INTERACTIVE EVIDENCE

New York State Bar Association

Family Law Section Summer Meeting

July 14, 2018

Hon. Christine M. Clark
Associate Justice
Appellate Division, Third Department

Hon. Jeffrey S. Sunshine
Supervising Judge for Matrimonial Matters
Kings County

Stephen Gassman, Esq.

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1. IMPLIED HEARSAY

FACTS:

Defendant was prosecuted for assaulting his estranged wife's boyfriend. At trial, a detective testified that he spoke to the wife who did not testify as the People could not locate her. Without disclosing the conversation he had with the wife, the detective stated that as a result of the conversation, he focused his investigation on the Defendant. The Defendant's counsel objects and moves to strike the answer of the detective.

RULING: Sustained

REASONING/AUTHORITY:

The detective's testimony was hearsay under the implied hearsay rule, which states that testimony that implies someone has made an out-of-court assertion when the testimony is offered to prove the truth of that assertion, is subject to the hearsay objection. It is just as objectionable as an express relating of the assertion itself. *People v. Stone*, 29 NY3d 166 (2017)

2. CROSS EXAMINATION – ADVERSE PARTY AS WITNESS

FACTS – Part "A"

Plaintiff calls defendant as her first witness. During the course of the examination, the defendant is asked a series of questions regarding his 2016 individual (married, filing separately) tax return, which includes Schedule C for his self-employed unincorporated business. The following question was posed to the defendant by Plaintiff's counsel: "The deductions you took on Schedule C for meals and entertainment were not business related, and were in fact personal expenses which you decided to deduct, correct? Defendant's counsel objects on the following grounds:

1. The question is leading.
2. Plaintiff has called defendant as her witness and is improperly attempting to impeach her own witness.

With respect to the objection of leading, sustained or overruled?

RULING: Overruled

REASONING/AUTHORITY

With respect to the leading objection, a party who calls adverse party as a witness should not be bound by the witness's answers and should be permitted to lead and cross-examine, because he is obviously a hostile witness. *Mtr. of Arlene W. v. Robert D.*, 36 AD2d 455, 456, 324 NYS2d 333 (4th Dept. 1971); see also, *Cornwell v. Cleveland*, 44 AD2d 891, 355 NYS2d 679 (4th Dept. 1974).

With respect to objection about impeaching her own witness, sustained or overruled?

RULING: Overruled

FACTS – Part "B"

Assume defendant denies that any of his deductions were improper. Plaintiff's counsel now seeks to introduce photographs of Defendant and family members at a resort to show that no business-related people were being entertained for the deductions taken by the business for that trip. Defendant's counsel objects.

RULING: Sustained

REASONING/AUTHORITY

Where an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions. Moreover, the general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing (*see* CPLR 4514). *Ferri v. Ferri*, 60 AD3d 625, 878 NYS2d 67(2d Dept. 2009). Here, the photographs do not qualify as a prior statement under oath or in writing.

FACTS – Part "C"

Plaintiff's counsel now starts to read sworn deposition testimony of the Defendant wherein his states that the trip in question was a family vacation which they took every February during the children's winter school recess. Defendant's counsel objects.

RULING: Overruled

REASONING/AUTHORITY:

The statements made under oath fall within the purview of CPLR 4514 and thus the witness, although an adverse party, may be impeached with the deposition transcript.

3. SPOLIATION – ADVERSE INFERENCE; DISMISSAL OF DEFENSE

FACTS:

During trial, plaintiff's counsel asks defendant to produce, pursuant to a subpoena duces tecum served upon defendant, emails purportedly relevant to the issue of defendant's alleged forgery of plaintiff's name on a deed to property which was owned by the parties jointly and then transferred by said deed to defendant's brother. Defendant testifies that he does not have the emails requested and that he destroyed the computer from which the emails in question was sent and received. He said he destroyed this computer at or about the time the commencement of the matrimonial action. Plaintiff's counsel asked for sanctions for spoliation including an adverse inference drawn against the defendant and dismissal of Defendant's answer to plaintiff's

separate cause of action for a constructive trust on the subject property. Defendant's counsel argues that although the emails were effectively destroyed, the plaintiff has failed to meet her burden of showing that the destroyed evidence was relevant to, or would have supported, plaintiff's claim for a constructive trust.

(a) Should the court draw an adverse inference against defendant?

If yes – vote overruled
If no - vote sustained

RULING: Overruled

(b) Should the court dismiss defendant's answer?

If yes – vote overruled
If no - vote sustained

RULING: Overruled

REASONING/AUTHORITY:

Regarding the issue of the showing of relevance to the destroyed emails, in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NYS3d 543 [2015] the Court of Appeals adopted the standards set forth by the Appellate Division, First Department in the *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 AD3d 33 (21012) decision holding that a party seeking sanctions for spoliation of evidence must show:
(1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction,
(2) that the evidence was destroyed with a "culpable state of mind," which would include negligence, and
(3) that the destroyed evidence was relevant to, or would have supported, the seeking party's claim or defense.
However, in addressing the second prong of the test in *Pegasus* the Court of Appeals held that if the evidence is determined to have been "intentionally or willfully destroyed" then the relevancy of that evidence to the seeking party's claim is presumed under the third prong of the inquiry (*id.*at 547). (emphasis added) *Crocker C. v. Anne R*, 58 Misc. 3d 1221(A), 2018 N.Y. Slip Op. 50182(U), 2018 WL 846746, at 17–18 (N.Y. Sup. Ct. 2018)

One of the most drastic remedies for spoliation, short of dismissing the action, is the striking of pleadings. "When a party negligently loses or intentionally destroys key evidence, depriving the non-responsible party from being able to prove its claim or defense, the court may punish the responsible party by the striking of its pleading" (*Baglio v. St. John's Queens Hosp.*, 303 AD2d 341, 342, 755 N.Y.S.2d 427 [2 Dept. 2003]).

4. CROSS EXAMINATION; NEW MATTER

FACTS:

Plaintiff, upon cross examination by Defendant's attorney is asked about a transfer of property Plaintiff made two years prior to the date of commencement of the action, a topic not alluded to during direct examination. Defendant's attorney asks leading questions regarding this transfer to which Plaintiff's counsel objects.

RULING: Sustained

REASONING/AUTHORITY:

When a cross examiner raises new matter on cross examination, the witness becomes the witness of the cross examiner and thus all of the rules governing direct examination, inclusive of non-use of leading questions, applies. As stated in *People ex rel. Phelps v. Court of Oyer & Terminer of New York City,* 83 NY 436 (1881), "As to the new matter [upon cross examination], the witness becomes his own, and in substance and effect the cross examination ceases." See also, *In re Benioff's Estate*, 73 M493, 133 NYS 413 (1911).

5. BAD ACTS; COLLATERAL EVIDENCE RULE

FACTS – Part "A"

In an action for partition of the former marital residence, the attorney for the former husband is cross-examining the former wife and he asks her if she filed tax returns for 2017. She answers yes. He then asks her if she claimed head of household filing status, and declared the children as dependents, although the children reside with the former husband, who has sole custody of the children, and she has a schedule of visitation with the children. Her attorney objects?

RULING: Overruled

FACTS – Part "B"

Assume the former wife denies she claimed head of household status and declared the children as dependents. The attorney for the former husband then marks the wife's 2017 tax return for identification, has the former wife identify it, and offers it in evidence. The former wife's attorney objects.

RULING: Sustained

REASONING/AUTHORITY:

The general rule is that a witness may be cross-examined with respect to specific immoral, vicious or criminal acts which have a bearing on the witness's credibility. However, the inquiry must have some tendency to show moral turpitude to be relevant on the credibility issue. (*Badr v. Hogan*, 75 NY2d 629). Here, based on the federal tax returns and the requirements promulgated by the IRS for head of household filing status and for exemptions for dependents, defendant's attorney had a good faith basis for the question posed to the wife, as the question raises the possibility that she may have committed tax fraud. Accordingly, the objection should be overruled. *See, Young v. Lacy*, 120 AD3d 1561 (4th Dept. 2014)

However, the objection to the introduction into evidence of the tax return is sustained by reason of the collateral evidence rule. *Young v. Lacy, supra.* The collateral evidence rule limits the ability of the cross-examiner to contradict the witness by introduction of extrinsic evidence. It holds that: "the 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**.** (citations omitted) This rule is premised on sound policy considerations for if extrinsic evidence which is otherwise inadmissible is allowed to be introduced to contradict each and every answer given by a witness solely for the purpose of impeaching that witness, numerous collateral minitrials would arise involving the accuracy of each of the witness' answers. The resulting length of the trial would by far outweigh the limited probative value of such evidence." (*Peo. v. Pavao*, 59 N.Y.2d 282, 288, 464 N.Y.S.2d 458 [1983])

Even where a particular subject is proper impeachment upon cross-examination, it is collateral unless it is relevant to some issue in the case other than credibility or is independently inadmissible in order to impeach the witness. Such collateral matter, while proper cross-examination because it is relevant to the witness's credibility, may not be used to impeach the witness by extrinsic evidence. *Badr v. Hogan*, 75 N.Y.2d 629, 634, 555 N.Y.S.2d 249 (1990); *People v. Schwartzman*, 24 N.Y.2d 241, 245, 299 N.Y.S.2d 817 (1969); *Peo. v. Jackson*, 165 A.D.2d 724, 564 N.Y.S.2d 259 (1st Dept. 1990); *Peo. v. Israel*, 161 A.D.2d 730, 732, 555 N.Y.S.2d 865 (2d Dept. 1990).

6. CROSS EXAMINATION – BAD ACTS

FACTS:

During cross examination of the Husband in a child custody case, the wife's attorney asks the Husband "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"? The Husband's attorney objects and 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." The Court asks the wife's attorney if he has a good faith basis for asking the question, and the attorney replies that his client feels he may have engaged in such conduct.

OBJECTION Sustained

REASONING/AUTHORITY:

Cross-examination relative to specific misconduct must be based upon reasonable grounds and pursued in good faith. *People v. Greer*, 42 N.Y.2d 170 (1977); *People v. Schwartzman*, 24 N.Y.2d 241, 245, 299 N.Y.S.2d 817 (1969), cert den 396 US 846 (1969); *People v. Alamo*, 23 N.Y.2d 630, 298 N.Y.S.2d 681 (1969)

7. ATTORNEY-CLIENT PRIVILEGE; COMMON INTEREST DOCTRINE

FACTS:

The Wife and her mother consult with Able Advocate, a matrimonial attorney, They discuss the fact that the wife's mother paid for the marital residence of the wife and her husband, title to which was taken as tenants by the entirety, pursuant to a promise by the husband to convey his one-half title interest in the property to his mother-in-law if he ceased living in the marital residence. She explores with Advocate a possible constructive trust action and the wife discusses a matrimonial action where the issue of occupancy and ownership of the marital residence is a key issue. At trial of the matrimonial action Advocate is subpoenaed to testify and when asked about the consultation he invokes the Attorney-Client privilege. The Husband's attorney argues that as the wife's mother was present during the entire consultation, the privilege has been waived.

RULING: Overruled

REASONING/AUTHORITY:

The 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). 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.*, 27 NY3d 616, 36 NYS3d 838 (2016)

Where two or more people consult an attorney on a matter of common interest, what they said is not protected in a subsequent action between them but is protected in an action between one of them and a stranger (*Wallace v. Wallace*, 216 NY 218; *Root v. Wright*, 84 NY 72)

8. EFFECT OF OPENING STATEMENT

During plaintiff's case, she testified that a parcel of real property was purchased during the marriage and was marital property. After her testimony, her attorney asked the Court to make a finding that the subject property was presumptively marital property based upon a statement by defendant's counsel during opening statement that defendant purchased the property during the marriage, though partially with money received from another source. Defendant's attorney objects to the finding of such presumption, arguing that what is said in opening statement is not evidence.

RULING*:* Overruled

REASONING/AUTHORITY:

The unequivocal, factual assertion made during opening statement constituted a judicial admission, and it was thereby established that at least a portion of defendant's interest in the property was presumptively marital property, shifting burden to defendant to rebut the presumption. *Kosturek v. Kosturek*, 107 AD3d 762, 968 NYS2d 97 (2d Dept. 2013). Where counsel, in opening or summation, makes a statement that is argument or opinion, no finding of a judicial admission is warranted. The statement of fact must b e made with sufficient formality

and conclusiveness that it, it must be deliberate, clear and unequivocal. *Rahman v. Smith*, 40 AD3d 613 (2d Dept. 2007)

9. PATIENT-PHYSICIAN PRIVILEGE

FACTS – Part "A"

In a child protective proceeding, the father's psychiatrist is called and is asked about an admission by the father of predatory sexual abuse he allegedly made to the psychiatrist for the purpose of treating his depression and suicidal ideation. The father's attorney objects and invokes the patient-physician privilege.

