st Dept. 2013)

C. ESI; Production of Facebook Postings

1. In a contested custody action, husband sought an order directing wife to turn over printouts of all pictures, posts and information posted on her Facebook pages over 4 years, claiming such disclosure would be relevant and material to the issue of the amount of time the wife had spent with the child since birth. The court held that the time spent by the parties with the child may be relevant and material and thus ordered defendant to produce for an in camera review printouts of her Facebook postings depicting or describing her whereabouts, outside the New York City area, from the time of child's birth to the commencement of the proceeding, and to provide an affidavit describing the printouts in general terms and also requiring defendant to provide an authorization permitting the court to have access to her Facebook postings during the applicable time period. The court also *sua sponte* directed plaintiff, the moving party, to produce all of defendant's postings that he possessed or had access to with an affidavit stating that they represent all such Facebook postings possessed by or available to defendant in their entirety during such time. *A.D. v. C.A.*, 50 M3d 180, 16 NYS3d 126, (Supreme Court, Westchester Co., 2015, Ecker, J.)

2. In personal injury action where plaintiff claimed injuries sustained erred her ability to play sports, and defendants search of the public portion of plaintiff's Facebook profile revealed photographs of plaintiff on skis at a relevant time, the Appellate Division held that defendants made a showing that at least some of the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on plaintiff's claim, the matter was remitted to the trial court to conduct an in camera inspection to determine which of the materials were relevant to plaintiff's alleged injuries. *Richards v. Hertz Corp.*, 100 AD3d 728, 953 NYS2d 654 (2d Dept. 2012)

D. Authentication - *People v. Johnson*, 2105 N.Y. Slip Op. 25431 (Co. Ct., Sullivan Co., 12/31/15, Labuda, J.) (Review of authentication of ESI evidence)

1. "However, although circumstantial evidence of authenticity may, in some cases, be sufficient to provide an adequate foundation upon which digital evidence may be admitted, circumstantial evidence is an insufficient foundation for admissibility where there is no evidence establishing the security of a website from which purported information has been accessed or that a purported author had exclusive access thereto. *Commonwealth v. Williams*, 456 Mass. 857, 869 [2010]. Indeed, "courts have recognized that authentication of ESI may require greater scrutiny than that required for the authentication of hard copy' documents ..." (*Lorraine, supra,* 241 F.R.D. at 542-543), and that decisions as to the admissibility of such items "are to be evaluated on a case-by case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity" (*Lorraine, id.,* 241 F.R.D. at 543, quoting *In the Interest of F.P.,* 878 A.2d 91, 96 [Sup.Ct. PA 2005]). "Indeed, courts increasingly are demanding that proponents of evidence obtained from electronically stored information pay more attention to the foundational requirements than has been customary for introducing evidence not produced from electronic sources." *Lorraine, supra,* 241 F.R.D. at 543.

2. Some methods of authentication
   a. Authentication by Personal Knowledge
   b. Authentication by Comparison to Known Authentic Samples
   c. Authentication by Circumstantial Evidence Coupled with Distinctive Characteristics
   d. Public Record or Reports as Authentication
   e. Self-Authentication

E. Text Messages – Authentication

1. The testimony of a "witness with knowledge that a matter is what it is claimed to be is sufficient" to satisfy the standard for authentication (*Gagliardi*, 506 F3d at 151). Here, there is no dispute that the victim, who received these messages on her phone and who compiled them into a single document, had first-hand knowledge of their contents and was an appropriate witness to authenticate the compilation. Moreover, the victim's testimony was corroborated by a detective who had seen the messages on the victim's phone. *People v. Agudelo*, 96 AD3d 611, 947 NYS2d 96 (1st Dept. 2012) leave to appeal denied, 20 NY3d 1095 (2013)

F. Social Media

1. A court is required to determine whether the content contained on the social media account is material and necessary, and then to balance whether the production of the contents would result in a violation of the account holder's privacy rights. *Fawcett v. Altieri*, 38 M3d 1022, 960 NYS2d 592 (S.Ct., Richmond Co., 2013)

2. Where defendant, in personal injury action, moved for an order compelling plaintiff to provide an unlimited authorization to obtain records of her Facebook account, including photographs, status updates and instant messages, application denied with exception that plaintiff would have to provide defendant with all photographs of herself posted on Facebook, either or after the accident, that she intends to use at trial. Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition. The decision to order an *in* camera review of items requested in discovery rests in the sound discretion of the court. *Forman v. Henkin*, 134 AD3d 593, 22 NYS3d 178 (1st Dept. 2015)

G. GPS Device

1. Government can attach a GPS tracking device to a public employee's personal vehicle without a warrant. When an employee chooses to use his car during the business day, GPS tracking of the car may be considered a workplace search, and public employees have a diminished right of privacy in the workplace if a search satisfies a standard of reasonableness. *Matter of Cunningham v. NYS Department of Labori*, 21 NY3d 515, 974 NYS2d 896 (2013)

H. Work Email

1. Physician's e-mail communications with his attorney, which e-mails were stored on defendant-hospital's e-mail server, were not confidential, for purposes of attorney-client privilege, where hospital's electronic communications policy, of which the physician had actual and constructive notice, prohibited personal use of hospital's e-mail system and stated that hospital reserved the right to monitor, access, and disclose communications transmitted on hospitals e-mail server at any time without prior notice, though physician's employment contract required hospital to provide him with computer equipment. *Scott v. Beth Israel Med. Ctr.*, 17 Misc3d 934, 847 NYS2d 436 [Sup. Ct. N.Y Co. 2007] [Ramos, J.]

XI. SPOLIATION OF EVIDENCE

A. Pegasus Aviation I, Inc. v. Varig Logistica S.A., --NY3d--, 2015 WL 8676955 (2015) - To support an award of sanctions for the spoliation of evidence, the movant must demonstrate:

1. That the party who controls the evidence had an obligation to preserve at the time of the spoliation;
2. The evidence was destroyed with a "culpable state of mind"; and
3. The spoliated evidence was relevant to the party's claim or defense "such that the trier of fact could find that the evidence would support that claim or defense

a. There is a rebuttable presumption that the evidence is relevant if the destruction is done intentionally or willfully or is the result of gross negligence; and

b. If the spoliation was merely negligent, the party seeking sanctions has the burden to establish the relevancy.

B. Amendment to FRCP 37(3) (12/1/15) limits the imposition of an adverse inference instruction “only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation.

C. Adverse Inference charge

1. A party's failure, after being ordered on multiple occasions, to produce relevant ESI that was known to have existed, and the parties concomitant failure to provide an adequate affidavit explaining the reasons for not locating certain ESI earlier and turning over it to the other party was "willful and contumacious", and the court imposed the sanction of adverse inference charge, as that would "prevent defendant from using the absence of these documents at trial to its tactical advantage." *General Motors Acceptance v. New York Cent. Mut. Fire Ins.,* 104 AD3d 523, 961 NYS2d 142 (1st Dept. 2013)

2. Expert – Destruction of Notes

a. “…while Dr. Elkin did not, as plaintiff suggests, testify that she “destroyed” her notes, she did concede that she did not comply with the subpoena, which required her to bring with her to court the notes that she used in generating her report on behalf of defendants. The failure to produce those notes affected plaintiff's ability to cross-examine defendants' expert and was fundamentally unfair to plaintiff. At the least, it would have been appropriate for the court to issue an adverse inference charge (*see Minaya v. Duane Reade Intl., Inc.,* 66 AD3d 402, 403 [1st Dept 2009]). That Dr. Elkin testified that the notes were subsumed in the report is of no moment. Plaintiff was entitled to independently investigate that claim without having to rely on Dr. Elkin's own assurances that the notes were themselves of no probative value.” *Herman v. Moore*, 134 AD3d 543, 21 NYS3d 254 (1st Dept. 2015)

XII. POWERS AND LIMITATIONS OF COURT

A. Questioning by Court

1. “The mother correctly contends that the Family Court's questioning of her during her testimony, which included pointed and persistent challenges to her credibility, was inappropriate. Under the circumstances of this case, the court's conduct did not operate to deprive the mother of a fair trial. However, we take this opportunity to remind the court that it must strictly avoid taking on either the function or appearance of an advocate at trial. *C.H. v. F.M.,* 130 AD3d 1028, 1029, 14 NYS3d 482 (2d Dept. 2015)

B. Independent Internet Research

1. We also caution the Justice that his independent internet investigation of the plaintiff's standing that included newspaper articles and other materials that fall short of what may be judicially noticed, and which was conducted without providing notice or an opportunity to be heard by any party…was improper and should not be repeated. *HSBC Bank USA, N.A., v Taher*, 104 AD3d 815, 962 NYS2d 301 (2d Dept. 2013)

