Party Admissions and Electronic Evidence

By Vesselin Mitev

At a recent hotly contested custody trial, armed with scores of text messages between my client and the opposing party, I realized that I had reason to revisit the topic I first wrote about more than three years ago: how to effectively use texts and other social media at trial, and overcoming the usual (and misplaced) objections to same.

Party admissions

Anything said or done (act or declaration) by a party that is inconsistent with that party's position at the trial is a party admission. It is received automatically in evidence against that party at trial and no foundation need be laid. In a custody case, for example, when one of the relevant inquiries is the mental state or fitness of the parties, a text sent by the mother to the father advising that she was suicidal and did not wish to live anymore, is a) directly probative of one of the major factors in deciding custody; and b) a party admission that is received in evidence, directly, as against the mother.

I note that the mother need not be the party being cross-examined; the examiner can literally read the text message into the record and then introduce the texts into evidence as party admissions *on his direct case*. There can be no objection to this; this is not hearsay; nor is it bolstering. Likewise, on cross, there is no need to lay any foundation (though that's up to the cross-examiner); it's enough to state — not ask — the party that, for example, "On January 3, 2016, you said to your husband, "I don't want to do this anymore; you and the kids will be better off without me." There is no requirement of a response; the admission is taken into evidence for the purpose that it is *inconsistent with the party's position, at trial, to wit: being a fit custodial parent*. You can, and should, go down the line, mercilessly: "On January 5, 2016, you posted a picture on your Instagram account of Kurt Cobain with the caption: "He got off easy" and so on.

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Admissions are broad: a party updating its Facebook status; commenting on an Instagram post; tweeting something — they are all examples of both acts and declarations — that go directly into evidence as long as they are related to (and inconsistent with) that party's position at trial. Admissions are also evidence of the facts contained within them, as opposed to a prior inconsistent statement. They are received, critically, even without the party who made them have to testify (which is why you can read them right into the record on your direct case).

To avoid any possible objection as to this method, you should be prepared to examine your witness (your party) that they are, for example, seeking custody; because they believe they will be more fit (at this point you should have established all the relevant factors and how you party's case rests upon them); then, you ask if they have read the cross-petition, or answer, (yes); and whether or not they believe the other party would be the more fit parent (no); and why. The "why" is key, because it allows you to now go down each factor, say, mental health, and establish the aforesaid line of admissions that the mother, in this case, has expressed suicidal thoughts and desires on multiple occasions and never sought help. The other (in my view, more dangerous option), is to call the other side first, commit them to the aforesaid pleadings, and then cross-examine them on their aforesaid admissions. I note that these are not requirements but methods to overcome a vigorously objecting adversary or to help convince an unpersuaded court.

The usual objections: that it is not a complete (text conversation); that you haven't downloaded and entered into evidence the 500-comment threat, but only introduced the party's, say, 2 comments; that your witness learned of the admission only via hearsay — are not germane. The black-letter law and evidence rules are unequivocal that these objections do not apply to party admissions.

Assume, however, that your adversary manages to block your attempt to enter these admissions on your direct case. Now, you are left with two options: wait until cross-examination, where it will be absolutely reversible error to not allow you to cross-examine the party with the aforesaid admissions, or you can, alternatively, read to your witness the relevant posts/texts, etc., and ask if they received

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them. There can be no objection to this (the usual, misplaced objection is that you're reading from something not in evidence; this is of course, a clever fallacy, since you can ask your witness anything you want; the answer is given freely by the witness, and can be yes, no, or I don't remember. Of course, if the witness does not remember, you are free to refresh their recollection with anything under the sun, including, you guessed it, the text message you were just asking about).

The proffer for this method (and to overcome the usual objections) is contained in the triumvirate of non-hearsay exceptions that are always on hand: a) state of mind exception; b) serves to complete a narrative; and c) goes to the ultimate issue: best interests of the child as to custody.

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