RULING: Overruled

REASONING/AUTHORITY:

Social Services Law §§ 413 and 415 impose mandatory reporting requirements on various health care providers, including physicians and psychologists, in cases of child abuse, and § 415 goes on to provide for the admissibility of such reports as evidence in child protective proceedings relating to the abuse. The Family Ct Act § 1046[a][vii] states that the privilege "shall (not) be a ground for excluding evidence which otherwise would be admissible" in abuse and neglect proceedings.

FACTS – Part "B"

The father is now on trial for criminal charges filed against him for the same acts. The same psychiatrist is called and asked about the same alleged admission. The father's attorney objects.

RULING: Sustained

REASONING/AUTHORITY:

In *Peo. v. Rivera*, 25 N.Y.3d 256 (2015), the Court of Appeals noted that "But it is one thing to allow the introduction of statements or admissions in child protective proceedings, whose aim is the protection of children, and quite another to allow the introduction of those same statements, through a defendant's psychiatrist, at a *criminal* proceeding, where the People seek to punish the defendant and potentially deprive him of his liberty. Evidentiary standards are necessarily lower in the former proceedings than in the latter because the interests involved are different. Thus, the relaxed evidentiary standards in child protective proceedings lend no credence to the People's argument that defendant should have known that any admission of abuse he made to his psychiatrist would not be kept confidential." Moreover, the Court noted that exceptions to the statutorily-enacted physician-patient privilege are for the Legislature to declare.

10. HEARSAY EXCEPTION; TREATMENT OR DIAGNOSIS

FACTS:

In a neglect proceeding, in response to the question, "what did the little girl say?", Dr. Fixbone, an orthopedist who treated the six-year old child's broken arm in the emergency room, is

prepared to testify that the little girl said "Mommy didn't' mean to hurt me when she pushed me down." The Mother's attorney objects.

RULING: Overruled

REASONING/AUTHORITY:

Statements made to medical personnel in connection with treatment are admissible. *Peo. v. Ortega*, 15 N.Y.3d 610 (2010). (Statement that complainant was "forced to" smoke a white, powdery substance was relevant to complainant's diagnosis and treatment. As the trial judge reasoned, under such a scenario, complainant would not have been in control over either the amount or the nature of the substance he ingested. In addition, treatment of a patient who is the victim of coercion may differ from a patient who has intentionally taken drugs. The references to complainant being "forced to" consume crack were admissible under the business records exception to the hearsay rule.

11. CROSS EXAMINATION OF YOUR OWN WITNESS

FACTS:

Plaintiff calls defendant as his witness on Plaintiff's direct case, the examination covering a multitude of issues. Upon completion of the examination, defendant's counsel conducts an examination of his client, utilizing leading questions on the ground that such questions are permitted upon cross examination. Plaintiff's counsel objects to the leading questions.

RULING Sustained

As stated in Prince, Richardson on Evidence (11th Ed.), Sec. 6-230:

"Leading questions are allowed on cross examination, since the witness may be presumed not to favor the cross-examiner. If the witness is, in fact, biased in favor of the cross-examiner, as where a defendant, who was called as plaintiff's witness, is being cross-examined by his own counsel, leading questions will generally not be permitted. In re Rogan's Estate, 404 Pa 205, 171 A2d 177; Nor is there any right to put leading questions on cross examination for the purpose of seeking to elicit new matter. Cross examining as to new matter is in effect conducting a direct examination, not a cross examination, of the witness, and is thus subject to the rules governing direct examination. *People ex rel Phelps v. Court of Oyer and Terminer*, 83 NY 436, 459 (1881)."

This follows the general rule that the propounding of leading questions is only applicable to hostile witnesses. *Cox v. Don's Welding Service, Inc.* 58 AD2d 1013 (4th Dept. 1977); *Brown v. Western Union Telegraph Co.*, 26 AD2d 316 (4th Dept. 1966)

12. FORENSIC REPORT; *FRYE* TEST; CROSS EXAMINATION BY LEARNED TREATISE

FACTS – PART "A":

In a child custody case, plaintiff-mother seeks to introduce the forensic report of the court-appointed mental health forensic expert as the expert is testifying. Plaintiff's counsel offers the report as a court exhibit and as an aid to the Court. Defendant's counsel objects to the offer on the ground that where there is a live witness, receipt of a report from such witness is neither necessary nor admissible.

RULING: Overruled

REASONING/AUTHORITY:

Although the Second Department has held in *Berruet v. Greaves,* 35 AD3d 460 (2006) that while trial courts are accorded wide discretion in making evidentiary rulings, professional reports constitute hearsay and therefore are not admissible without the consent of the parties, it is clear that the overwhelming majority of courts permit the introduction into evidence of the report as an aid to the Court.

FACTS – PART 'B":

A scrutiny of the report reveals that it contains no reference to any scientific professional literature or studies in support of the report's analysis and opinions and thus does not comply the Frye v. U.S. (293 F. 1013) test applicable to New York cases and thus should not be admissible.

RULING: Overruled

REASONING/AUTHORITY:

The "general acceptance" requirement, also known as the *Frye* test, governs the admissibility of expert testimony and New York and it asks "whether the expert's techniques, when properly performed, general results accepted as reliable within the scientific community generally. *Sean R. v. MMW of N. Am., LLC,* 26 NY3d 801 (2016). It has been held, however, that *Frye* does not require that 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 is admissibility. *Straus v. Strauss,* 136 AD3d 419 (1st Dept. 2016)

FACTS – PART "C"

Upon cross examination of the forensic evaluator by defendant's counsel, the evaluator is asked if he is familiar with the publication Kapan & Sadock's Synopsis of Psychiatry. He acknowledges that he is familiar with the publication. He is then asked if he regards the publication as an authoritative work in the field. The evaluator answers that while he uses the publication as a resource in his own practice and attempts to adhere to the guidelines in the publication, he could not say that it was authoritative. Defendant's counsel then seeks to question witness was a passage from the publication which is at variance with the direct testimony of the witness. Plaintiff's counsel objects.

RULING: Overruled

REASONING/AUTHORITY:

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 (*see Lenzini v Kessler*, 48 AD3d 220, 220, 851 NYS2d 163 (1st Dept. 2008); *Egan v Dry D, E. B. & B.R. Co.*, 12 AD 556, 42 NYS 188 (1st Dept. 1896). 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, we note that the modern trend, with which we agree, 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 (*see Linton v Nawaz*, 62 AD3d 434, 443 [2009], *affd* 14 NY3d 821 [2010]; *Cholewinski v Wisnicki*, 21 AD3d 791, 792 [2005]; *see also Matott v Ward*, 48 NY2d 455, 460-461 [1979]). 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, 607 NYS2d 344 (Ct. App. 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 (App. Div. 2015)

13. BASIS OF PHYSICIAN'S TESTIMONY

FACTS:

In a divorce trial involving the issue of spousal maintenance, the wife calls Dr. Malcolm Practice as a witness. Dr. Practice 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. The Husband's attorney objects and moves to strike the opinion of the doctor.

RULING: Sustained

REASONING/AUTHORITY

A physician who did not physically examine the plaintiff could not testify to a diagnosis of plaintiff's back injury based on films not in evidence. *Nuzzo v. Castellano*, 254 A.D.2d 265, 678 N.Y.S.2d 118 (2d Dept., 1998). A doctor cannot testify based on an X-ray without producing that X-ray and introducing it into evidence. *Hambsch v. N.Y.C Transit Authority*, 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984).

Note, however, that if the witness was the wife's *treating* physician and relied upon the films in part in forming an opinion, a difference result would be reached. See, *LaForte v. Tiedemann*, 41 A.D.3d 1191, 1192, 837 N.Y.S.2d 457 (4th Dept. 2007) (The court also properly allowed plaintiff's treating orthopedic surgeon to testify that he had relied on the reports of non-testifying physicians, inasmuch as "those out-of-court materials are of the kind generally accepted as reliable by experts in the medical profession".)

14. IMPEACHMENT; PRIOR INCONSISTENT STATEMENT

FACTS – Part "A"

In a child custody case, plaintiff calls Joe Reliable, defendant's best friend, as a witness and asks him if he heard the defendant tell the party's three 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 defendant. Reliable denies that he heard such a conversation. The plaintiff's attorney then asks Reliable if he told Jill Yenta that he heard such a conversation. Defendant's attorney objects.

RULING: Sustained

REASONING/AUTHORITY:

A party may not impeach the credibility of a witness whom he calls (see Becker v. Koch, 104 N.Y. 394) unless the witness made a contradictory statement either under oath or in writing (see CPLR 4514)." See also, *Miller v. Galler*, 45 A.D.3d 1325, 846 N.Y.S.2d 493 (4th Dept. 2007) (court properly refused to allow plaintiff to impeach the credibility of defendant Marvin Galler, M.D. on direct examination by questioning him with respect to a criminal conviction. It is well established that an adverse party or a hostile witness may not be impeached on direct examination by evidence of his or her criminal conviction.)

FACTS – Part "B"

Plaintiffs' counsel then lays the foundation to introduce a document signed by Reliable 6 months before trial where he alludes to the subject conversation and relates the substance of the conversation. He offers the document into evidence.

OBJECTION: Defendant's attorney objects.

RULING: Overruled

REASONING/AUTHORITY:

The general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing. (*see* CPLR 4514). *Ferri v. Ferri*, 60 A.D.3d 625, 878 N.Y.S.2d 67(2d Dept. 2009)

15. ADMISSION BY EXPERT

FACTS:

The forensic accountant retained by the defendant-husband to value his business interest testifies on direct examination that in normalizing the earnings of the business, he added back the sum of $40,000, representing the salary and payroll expenses of the parties' daughter, a college student at the University of Arizona. Upon defendant's direct examination, he is asked about his daughter's employment and states that the forensic accountant he retained was in error and that

his daughter performed various business-related tasks for which she was fairly albeit not excessively paid. Plaintiff's counsel objects and moves to strike the answer, arguing that the defendant is bound by the admission made by the forensic accountant.

RULING: Overruled

REASONING/AUTHORITY

A statement by an expert that is put forward by a party in litigation constitutes an informal judicial admission that is admissible against, although not binding upon, the party that submitted it. (*Djetounmani v. Transit Inc.*, 50 AD3d 944. 857 NYS2d 601 [2d Dept. 2008]). As an informal judicial admission is not binding and can be explained, defendant's testimony is admissible.

16. MISSING WITNESS CHARGE

FACTS:

In an action seeking to set aside a prenuptial agreement based upon fraud in the 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 her version of the facts.

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

If Yes – Overruled

If No - Sustained

RULING: Overruled. The Court should draw the negative inference.

REASONING/AUTHORITY:

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 A.D.2d 250, 252, 569 N.Y.S.2d 452 [1st Dept., 1991); *Gruntz* v. *Deepdate General Hospital*, 163 A.D.2d 564, 566, 558 N.Y.S.2d 623 [2d Dept., 1990)]; See, *Noce* v. *Kaufman*, 2 N.Y.2d 347, 161 N.Y.S.2d 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."

In a child custody case, where the 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.), revd. on other grounds, 130 A,D.3d 920 (2d Dept. 2015)

The preconditions for this missing witness charge, applicable to both criminal and civil trials, may be set out as follows:
(1) the witness's knowledge is material to the trial;
(2) the witness is expected to give noncumulative testimony;
(3) 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
(4) the witness is available to that party (*Devito v. Feliciano*, 22 N.Y.3d 159, 165-66, 978 N.Y.S.2d 717 (2013).

Note, however, that the party seeking such an inference has the burden of promptly notifying the court of the need for same, thus permitting the parties to "tailor their trial strategy to avoid substantial possibilities of surprise". Once the party requesting the charge meets its initial burden, the party opposing the request can defeat it by demonstrating that, *inter alia*, the witness was not available, was outside of its control, or the issue about which the witness would have been called to testify is immaterial. *Herman v. Moore*,, 134 AD3d 543 (1st Dept. 2015)

17. IMPEACHMENT BY CRIMINAL CONVICTION

FACTS:

In a custody case in which the mother has made allegations against the father of sexually abusing the parties' daughter and other 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.

RULING: Overruled (although discretionary with Court)

CPLR §4513 provides: A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.