C. Weight to Opening Statement

1. Plaintiff established, *prima facie*, her entitlement to equitable distribution of subject parcel of real property, where defendant admitted in his Statement of Proposed Disposition that he acquired some ownership interest in property during marriage and confirmed timing of his acquisition in opening statements during which defense counsel asserted that, during marriage, defendant purchased property, though partially with money received from another source; that unequivocal, factual assertion made during opening statements constituted judicial admission, and it was thereby established that at least a portion of defendant's interest in property was presumptively marital property, shifting burden to defendant to rebut that presumption. *Kosturek v. Kosturek,* 107 AD3d 762, 968 NYS2d 97 (2d Dept. 2013)

XIII. TELEPHONIC TESTIMONY

A. Court properly exercised its discretion in permitting the telephonic testimony of an expert witness who resided in another state (*see* Domestic Relations Law § 75-j [2]; *Rodriguez v. Feldman*, 126 AD3d 1557, 1558, 6 NYS3d 847 (4th Dept. 2015)

XIV. ADVOCATE-WITNESS RULE

A. 22 NYCRR § 1200.00, Rule 3.7. -
"a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
(1) the testimony relates solely to an uncontested issue;
(2) the testimony relates solely to the nature and value of legal services rendered in the matter;
(3) disqualification of the lawyer would work substantial hardship on the client;
(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
(5) the testimony is authorized by the tribunal.
(b) A lawyer may not act as advocate before a tribunal in a matter if:
(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9."

B. *Salomone v. Abramson*, 48 M3d 318, 5 NYS3d 838 (S.Ct., N.Y. Co., 2015, Kornreich, J.)

1. Restrictions on a party's right to select representation by a particular attorney should be carefully scrutinized because disqualification of counsel based on the advocate witness rule can be used as a tactic to stall and derail the proceedings, redounding to the strategic advantage of one party over another.

2. A party seeking disqualification of counsel, under the advocate witness rule, must make a showing that the testimony of counsel will be necessary to establish the client's claim or be prejudicial to the client in the event the attorney is called by the other side.

XV. FIFTH AMENDMENT PRIVILEGE

A. Where wife invoked the Fifth Amendment privilege during an examination before trial of questions relative to cash funds removed from the parties' business, the court noted that while a negative inference may be drawn from one's refusal to answer questions at trial in a civil matter, this may only be done when there is some independent evidence presented which allows the court to make such an inference. Moreover, imposition of the civil sanction may not be based solely upon the wife's assertion of the Fifth Amendment and a party's refusal to answer does not automatically lead to an adverse determination but is rather only one of multiple factors to be considered. The court noted that the wife's invocation of the Fifth Amendment privilege was not only reasonable in the circumstances but since she already admitted that her financial statements previously provided to the court were inaccurate, no adverse inference was necessary. The wife only invoked the privilege with respect to certain tax returns because of potential criminal liability for failing to report income to the IRS. The court noted the husband invoked the same privilege in the course of the proceedings for the same reason. Both parties affirmed that they lied on all of their financial documents until they were able to take advantage of an Offshore Voluntary Disclosure Initiative dealing with the admission of hidden income outside of United States, and paying the taxes and interest, in order to avoid criminal charges. *Anonymous v. Anonymous,* NYLJ, 7/3/13, S.Ct., N.Y. Co., Helewitz, Special Referee

B. The privilege cannot be invoked where the witness fears civil liability by his answer as opposed to criminal prosecution. *J.F. v. W.F.,* NYLJ, 12/1/13, Supreme Court, N.Y. Co., Helewitz, Ref.

XVI. IMPEACHMENT BY TREATISE

A. Issue of Authoritative

1. It is well settled that the use of scientific works and publications may be used for impeachment purposes during cross-examination if it has been demonstrated that the work is the type of material commonly relied upon in the profession and has been deemed authoritative by such expert. Here, defendant recognized the publication

as a “standard of care” to which he attempted to “adhere” in his own practice. Although he did not use the word “authoritative” in describing the publication, the modern trend, is to eschew a narrow and rigid reliance upon semantic choices when other words, and the testimony viewed as a whole, convey an equivalent meaning as that in the traditional verbal formulation. Thus, a physician may “not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative” where he has testified that it is reliable (*Spiegel v Levy*, 201 AD2d 378, 379 [1994], *lv denied* 83 NY2d 758 [1994]; *see Lenzini*, 48 AD3d at 220), especially where, as here, he agreed that it constituted a “standard of care” to which he attempted to “adhere.” *Wolf v. Persaud,* 130 AD3d 1523, 1525, 14 NYS3d 601 (4th Dept. 2015)

XVII. IN CAMERA WITH CHILD

A. Coaching Child

1. “An in camera examination was conducted of the subject child (Autistic) on October 1, 2014 and the transcript sealed. At the in camera, then seven year old J.M. was extraordinarily precise and unusually articulate as to her desired parental access schedule, including specific days and times that a parental switch should occur. Moreover, the child answered questions with what appeared to be rehearsed responses, offering her proposed schedule in response to questions addressing other topics. After a review of the in camera examination, this Court has no alternative but to conclude that this special needs child was likely influenced as to what to tell this Court. The Court notes that Husband has repeatedly expressed a concern regarding Wife's attempts to “coach” the subject child. Under these circumstances, the in camera examination has been afforded less weight than it would ordinarily be afforded by this Court in rendering this decision. …However, in what appeared to be a credible moment the child clearly indicated that she frequently switches her opinion as to who she desires to live with.” *C.M. v. C.M.*, 47 M3d 1210(A), 16 NYS3d 710 (Supreme Court, Richmond Co., DiDomenico, J., 2015)

B. Testimony In Camera

1. Family Court properly permitted one of mother's children to testify at fact-finding hearing in camera in neglect proceedings, where court balanced mother's due process rights with emotional well-being of child by permitting child to testify outside mother's presence but subject to contemporaneous cross-examination by mother's attorney following consultation with mother, and affidavit submitted by social worker established potential trauma to child, which would likely interfere with child's ability to testify accurately and without inhibition concerning allegations of excessive corporal punishment. *In re Moona C.,* 107 AD3d 466, 967 NYS2d 54 (1st Dept. 2013)

XVIII. WITNESSES

A. Incomplete cross examination

1. Plaintiff contends that defendant should not be awarded maintenance because of her refusal to submit to a complete cross-examination, which prevented the court from ascertaining her standard of living at the time of the divorce action, in contrast to the time earlier in the marriage when the parties co-resided. When a party, through no fault of its own is deprived of the benefit of the cross-examination of a witness, a court may strike that witness's direct testimony in whole or in part. Although the court did not condone defendant's failure to return to court to complete her cross-examination during the custody phase of the trial, and believes that this conduct must be sanctioned, under the particular circumstances of this case, the court providently exercised its discretion when it drew a negative inference against defendant with respect to custody issues but declined to strike her testimony in its entirety. Among other things, the court was familiar with the parties' lavish standard of living during the marriage and defendant testified and was cross-examined for a number of days during the financial phase of the trial. During this testimony, defendant acknowledged that her food and unreimbursed medical expenses had decreased, that many of the amounts in her net worth statement reflected the way the parties lived before separating, and that she had reduced her spending on many of these items. Accordingly, plaintiff's claims of prejudice are overstated, and a negative inference with respect to custody was an adequate sanction for defendant's misconduct. *Cohen v. Cohen*, 120 AD3d 1060, 1065-66, 993 NYS.2d 4 (1st Dept. 2014),leave to appeal denied, 24 NY3d 909, 998 NYS.2d 310 (2014)

B. Lay Witness Testimony

1. Individual seeking spousal maintenance is entitled to submit general testimony regarding a medical condition, where the effect of that condition on the person's ability to work is readily apparent without the necessity of expert testimony. A decision of the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof. *Knope v. Knope,* 103 AD3d 1256, 959 NYS2d 784 (4th Dept. 2013); see also, *Rindos v. Rindos*, 264 AD2d 722, 694 NYS2d 735 (2d Dept. 1999) (“Considering all of the evidence…, including the testimony of the Plaintiff concerning her disability, we conclude that …maintenance should continue for a period of 10 rather than 6 years.”)

