Common Evidence Issues in Family Trials (Part II): The Rules Still Apply

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In our March 18, 2021, New Jersey Law Journal article, we wrote about the practical application of various Rules of Evidence that frequently appear in the practice of family law. The article was an overview of certain Rules and how they apply in different family law contexts. We resume that discussion here, continuing in the same vein to provide some practical advice on the use and applicability of the Rules in real-life situations that may face family law practitioners.

As a threshold matter, family law attorneys must know N.J.R.E. 611 and N.J.R.E. 403 (particularly as it relates to N.J.R.E. 611). First and foremost, and perhaps somewhat obviously, N.J.R.E. 611 provides for the following: the court controls the proceeding. It is the court's obligation to manage the flow and ensure the proper administration of the proceeding, avoid wasting time, and protect the witnesses from harassment or undue embarrassment. Indeed, some of the objections you may hear attorneys cry out ("badgering the witness" for example), are actually derived from this Rule. In a similar vein, N.J.R.E. 403 provides the court with additional grounds to maintain "control" of the evidence. In practice, for example, you have undoubtedly heard: "asked and answered!" While this is an appropriate phrase used by the most seasoned trial attorneys (including Jack McCoy), the phrase does not appear in the Rules; the objection is derived from a trial court's discretion to exclude "needless presentation of cumulative evidence." See N.J.R.E. 403(c).

Next, subsection (b) of N.J.R.E. 611 guides the scope of cross-examination. Sometimes the Family Part may appear like the "Wild West" with examinations seeming like a hodgepodge of cross and direct. Make no mistake, without leave, your cross-examination should not go beyond the subject matter of the direct examination or matters affecting the credibility of a witness. In function, as testimony progresses from direct to cross to redirect, the subject matter of the questioning becomes narrower.

Thus, without leave, you cannot ask a question during your redirect examination that you forgot to ask during your direct, and which the cross-examination did not address. The continued questioning is to allow you to elicit testimony in response to your adversary's questioning (e.g., to "clean up" your witness), but not to delve into new areas of inquiry.

On a related score, you must remember the difference between open-ended questions and questions that are leading. The general rule of thumb is that open-ended questions should be used for your (direct) witnesses; leading questions are to be used for adverse witnesses (i.e., cross-examination). However, N.J.R.E. 611(c) provides an exception to this general maxim. Under that Rule, where an attorney calls an *adverse* witness as his or her own witness and/or the witness becomes a "hostile" witness, the witness may be asked leading questions. In practice, particularly in domestic violence matters where discovery is not permitted, calling the adverse litigant (the defendant) as the first witness allows an attorney to "lock" the adverse litigant into certain answers. This is a particularly effective strategy where the examiner has audio or video recordings, or text messages, which contain evidence of domestic violence.

Lastly, regardless of which Part (Chancery, Civil, or Criminal) in which you have a trial, you will be met with bogus objections regarding "leading" questions. Simply put, just because the question is not open-ended does not necessarily mean the question is leading. Similarly, just because the question may call for a one-word answer does not necessarily mean it is leading. A leading question has the *answer* subsumed within the question: "Isn't it true that the light was red?" or "You would agree that the light was red?" As opposed to: "Was the light red?" The former examples have the answer built into the question, and they are the classic form for an effective cross-examination. The latter, albeit calling for a one-word response and not one that is open-ended, is not a leading question because the answer is not built into the question.

Our last article gave an overview of hearsay and discussed a few exceptions to the hearsay rule (learned treatises, prior consistent statements, and party statements). In addition to those examples, Family Part cases often involve business records, N.J.R.E. 803(c)(6). General speaking, records kept in the normal course of business are exempt from the bar to hearsay. The Rule pertains to statements contained in a record made at or near the time of observation by a person with actual knowledge, or

from information supplied by such a person, if the record was made in the regular course of business *and* it was the regular practice to make that record. The Rule also requires a "trustworthy analysis." On its face, this Rule allows for a number of different records to be admitted into evidence without the ability to question all of the potential witnesses who contributed to that record. A few examples are worth mentioning.