Generally, civil litigants have broad authority to impeach witnesses with convictions during cross-examination. See, e.g., *Vernon v. New York City Health and Hospitals Corp*., 167 A.D.2d 252, 561 N.Y.S.2d 751 (1st Dept. 1900)(plaintiff's marijuana convictions), albeit the matter lies within the trial court's discretion. *Morgan v. National City Bank*, 32 A.D.3d 1264, 1265, 822 N.Y.S.2d 201, 203 (4th Dept., 2006). However, as noted in *Tripp v. Williams*, 39 M3d 318, 959 N.Y.S.2d 412 (Supreme Court, Kings Co., 2013, Battaglia, J.), 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. In *Tripp*, 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 *People v. Sandoval*, 34 NY2d 371, are applicable to civil, as well as criminal, actions. Here, however, as the past crime involves sexual abuse, it is highly likely that the certificate of conviction will be admitted.

Since the issue here is sexual abuse, it is likely that the prior conviction can be used for impeachment purposes.

18. HEARSAY; ADMISSION EXCEPTION

FACTS:

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." Defendant objects and moves to strike the statement.

RULING: Overruled.

The police officer who prepared the report was acting within the scope of his duty in recording the defendant's statement. Generally, a memorandum of a police officer not witnessing an incident in question and based upon hearsay statements of third persons present, is held inadmissible. *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930). However, although the officer was not present and did not witness the incident in question, the statement in the report by the husband is admissible as an admission of a party, a noted exception to the hearsay rule. *Jackson v. Donien Trust*, 103 A.D.3d 851, 962 N.Y.S.2d 267 (2d Dept. 2013). See also, See, e.g., *Kelly* v. *Wasserman*, 5 N.Y.2d 425, 185 N.Y.S.2d 538 (1959) (admission by a party litigant to a social worker who recorded the statement pursuant to a business duty); *Peo.* v. *Babala*, 154 A.D.2d 727, 729, 547 N.Y.S.2d 683 (3d Dept., 1989).

19. BUSINESS RECORD RULE; VOLUMINOUS RECORD RULE

FACTS – Part "A"

In a divorce action, 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.

RULING: Sustained

REASONING/AUTHORITY

As the spreadsheet in question was prepared by plaintiff's counsel for use at the trial, and not supported by a proper business record foundation, the spreadsheet is not admissible as a business record. *35 E. 57th St., LLC v. 57th St. Day Spa, LLC*, 126 A.D.3d 471, 2 N.Y.S.3d 789 (1st Dept. 2015). Documents prepared for litigation lack the indicia of reliability necessary to invoke the business records exception to the hearsay rule. *Peo. v. Rogers*, 8 A.D.3d 888, 780 N.Y.S.2d 393 (3d Dept., 2004).

FACTS – Part "B"

Plaintiff's counsel renews the application to admit the spreadsheet but now bases the proffer upon the voluminous record rule. Defendant's counsel objects.

RULING: Overruled.

The voluminous record rule is an exception to the Best Evidence Rule and allows the use of summaries where the originals are so numerous so they cannot reasonably be examined in court. The requirements for imposition of the rule are as follows:

1. Voluminous records
2. Originals must be admissible for the summaries based on the originals to be admissible
3. Summaries may not include information not contained in or computed from the originals
4. Originals or duplicates of voluminous records must be made available to the other side for examination or copying. *Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440, 358 NYS2d 367 [1974]); *Peo. v. Potter*, 255 AD2d 763, 682 NYS2d 238 [3d Dept. 1998]; *NYC Dept. of Education v. Demaria*, 27 M3d 1219 (A), Civil Ct., Kings Co., 2010, Dear, J.)

Summaries or balances of accounts may be produced to prove aggregate profits or receipts without the need to produce those documents which set forth the underlying dates. Business summaries have been deemed to be independent from the writings or documents upon which they are drawn. *R & I Electronics, Inc. v. Neuman*, 81 AD2d 832, 438 NYS2d 832 [2d Dept. 1981])

20. HEARSAY; FORENSIC REPORT

FACTS:

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.

RULING: Overruled

REASONING/AUTHORITY

While it is questionable as to whether the report will be admissible under the professional reliability rule, as there is no evidence that reliance upon the subject collaterals is deemed reliable within the profession (*Wagman v. Bradshaw*, 292 A.D.2d 84, 739 N.Y.S.2d 421 [2d Dept.2002]), nor independent evidence establishing the reliability of the out-of-court material (*Hambsch v. N.Y.C. Tr. Auth.*, 63 N.Y.2d 723, 480 N.Y.S.2d 195 [1984]). However, even if the professional reliability test is not met, the expert may rely upon the out-of-court material if the declarant(s) testifies and is subject to cross examination. (*Wagman v. Bradshaw, supra; Peo. v. Stone*, 35 N.Y.2d 69, 358 N.Y.S.2d 737 [1974])

Recently, in *Straus v. Strauss*, 136 AD3d 419 (1st Dept. 2016), the court stated:

> The forensic report does not rely to a significant extent on hearsay statements. A review of the report reveals that the primary source of the report's conclusions are the forensic evaluator's firsthand interviews with the parties. In any event, defendant intends to call as witnesses at any future custody hearing anyone to whom the forensic evaluator spoke; thus, the declarants will be subject to cross-examination, rendering admissible any opinion evidence based on their statements (*see Wagman v. Bradshaw*, 292 A.D.2d 84, 86–87, 739 N.Y.S.2d 421 [2d Dept.2002]). To the extent that any hearsay declarants are not cross-examined, the motion court acknowledged that those portions of the report containing inadmissible hearsay should be stricken or not relied upon (*see Lubit v. Lubit*, 65 A.D.3d 954, 956, 885 N.Y.S.2d 492 [1st Dept.2009], *lv. denied* 13 N.Y.3d 716, 2010 WL 118203 [2010], *cert. denied* 560 U.S. 940, 130 S.Ct. 3362, 176 L.Ed.2d 1247 [2010]). (emphasis added)

21. JUDICIAL FACT RESEARCH; JUDICIAL NOTICE

FACTS- Part "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]

RULING: Sustained (albeit discretionary with Court)

REASONING/AUTHORITY

The Second Department, in *HSBC Bank USA, N.A. v. Taher*, 104 A.D.3d 815, 818, 962 N.Y.S.2d 301, 304 (2d Dept. 2013), issued the following admonition:

> 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 (*see HSBC Bank USA, N.A. v. Taher*, 32 Misc.3d 1208[A], 2011 N.Y. Slip Op. 51208[U], 2011 WL 2610525 [Sup. Ct., King County]), was improper and should not be repeated.

Similarly, it has been held that in conducting its own independent factual research, by exploring the web site of a party to the litigation, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. *N.Y.C. Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 8 M3d 33, 798 N.Y.S.2d 309 (App. Term, 2d Dept.)

cf. *Munaron*, 21 M3d 295, 862 N.Y.S.2d 796 (S.Ct., Westchester Co., Jamieson, J.) - Court took judicial notice, after advising parties thereof, that plaintiff was still the CEO of a particular corporation by Court's examination of N.Y. Secretary of State's official website.

FACTS – Part "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.

RULING: Overruled

REASONING/AUTHORITY

CPLR 4511 (b) provides that upon request of a party, a court may take judicial notice of federal, state, and foreign government acts, resolutions, ordinances, and regulations, including those of their officers, agencies, and governmental subdivisions. In *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 871 N.Y.S.2d 680 (2d Dept. 2009), the Court held:

> The diagnosis and procedure codes key published by the United States Government on its Department of Health and Human Services (HHS) Web site was properly given judicial notice (*see* CPLR 4511 [b]) in plaintiff hospital's action to recover assigned no-fault medical benefits from defendant insurer. Upon request of a party, a court may take judicial notice of federal, state and foreign government acts, resolutions, ordinances and regulations, including those of their officers, agencies and governmental subdivisions. Judicial notice is not strictly limited to the constitutions, resolutions, ordinances and regulations of government, but may apply to other public documents that are generated in a manner which assures their reliability. The HHS diagnosis and procedure codes key is of sufficient authenticity and reliability that it may be given judicial notice. The accuracy of the codes key was not contested by plaintiff, and was not subject to courtroom fact-finding. The fact that the code system might not be readily understood by the lay public

was of no significance, as the information was proffered for judicial notice not on the basis of being generally understood by the public, but rather, on the basis of its reliable source.

22. LAY TESTIMONY; MEDICAL CONDITION

FACTS:

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

RULING: Overruled

REASONING/AUTHORITY

A lay witness can offer generalized testimony about his/her medical condition.

An 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. *Knope v. Knope*, 103 A.D.3d 1256, 959 N.Y.S.2d 784 (4th Dept. 2013). In *Rindos v. Rindos*, 264 A.D.2d 722, 694 N.Y.S.2d 735 (2d Dept. 1999), the court stated: "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."

23. BUSINESS RECORD RULE; COMPUTER PRINTOUTS

FACTS – Part "A"

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.

RULING: Sustained

REASONING/AUTHORITY

The printout was not admissible as a business record as it was created for litigation. *Sager Spuck Statewide Supply Co., v. Meyer*, 298 A.D.2d 794, 751 N.Y.S.2d 318 (3d Dept. 2002).

FACTS – Part "B"

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 Husband's attorney objects.

RULING: Overruled

REASONING/AUTHORITY

The computer database qualified as a business record (*see Ed Guth Realty v Gingold*, 34 N.Y.2d 440, 451 [1974]), and then properly admitted a printout from the database (*see People v Weinberg*, 183 A.D.2d 932, 933 [1992], *lv denied* 80 N.Y.2d 977 [1992]; *see also Ed Guth Realty*, 34 N.Y.2d at 452).

24. EXPERT QUALIFICATIONS

FACTS:

An expert witness' qualifications are drawn out on direct. Once qualifications are given, the expert witness starts rendering opinions. The opponent objects because the witness has not been declared an expert.

RULING: OVERRULED

REASONING/AUTHORITY

"The court is not required to formally declare or certify that a witness is expert before permitting him to give expert testimony." *People v. Leung*, 272 A.D.2d 88 (1st Dep't 2000). As for the trial judge declaring the witness to be an expert, "the court is not required to explicitly declare a witness an expert before permitting such testimony. In fact, there is legitimate criticism of that practice on the basis that making such a declaration in front of a jury improperly bolsters the witness and appears to grant the witness the imprimatur of the court." *People v. Lamont*, 21 A.D.3d 1129 (3d Dept. 2005), lv. den. 6 N.Y.3d 835 (2006).

25. REFRESHING WITNESS' RECOLLECTION

FACTS – Part "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." Defendant's counsel demands an opportunity to review the documents that the witness reviewed. The plaintiff's counsel objects.

RULING: SUSTAINED

REASONING/AUTHORITY:

"Pretrial preparation frequently involves the review of many documents by a witness regardless of a need to refresh recollection. A court in its discretion may limit the inspection of such material to prevent a defendant from embarking on a 'roving tour' through the prosecutor's office." *People v. Carrier*, 270 A.D.2d 800, 706 N.Y.S.2d 726 (4th Dep't. 2000).

FACTS – Part "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". Defendant's counsel demands an opportunity to review the notes that the witness reviewed. The plaintiff's counsel objects.

RULING: Overruled

REASONING/AUTHORITY:

Compare *Chabica v. Schneider*, 213 A.D.2d 579, 624 N.Y.S.2d 271 (2nd Dept. 1995): Although the plaintiff never explicitly stated that he had used the subject notes to refresh his recollection with respect to the conversation in which the defendant had purportedly told him that the anesthesia must have entered the eyeball, it is undisputed that the plaintiff had reviewed those notes for the express purpose of preparing for his testimony at the trial. Even if the plaintiff never used the words, "refresh my recollection," it is quite clear that the sole object and ultimate goal of reading the notes immediately prior to trial was to refresh his memory. Accordingly, the defendant was entitled to have the diary containing the notes made available to him for inspection and use upon cross-examination.

26. EMAILS; ATTORNEY-CLIENT PRIVILEGE

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 single 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

RULING: Sustained - The e-mails were privileged.

REASONING/AUTHORITY:

Parnes v Parnes, 80 A.D.3d 948, 915 N.Y.S.2d 345 (3d Dept., 2011) -- E-mails between husband and attorney regarding strategy for husband to gain advantage in future matrimonial and custody litigation were protected by attorney-client privilege in divorce action. Husband's carelessness in leaving a note containing his user name and password on the desk in the parties' common office in the shared home did not constitute a waiver of the privilege. Defendant took reasonable steps to keep the e-mails on his computer confidential. Defendant set up a new e-mail account and only checked it from his workplace computer. Leaving a note containing his user name and password on the desk in the parties' common office in the shared home was careless, but it did not constitute a waiver of the privilege. Defendant still maintained a reasonable expectation that no one would find the note and enter that information into the computer in a deliberate attempt to open, read and print his password-protected documents
However, defendant waived the privilege with respect to one hardcopy page of a five page e-mail that he left on his desk. Regardless of whether the parties had separate desks, the room was used by multiple people, including the plaintiff, their nanny and babysitters.