C. Fifth Amendment – Negative Inference

1. In a matrimonial action in which defendant was held in civil contempt for failing to comply with an order requiring him to deposit in escrow the proceeds of the sale of real property that was the subject of a prior equitable distribution determination in favor of plaintiff, Supreme Court did not violate defendant's constitutional rights in drawing a negative inference from his invocation at the contempt hearing of his Fifth Amendment right against self-incrimination with respect to questions regarding the location of the proceeds, where defendant failed to request to bifurcate the hearing so plaintiff's criminal contempt allegations would be considered first. A negative inference

may be drawn in the civil context when a party invokes the right against self-incrimination. Defendant's invocation of the privilege did not relieve him of his burden to present adequate evidence of his financial inability to comply with the order so as to avoid civil contempt liability. Moreover, because defendant failed to request to bifurcate, he could not complain that Supreme Court erred in drawing negative inferences specifically allowed by the law. *El-Dehdan v. El-Dehdan,* 26 NY3d 19, 19-20, 19 NYS3d 475 (2015)

XIX. PRESUMPTIONS

A. Presumption that parents should have visitation with child applies even when parent is incarcerated, and opposing parent must rebut by showing, with preponderance of the evidence, that such visitation is not in the child's best interest. *Granger v. Misercola*, 21 NY3d 86, 967 NYS2d 872 (2013)

XX. CROSS EXAMINATION BY BAD ACTS

A. Good Faith Basis

1. Although a witness may be questioned about prior bad acts which bear upon his [or her] credibility, the questions must be asked in good faith and must have a basis in fact. *People v. Spirles*, --AD3d--, 2016 N.Y. Slip Op. 00830 (4th Dept. 2016)

B. Civil Sandoval Application

1. In a personal injury action, plaintiff was precluded from impeaching defendant with evidence of his 25-year-old convictions of certain sex crimes, apparently committed against minors. CPLR 4513 does not deprive a trial court of all discretion in controlling the use of a criminal conviction for impeachment. The potential for the unfairness in the admission of prior crimes may be as great for a civil litigant, who has no control over the use of a criminal conviction and has no right not to testify, as for a criminal defendant. Here, due to the long passage of time since the convictions and the lack of evidence that the crimes involve forcible conduct, the probative value of the convictions was outweighed by the potential for prejudice to the defendant. The principles articulated in Sandoval, 34 NY2d 371, are applicable to civil, as well as criminal, actions. *Tripp v. Williams*, 39 M3d 318, 959 NYS2d 412 (Supreme Court, Kings Co., 2013, Battaglia, J.)

2. There is no bright-line rule of exclusion based upon age of conviction. *People v. Martin*, --AD3d-, 2016 N.Y. Slip Op. 01357 (3d Dept. 2016)

C. Perjury

1. "We reject plaintiff's contention that Supreme Court erred in allowing cross-examination of her expert regarding an out-of-state conviction of contempt. That conviction was based upon lies told by the expert to a judge during the course of the

expert's trial testimony. Although the conviction was in 1983, " '[c]ommission of perjury or other acts of individual dishonesty, or untrustworthiness . . . will usually have a very material relevance, whenever committed' " (*Donahue v Quikrete Cos.* [appeal No. 2], 19 AD3d 1008, 1009 [2005], quoting *People v Sandoval*, 34 NY2d 371, 377 [1974]). *Towne v. Burns*, 125 AD3d 1471, 3 NYS.3d 844 (4th Dept. 2015)

D. Domestic Violence

1. Prior bad acts in domestic violence situations are more likely to be considered relevant and probative evidence because the aggression and bad acts are focused on one particular person, demonstrating the defendant's intent and motive. *People v. Pham*, 118 AD3d 1159, 987 NYS.2d 687 3d Dept. 2104), leave to appeal denied, 24 NY3d 1087 1 N.Y.S.3d 14 (2014)

E. Civil Judgments

1. Civil judgments cannot be characterized as bad or immoral ... acts involving moral turpitude that would allow them to be used to question the defendant's credibility" *Quiroz v. Zottola*, 129 AD3d 698, 698, 11 NYS3d 194 (2d Dept. 2015)

F. Juvenile Delinquency; Youthful Offender

1. Although it is impermissible to use a youthful offender or juvenile delinquency adjudication for impeachment purposes because those adjudications are not convictions of a crime, the illegal or immoral acts underlying such adjudications may nevertheless be utilized for impeachment purposes. *People v. Lucius*, 289 AD2d 963, 737 NYS2d 717 (4th Dept. 2001)

XXI. COLLATERAL EVIDENCE RULE

A. The Rule

1. "[t]he party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility. *Peo. v. Pavao*, 59 NY2d 282, 288, 464 NYS2d 458 [1983]); *Badr v. Hogan*, 75 NY2d 629, 634, 555 NYS2d 249 (1990)

2.. Rule limits the ability of the cross-examiner to contradict the witness by introduction of extrinsic evidence

3. Policy Reason – prevent numerous collateral minitrials

B. What is Collateral

1. Where the subject matter bears upon witness's credibility because it shows that the witness had acted deceitfully on a prior unrelated occasion, it is collateral and, if the witness denies the conduct, the questioner is bound by the witness's answer and may not refute it with independent proof. *Peo. v. Pavao*, 59 NY2d 282, 464 NYS2d 458 (1983).

2. Court precluded plaintiff from using the verified answer of the defendant to impeach her credibility with respect to a collateral matter which had no relevance to any issue in the case. *Perkins v. Murphy*, 7 AD3d 500, 775 NYS2d 591 (2d Dept. 2004)

3. Family Court's improvident exercise of discretion in permitting the introduction of extrinsic evidence to contradict babysitter's testimony regarding matters that had no direct bearing on any issue in child custody modification case other than credibility was error, albeit harmless error under facts of case. *Gorniok v Zeledon-Mussio,* 82 AD3d 767, 918 NYS2d 516 (2d Dept. 2011)

C.. Caveat - A negative response by the witness does not preclude further questioning of the witness on the point, "for, it if did, the witness would have it within his power to render futile most cross-examination." *People v. Sorge*, 301 NY 198 [1950].

D. Not Collateral

1. The witness's bias or hostility - *Badr v. Hogan*, 75 NY2d 629, 555 NYS2d 249 (1990); *Leistner v. Leistner*, 137 AD 2d 499, 524 NYS2d 243 (2d Dept.,1988)

2. The witness's impaired ability to perceive - *Badr v. Hogan*, 75 NY2d 629, 555 NYS2d 249 [1990]

3. Record of Conviction - *Sansevere v. United Parcel Serv., Inc.,* 181 AD2d 521, 522-23, 581 NYS2d 315, 316, (1st Dept. 1992)

XXII. INTERPLAY OF COLLATERAL EVIDENCE RULE AND CROSS EXAMINATION OF PRIOR BAD ACTS

A. In personal injury action, error for trial court to refuse to let defendant's attorney question plaintiff as to why she filed tax returns as head of household when she was married and living with her Husband at the time, and the number of dependents she claimed, as the questions raised the possibility of tax fraud which has some tendency to show moral turpitude and thus are relevant on the credibility issue. However, defendant's attorney would have been bound by plaintiff's answers and could not resort to extrinsic evidence or other witnesses to refute plaintiff's answers because of the collateral evidence rule. *Young v. Lacy*, 120 AD3d 1561, 993 NYS2d 222 (4th Dept. 2014)

B. In personal injury action, where the issue was whether the infant plaintiff's accident occurred because she fell from the monkey bars, as opposed to an orange ladder, and the defense was that the infant was not only mistaken but was coached to tell a false story (and thus a recent fabrication), error to preclude plaintiff from introducing an entry in the emergency room record where the infant plaintiff told the emergency room physician that she fell from the monkey bars (a prior consistent statement). Additionally, the infant's statement fell within another exception to the

hearsay rule, i.e., the statement was germane to the infant plaintiff's medical treatment on the date of the incident. *Nelson v. Friends of Associated Beth Rivka Sch. For Girls*, 119 AD3d 536, 987 NYS2d 907 (2d Dept. 2014)

XXIII. ADMISSIONS

A. By Agents

1. Because the appraisal annexed as an exhibit to the amended verified complaint was prepared on behalf of defendants, by their agent authorized to make such a statement, it was a party admission. *Rosasco v. Cella*, 124 AD3d 447, 1 NYS3d 71 (1st Dept. 2015)

B. Contained in Hearsay Record

1. A hearsay entry in a hospital record is admissible under the business records exception to the hearsay rule only if the entry is germane to the diagnosis or treatment of the patient. However, if the entry is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to diagnosis or treatment, as long as there is "evidence connecting the party to the entry". *Robles v. Polytemp, Inc.*, 127 AD3d 1052, 7 NYS3d 441 (2d Dept. 2015)

2. Police accident report submitted by the defendant in support of his motion was not certified as a business record and thus constituted inadmissible hearsay, except for that portion of the report which contained a party admission by the plaintiff that she did not have a recollection of the accident. *Gezelter v. Pecora*, 129 AD3d 1021, 13 NYS3d 141 (2d Dept. 2015)

XXIV. DECLARATION AGAINST INTEREST

A. A statement in which an individual admits to conduct constituting an offense is a statement against penal interest where the individual believes that the conduct may be illegal but does not know whether or not it is. *Peo. v. Soto*, 113 AD3d 153, 976 NYS2d 87 (1st Dept. 2013)

XXV. JUDICIAL NOTICE

A. Where it was the court's customary practice to prepare summaries of conferences and forward them to counsel for the parties, by email, and where such emails were not disputed, the court can on its own motion take judicial notice of such emails. Here the court did so in determining whether a husband's failure to settle a case at a much earlier date and the actual settlement was a factor in awarding counsel fees. *Clements v. Clements*, 43 M3d 1211(A), 990 NYS2d 437 (Supreme Court, Monroe Co., 2014, Dollinger, J.)