For those of you who handle DCPP matters (FN docket), you are almost certainly going to face the proffered admission of evidence pursuant to the business records exception to hearsay. The complexity in these particular matters is compounded not only be the applicability of the Rules of Evidence, but also the specific set of statutes that apply to Title 9 actions. As it relates to DCPP matters, you must also be mindful of N.J.S.A. 9:6-8.46, entitled "Evidence." If a Division report is admissible under N.J.R.E. 803(c)(6) and meets the applicable provisions of N.J.S.A. 9:6-8.46, the court may consider the statements in the report that were made to the author by Division staff personnel, or affiliated medical, psychiatric, or psychological consultants, if those statements were made based on their own first-hand factual observations, at a time reasonably contemporaneous to the facts, and in the usual course of their duties with the Division. However, do not be fooled by the expansive nature of these rules and statutes and continue to insist that statements contained within the Division's report should still be deemed inadmissible hearsay unless otherwise admissible. For example, expert diagnoses and opinions in a Division report are inadmissible hearsay, unless the trial court specifically finds they are trustworthy under the criteria in N.J.R.E.808, including that they are not too complex for admission without the expert testifying subject to cross-examination.

Another frequently encountered scenario occurs with the use—or attempted use—of police reports. Assuming a party can obtain access to relevant police reports (and that could be the subject of a whole other article), a recurring question is: *how can the records be used in my case*? Police reports are frequently relied upon in domestic violence matters. A party seeking, or defending, the imposition of a Final Restraining Order may attempt to use police reports to their advantage. However, more often than not, attempts are made to offer the report without the necessary witness(es) that would make the contents of the report admissible. For example, the proponent of the police report does not call the police officer who wrote the report or a custodian of records who can authenticate the report. Assuming you call the appropriate witness to authenticate the record and lay the appropriate

foundation, generally speaking, a police report *is* admissible as a record of a regularly conducted activity (e.g., that a police officer responded to a call on a particular date and time), N.J.R.E. 803(c)(6), and as a public record, *see* N.J.R.E. 803(c)(8), for that same purpose.

To what end can the contents of the report be used? A police report may be admissible to prove the fact that certain statements were made to an officer. So, for example, the police report may relay that a domestic violence defendant admitted to striking the victim. But, absent another hearsay exception, the report may not be offered for the truth of those statements. Of course, in this example, N.J.R.E. 803(b)(1) would allow substantive use of the defendant's statement. But, what if the police officer's report contains statements from non-party witnesses? Under N.J.R.E. 803(c)(6), the non-party statements are not admissible unless they meet one of the other hearsay exceptions.

What if the police report contains a memorialization of an officer's observations? For example, what if the responding police officer viewed the same defendant from the prior example actually striking the victim? Under that scenario, assuming the report is "trustworthy" it can be used under N.J.R.E. 803(c)(6) in a family law matter as evidence that the defendant struck the victim. To be sure, the defendant could call the police officer as a "live" witness in court to impeach the police officer, but if the defendant fails to secure that testimony, the defendant may be "stuck" with the contents of the report.

But what do you do if the report is admitted over your objection and the hearsay declarant is unavailable? Fortunately, N.J.R.E. 806 allows the credibility of a hearsay declarant (e.g., the police officer who wrote the report that is admissible under N.J.R.E. 803(c)(6)) to be attacked as if the officer had been in court that day. For example, in a different context (a contested adoption case we tried), the trial court allowed admission of hearsay statements of a party (i.e., the statement was *not* offered *against* the party) offered in court through hearsay documents. Fortunately, we had hired a private investigator to observe that party prior to the proceeding. Following admission of the hearsay statements, we called the private investigator to testify. The adverse counsel objected on relevancy grounds and the adverse litigant failed to appear in court for cross-examination. We relied on N.J.R.E. 806 as grounds to impeach the party (also a hearsay declarant in this context) as to the statements made in the hearsay document.

After two articles and more than 3,000 words, it should be clear that although the Rules of Evidence are complex, they are manageable—and, in many instances, call for an exhilarating game of “chess” with your adversary. If you view them through that prism—a competition to include/exclude particular evidence—you may learn to love this aspect of our practice.

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