27. HOW EVIDENCE IS PROCURED: EFFECT ON ADMISSIBILITY

FACTS:

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.

RULING: OVERRULED

REASONING/AUTHORITY:

A statement procured by governmental agent in violation of one=s constitutional rights is nevertheless admissible in a civil case. *Terpstra v. Niagra Fire Ins. Co.*, 26 N.Y.2d 70, 308 N.Y.S.2d 378 (1970). The Court of Appeals has stated that A[a] violation of a constitutional right may have different consequences depending upon whether the evidence obtained in violation of that right is attempted to be used in criminal or noncriminal proceedings.@ *People v. New York State Bd. of Parole*, 65 N.Y.2d 145, 490 N.Y.S.2d 742 (1985) (violation of right to counsel under State Constitution did not preclude use at parole revocation hearing of statements obtained).

Moreover, the best evidence rule is not implicated since the police officer had knowledge of the Husband=s statement independent of the writing in which it was ultimately incorporated. See *People v. Colon*, 281 A.D. 354, 119 N.Y.S.2d 503 (1st Dept.. 1953); see also *Grieshaber v. City of Albany*, 279 A.D.2d 232 720 N.Y.S.2d 214 (3d Dept.. 2001) (where a party seeks to prove the content of a conversation, an individual who heard the conversation may testify as to its content despite existence of tape recording).

To be admissible under the business record exception to the hearsay rule, the police report containing the statement of Husband must meet the statutory requirements under CPLR 4518(a). See, *People v. Morrow*, 204 A.D.2d 356, 612 N.Y.S.2d 604 (2d Dept. 1994). Either the officer who made the report or another police official must testify that the record was made in the regular course of business, that it was the regular course of business to make such a record, that the record was made at or near the time of the occurrence and that the officer making the report was under a duty to do so. See CPLR 4518(a*); People v. Maisonave*, 140 A.D.2d 545, 547 (2d Dept.. 1988). Moreover, the testifying officer must be able to identify the declarant and the Husband=s statement itself must qualify under some other hearsay exception. See, *Maisonave*, 140 A.D.2d at 547 (indicating that absent the duty of the declarant to make the statement Athe police report is still admissibleY for proof that the statement was made [and] the statement itself could then be admitted for its truth and content if it fit under another hearsay exception.@)

28. HEARSAY; STATE OF MIND

FACTS:

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

RULING: Overruled

In custody cases, there is an exception to the hearsay rule involving allegations of abuse and neglect (Family Court Act '1046[a][vi]), provided such statements are corroborated. In any event, the statements of the child to petitioner and his wife as well as statements made by a nurse to petitioner's wife were not offered for the truth of the matters asserted therein but, rather, were offered to explain actions taken by petitioner and his wife, and thus those statements and that testimony fall within an exception to the hearsay rule. In fact, the statements are not hearsay in the first instance as they are not offered to prove the truth of the matter asserted but rather to demonstrate the state of mind of the petitioner and his wife. *(Mateo v. Tuttle*, 26 A.D.3d 731, 809 N.Y.S.2d 699 [4th Dept. 2006])

Regarding the applicability of Family Court Act §1046(a) to custody cases based upon allegations of abuse, the children's out-of-court statements are excepted from the hearsay rule, but must be corroborated. *Zukowski v. Zukowski*, 106 A.D.3d 1293, 1294, 965 N.Y.S.2d 231, 233 (3d Dept. 2013); *Sutton v. Sutton*, 74 A.D.3d 1838, 902 N.Y.S.2d 746 (4th Dept. 2010).

29. BUSINESS RECORD RULE

FACTS:

In a proceeding to terminate parental rights, the Department of Social Services offers into evidence a report prepared in Georgia pursuant to the Interstate Compact on the Placement of Children. The respondent-father objects, claiming that the report should not be admitted unless

the Department of Social Services demonstrates that all reporting parties referenced in the report were under a business duty to impart the information stated in the report.

RULING: Sustained

REASONING/AUTHORITY:

These facts are taken from a recent Fourth Department case, *In re Dakota S.*, 43 AD3d 1414 (4th Dept. 2007). The Court held that the father=s objection was valid to the extent that certain portions of the report proffered should not have been admitted because petitioner failed to establish that the reporting party was under a business duty to report the information.

This holding is consistent with the Court of Appeals holding in *Matter of Leon RR*, 48 NY2d 117, 421 NYS2d 863 (1979), where the Court noted that with respect to a document being offered under the business record rule, each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception. Thus, not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant.

In *Penny K.* v. *Alesha T*, 39 AD3d 1232, 834 NYS2d 760 (4th Dept. 2007), the narrative portion of child protective service investigation summary was not admissible under the business record exception to the hearsay rule, as the source of the information contained in such narrative portion was unknown and thus determination could not be made as to whether the source of the information was under a business duty to report such information.

30. PRIOR INCONSISTENT STATEMENT; IMPEACHING ONE=S OWN WITNESS

FACTS:

Plaintiff-wife called to the stand her husband=s financial advisor/stockbroker, Mr. Churn, and plaintiff=s counsel inquired about what transpired when the husband opened a brokerage account with Mr. Churn=s employer, Pump and Dump Inc. Specifically, plaintiff=s counsel asked if the husband, in opening the account in the joint names of the parties, said anything to Mr. Churn as to the reason for joint names on the account. Mr. Churn immediately replied that the husband said the funds on deposit were funds he inherited from his late father and that he wanted the account to be in the joint names of he and his wife solely for convenience purposes. Plaintiff=s counsel then elicited from the witness his recollection about being deposed before trial at the attorney=s office, and the attorney then refers to page 22 of the transcript of the deposition, and begins to read lines 3 to 23 of that page of the transcript. The husband=s attorney objects, arguing that the wife=s attorney is now attempting to improperly impeach his own witness.

RULING: Ovcrruled

REASONING/AUTHORITY:

The so-called Avoucher rule@ generally prohibits impeachment of one=s own witness (*Becker v. Koch*, 104 NY 394, 401), on the theory that when a party calls a witness to the stand on his/her case, the party vouches for the credibility of the witness. However, there is a statutory exception, to wit: CPLR 4514, which provides that Aany@ witness (including one=s own witness) can be impeached by a prior inconsistent statement, provided the statement is in writing subscribed by the witness or is given under oath. Specifically, CPLR 4514 states that AIn addition to impeachment in the manner prescribed by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in writing subscribed by him or was made under oath.@ (Emphasis added); see also *Jordan* v. *Parrinello*, 144 AD2d 540, 534 NYS2d 686 (2d Dept. 1988).

Here, the deposition testimony, given under oath, can be used to impeach the witness despite the fact that plaintiff called the witness to testify.

31. DOCTOR=S OFFICE RECORDS; REPORT

FACTS:

In a child support modification proceeding, wherein the father seeks to reduce his child support obligation based upon his claim that because of his psychiatric disorders, he cannot resume employment, the father offers into evidence his psychiatrist=s office records, consisting of a letter summarizing the doctor's diagnosis, treatment and opinions, supported by the statutory foundations for the admissibility of a business record rule pursuant to CPLR 4518(a). The mother objects to the offer.

RULING: Sustained

REASONING/AUTHORITY:

As explained in *Bronstein-Becher* v. *Becher*, 25 AD3d 796, 809 NYS2d 140 (2d Dept. 2006), the father was not permitted to introduce medical reports from his psychiatrist on issue of his ability to return to work. A physician=s office records, supported by the statutory foundations of CPLR 4518(a), are admissible as business records. However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor=s opinion or expert proof. Moreover, certification of the records does not cure the defect as only hospital records, not physician office records, are admissible by certification. Similarly, in *Anthony* v. *Demers*, 29 AD3d 1092, 814 NYS2d 802 (3d Dept. 2006), the Court correctly refused to admit defendant=s medical records into evidence in the absence of the required certification or authentication (CPLR 4518[c]), and in the absence of independent evidence establishing the foundational requirements for admissibility (CPLR 4518[a]).

32. JUDICIAL NOTICE; WEBSITES

FACTS;

In a matrimonial action, the husband was directed to sell his 100% stock interest in X Corp. In a contempt proceeding brought by his wife wherein she alleges that husband did not make that

sale, husband claims he did but neither the sales contract nor the promissory note was produced and neither the alleged buyer nor the corporation's accountant appeared for depositions. As evidence that husband never sold the stock, wife seeks to introduce a printout from the corporation's website that shows husband listed as president?

RULING:

REASONING/AUTHORITY

New York has taken judicial notice of facts found on websites, including official government websites (see, e.g., *N.Y.C. Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 3 Misc.3d 33, 798 NYS2d 309 [State Department of Insurance for corporate presence in county]; *DeMatteo v. DeMatteo*, 194 Misc.2d 640, 749 NYS2d 671 [Surgeon General's report for dangers of second-hand smoke]); *Gallegos v. Elite Model Management Corp.*, 758 NYS2d 777 [hospital website for asthmatic conditions and causes]).

Where there is a real issue as to the reliability of the material posted on a website, courts have refused to admit such material in evidence. In *Munaron v. Munaron* , 21 Misc.3d 295, 862 N.Y.S.2d 796 [Sup. Ct. Westchester Co. 2008][Jameson, J.]), where the issue was whether the husband sold his business as judicially directed, entity information from the Secretary of State that the defendant was still a corporate officer was presented, with the information from the Secretary of State's website being gleaned from the Judge's own research, with the Judge informing the parties that it would be taking judicial notice of this fact. As there was no showing as to when the website was last updated, the information about its current corporate officers was questionable. In *Miriam Osborne Mem. Hosp. Assoc. v. Assessor* ,9 Misc.3d 1019, 800 N.Y.S.2d 909 [Sup. Ct. Westchester Co.][Dickerson, J.]), the court refused to take judicial notice of compilation of real property sales data from a government website as the governmental entity attached to the compilation a disclaimer that it did not warrant "the accuracy, reliability or timeliness" of the underlying data comprising the compilation."

33. E-MAILS

FACTS – Part "A"

Wife seeks divorce from husband on grounds of adultery and cruel and inhuman treatment. She offers into evidence an e-mail from husband to Nancy Franklin wherein he recounts a romantic romp they had earlier that day. Wife printed out the e-mail from their home- PC she and her husband share with a common password. She offers it into evidence and the Husband's attorney objects.

RULING: Overruled.

REASONING/AUTHORITY:

In *Gurevich v. Gurevich*, 24 M3d 808, 886 NYS2d 558 (S.Ct.,, Kings Co., 2009, Sunshine, J.), it was held that a party to a matrimonial action has the right to access and utilize the email account of the estranged spouse whom she no longer resides with and obtain copies of emails in his email account, in an attempt to show a scheme by the husband of hiding his income. Such action does

not constitute illegal “eavesdropping” pursuant to Penal Law §250.00 which requires unlawfully intercepting or accessing electronic mail. That section prohibits individuals from intercepting communications going from one person to another. Here, the emails was not “in transit” but were stored in an email account, and thus there was no interception, and the emails could not be suppressed pursuant to CPLR §4506[1].

FACTS – Part “B”

Assume the 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. She offers it into evidence and the Husband’s attorney objects.

RULING: Overruled

REASONING/AUTHORITY

In *Scott v. Beth Israel Med. Ctr*., 17 Misc.3d 934, 847 N.Y.S.2d 436 [Sup. Ct. N.Y Co. 2007][Ramos, J.], 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.

Employee lacked any reasonable expectation of privacy, and thus confidentiality, in his personal use of employer's e-mail system, and accordingly e-mails which employee sent through employer's system were not subject to attorney-client privilege; employer's e-mail policy, of which employee had at least constructive notice, asserted that employer owned all e-mails on its system, that employer reserved the right to audit networks and systems to ensure employees' compliance with e-mail policy, and that employer reserved the right to access and review any messages and to disclose such messages to any party. *Peerenboom v. Marvel Entm't, LLC*, 148 AD3d 531, 50 NYS3d 49 (1st Dept. 2017)

FACTS – Part “C”

Assume the *Wife printed out the e-mail from her husband’s laptop, provided to him by his employer for business use, accessing it by hiring a computer expert who “hacked” into the computer. Is the e-mail admissible?*

RULING:

REASONING/AUTHORITY:

34. SPOUSAL PRIVILEGE

In an action for a divorce, the Wife is testifying on direct examination about her husband=s business and income, and the parties= expansive lifestyle. Her husband is the sole stockholder of

a corporation that owns and operates four pizzerias. The wife=s counsel ask her if the husband has talked to her about the extent and nature of his income from the corporation. She replied that he did on several occasions, all of which took place during amorous moments and prior to the onset of the marital discord, and she relates the dates and places of such conversations. When asked to relate the substance of the conversations, she stated that her husband told her that in addition to his salary from the corporation, in the sum of $65,000 per year, he took more than $200,000 in cash each year which was not declared upon their income tax returns. The husband=s attorney objects and moves to strike the answer of the wife on the ground of the spousal privilege as set forth in CPLR 4501(b).