B. A court may take judicial notice of undisputed court records and files. *IMA Acupuncture, P.C. v. Hertz Co.*, 2016 N.Y. Slip Op. 50258(U), 2016 WL 831099, at *1 (N.Y. App. Term. Mar. 1, 2016)

C. Courts may take judicial notice of their own prior proceedings and records, including exhibits. *Mtr. of Nicole WV.,* 296 AD2d 608, 746 NYS2d 53 (3d Dept. 2002)

D. A court may take judicial notice of prior judicial proceedings though in a different court and involving different parties. Family Court properly took judicial notice, in an abuse and neglect proceeding, of mother's boyfriend's criminal plea allocution, in which he admitted to causing some of one-year-old child's injuries, where Court made clear at outset of fact-finding hearing that it intended to take judicial notice of all prior orders and findings, to which no objection was made, and Court's primary purpose in taking judicial notice was to assess boyfriend's credibility as a witness. *In re Julian P.,* 129 AD3d 1222, 11 NYS3d 699 (3d Dept. 2015)

E. The Family Court properly took judicial notice of, among other things, the prior adjudications of permanent neglect against the mother with respect to the child's two older siblings. In Re *Nowell M.,* 115 AD3d 746, 981 NYS2d 588 (2d Dept. 2014)

F. There is no merit to the plaintiff's contention that the Supreme Court erred in taking judicial notice of the defendant's net worth statements which had been filed with the court pursuant to Section 236 of the Domestic Relations Law and 22 NYCRR 202.16(b). *Baumgardner v Baumgardner,* 98 AD3d 929, 951 NYS2d 64 (2d Dept. 2012)

XXVI. JUDICIAL IMMUNITY

A. Individuals serving in judicial capacities along with those who are delegated judicial or “quasi–judicial" functions are immune from civil lawsuits based on any actions taken in their official capacities. This judicial immunity privilege is regularly applied to expert witnesses when such witnesses are appointed by the court. *Chen v. Daly*, NYLJ, 1/29/16 (Supreme Court, NY Co., Kern, J.)

XXVII. *FAMILY OFFENSE PROCEEDING – STANDARD OF PROOF*

A. Where a person who has violated an order of protection is incarcerated as a punitive remedy for a definite period – with no avenue to shorten the term by acts that extinguish the contempt, then that aspect of the Family Court Act article 8 proceeding is one involving criminal contempt and the standard of proof that must be established to show the individual willfully violated the court's order is beyond a reasonable doubt. *Stuart LL. V. Aimee KK.,* 123 AD3d 216, 995 NYS2d 317 (3d Dept. 2014)

XXVIII. EXPERT TESTIMONY – PROFESSIONAL RELIABLE HEARSAY

A. Professional Reliable Hearsay - Elements

1. The professional reliability exception to the rule that opinion evidence must be based on facts in the record or personally known to the expert witness has three elements:

a. the information relied upon by the expert must be of a kind ordinarily accepted by experts in the field in forming a professional opinion (*Wagman v. Bradshaw*, 292 AD2d 84, 739 NYS2d 421 [2d Dept. 2002]);

b. there must be evidence establishing the reliability of the information (*Hambsch v. NYCTA*, 63 NY2d 723, 480 NYS2d 195 [1984]); and

c. the out-of-court material must not be the principal basis for the expert's opinion but rather a link in the chain of data upon which the witness relied (*Borden v. Brady*, 92 AD2d 983, 461 NYS2d 497 [3d Dept. 1983]).

2. The reliability of information is primarily a question for the trial court, rather than the expert, in determining whether to apply the professional reliability exception to the rule that opinion evidence must be based on facts in the record or personally known to the expert witness. *State v. William F.*, 44 M3d 338, 985 NYS2d 861 (Sup. Ct., NY Co., 2014, Conviser, J.)

3. The professional reliability exception to the hearsay rule enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession. In a custody modification proceeding, the opinion testimony of a court-appointed forensic psychologist, based in part upon information obtained from Department of Social Services caseworkers who were not subject to cross-examination, was admissible with expert testifying, without contradiction, that the information obtained from these collateral sources was commonly relied upon within her profession when conducting a forensic psychological evaluation in the context of a custody proceeding, and her opinion was principally based upon information she obtained from her extensive interviews with mother, father, and children, with a collateral source information serving only as a "link in the chain" of data that assisted her in forming her opinion. *Greene v. Robarge*, 104 AD3d 1073, 962 NYS2d 470 (3d Dept. 2013)

B. Deemed Reliable in the Profession

1. When determining what materials may serve as the basis for an expert's opinion, the court will not automatically accept any given expert's opinion with respect to whether any particular material is relied upon in the profession, and if such material appears inherently unreliable, or there are conflicting opinions from other experts as to what material is properly relied upon, the court may reject an expert's testimony in this regard; however, the expert's view of what is properly relied upon by experts in his profession is highly relevant, and it may, in a proper case, be deemed determinative. *State v. J.R.C.*, 47 M3d 969, 7 NYS3d 866 (Supreme Court, Livingston Co., 2015, Wiggins, J.)

C. Basis Hearsay in MHL Article 10 Proceedings

1. In a MHL Article 10 proceeding, otherwise inadmissible hearsay may be admitted as the underlying basis for an expert's opinion (i.e., basis hearsay) where the following due process protections are met: (1) the proponent demonstrates through

evidence that the hearsay is reliable; and (2) the court determines that the probative value in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect. *State v. Floyd Y.* 22 NY3d 95 (2013)

2. *State v. John S.*, 23 NY3d 326, 342-43, 991 NYS2d 532, 544 (2014): "In *Floyd Y.,* we defined the extent to which "a court may admit hearsay evidence when it serves as the underlying basis for an expert's opinion in an article 10 proceeding" (*see* 22 N.Y.3d at 98, 979 N.Y.S.2d 240, 2 N.E.3d 204). Because an article 10 proceeding is civil in nature, the respondent is not entitled to the constitutional protections that apply to criminal proceedings under the Fifth and Sixth Amendments (*see id.* at 103–104, 979 N.Y.S.2d 240, 2 N.E.3d 204). Rather, article 10 proceedings must comport with constitutional principles of due process, which demand that "any hearsay basis evidence ... meet minimum requirements of reliability and relevance before it can be admitted at an article 10 proceeding" (*id.* at 109, 979 N.Y.S.2d 240, 2 N.E.3d 204…Hearsay basis evidence is admissible at an article 10 trial "if it satisfies two criteria. First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the 'probative value in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect' " (*id.,* citing FRE 703 [alterations omitted]). This two-part analysis "provide[s] a necessary counterweight to the deference juries may accord hearsay evidence simply because an expert has propounded it ..., yet allow[s] the jury to evaluate expert opinions by considering reliable and probative evidence" (*id.*).

3. Reliability

a. Where evidence of sex offenses is supported by adjudications of guilt, such as convictions or guilty pleas, deemed inherently reliable. *State v John* , 23 NY3d 326, 991 NYS2d 532 (2014). Similarly, hearsay containing an admission of guilt deemed reliable.

b. Where hearsay indicates respondent was acquitted of a sex offense, not reliable and unduly prejudicial. *State v. John, supra.*

c. Hearsay about uncharged crimes excluded if the underlying allegations are not supported by an admission from respondent or extrinsic evidence substantiating the allegations. *State v. Charada T.*, 23 NY3d 355, 991 NYS2d 9 (2014)

d. Respondent sex offender entitled to new civil-commitment trial because the state's expert relied on sex-offense charges of which respondent was acquitted and other sex-offense charges which were dismissed, with no evidence presented that the respondent committed the dismissed offenses. *Matter of NYS v. David S.*, --AD3d--, 24 NYS3d 284 (1st Dept. 2016)

4. Expert testimony based upon hearsay is ordinarily admissible under the professional reliability rule for the limited purpose of informing the factfinder of the basis of the experts' opinions and not for the truth of the matters related. State's expert psychologist was entitled to consider defendant's presentence reports, Sex Offender Registration Act (SORA) records and parole revocation records in determining that

defendant was a dangerous sex offender requiring confinement; such material was of the type commonly relied upon in SORA proceedings, and was relevant and not unduly prejudicial. *State v. Mark S.*, 87 AD3d 73, 924 NYS2d 661 (3d Dept. 2011)