RULING: Overruled

REASONING/AUTHORITY:

The spousal privilege attaches only to confidential communications, i.e., those which would not have been made but for absolute confidence in, and induced by, the marital relation. (*Poppe*, 3 NY2d 312, 165 NYS2d 99 [1957]; *Peo. v. Dudley*, 24 NY2d 410, 301 NYS2d 9 (1969)). At first blush, the objection appears to have merit as the elements necessary to assert the spousal privilege are present. (See CPLR 4502(b): A husband or wife shall not be required, or, without consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage.).

However, when information critical to the outcome of a civil case is otherwise barred by the spousal privilege, the privilege may be breached in the interests of justice. The Court of Appeals, in *Prink v. Rockefeller Center, Inc.*, 48 NY2d 309, 442 NYS2d 911 (1979) stated:

> "Probably the policy of encouraging confidences is not the prime influence in creating and maintaining the privilege. It is really a much more natural and less devious matter. It is a matter of emotion and sentiment. All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife. It is important to recognize that this is the real source of the privilege. When we do, we realize at once that this motive of delicacy, while worthy and desirable, will not stand in the balance with the need for disclosure in court of the facts upon which a man's life, liberty, or estate may depend."

While a Aclose call@, the objection should be overruled as the extent of the husband=s income is crucial to the determination of the case.

35. HEARSAY; DECLARANT=S STATE OF MIND

FACTS:

As part of a divorce judgment, the mother was granted custody of the parties= 5-year old daughter, Tracy. When the mother remarried to a man named Jenkins, the child=s father petitioned for a change of custody. At the hearing on his application, the child=s nanny was called as a witness by the father. Part of her testimony was as follows:

A. I told her [the child] that her mommy and Mr. Jenkins had got married, and she started to cry. She put her arms around me and said he [Jenkins] is mean to me, he pushes and hits me when mommy=s not home, and he touches me in places@.

Q. Does she say this to you often?

A. Yes. On numerous occasions, she tells me he is Amean@, that is the word she constantly uses in talking about him.

The mother=s counsel objects and moves to strike the testimony as inadmissible hearsay.

RULING: Overruled

REASONING/AUTHORITY:

Inherent within the definition of hearsay is that when the out-of-court statement is offered not to prove the truth of the facts asserted, but for some other relevant purpose, such as to demonstrate the *state of mind of the declarant*, *Loetsch v. N.Y.C. Omnibus Corp*., 291 NY 308, 52 NE2d 448 (1943), or to demonstrate the *state of mind of the person hearing the statement*, *Ferrara v. Galluchio*, 5 NY2d 16, 176 NYS2d 996 (1958), the hearsay rule is inapplicable and, hence, does not operate to bar the evidence.

Here, while the statements of the child are clearly out-of-court statements, they are not offered to prove that Jenkins pushes or hits or touches the child, or to prove that he is mean. However, the statements are offered to prove that the declarant, the child, dislikes Jenkins and therefore would not want to live in the same household with him. As the out-of-court statement comes in to prove the state of mind of the declarant, it is not hearsay.

36. PSYCHOLOGIST-CLIENT PRIVILEGE; CHILD

FACTS:

In a child custody proceeding, the mother subpoenaed the child=s treating therapist, a psychologist, to testify. The father=s attorney and the attorney for the child objected to the therapist testifying, arguing that the psychologist-client privilege precludes such testimony. The mother argues that in a custody case, privileges are waived. Is the objection to the testimony sustained or overruled?

RULING: Sustained

REASONING/AUTHORITY

In *Ascolillo v. Ascolillo*, 43 A.D.3d 1160 (2d Dept. 2007), the Second Department held that in a child custody proceeding, the Family Court properly refused to permit the mother to call the child=s therapist as a witness, since the Law Guardian did not consent to the disclosure of confidential communications between the child and his therapist, and the instant proceeding was not a child protective proceeding pursuant to Article 10 of the Family Court Act.

If the issue involved a therapist for one of the parents, a different result would follow, as it has been held that generally a party automatically waives his right to a physician-patient privilege or psychiatrist privilege when disputing custody, thereby placing his physical, mental and emotional condition in issue. (*Baecher v. Baecher*, 58 AD2d 821[2d Dept. 977]; *Proschold v.:Proschold*, 114 Misc.2d 568 [Suffolk Co., 1982]). However, although a party waives the physician-patient privilege concerning his or her mental or physical condition by actively contesting custody, there first must be a showing beyond mere conclusory statements that resolution of the custody issue requires revelation of the protected material. *Bruzzese v. Bruzzese*, 152 A.D.3d 563 (2d Dept. 2017).

37. BASIS OF EXPERT TESTIMONY

FACTS:

In a proceeding by the mother of a child to terminate the visitation of the paternal grandparent of the child, the grandmother retained a forensic psychiatric expert, and through her counsel, invited the mother and the child to be interviewed by this expert prior to trial. The mother, through her counsel, and on behalf of herself and the child, declined the invitation. The expert=s pretrial disclosure revealed that while she did not interview the mother or the child, she based her opinion in this case upon her evaluation of the grandmother, a review of voluminous court filings and transcripts, correspondence and seven hours of taped telephone conversations between the grandmother and the child. The mother of the child objects to the expert witness testifying, proffering that such testimony is valueless where the expert has not seen the child or the mother.

RULING: Overruled

REASONING/AUTHORITY

In *Stellone* v. *Kelly*, 45 AD3d 1202, 846 NYS2d 723 (3d Dept. 2007), it was held that opinions and opinions of a psychologist may be discounted or rendered valueless if all involved parties are not interviewed or evaluated. However, in proceeding to terminate grandmother=s visitation, the mother was given the opportunity, but declined, to meet with the psychologist or allow the child to do so. The expert, who acknowledged the limitations of her opinions and recommendations due to her inability to meet with the mother or child, relied not only on her evaluation of the grandmother but also a review of voluminous court filings and transcripts, correspondence, and seven hours of taped telephone conversations between the grandmother and child. Accordingly, the Family Court did not err in considering the testimony of the grandmother's expert witness. 771, 771, 505 N.Y.S.2d 656 [1986]). The court had the discretion to admit the expert's testimony and consider the one-sidedness of the evaluation when determining what weight to accord that testimony (*see People ex rel. Cramp v. Cramp*, 117 A.D.2d at 763, 498 N.Y.S.2d 484). In *Crum v. Crum*, 122 A.D.2d 771 (1986), it was held that the fact that psychiatric expert had interviewed and observed only husband did not preclude admission of psychiatric testimony on issue of custody in matrimonial action, where accepted portions of expert's testimony were based upon facts about wife independently established at hearing.

38. BASIS OF EXPERT TESTIMONY

FACTS:

In a custody modification proceeding, where the Father seeks to change custody of the children from the Mother to himself, a witness for the Father, a psychologist, testifies and opines that based upon his review of the report of the court-appointed forensic evaluator, and his interviews with the children and the Father, which interviews were conducted on a Saturday when the Father had visitation with the children, and without the knowledge of the Mother, the court-appointed evaluator=s opinion that the Mother should retain custody was in error, as the court-appointed evaluator failed to recognize the family dynamic of a classical case of Parental Alienation Syndrome (PAS), manifested by the Mother=s overt and subtle remarks and actions in denigration of the Father. The Mother=s attorney objects and moves to strike the entire testimony of this witness.

RULING: Sustained

REASONING/AUTHORITY

This fact pattern raises several issues:

1. The manner in which the interviews with the children were held by the Father=s witness, the psychologist. In *McGreevy v. McGreevy*, 92 AD2d 1077, 462 NYS2d 78 (3d Dept., 1983) it was held not to be error for a court to refuse to permit the father's psychologist to testify at a hearing where the mother, the custodial parent, was never informed of the psychological examination of her child, did not consent to it, and was not interviewed by the psychologist. In other cases, such Aone-sided@ interviews have furnished a basis for courts to conclude that the opinions based thereon were entitled to little weight. See, *Walden v. Walden*, 112 AD2d 1035, 492 NYS2d 827 (2d Dept., 1985); *Gallant v. Gallant*, 104 AD2d 147, 482 NYS2d 272 (1st Dept., 1984) (One-sided interview given little or no weight)

2. Regarding the Parental Alienation Syndrome issue, as was held in *Zafran v. Zafran*, 191 Misc.2d 60, 740 NYS2d 596 (S.Ct., Nassau Co., 2002, Ross, J.) :

> The threshold standard for admissibility of novel scientific evidence in New York State is the "Frye" rule (see Frye v United States, 293 F 1013, 1923), which requires that novel or innovative scientific evidence be "based on ... a principle or procedure [which] has 'gained general acceptance' in its specified field" (People v Wesley, 83 NY2d 417, 422 (1994), quoting Frye v United States, supra at 101.The burden is upon the proponent to "show the generally accepted reliability of such procedure in the relevant scientific community through judicial opinions, scientific or legal writings, or expert opinion other than that of the proffered expert."

The reliability here can be established in two ways. The general acceptance would be so "apparent, open and notorious" that the court could take judicial notice, or the acceptance could be established by legal writings and opinions (Prince, Richardson on Evidence ' 7-311, at 476

(Farrell 11th ed))....the court sua sponte will permit the defendant to proceed with a "Frye" type hearing prior to the trial of this matter, at which time the defendant will have the opportunity to establish admissibility of expert testimony on the theory of Parental Alienation Syndrome. See also, *Peo. v. Loomis*, 172 M2d 265 (Suffolk Co. Ct., 1997); *Peo. v. Fortin*, 184 M2d 10 (Co. Ct., Nassau Co., 2000); *Peo. v. Bimonte*, 185 M2d 390 (Crim. Ct., Qns. Co., Heffernan, Jr., J.)

39. OPINION AS TO VALUE

FACTS – Part "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 when the value of the jewelry was asked, she replied Aapproximately $30,000". No other proof or 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. The wife objects, claiming that the burden was on the husband, the non-titled spouse of the jewelry, to prove its value, and he has failed to do so, thereby waiving any claim to the jewelry.

RULING: Waiver of claim – Sustained

Value fixed by statement of net worth - Overruled

REASONING/AUTHORITY**:**

The wife=s estimate of the value of her jewelry is admissible and proper on two grounds: First, as the estimate was contained in her sworn statement of net worth, the estimate amounted to an informal judicial admission. (See, *Fassett v. Fassett*, 101 AD2d 604, 475 NYS2d 154 (3d Dept., 1984) - wife=s estimate of value of furnishings and household equipment represent informal judicial admissions.) Second, as the owner of the property in question, she can testify as to its value regardless of any showing of special knowledge as to the property's value (see, Fisch, New York Evidence ' 372, at 89 [2d ed, 1988-1989 Supp]; 58 NY Jur 2d, Evidence and Witnesses, '705, at 355).@ (*Tulin v. Bostic*, 152 AD2d 887, 544 NYS2d 88 (3d Dept. 1989)); *Levine*, 37 AD3d 553, 830 NYS2d 250 (2d Dept. 2007) (Supreme Court properly credited defendant husband=s value with regard to certain items because he was familiar with those items and plaintiff wife could not refute his testimony.) However, as the property in question is jewelry, an issue arises as to the owner=s capacity to testify as to value without any showing of special knowledge. (See, *Peo. v. Womble*, 111 AD2d 283, 489 NYS2d 521 (2d Dept., 1985) -- The general rule requiring that a proper foundation be laid to show the witness has knowledge upon a subject before the witness can testify as to the market value does not apply where the witness is the owner as the owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales; owner's testimony regarding the purchase price of the property may be probative on the issue of value so long as the property is of the sort not subject to prompt depreciation or obsolescence, e.g., jewelry. In *Cuozo v. Cuozo*, 2 AD3d 665 (2d Dept. 2003), the court held that A[T]he Supreme Court properly credited the plaintiff=s testimony as to the value of certain jewelry and tools, since he was familiar with the items, and the defendant did not challenge the testimony at trial...@

Even the valuation of real estate can be testified to by the owner of the subject property. (*Del Vecchio v. Del Vecchio*, 131 AD2d 536 (2d Dept., 1987) -- Valuation of marital residence based on plaintiff's testimony concerning her knowledge of the recent sale of a neighbor's house which was of similar design to the marital residence.)

FACTS – Part "B":

Assume the same facts as above but in her net worth statement, instead of stating that the jewelry was worth Aapproximately $30,000", the wife merely put next to the value question Asubject 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.

RULING: Overruled

If Wife retains jewelry without credit – Sustained

If wife does not retain jewelry without credit - Overruled

REASONING/AUTHORITY**:**

The Wife=s request should be granted, as the husband failed to carry his burden of proof as to the value of the subject items.

The rule is well-settled that the non-titled spouse has the burden of proof as to the value of property if that spouse desires equitable distribution of the property. (See, *Rocano v. Rocano*, 12 Misc.3d 1169(A),820 N.Y.S.2d 845 (S.Ct., Kings Co. Sunshine, J.) (The fact that the husband is listed as president of R & R United Inc., does not rise to the level that this court can order equitable distribution of any asset where there is absolutely no valuation of the asset by any expert testimony or any testimony adduced by any party during the course of the litigation).

See also, In *Gober v. Gober v. Gober*, 4 AD3d 175, 772 NYS2d 32 (1st Dept.,2004), the court held that plaintiff should be permitted to retain her jewelry and furs (which were never evaluated), inasmuch as defendant was not required to divide his jewelry and other personal property.

40. BUSINESS RECORD; JUDICIAL NOTICE OF AUTHENTICITY

FACTS:

During the course of a matrimonial trial, the Wife is testifying and is attempting to prove that the husband has a bank account in Europe that he has not previously disclosed in his statement of net worth or elsewhere during pre-trial discovery. Her attorney marks a stack of bank statements for identification, has the Wife identify the statements as those from her husband=s heretofore unidentified European account, and the statements are then offered into evidence. The husband=s attorney objects on the ground of hearsay.

RULING: Overruled

REASONING/AUTHORITY:

In *Elkaim* v. *Elkaim*, 176 AD2d 116, 574 NYS2d 2 (1st Dept., 1991), the Appellate Division affirmed the trial court's admission into evidence of bank records of the husband's European accounts, *notwithstanding absence of authenticating foundation by an employee of bank*. The records were obtained by means of a court-ordered authorization form signed by the Husband. The Court held that judicial notice can provide the foundation for admitting business records which are "...so patently trustworthy as to be self-authenticating..". Although business records are customarily offered through a custodial or employee of the business organization that created them who can explain the record-keeping of his organization, judicial notice can provide a foundation for admitting the records of a particular business when the records are so patently trustworthy as to be self-authenticating. Court found that "...the bank records were procured by defendant himself (under compulsion of court order) from the banks which supposedly created them, and thus their authenticity cannot be seriously challenged. They appear regular on their face, and in format conform to the type of statements with which banks customarily supply their customers on a monthly basis for the purpose of advising them of deposits, withdrawals, and balances. No reasons are offered by defendant why these records should not be viewed as reliable and trustworthy, other than that they are technically hearsay and that no witness was called to testify that they were made in the regular course of the bank's business at or about the time of the transactions they describe, but, in the circumstances, we do not consider this reason enough to exclude what appears to be perfectly trustworthy evidence (emphasis supplied)."

See also, *Niagqara Frontier Transit Metro Sys., Inc. v. County of Erie*, (4th Dept., 1995) ("The financial statement [of the plaintiff), introduced through the affidavit of Metro's chief financial officer, is a business record...and so clearly so that it can be deemed self-authenticating")

However, in *Henriquest v. Kindercare Learning Center*, 6 AD3d 220,(1st Dept. 2004) the Court properly excluded testimony and letters from the N.J. Division of Youth and Family Services regarding an investigation conducted by the agency, where the agency's representative could not provide a sufficient foundation of trustworthiness and reliability. The Court of Appeals addressed this issue in *People v. Ramos* (13 N.Y.2d 914 [2010], *revg.*, 60 A.D.3d 1091, 876 N.Y.S.2d 127 [2d Dep't 2009]). The Appellate Division had held, with respect to alleged bank records consisting of a document received at the District Attorney's office through a fax machine, that judicial notice may provide a basis for admitting business records when the records proffered are "so patently trustworthy as to be self-authenticating" (*People v. Kennedy*, 68 N.Y.2d 569, 577 n. 4, 510 N.Y.S.2d 853, 503 N.E.2d 501; *see Elkaim v. Elkaim*, 176 A.D.2d 116, 117, 574 N.Y.S.2d 2; *see also* Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 4518.18 [5th ed.]). However, the Court of Appeals reversed, stating that: "The trial court erred when it admitted hearsay evidence without a proper foundation (CPLR 4518 [a]). Even assuming some documents may be admitted as business records without foundation testimony (*see People v Kennedy*, 68 NY2d 569, 577 n 4 [1986]), the record at issue in this case was not such a document. Nothing on its face indicates that it "was made in the regular course of any business and that it was the regular course of such business to make it" (CPLR 4518 [a])." Factually, the complaining witness testified that the alleged bank records shown to her were not the bank statements that she received at her home and the document did not look like the bank statements she customarily receives at home. The witness denied any knowledge of the bank's record-keeping practices. She did not know when the document was made and denied any knowledge that it was made or kept

by the bank in the ordinary course of business. No testimony from any bank employee or representative was offered by the People.

41. NON-HEARSAY: STATE OF MIND

FACTS:

In an action for divorce commenced by the Husband on the ground of cruel and inhuman treatment, the Husband offers to testify that, in order to save his marriage, he had dialed a number listed to the Wife=s paramour, who identified himself as the person the Husband believed him to be, and who proceeded to tell the Husband that he loved the [Husband=s} Wife, that she loved him and that unbeknownst to the Husband, he and the Wife had maintained this affair for the past five years, and that she sent him love letters and gave him gifts. The Wife=s attorney objects and moves to strike the testimony.

RULING: Overruled

REASONING/AUTHORITY**:**

This kind of evidence was held admissible in *Kahn v. Kahn*, 51 A.D.2d 871 (4th Dept. 1976) as impact evidence on the issue of the hearer=s state of mind. The Court in *Kahn* stated as follows: ASuch statements are received not as testimonial assertions of truth (*Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249; Richardson, Evidence [Tenth Ed.] 203), but rather to prove the mental state of the hearer (Barbagallo v. Americana Corp., 25 N.Y.2d 655, 306 N.Y.S.2d 466, 254 N.E.2d 768). Defendant's state of mind was relevant in her cause of action grounded on cruel and inhuman treatment and on plaintiff's cause of action alleging abandonment. In that light, the testimony was not hearsay. (Matter of Bergstein v. Board of Educ., 34 N.Y.2d 318, 324, 357 N.Y.S.2d 465, 469, 313 N.E.2d 767, 770.)@

See also, *Zupan v. Zupan*, 177 A.D.2d 832 (3d Dept., 1991) (Where husband asserted affirmative defense of the existence of an antenuptial agreement to wife=s requests for equitable distribution and other relief, the substance of conversations that the wife sought to admit as to proof of her state of mind at the time she executed the agreement she now challenges, was properly excluded as hearsay because the probative value as to state of mind evidence was substantially outweighed by the obvious danger of unfair prejudice to the defendant.); *Doreen J. v. Thomas John R.,* 101 AD2d, 476 NYS2d 10 (2d. Dept. 1984): AWe would also note that at the new trial, petitioner=s mother should be permitted to testify concerning the instructions that she gave to petitioner before petitioner went to the Department of Social Services. Such testimony would not be hearsay as it would not be offered to prove the truth or falsity of the instructions, but simply for the purpose of showing that the instructions were given and would be relevant as circumstantial evidence of petitioner=s state of mind (see, e.g., People v. Felder, 37 N.Y.2d 779, 375 N.Y.S.2d 98, 337 N.E.2d 606; Barbagallo v. Americana Corp., 25 N.Y.2d 655, 306 N.Y.S.2d 466, 254 N.E.2d 768; Richardson, Evidence [Prince, 10th ed], '' 203, 205).@

42. AUTHENTICATION; TAPE RECORDINGS

FACTS – Part “A”

In an action for divorce, the plaintiff-Wife testified that upon returning to the marital residence one day last month, she discovered an envelope on her desk, addressed to her in her Husband's handwriting, containing an audio tape. She further testified that she immediately played the tape and identified the voice on the tape as that of her Husband, and that the tape was a message to her from her Husband regarding the parties' financial situation.The Wife's attorney then sought to play the tape. A series of objections are made on the following grounds:

Objection is made on the basis that there was no proper foundation for the playing of the audio tape. Overruled or sustained?

RULING: Sustained

REASONING/AUTHORITY:

The objection should be sustained on the basis that a proper foundation has not been laid for the introduction of the tape. A proper foundation consists of testimony that the tape recording was a true and accurate record of the conversation, and that nothing had been deleted or added to the conversation. (*People* v. *Arena*, 48 N.Y.2d 944 (1979). In *Cross v. Davis*, 269 A.D.2d 837, it was held to be error to admit a tape recording where the proponent failed to establish by Aclear and convincing proof@ that the offered evidence is genuine and that there has been no tampering with it. In *Peo. v. Ely*, 68 NY2d 520 (1986), the Court of Appeals identified various means of authentication of a tape recording, including:

(1) Testimony of participant to conversation that it is a complete and accurate reproduction of the conversation and has not been altered; or

(2) Testimony of a witness to the conversation or to is recording, such as the machine operator, to the same effect; or

(3) Testimony of participant to conversation together with proof by an expert that upon analysis of the tapes for splices or alterations there was neither.

FACTS – Part "B"

After the Wife testified that the tape was a true and accurate record of the conversation she heard and that nothing had been deleted or added, objection is made on the basis that no testimony has been adduced relative to the chain of custody of the tape from last month, when the Wife discovered the tape, to the present. Overruled or sustained?

RULING: Overruled

REASONING/AUTHORITY**:**

A chain of custody principle is employed when evidence is not patently identifiable, or is capable of being replaced or altered, e.g. drugs. Tape recordings made by a participant to a conversation do not fall within this category. Where the participant is available to testify that the conversation was fairly and accurately reproduced on the tape and has not been altered, a foundation is established and chain of custody evidence is not necessary (*People v. McGee*, 49 N.Y.2d 48 424 N.Y.S.2d 157 (1979); *People v. Julian*, 41 N.Y.2d 340, 392 N.Y.S.2d 610 (1977).

However, in *Grucci v Grucci*, 20 NY3d 893, 957 NYS2d 652 [2012], the husband was accused of violating an order of protection and was indicted by a grand jury. After being acquitted, he brought an action to recover damages for malicious prosecution arising out of plaintiff's arrest on charges of criminal contempt following his alleged violation of an order of protection directing plaintiff to stay away from defendant. The husband sought, through the testimony of his brother, to play for the jury in audiotape of a telephone conversation in which the wife purportedly made it clear to the brother that after she went to the police, she was not in fact afraid of the husband. The Court of Appeals held that it was not reversible error for the trial judge to have excluded from evidence, as inadmissible hearsay, statements made by defendant to a witness during a telephone conversation. Although plaintiff argued that defendant's alleged statements were being offered to prove her state of mind (i.e., malice) rather than for their truth, plaintiff wanted the witness to testify that defendant had told him that she was not afraid of plaintiff and that she had expressed an alternative motive for going to the police in order to show that defendant had lied to the authorities. However, for that tactic to work, plaintiff would have had to ask the jury to believe that defendant's alleged statements to the witness were, in fact, true. While defendant's statements were admissible as admissions of a party-opponent, plaintiff never made that argument to the judge. Additionally, the omission of that testimony was not so crucial with respect to the issue of whether defendant initiated the prosecution as to require a new trial.

The Court of Appeals noted that the predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered. There was no attempt to offer proof about who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody during the nearly nine years that elapsed between the date of the alleged conversation and the trial. Accordingly, given the facts and circumstances of this case, the judge did not abuse his discretion by requiring more than the witness's representation that the tape was “fair and accurate” to establish a sufficient predicate before playing the tape for the jury.

FACTS - P youart “C”

Objection to the playing of the tape and its introduction into evidence is then made on the basis that the communication is subject to the spousal privilege, the Husband's attorney contending that if the tape is played, it will reveal the Husband asking the Wife for forgiveness and pleading with her to reconcile with him. The Wife's attorney argues, as an offer of proof, that if the tape is played it will reveal an admission by the Husband of a meretricious relationship. Overruled or sustained?