5. Once found reliable, the basis hearsay can be disclosed to assist the fact-finder with its essential article 10 task of evaluating the expert's opinion. *State v. Floyd Y., supra.*

D. Basis Hearsay; Forensic Report

1. Straus v. Strauss, --AD3d--, 24 NYS3d 76 (1st Dept. 2016)

a. Frye v. U.S (293 F. 1013) does not require that a forensic report cite specific professional literature in support of the report's analyses and opinions. The opposing side, however, is free to cross-examine the forensic evaluator regarding the lack of citations, and such an omission is relevant to the weight to be accorded to the evaluator's opinion, not to its admissibility.

b. It is permissible for the forensic report to not rely to a significant extent on hearsay statements where the primary source of the report's conclusions are the evaluator's firsthand interviews with the parties. Moreover, where the proponent of the report intends to call as witnesses at a future custody hearing anyone to whom the evaluator spoke, thereby rendering the declarants subject to cross-examination, it renders admissible any opinion evidence based on their statements. To the extent that any hearsay declarants are not cross-examined, those portions of the report containing inadmissible hearsay should be stricken or not relied upon.

XXIX. OTHER ASPECTS OF HEARSAY

A. Hearsay – Summary Judgment

1. Although hearsay evidence that is inadmissible at trial may be sufficient to defeat a motion for summary judgment, there must be some additional competent evidence to support the motion or an excuse for the failure to present proof in admissible form. *Zupan v. Price Chopper Operating Co.,* 132 AD3d 1211, 19 NYS3d 615 (3d Dept. 2015)

2. Although hearsay evidence may be considered in opposition to a motion for summary judgment, such evidence alone is not sufficient to defeat the motion. *Feinberg v. Sanz*, 115 AD3d 705, 982 NYS2d 133 (2d Dept. 2014)

B. State of Mind

1. The court properly allowed the child's psychologist to testify concerning certain out-of-court statements made by the child. Those statements were offered to show the child's state of mind rather than to establish the truth of the matter asserted. *In re Noemi D.,* 43 AD3d 1303, 842 NYS2d 808 (4th Dept. 2007)

2. “Of the evidentiary issues raised on appeal, the only ones that are arguably preserved are those relating to evidence of a witness's thought processes and discovery of defendant's name on the Internet, and evidence of another witness's conversation with a person at defendant's shop. The court properly exercised its discretion in receiving all of this evidence, which was admissible to establish the state of mind of the respective witnesses in relevant contexts.” *People v. Mitchell*, 136 AD3d 401, 24 N.Y.S.3d 71, 73 (1st Dept. 2016)

C. Diagnosis or Treatment Exception

1. Three-year-old victim's statement to emergency room pediatrician, that defendant would not “let him out” of bathtub containing scalding hot water, was nontestimonial, and thus admission of statement did not violate defendant's constitutional right to confront witnesses against him in prosecution for assault in the first degree and endangering welfare of child, even if pediatrician had secondary motive for asking victim why he did not get out of bathtub, since primary purpose of pediatrician's inquiry was to determine mechanism of injury so diagnosis could be rendered and medical treatment administered. *People v. Duhs*, 16 NY3d 405, 922 N.Y.S.2d 843 (2011)

2. Generally, admissions not germane to the treatment or diagnosis of a plaintiff's injuries are not admissible under the business records exception to the hearsay rule. A hearsay entry in a hospital record as to the cause of an injury may be admissible at trial even if not germane to diagnosis, if the entry is inconsistent with a position taken at trial. However, there must be evidence that connects the party to the entry. *Grant v. New York City Transit Auth.*, 105 AD3d 445, 963 NYS2d 63 (1st Dept. 2013)

3. Remarks by a Third Party

a. Statements made by a third person providing health-related information for the purpose of treatment are intrinsically reliable and thus qualify as part of the hearsay exception that statements made by a patient germane to medical treatment are admissible for their truth. This is true whether the declarant is a family member, an acquaintance, a case worker, another treatment provider or even a person on the street who might have observed something relevant to a patient’s condition, as long as the statement is made directly to a medical provider in response to questions about the patient’s condition. *In re A.M.*, 44 M3d 514, 986 NYS2d 781 (Fam. Ct., Bronx Co., 2014, Hettleman, J.)

D. Impeaching Hearsay Declarants

1. Where a surgical report and other medical records authored by a non-testifying surgeon were admitted as business records, defendant should have been able to offer into evidence certified copies of Department of Health records reflecting the surgeon’s plea of guilty to insurance fraud and misconduct. The records were offered to impeach the non-testifying surgeon’s credibility, where plaintiff’s expert relied in part upon the records of the non-testifying surgeon to formulate his opinion. When an out-of-

court statement is admitted pursuant to a hearsay declaration as proof of the matter asserted, the credibility of the declarant may be attacked as if the declarant was a witness at trial. *Lawton v. Palmer*, 126 AD3d 945, 7 NYS3d 177 (2d Dept. 2015)

2. In a bus accident case, where the bus driver was incarcerated in another state and unable to testify, and excerpts of his examination before trial and testimony at a prior trial were read into the record, proof of the driver's conviction for possession of a firearm was relevant to the driver's credibility and should have been admitted under New York's rule allowing impeachment of hearsay declarants. *Delva v. NYC Trans. Auth*, 123 AD3d 653, 998 NYS2d 208 (2d Dept. 2014)

E. Hearsay Statements of Child

1. There is an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Court Act § 1046(a)(vi), where, as here, the statements are corroborated. The statement of each child tends to support the statement of the other and, viewed together, the statements give sufficient indicia of reliability to each child's out-of-court statement. Moreover, there is additional corroboration from other witnesses who testified at the hearing. *Ordona v. Campbell*, 132 AD3d 1246, 17 NYS3d 803 (4th Dept. 2015)

2. A child's prior out-of-court statements may provide the basis for a finding of abuse, provided that these hearsay statements are corroborated, so as to ensure their reliability; any other evidence tending to support the reliability of the previous statements shall be sufficient corroboration. McKinney's Family Court Act § 1046(a)(vi). *In re Zeeva M.*, 126 AD3d 799, 5 NYS3d 258 (2nd Dept. 2015)

3. *People v. Gross*, --NY3d--, 2016 N.Y. Slip Op. 01204

a. The term 'bolstering' is used to describe the presentation in evidence of a prior consistent statement, and it has been repeatedly held that it is generally improper to introduce testimony that the witness had previously made prior consistent statements, when there is no claim of either prompt outcry or recent fabrication. However, nonspecific testimony about a child-victim's reports of sexual abuse does not constitute improper bolstering when offered for the relevant, nonhearsay purpose of explaining the investigative process' and assisting in the completion of the narrative of events which led to the defendant's arrest.

b. The testimony of a nurse-practitioner concerning the child's history of sexual abuse is permissible testimony as the child's statements to the nurse-practitioner was "germane to diagnosis and treatment" and therefore were properly admitted as an exception to the hearsay rule.

XXX. EXPERT TESTIMONY

A. Exceeding Area of Expertise

1. In a criminal case, a detective was called to testify as an expert in decoding phone conversations among drug dealers, as, for example, the use of The word “onion” meant marijuana package. However the testimony went much further and the detective interpreted portions of the conversations that were not encoded. This was error as the detective testified well outside of his qualifications and his testimony invaded the province of the finder of fact. *Peo. v. Inoa*, 25 NY3d 466, 13 NYS3d 329 (2015)

B. Behavior of Sexual Abusers

1. Trial court did not abuse its discretion in admitting expert testimony discussing behavior of sexual abusers in prosecution for course of sexual conduct against a child and endangering the welfare of a child, where testimony was helpful to understand victims' unusual behavior and expert did not render an opinion as to whether abuse took place. The expert testimony about "grooming” in other ways abusers seek to gain the confidence of young people they want to victimize was "permissible as helpful" to jurors in their understanding of the victim's behavior. For example, it helped to explain why the victim did not immediately report the abuse. *People v. Diaz*, 20 NY3d 569, 965 NYS2d 738 (2013)

XXXI. FRYE STANDARD

A. New York allows testimony based on scientific tests or principle only after they have achieved “general acceptance.” (See, e.g., *La Rose v. Corrao*, 105 AD3d 1009, 963 NYS2d 712 [2d Dept. 2013]