RULING: Sustained

REASONING/AUTHORITY

Although the tape might contain an admission, it appears to be subject to the spousal privilege (CPLR 4502[b]), providing that a Husband or Wife shall not be required, or, without the consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage. The issue is whether this is a "confidential" communication, i.e., one made in reliance on the marital relationship and which would not have been made but for this relationship. In *Matter of Vanderbilt (Rosner-Hickey*, 57 N.Y.2d 66, 453 N.Y.S.2d 662 (1982) it was held that in determining the nature of the communication, the Court should consider not only

the contents, but also the manner and context in which the communication is transmitted. In that case, where a tape recording was discovered by the author's Wife in plain view on a desk in the marital residence and was addressed to his Wife and no one else, these facts, coupled with the contents of the tape, lead to the conclusion that it was a confidential communication between a Husband and Wife.

43. TAPE RECORDINGS: ISSUE OF CONSENT

FACTS – Part "A"

During the pendency of a contested child custody proceeding, and while the Father had access with the children at his home, he tape recorded a number of telephone conversations the children had with the mother. At trial, the Father=s attorney has the tapes properly authenticated and when objection is made to the tapes based on relevancy, the Father=s attorney makes an offer of proof that the tapes will reveal the Mother=s inappropriate, profane and intemperate remarks to the children, particularly when she is talking to them about their father. The Mother=s attorney further objects to the tapes based on lack of consent of one the participants to the conversation consenting to the taping. The Father=s attorney argues that as he is a parent of the children, and custody is not yet decided, he has authority to and did consent to the taping on behalf of the children, and that doing so was in their best interests as it revealed the remarks of the Mother which are germane to the proceeding. Ruling?

RULING: Overruled

REASONING/AUTHORITY:

In *Peo. v. Badalamenti*, 27 N.Y.3d 423 (2016), the Court of Appeals dealt with the issue of the vicarious consent doctrine applied to NY's Eavesdropping Statute (Penal Law §202.05). The Court held that:

1. If a parent or guardian has a good faith, objectively reasonable basis to believe that it is necessary, in order to serve the best interests of his or her minor child, to create an audio or video recording of a conversation to which the child is a party, the parent or guardian may vicariously consent on behalf of the child to the recording.
2. A parent or guardian who is acting in bad faith or is merely curious about his or her minor child's conversations cannot give lawful vicarious consent to their recording, for purposes of the eavesdropping statute.
3. A trial court should consider all objections to the relevance of portions of the recording, and if possible, it should do so before a recording is played to the jury, so that parts that have no relevance do not become public by inclusion in a trial.

The Court followed the federal case of *Pollack v. Pollack* (6th Cir.) and the New York case of *Peo. v. Clark*, 19 Misc3d 6. In *Clark*, an autistic child got off the school bus with bruises so the mother put a tape recorder in the child's backpack, leading to the arrest of the bus matron. The Court held that the bus matron was not entitled to suppression of a recording of defendant's conversation on the school bus.

As to the criticism that the ruling will impair the autonomy of a child, the court quoted a Supreme Court of the United States case, stating that: “traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination… They are subject, even as to their physical freedom, to the control of their parents or guardians.”

FACTS – Part “B”

After the foregoing objection was sustained, the Father=s attorney asked the Court to grant him permission to have the tapes sent to and listened by the Court-appointed forensic evaluator, alleging that the tapes contained highly relevant information and it was important for the evaluator to have as much information about the case as possible.

If permission granted – Sustained

If permission not granted - Overruled

RULING: Overruled

REASONING/AUTHORITY:

In *I.K. v. M.K.*, 194 Misc2d 608 (Supreme Court, NY Co., 2003, Gische, J.), this argument was made. The court, while holding that the father’s tape recordings of conversations between the mother and the children violated CPLR §4506, ruled that experts and professionals were precluded from using evidence of such conversations at the custody trial, the court commenting that : AThe court also holds that these tapes cannot be used by other experts or professionals who may be called as witnesses in the custody trial. The express language of CPLR ' 4506 applies to exclude not only the tapes themselves, but also to the use of evidence "derived" from the tapes. To the extent that any expert obtaining the tapes would base their opinion upon their content, such opinion would be derived from the tapes and excludable from evidence. The court can avoid this potential problem by prohibiting the experts from having the tapes in the first instance.@

In view of the subsequent Court of Appeals holding in *Peo. v. Badalamenti, supra,* would the ruling change? If the vicarious consent standard is met, there appears to be no reason to deny the court-appointed evaluator access to the tape.

44. BIAS, HOSTILITY

FACTS:

In an action for divorce, the Wife calls as a witness a former employee of the husband who testifies about unreported cash sales in the husband=s business. On cross-examination, the husband=s lawyer suggests that the witness is biased against the husband because contrary to the direct testimony of the witness, instead of voluntarily leaving the employ of the husband, he was discharged because he misappropriated funds that belonged to the business. The witness denied that this occurred and stated he harbored no ill feelings toward the husband. On the husband=s case, a current employee of the husband, who knew the former employee who testified against the husband, took

the stand and was asked what derogatory statements, if any, the former employee told him about the husband when he left the husband=s employ. The wife=s attorney objected, claiming that the husband=s attorney is seeking to introduce extrinsic evidence on a collateral matter; the wife=s attorney argued that he is entitled to show from one witness that another witness was biased against his client.

RULING: Overruled

REASONING/AUTHORITY:

The objection should be overruled. The hostility of a witness toward a party to the action against whom the witness testified can be proved either by the party or by others. *Potter v. Browne*, 197 NY 288 (1910). Evidence tending to show that a witness was hostile to a party is not deemed collateral *People v. Miranda*, 176 AD2d 494 (1st Dept., 1991). In *Leistner v. Leistner*, 137 A.D.2d 499 (2d Dept., 1988), it was held that the trial Court should have permitted testimony by a third party as to an expression of hostility toward the Father in a custody case by one of the Mother's witnesses. When a witness on cross-examination denies hostility toward the party against whom he/she has testified, or admits it with qualification, that party may offer testimony showing affirmative acts or declarations of hostility. (*Potter v. Browne, supra*)

45. PRESENT SENSE IMPRESSION

FACTS:

On the issue of custody of a six-year-old child, Wife testifies that she received a telephone call from her 17-year-old daughter who, with her brother, was visiting with her Father, and the daughter said, "Mom, you better come here right away. Dad is beating Billy pretty badly." Father's attorney objects and moves to strike the answer on the ground of hearsay.

RULING: Overruled

REASONING/AUTHORITY:

The Court of Appeals has recognized the present sense impression as an exception to the hearsay rule. *People v Brown*, 80 NY2d 729 (1997). The element of reliability derives from the statements being contemporaneous with the event to which it relates. A spontaneous hearsay statement describing an event and contemporaneous to an event can qualify for admission even though the event is unremarkable and the declarant is not excited or startled. The underlying theory is that a statement describing an event when or immediately after it occurs is reliable because of the contemporaneity of the event observed and the hearsay statement describing it leaves no time for reflection. New York, however, has a strict contemporaneity requirement, i.e., the statement must be made while the declarant was perceiving an event or condition, or immediately thereafter. In addition, there is a corroboration requirement, i.e., the proponent must provide some independent evidence that the declarant accurately described the event. In *People v. Buie*, 86 NY2d 506 (1995) it was held that the present sense impression does not require a showing that the declarant is unavailable as a *sine qua non* to admissibility, though that factor may be weighed by the trial court in assessing the issue of probative value versus undue prejudice.

Here, it appears that the daughter is relating the statement while she is perceiving the event.

46. HANDWRITING

FACTS:

During a divorce trial, the wife seeks to introduce a handwritten note of the husband that lists various offshore bank accounts he allegedly maintains. The husband testifies that this is not in his handwriting and he never saw the note before. There is no handwriting expert hired by either side, but the wife seeks to introduce a statement the husband wrote out on a MV 104 form around the same time in his own handwriting to show the judge it is his handwriting. Objection by the husband=s attorney because there is no expert to testify on handwriting.

RULING: Overruled

REASONING/AUTHORITY:

A trier of fact can make his or her own comparison of handwriting samples in the absence of expert testimony on the subject. (*Roman v. Goord*, 272 AD2d 695, 708 NYS2d 904 [3rd Dept. 2000]; *Johnson v. Coombe*, 271 AD2d 780, 707 NYS2d 251 [3rd Dept. 2000])

American Linen Supply Co. V. M.W.S. Enterprises, Inc., 6 AD3d 1079, 776 NYS2d 387 (4th Dept. 2004) - Handwriting exemplars of the president of a corporation were relevant and should have been admitted to purpose of comparison to his purported signature on a particular contract since his signing of a 1994 contract was an issue.

47. SETTLEMENT NEGOTIATIONS

FACTS:

During the course of settlement negotiations that occurred in the hallway of Supreme Court in a custody and order of protection case, the husband admitted that he did at times lose his temper and strike the wife about the arms and legs Abut never her face@. The negotiations failed and the matter went to trial. At trial, counsel for wife sought to elicit that statement as an Aadmission@. The husband=s attorney objected. Do you sustain or overrule the objection?

RULING: Sustained

REASONING/AUTHORITY:

CPLR 4547: AEvidence of (a) furnishing, or offering or promising to furnish, or accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not

limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution. (emphasis added)

See, Miller v. Sanchez, 6 Misc. 3d 479 (Civ. Ct., Kings Co., 2004) - Aevidence of any conduct or statement made during compromise negotiations shall also be inadmissible.@

48. IMPEACHMENT OF OWN WITNESS

FACTS:

In a trial of a divorce action, the wife serves a trial subpoena and calls as a witness a nurse employed in the husband=s dental office for the purpose of establishing that the nurse witnessed an assault of the wife by the husband when the wife unexpectedly came to the husband=s office about one year ago. In response to questions by the wife=s attorney, the nurse denies that she witnessed any such assault. The wife=s attorney then seeks to introduce into evidence a copy of a written deposition the witness purportedly gave to a police officer who was called to the scene of the alleged incident. Objection is made by the husband=s attorney that the wife is improperly attempting to impeach the credibility of her own witness.

RULING: Overruled

REASONING/AUTHORITY:

While generally a party may not impeach the credibility of a witness whom he or she has called to the stand, an exception exists pursuant to CPLR 4514, which states that AIn addition to impeachment in the manner prescribed by common law, any party may introduce proof that <u>any witness</u> has made a prior statement inconsistent with his testimony if the statement was made in writing subscribed by him or was made under oath.@ (Emphasis added); see also *Jordan* v. *Parrinello*, 144 AD2d 540, 534 NYS2d 686 (2d Dept. 1988).

Here, there was a written declaration by the witness and thus the impeachment was proper.

49. BASIS OF EXPERT TESTIMONY; MEDICAL TESTIMONY

FACTS – Part "A"

In an action for a divorce, the wife seeks a permanent award of spousal maintenance, claiming that because of her medical condition, she cannot work and therefore cannot become self-supporting. In support of her claim, she calls as a witness her internist who, after being qualified as an expert, testified that because of her continuous complaints of back pain and other symptoms, he referred her to a specialist. He further stated that he has an opinion as to whether she can undertake employment which opinion is based upon his recent review of her x-rays and MRI films which were taken by the specialist. When asked what was his opinion, there is an objection.

RULING: Sustained

REASONING/AUTHORITY:

The objection should be sustained for several reasons.

First, although an expert may rely in part upon material not in evidence, provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion and the out-of-court material is accompanied by evidence establishing its reliability (*Wagman v. Bradshaw*, 292 AD2d 84, 739 NYS2d 421 [2d Dept. 2002]; *Peo*. v. *Sugden*, 35 NY2d 453, 363 NYS2d 923 [1974]), the out-of-court material cannot be the sole or principal basis of the opinion. (*Bordon v. Brady*, 92 AD2d 983, 461 NYS2d 497 [3d Dept., 1983]; *O'Shea v. Sarro*, 106 AD2d 435, 437, 482 NYS2d 529 [2d Dept., 1984]). Here, the testifying physician is relying solely on the out-of-court material as the basis of his opinion.

Second, a physician may not give testimony based upon an x-ray without the x-ray being produced in court and received in evidence. (*Hambsch v. NYC Transit Authority*, 63 NY2d 723, 480 NYS2d 195 [1984]). Similarly, a medical opinion that is based upon an MRI film that is not in evidence is inadmissible (*Beresford v. Waheed*, 302 AD2d 342, 754 NYS2d 350 [2d Dept. 2003).

FACTS – PART "B"

After that court=s ruling, the doctor is asked if he is aware of what prescription medication the plaintiff-wife is taking, and he answers in the affirmative. After identifying the various medications, the doctor was asked if there is an authoritative text or treatise which sets forth the side effects of prescription drugs like those taken by the plaintiff. The doctor says there is and the book is the Physician=s Desk Reference (PDR). The attorney for the Wife then offers into evidence several segments from the PDR which list and discuss the side effects of the medications taken by the plaintiff.

RULING: Sustained

REASONING/AUTHORITY:

The objection to the offer of the passages from the PDR should be sustained.