B. While the *Frye* test for assessing the evidentiary reliability of scientific evidence turns on acceptance by the relevant scientific community, the particular procedure need not be unanimously endorsed by scientists rather than generally acceptable as reliable. Even though the expert is using reliable principles and methods and is extrapolating from reliable data, a court may exclude the expert's opinion under the *Frye* test if there is simply too great an analytical gap between the data and the opinion proffered. *Cornell v. 260 West 51st Street Realty, LLC,* 22 NY3d 762, 986 NYS2d 389 (2014)

C. Testimony of deputy medical examiner who performed an autopsy on victim's body, that in his opinion the victim's neck had been compressed for “something in the range of two, three, four minutes,” was admissible in defendant's prosecution for manslaughter, even though no scientific studies had been published to show how lengthy a compression was required to produce the petechiae and purple coloring present in the victim; the medical examiner did not claim to rely on any established scientific principle, and made clear that his testimony was based on his personal “experience,” meaning what he had observed, heard, and read about particular cases. There will ordinarily be no unfairness in allowing an expert who is a scientist to express an opinion based on his own experience as long as the jury is not misled into thinking that the expert's opinion reflects a generally accepted principle. *People v. Oddone,* 22 NY3d 369, 980 NYS2d 912 (2013)

XXXII. EXCITED UTTERANCES

A. Patient's statements to his wife while at hospital complaining of pain, discomfort, hunger, difficulty breathing, and feeling that he was dying, were excited utterances or present sense impressions, or both, and therefore admissible at trial in estate's action against hospital to recover damages for personal injuries and wrongful death based upon medical malpractice, as exceptions to the hearsay rule for the truth of the matters they asserted. *Hyung Kee Lee v. New York Hosp. Queens*, 118 AD3d 750, 987 NYS.2d 436 (2d Dept. 2014)

B. Rape victim's statements to her brother-in-law were admissible as excited utterances, where brother-in-law testified that when he received a phone call from the victim, she was crying, upset and breathing heavily, and stated that defendant had just raped her and would not leave her house, and victim was still upset five minutes later when she made additional statements after brother-in-law had arrived at her home. *People v. Pham*, 118 AD3d 1159, 987 NYS2d 687 (3d Dept. 2014)

XXXIII. BUSINESS RECORD RULE

A. Foundation

1. Special Referee erred in admitting a spreadsheet into evidence as a business record pursuant to CPLR 4518(a), since the document was prepared by plaintiff's counsel for use at the hearing and was not supported by a proper business record foundation. *35 E. 57th St., LLC v. 57th St. Day Spa, LLC*, 126 AD3d 471, 2 NYS.3d 789 (1st Dept. 2015)

2. Court erred in admitting certain EZ-Pass records because "[a] proper foundation for [their] admission ... [was not] provided by someone with personal knowledge of the maker's business practices and procedures and there was no indication that the records were certified to comply with CPLR 4518 pursuant to CPLR 3122-a. *Sheridan v. Sheridan*, 129 AD3d 1567, 12 NYS3d 434 (4th Dept. 2015)

3. The store detective was competent to authenticate the record. A proper foundation for admission of a business record may be laid by a witness familiar with the practices and procedures of the particular business; the person who prepared the record need not testify….Here, the store detective had sufficient familiarity with the store procedures regarding the creation of such receipts to lay a foundation for its admission… The witness was clearly competent to state the unremarkable and familiar fact that when the code on an item is scanned, the computer reveals the item's price, including any applicable sale price. There was no need for further explanation of how the computer system "functioned," or any reason to believe that a salesperson could provide significantly different information. *People v. Nashal*, 130 AD3d 480, 13 NYS3d 396 (1st Dept. 2015), leave to appeal denied, 26 NY3d 1010, 20 NYS3d 550 (2015)

B. Business Duty

1. Defendant sought to introduce foster care agency reports containing statements by two foster mothers regarding the victim's alleged untruthfulness regarding unrelated matters in the past. These reports satisfied the business duty requirement of the business records exception to the hearsay rule (*see Johnson v Lutz*, 253 NY 124, 128 [1930]) because the foster mothers were expected to report on the child's relevant conduct. However, the reports in issue were properly excluded. The proffered evidence largely consisted of opinions, conclusions, second-hand accounts and anecdotal evidence. Such statements are inadmissible, even if contained within otherwise admissible business records. *People v. Smith*, 122 AD3d 446, 996 NYS2d 35 (2014) leave to appeal denied, 25 NY3d 992, 10 NYS3d 535,(2015)

C. Filing of a third party's business record

1. While the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, such records are nonetheless admissible if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon the recipient in its business. *Deutsche Bank Nat. Trust Co. v. Monica*, 131 AD3d 737, 15 NYS3d 863 (3d Dept. 2015)

D. Medical Records

1. In parental rights termination proceeding based on parent's mental illness, medical records containing diagnoses are admissible under the business record exception to the hearsay rule, as germane to his treatment. *In re Skylar F.*, 121 AD3d 611, 612, 995 NYS2d 63 (1st Dept. 2014)

2. The court properly admitted the victim's medical records, including references to domestic violence, under the business records exception to the hearsay rule (*see* CPLR 4518 [a]). Such statements were part of the attending physician's diagnosis, and were relevant to diagnosis and treatment, since "[i]n addition to physical injuries, a victim of domestic violence may have a whole host of other issues to confront, including psychological and trauma issues that are appropriately part of medical treatment" (*People v Ortega*, 15 NY3d 610, 619 [2010]). *People v. Livrieri*, 125 AD3d 579, 6 NYS3d 5 (1st Dept. 2015), leave to appeal denied, 25 NY3d 1166, 15 NYS3d 298 (2015)

XXXIV. PRIOR CONSISTENT STATEMENTS

A. The term 'bolstering' is used to describe the presentation in evidence of a prior consistent statement–that is, a statement that a testifying witness has previously made out of court that is in substance the same as his or her in-court testimony. *People v. Taylor*, 134 AD3d 1165, 20 NYS3d 708 (3d Dept. 2105)

B. New York courts have routinely recognized that “nonspecific testimony about [a] child-victim's reports of sexual abuse [does] not constitute improper bolstering [when] offered for the relevant, nonhearsay purpose of explaining the investigative process and completing the narrative of events leading to the defendant's arrest” (*People v Rosario*, 100 AD3d 660, 661 [2d Dept. 2012]; *see also People v Gregory*, 78 AD3d 1246, 1246 [3d Dept 2010])

XXXV. PRIOR INCONSISTENT STATEMENTS

A. There must be a proper foundation laid for the introduction of prior inconsistent statements of a witness. In order to prevent surprise and give the witness the first opportunity to explain any apparent inconsistency between his [or her] testimony at trial and his [or her] previous statements, he [or she] must first be questioned as to the time, place and substance of the prior statement”. *People v. Haywood*, 124 AD3d 798, 2 NYS3d 164, (2d Dept. 2015) leave to appeal denied, 25 NY3d 1202, 16 NYS3d 524, (2015)

B. The trial court also properly admitted the statement as a prior inconsistent statement. While the nonparty witness, who initially testified that the signature on the statement looked like hers, ultimately denied signing the statement, defendant was permitted to “introduce proof” to the contrary. *Cruz v. City of New York*, 132 AD3d 593, 594, 18 NYS3d 617 (1st Dept. 2015)

XXXVI. HANDWRITING

1. Hearing Officer conducted his own handwriting analysis after examining the documentation reviewed during the investigation, and we note that he was entitled to make his own comparison without expert testimony. *Christian v. Venettozzi*, 114 AD3d 975, 979 NYS.2d 863 (3d Dept. 2014)

XXXVII. AUDIO RECORDING

A. Foundation

1. Proper foundation for admission of audio recording established by father’s testimony that he personally recorded the conversation, the recording was complete and accurate reproduction of the interaction, and the recording was not altered. Any infirmities concerning audibility went to the weight of the evidence, not its admissibility. *Giresi-Palazzolo v. Palazzolo*, 127 AD3d 752, 7 NYS3d 222 (2d Dept. 2015)

XXXVIII. BEST EVIDENCE RULE

A. Trial court properly precluded company witness from presenting testimony concerning value of company's carry-forward contracts, accounts receivable, monthly billings, and summary of customer revenues in action brought against company by holder of notes for claims arising from company's failure to pay notes; best evidence rule required production of those documents; witness did not proffer adequate explanation for his failure to produce documents; and any testimony based on contents of unproduced documents would be inadmissible hearsay. *Shanmugam v. SCI Eng'g, P.C.*, 122 AD3d 437, 996 NYS2d 252 (1st Dept. 2014)

B. Under an exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith. Loss of primary evidence under exception to best evidence rule may be established upon showing of a diligent search in location where the document was last known to have been kept, and through testimony of the person who last had custody of the original; the more important the document to resolution of ultimate issue in the case, stricter becomes the requirement of the evidentiary foundation establishing loss for the admission of secondary evidence. *Amica Mut. Ins. Co. v. Kingston Oil Supply Corp.*, 134 AD3d 750, 21 NYS3d 318 (2d Dept. 2015)