First, the use of a treatise, text or other authoritative source is limited to cross-examination for impeachment purposes. (*Kirker* v. *Nicolla*, 256 AD2d 865, 681 NYS2d 689 [3d Dept.1998]). Scientific books or reports are excluded as hearsay when offered as proof of the facts asserted in them (Prince, Richardson on Evidence ' 7-313 [Farrell 11th ed]).

Second, the PDR (Physician=s Desk Reference) is hearsay. Moreover, the testifying physician could not even testify to an opinion that is based solely on the PDR. (*Spensieri* v. *Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]).

50. CROSS-EXAMINATION; EXTRINSIC EVIDENCE

FACTS:

In a constructive trust action by the wife against her husband, on cross-examination of the wife by the husband=s attorney, she was asked if at any time she received money from the Department of Social Services (DSS) to which she was not entitled. She answered ANo@. She was then shown a document which was a confession of judgment signed by her (she acknowledged her signature) and which indicated that she had received $3,000 from DSS and confessed judgment for that amount. When further questioned, over objection, she insisted that the money she had received was rightfully hers. She was then asked:

Q: Did you agree to pay back the money that you were not supposed to get?

A: I agreed to pay the money back, yes.

The husband=s attorney then offered the confession of judgment, containing a certification, in evidence. The Wife's attorney objects to the proffer.

RULING: Sustained

REASONING/AUTHORITY:

The facts are taken from *Badr v. Hogan*, 75 NY2d 629 (1990), where the Court of Appeals held it was reversible error to permit cross-examination in the manner set forth above as it violates the rule barring the use of extrinsic evidence (the confession of judgment) to contradict a witness=s answers on collateral matters. The issue of her receipt of funds was clearly collateral, i.e., it was not relevant to some issue in the case other than credibility, nor was it independently admissible to impeach a witness (e.g., witness=s bias, hostility or impaired ability to perceive). As collateral, while the attorney could continue to question after she denied ever receiving the money in the hope of eliciting a different answer, the cross-examiner could not use extrinsic evidence to refute the denial.

However, the Court of Appeals also noted that a witness may be cross-examined with respect to specific immoral, vicious or criminal acts which have a bearing on the witness=s credibility. While the nature and extent of such cross-examination is discretionary with the trial court, the inquiry must have some tendency to show moral turpitude to be relevant on the credibility issue. The Court of Appeals notes that neither the trial court or appellate division decisions raises that issue and its resolution was unnecessary for their decision.

51. CUSTODY; HEARSAY; BASIS OF EXPERT OPINION; REPORTS

FACTS – Part "A"

In a custody case, the court-appointed forensic expert, a psychologist, is called to the stand by the wife=s attorney. He testifies to his multiple interviews with the parties and the children, as well as interviews with collateral sources, including the children=s teachers and the father=s live-in paramour, Ms. Thirtysomething, as well as his review of voluminous court documents provided to him by the attorneys for the parties. He testifies that all of this information was utilized by him and formed the basis of his opinions in this case.The mother=s attorney asks if he has formulated , with a reasonable degree of medical certainty, an opinion as to a custodial arrangement that will serve the best interests of the child. He states that he has, and is asked to

relate that opinion. Objection is made with the Father=s attorney arguing that the question calls for an answer which usurps the function of the court.

RULING: Sustained

REASONING/AUTHORITY:

There is unquestionably a debate about whether a trial court should permit a court-appointed forensic evaluator to make and testify to an ultimate opinion as to the issue of child custody. This debate was recognized in *John A.* v. *Bridget M.*, 16 AD3d 324, 791 NYS2d 421 (1st Dept. 2005), wherein the Court stated:

> AFinally, it seems apparent, in reviewing this record, that the ultimate decision as to the key issue in this case, i.e., whether to award custody to the father because of the mother's attempts to undermine his relationship with the children, was made on the basis of the experts' testimony. Courts should be ever mindful that, while the forensic expert may offer guidance and inform, the ultimate determination on any such issue is a judicial function, not one for the expert. In this regard, it should be noted that there is an ongoing debate in both the legal community and the mental health profession as to the implications of expert psychological opinion in custody litigation, especially when the opinion is a conclusion as to the ultimate determination as to where to award custody so as to serve the child's best interest (Tippins, Matrimonial Practice, Custody Evaluations--Part IX: Babies, Bathwater and "Daubert," NYLJ, November 5, 2004, at 3; see also Tippins, Matrimonial Practice, Custody Evaluations-- Part X: "Daubert" and Its Progeny Parsed, NYLJ, January 7, 2005, at 3; Caher, Experts Challenge Family Court's "Best Interests of Child" Standard, NYLJ, 428 February 22, 2005, at 1). Indeed, "the American Psychological Association ... Guidelines for Child Custody Evaluations expressly note [that] 'the [mental health] profession has not reached consensus about whether psychologists ought to make recommendations about the final custody determination to the courts' " (Tippins, Matrimonial Practice, Custody Evaluations -Part IX: Babies, Bathwater and "Daubert," NYLJ, November 5, 2004, at 3).@

FACTS – Part “B”

In further questioning, the forensic evaluator is asked about his interview with the father=s live-in paramour, and specifically, he is asked what Ms. Thirtysomething said about her relationship with the oldest child of the parties. Objection is made on the basis of hearsay.

RULING: Sustained

REASONING/AUTHORITY**:**

While it is clear that the basis of an expert=s opinion can include out-of-court material, i.e., hearsay, where reliance upon that material is deemed reliable in the particular profession and reliability is established *(Peo*. v. *Sugden,* 35 NY2d 453, 363 NYS2d 923 [1974]; *Hambsch v.*

NYC Transit Authority, 63 NY2d 723, 480 NYS2d 195 [1984]), the Court of Appeals, in Peo. v. Goldstein, 6 NY3d 119 (2005), addressed the issue of whether the expert witness who so relies upon such data can in fact testify to the date. The Court is *Peo.* v. *Goldstein* stated:

> Both parties seem to assume that, if that test was met, Hegarty was free, subject to defendant's constitutional right of confrontation, not only to express her opinion but to repeat to the jury all the hearsay information on which it was based. That is a questionable assumption.*Stone* and *Sugden* were concerned with the admissibility of a psychiatrist's opinion, not the facts underlying it. There is no indication in either case that the prosecution sought to elicit from the psychiatrist the content of the hearsay statements he relied on. And it can be argued that there should be at least some limit on the right of the proponent of an expert's opinion to put before the factfinder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party's expert a "conduit for hearsay" (Hutchinson v Groskin, 927 F2d 722, 725 [2d Cir 1991]).The distinction between the admissibility of an expert's opinion and the admissibility of the information underlying it, when offered by the proponent, has received surprisingly little attention in this state (which perhaps accounts for the parties' failure to discuss it here). We have found no New York case addressing the question of when a party offering a psychiatrist's opinion pursuant to Stone and Sugden may present, through the expert, otherwise inadmissible information on which the expert relied. The issue of when a proponent may present inadmissible facts underlying an admissible opinion has, however, been discussed by courts in other jurisdictions, and in many law review articles (see authorities cited in Kaye et al., The New Wigmore: Expert Evidence ' 3.7 [2004]). And in 2000, rule 703 of the Federal Rules of Evidence ("Bases of Opinion Testimony by Experts") was amended to deal with this issue. The last sentence of the rule now provides: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." We are not called upon to decide here, and do not decide, whether the New York rule is the same as, or less or more restrictive than, this federal rule.

Of course, *Peo.* v. *Goldstein*, was a criminal case and principally involved the effect of the right of confrontation pursuant to *Crawford* v. *Washington*, 541 U.S. 36 [2004]

52. OPINION EVIDENCE

FACTS – Part “A”

In a custody contest where the Mother alleges that the Father sexually abused their child, the Mother offers the testimony of a certified social worker who, after satisfying the court as to her expert qualifications, and having preliminarily testified concerning the various interviews had with the child, she testifies that: AChildren do not have the skill at lying that adults do.” Father’s attorney objects

RULING: Overruled

REASONING/AUTHORITY:

Matter of Nicole V., 71 NY2d, 112, 524 N.Y,S.2d 19 (1987) where the Court stated that:

AThe sexually abused child syndrome is similar to the battered child syndrome. It is a recognized diagnosis based upon comparisons between the characteristics of individuals and relationships in incestuous families, as described by mental health experts, and the characteristics of the individuals and relationships of the family in question (see, Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse, at 39-79 [1982]; Sloan, Protection of Abused Victims: State Laws and Decisions, Children, at 110-113 [Oceana Publication]). Expert diagnoses on the subject have thus been accepted by some of our courts to validate out-of-court statements, particularly when an independent expert is employed for the purpose (see, e.g., Matter of Linda K., 132 AD2d 149;Matter of Ryan D., 125 AD2d 160; Matter of Fawn S., 123 AD2d 871;Matter of Kimberly K., 123 AD2d 865;Matter of Michael G., 129 Misc 2d 186). Indeed, such evidence has been accepted by us (see, People v Keindl, supra) and by courts of other jurisdictions, even in criminal cases, either to bolster credibility of infant victims (see, e.g., State v Kim, 64 Haw 598, 645 P2d 1330;State v Middleton, 294 Ore 427, 657 P2d 1215) or to corroborate the victim's testimony (see, e.g., State v Sandberg, 392 NW2d 298[Minn]; see also, Doe v New York City Dept. of Social Servs., 709 F2d 782, 791, cert denied sub nom. Catholic Home Bur. v Doe, 464 US 864). We conclude expert testimony was properly used to satisfy the corroboration requirements of section 1046 (a) (vi) in this case....The validation evidence came from Nicole's therapist, Ms. Lemp. She testified Nicole's behavior led her to conclude Nicole had been sexually abused.... She found it significant that Nicole repeated her claims to various people over a period of time in a consistent manner because, she stated, children "do not have the skill at lying that adults do" and thus "cannot be consistent [about lying] for a period of several months to several different people".

AThere is no question that under New York law, a witness can testify about factors affecting the reliability of another witness, as long as he or she avoids commenting directly on the credibility of the witness. *Washington v. Schriver*, 255 F.3d 45 (2dCir. June 15, 2001).

FACTS – Part B

Further testimony of same witness:

A*[T]he eye witness account provided by [the child] conformed well to the pattern and the content of accounts given by children who are known to have been sexually abused, so in my opinion she was providing an account which appeared to be any eye witness account of real events that happened to her.@*

RULING: Overruled

REASONING/AUTHORITY:

See, *Matter of Katje AYY@*, 233 A.D.2d 695, 650 N.Y.S.2d 363 (3d Dept. 1996).

AReview of the expert's testimony in the Kelly F. case (supra) led this Court to conclude that the expert "offered Family Court nothing more than his opinion that Kelly was telling the truth when she said she had been sexually abused by respondent" (supra, at 229, and we held that "such testimony, standing alone, does not in our view constitute reliable corroboration of Kelly's statements" (supra, at 230. In this case, petitioner's expert offered Family Court much more than just his opinion that the child was being truthful. In fact, the expert made no effort to vouch for the child's credibility, but instead concluded that "the eye witness account provided by Katje ... conformed well to the pattern and the content of accounts given by children who are known to have been sexually abused, so in my opinion she was providing an account which appeared to be any eye witness account of real events that happened to her". The expert described the methodology which he used in his interview of the child and also provided a detailed explanation of the reasoning he used in reaching his conclusion. Respondent identifies certain "problems" encountered by the expert during his interview of the child, but the expert's testimony includes a detailed explanation of the "problems" and the reasons for his conclusion that the "problems" did not affect his ability to form an opinion on the validation issue.@

See, *Washington v. Schriver,,* 255 F.3d 45 (2d Cir. June 15, 2001).

Testimony focusing on Acredibility@ of the children instead of addressing whether they manifest sexual abuse syndrome is inadmissible. *Matter of R.M. Children.*, 165 Misc.2d 441 (Fam. Ct., Kings Co. 1995); see also, *Matter of Thomas AN@,* 229 A.D. 2d 666 (3d Dept. 1996)

FACTS – Part “C”

Further testimony of same witness:

There was no indication that the children were Acoached@ or Aprogrammed@.

RULING: Overruled

REASONING/AUTHORITY**:**

See, *Matter of Tracy AV@,* 220 A.D.2d 888 (3d Dept. 1995) B AAlthough respondent notes that these allegations arose in the context of a contested custody matter, Simmons explored the possibility that the children had been "coached" or " 'programmed' " and found no indication of this (see, Matter of Brandon UU., 193 AD2d 835, 837). Thus, we cannot say that Family Court abused its discretion in determining that the children's allegations had been sufficiently corroborated.@