XXXIX. PAST RECOLLECTION RECORDED

A. The requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his [or her] knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information. *Zupan v. Price Chopper Operating Co.,* 132 AD3d 1211, 19 NYS3d 615 (3d Dept. 2015);); *People v. DiTommaso*, 127 AD3d 11, 15-16, 2 NYS.3d 494 (1st Dept. 2015), leave to appeal denied, 25 NY3d 1162, 15 NYS.3d 294 (2015)

B. Where the father did not testify that he could not recall the events that he recorded in the journal and although he testified that he made the entries contemporaneously with the events contained therein, a review of the journal reflects that the father later added commentary and/or observations on the events discussed; in addition, the journal contains alleged re-creations of texts and e-mails between the parties, which were not produced. Those portions of the journal violate the best evidence rule, which requires the production of an original writing where its contents are in dispute and sought to be proven. While counsel for the father could have utilized the

journal to refresh the father's recollection as to specific dates or events, the court erred in allowing the admission of the entire document in evidence *Saperston v. Holdaway*, 93 AD3d 1271, 940 NYS2d 728 (2012)

XL. HABIT & CUSTOM; ACKNOWLEDGMENT CLAUSE

A. Notary's conclusory statement that he followed "custom and practice" in taking acknowledgment of signatures was insufficient; custom and practice evidence requires description of specific protocol repeatedly and invariably used. *Galetta v. Galetta*, 21 NY3d 186, 969 NYS2d 826 (2013)

XLI. MISSING WITNESS CHARGE

A. The preconditions for the missing witness charge, applicable to both criminal and civil trials, may be set out as follows: (*Devito v. Feliciano*, 22 NY3d 159, 165-66, 978 NYS2d 717 (2013):

a. the witness's knowledge is material to the trial;

b. the witness is expected to give noncumulative testimony;

(1) Evidence is not cumulative under this rule when it would corroborate evidence presented by the party seeking the missing witness instruction; here defense-retained physicians who examined plaintiff before trial to ascertain validity of personal injury damages were not called by defendant to testify at trial. The fact that their testimony presumably would have duplicated that of a plaintiff's physicians' testimony is not cumulative; helpful evidence coming from opposing side is of different quality than self-serving evidence.

c. the witness is under the "control" of the party against whom the charge is sought, so that the witness would be expected to testify in that party's favor; and

d. the witness is available to that party

(1) A treating psychiatrist in the petitioner's employee would normally qualify as an available witness within the petition's control. The treating psychiatrist, as opposed to the reviewing doctor, who testified, possesses the greatest knowledge about the patient and information on a material issue raised in the proceeding and thus the testimony is not cumulative. *Adam K. v. Iverson,* 110 AD3d 168, 970 NYS2d 297 (2d Dept. 2013)

(2) Family Court could not sua sponte draw a negative inference based on mother's failure to call child's maternal grandmother as a witness in family offense proceeding brought by father on behalf of child, based on father's allegations that mother had physically abused their child, without first giving mother an opportunity

to explain her failure to call the grandmother as a witness, or to discuss whether the grandmother was even available to testify or under her control. *Spooner-Boyke v. Charles*, 126 AD3d 907, 4 NYS3d 137 (2d Dept. 2015)

B. Civil Case

1. The underlying rationale of the rule is the common sense notion that a party will normally call a witness who would be expected to provide testimony in the party's favor; and when the witness it not called, it is fair to infer that the witness' testimony would not support that party's version of events. An unfavorable inference may be drawn when a party fails to produce evidence which is within his or her control and which he or she is naturally expected to produce (*Reichman* v. *Warehouse One, Inc.*, 173 AD2d 250, 252, 569 NYS2d 452 [1st Dept., 1991); *Gruntz* v. *Deepdate General Hospital*, 163 AD2d 564, 566, 558 NYS2d 623 [2d Dept., 1990)]; See, *Noce* v. *Kaufman*, 2 NY2d 347, 161 NYS2d 1 [1957] -- "where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inference may be drawn against him which the opposing evidence on the record permits."

C. In child custody case, where mother elected not to call as witnesses any of the purported specialists who either evaluated the child or with whom the mother consulted about the child, the court will infer that had such witnesses testified, their testimony would not have been favorable to the mother's case. *E.V. v. R.V.*, 44 M3d 1210 (S.Ct., Westchester Co., 2014, Colangelo, J.)

D. Prompt Notification

1. The party seeking a missing witness charge has the burden of promptly notifying the court when the need for such a charge arises. The purpose of imposing such a burden is, in part, to permit the parties "to tailor their trial strategy to avoid substantial possibilities of surprise. *Herman v. Moore*, 134 AD3d 543, 21 NYS3d 254 (1st Dept. 2015)

XLII. EAVESDROPPING

A. New York's eavesdropping statutes (Penal Law § 250.00[2]; *see* CPLR 4506[1], [2]) are implicated only when the recording is made "by a person not present thereat". The parties' son, who made the subject recording from his bedroom, was "present" for the purposes of the statutes and the tape he made was admissible in the family offense proceeding between his mother and father. *McLaughlin v. McLaughlin*, 104 AD3d 1315, 961 NYS2d 838 (4th Dept. 2013)

XLIII. BURDEN OF PROOF

A. Clear and convincing evidence supports the finding of permanent neglect. A preponderance of the evidence supports the determination that it was in the best interests of the child to terminate the mother's parental rights to free the child for adoption. *In re Alexandria D.*, --AD3d--, 2016 N.Y. Slip Op. 01416 (1st Dept. 2016)

B. A finding of neglect does not require actual injury or impairment, but only an imminent threat that such injury or impairment may result, which can be established through a single incident or circumstance*. In re Dylynn V.*, --AD3d--, 2016 N.Y. Slip Op. 01214 (3d Dept. 2016)

C. It is well settled that evidence of the failure to pay child support as ordered constitutes prima facie evidence of a willful violation. Once a prima facie showing of willfulness has been made, the burden shifts to the party who owes the child support to offer some competent, credible evidence of his or her inability to make the required payments. *Tikwana P. v. Keeshan E.*, 50 Misc. 3d 1218(A), 2016 N.Y. Slip Op. 50150(U (Fam. Ct., Kings Co., 2016, Vargas, J.)

D. A family offense must be established by a fair preponderance of the evidence. *Ramdhanie v. Ramdhanie*, 129 A.D.3d 737, 737, 9 N.Y.S.3d 583 (2d Dept. 2015)

SUFFOLK ACADEMY OF LAW

INTERACTIVE EVIDENCE SCENARIOS – March 21, 2016

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I. (a) In a child custody trial, the father is being cross-examined and is asked the following question:. "Isn't it a fact that you filed false tax returns in 2011 by failing to declare over $100,000 of cash receipts from your pizza restaurants"?

OBJECTION: The father's attorney objects on the ground of relevancy.

(b) *The wife's attorney then asks the father: "Is it not a fact, sir, that over the last ten years you have molested numerous women and paid them off to keep quiet about your sexual molestation"?*

OBJECTION: The Husband's attorney states: "This is a bad faith fishing expedition by counsel; he knows of no such conduct on the part of my client. Counsel should be admonished."

II. *In a divorce trial involving the issue of spousal maintenance, the wife calls Dr. O.B. Care as a witness. Dr. Care is qualified as an expert and states that, although he did not personally examine the wife, he has carefully reviewed the x-rays and MRI films of the wife, and opines that based upon these diagnostic procedures, the wife has a permanent disability and is unable to undertake gainful employment that requires any substantial degree of physical movement or activity.*

OBJECTION: The Husband's attorney objects and moves to strike the opinion of the doctor.

III. *In a child custody case, plaintiff calls Joe Reliable, defendant's best friend, as a witness and asked him if he heard the defendant tell the party's 3 children that their mother was mean, did not care for them, and really did not want the children to live with her – she just wanted more money from the plaintiff. Reliable denies that he heard such a conversation. The plaintiff's attorney then asked Reliable if he told Jill Yenta that he heard such a conversation.*

OBJECTION: Defendant's attorney objects.

IV. *In an action seeking to set aside a prenuptial agreement based upon fraud in inducement, i.e., that the husband promised to "tear up" the agreement when the parties had. a child, testimony was adduced regarding a meeting attended by the prospective bride, prospective groom and each of their fathers as to whether such a promise was made at such a meeting. The husband testified that there was never any such promise and no mention of it was made at the meeting, and his father's testimony. parroted that of the husband. The wife testifies in detail about the mention of the promise at the meeting but she fails to call her father as a witness, although he lives in proximity to her and she has a close relationship with him. The husband asked the court to draw a negative inference, i.e., that had the father of the wife testified, his testimony would not support the wife's version of the facts.*

ISSUE: Should the court draw such an inference based upon the principles of the missing witness charge.

V. *In a custody case in which the mother has made allegations against the father that he is sexually abuse the parties' daughter and others children, the mother's attorney seeks to introduce a certified certificate of conviction of the father of sexual abuse of a minor female which occurred 20 years before the trial of this action.*

OBJECTION: The father's attorney objects on the ground that the conviction is too remote to be relevant and would be unduly prejudicial to the father.

VI. *In a family offense proceeding involving an incident which occurred at the marital residence of the parties, petitioner – wife sought to present evidence of a police incident report prepared by the responding police officer wherein the officer records a statement made by the respondent – husband that "This is so unlike me. I am a calm guy. I guess I just lost it. She does that to me."*

OBJECTION: Defendant objects and moves to strike the statement.

VII. *In a divorce action, the plaintiff's counsel had prepared and offered into evidence a spreadsheet reflecting all credit card and personal check payments of the parties for their personal lifestyle for a period of 2 years immediately preceding the commencement of the action. Plaintiff offered the spreadsheet into evidence pursuant to the business record rule contained in CPLR 4518(a).*

OBJECTION: Defendant objects to the admission of the document.

VIII. *During a contested child custody trial, plaintiff offered into evidence a report of the court – appointed forensic evaluator which includes sections containing interviews the evaluator held with ten collateral sources in addition to interviews with the parties and the children of the marriage. Defendant objects to the admission of the report on the basis that it is replete with inadmissible hearsay. Plaintiff argues that the hearsay is permissible under the professional reliability exception to the hearsay rule; that in any event plaintiff intends to call each of the collaterals as witnesses; and the principal basis of the expert's opinion is based on interviews with the parties and the children.*

OBJECTION: Defendant objects to admission of report.

IX. (a) *During a divorce trial, the wife alleges that the husband is under investigation for stock fraud and manipulation and that as a result of his actions, marital funds have been wasted by the husband for substantial legal fees and related costs, for which she seeks a credit in the distribution of marital property. The wife acknowledges that she is not privy to any of the details of the alleged stock fraud and manipulation. On the next day of trial, the judge informs the attorneys that he has done research on the Internet and has perused some newspaper articles concerning the allegations posited against the husband. The attorney for the husband immediately notes his objections to the actions of the judge and moves for a mistrial and recusal of the judge from this case.*

OBJECTION: [If mistrial and recusal should be granted, SUSTAINED; if not, OVERRULED]

(b) During the same trial, upon the request of the defendant, the Court took judicial notice of employment information published on the U.S. Government web site.

OBJECTION: Plaintiff objects based on hearsay and unreliability.

X. *During a divorce trial in which the wife seeks spousal maintenance, she seeks to testify regarding her medical condition, the symptoms that she experiences, and the daily physical limitations occasioned by her medical condition.*

OBJECTION: Husband's attorney objects, stating that expert testimony by a physician would be required and that the wife is not qualified to offer such testimony.

XI. *In a divorce action in which the wife's forensic accountant is testifying, the wife's attorney questions the accountant about a summary sheet of all sales made by the Husband , a commissioned sales person, during a three-year period. The accountant states that he created the summary sheet. The document is marked and offered into evidence as a business record.*

OBJECTION: Husband's attorney objects.

(a) *Suppose the wife calls the Husband's company's bookkeeper who then testifies that she made the entries that comprise the computer printout after the husband reported each sale, as was the practice in the business, it was the regular course of business to make such entries, and that the entries were made based on regular submissions made at or about the time the sales were concluded. The computer printout, constituting a summary of the sales, is offered as evidence.*

OBJECTION: Husband's attorney objects.

XII. *An expert witness's qualifications are drawn out on direct. Once qualifications are given, an expert witness starts rendering opinions.*

OBJECTION: The opponent objects because the witness has not been declared an expert.

XIII. (a) *Witness (A) testifies on direct for plaintiff. On cross, Witness (A) is asked if he reviewed any documents prior to testifying. He answers "I reviewed a 5 drawer file cabinet full of reports related to this case."*

OBJECTION: Defendant's counsel demands an opportunity to review the documents that the witness reviewed. The plaintiff's counsel objects.

(b) *Witness (B) testifies at the same trial for plaintiff. On cross, Witness (B) is asked if he reviewed any documents prior to testifying. He answers that "last night I perused some notes from my diary about a conversation I previously had with the Defendant".*

OBJECTION: Defendant's counsel demands an opportunity to review the notes that the witness reviewed. The plaintiff's counsel objects.

XIV. The Wife testified that she surreptitiously taped a telephone conversation with her Husband during which he made several damaging admissions. She produces the tape and testifies it is a true and accurate recording of the conversation she had with her husband and that nothing had been deleted or added. She offers the tape into evidence.

OBJECTION: Objection is made on the basis of an improper foundation and that no testimony has been adduced relative to the chain of custody of the tape from six months ago when she made the tape to the present. Overruled or sustained?

XV. (*a) In a divorce trial, wife offers into evidence an e-mail from the husband to Nancy Franklin wherein he recounts all the expensive gifts he has purchased for her with marital funds. Wife printed out the e-mail from the home PC her and her husband share with a common password.*

OBJECTION: Husband objects to admission of email.

> *(b) Assume Wife printed out the e-mail from her husband's laptop, provided to him by his employer for business use, accessing it when the husband left the computer at home and had not logged out.*

OBJECTION: Husband objects to admission of email.

XVI. *In a matrimonial action, wife claims that husband has a "secret" bank account which contains $750,000. To prove the existence of such account she offers into evidence bank records from a branch of Chase Bank (clearly identified) in husband's name (also clearly identified). She claims that she received these records by fax from the bank (cover sheet attached) at her request. The maker, custodian or transmitter of the records is not called to testify and husband claims he has never seen such records before.*

OBJECTION: Objection is made to the admission of the records.

XVII. *When the parties began experiencing marital difficulties, defendant contacted attorney Van Ryn and they exchanged e-mails discussing a strategy for defendant to gain advantage in future matrimonial and custody litigation. Plaintiff commenced a divorce action. At defendant's deposition, plaintiff's trial counsel questioned defendant about his e-mails with Van Ryn. Plaintiff apparently discovered a page of one of the e-mails on defendant's desk and, while searching for the remainder of the letter, discovered the user name and password for defendant's e-mail account. She used the password to gain access to defendant's account, printed the e-mails between him and Van Ryn, and turned them over to her counsel. Plaintiff then amended the complaint to reflect that defendant conspired with Van Ryn to cause plaintiff anguish. Counsel subpoenaed Van Ryn for a deposition and to produce documents. Motions were then made to quash the subpoena, preclude plaintiff from using any privileged communications between defendant and Van*

Ryn, strike the portions of the amended complaint based on privileged information and disqualify plaintiff's counsel.

OBJECTION: If emails are privileged, SUSTAINED; if not privileged, OVERRULED

XVIII. *On the issue of whether the Husband assaulted the Wife, the Wife, in the divorce action, seeks to introduce the testimony of the arresting police officer to whom the Husband made an incriminating statement concerning an alleged act, later reduced to writing and ultimately suppressed during the course of a criminal proceeding because it was secured in violation of the Husband's constitutional rights.*

OBJECTION: The Husband's attorney objects and states that the statement must be suppressed in the divorce action as well.

XIX. *In a child custody modification proceeding, the father testified to what the child of the parties said to him and his present wife, as well as statements made by a nurse to the petitioner's wife, to explain why he and his wife took the child to the emergency room of a local hospital to be examined for possible abuse.*

OBJECTION: The wife's attorney objects and moves to strike the testimony on the ground of hearsay.

XX. *(a)In her sworn statement of net worth, received in evidence during the matrimonial trial, the wife listed her five pieces of jewelry and stated that they were acquired during the marriage and where the value of the jewelry was asked, she replied "approximately $30,000". No other proof at testimony was adduced by either side as to the wife's jewelry or its value. At the close of the case, the husband asked the court to deem the wife's jewelry as marital property and to fix its value at $30,000.*

OBJECTION: The wife objects, claiming that the burden was on the husband, the non-title holder of the jewelry, to prove its value, and he has failed to do so, thereby waiving any claim to the jewelry.

(b)Assume the same facts as above but in her net worth statement, instead of stating that the jewelry was worth "approximately $30,000", the wife merely put next to the value question "subject to appraisal". There is no other testimony or proof adduced regarding the jewelry during the trial. The wife requested the court to give her the jewelry without any credit to the husband.

OBJECTION: Ruling for Wife, SUSTAINED; Ruling against Wife, OVERRULED

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