HOW TO GET YOUR 911 CALL INTO EVIDENCE AND ADVISE YOUR JUDGE

Cheat Sheet for a Confrontation Objection: Crawford and Progeny

There is a major misconception that the State must present either the 911 caller, or 911 call taker (or both) in order to get a 911 call admitted. Just like EMS and Medical Records, a 911 call is a business record, no more, no less. You don't have to put an EMT, nurse, or doctor on the stand to admit your records, so why should you have to put the caller or call taker on? Here's the skinny, and what to argue to your Judge when your caller and call taker are unavailable.

For starters, your witnesses must actually be unavailable to testify, if the witness is available and you just decide not to call them, you lose.

A 911 call is a business record, just like any other records kept in the ordinary course of business. There are two things that must exist to get your 911 call into evidence:

1. Your call must be authenticated as a record kept in the ordinary course of business (see TRE 803(6)(B)), this can be done with:
    a. a properly, and timely served Record and Business Records Affidavit (see TRE 902(10)); or,
    b. having the Custodian of Records testify to the same information that would be provided in the Affidavit.

2. The contents of the call must also meet all the applicable rules of evidence (typical objections are Confrontation and Hearsay). Most of the time, the majority of the contents will be NON-testimonial, and will also have hearsay exceptions.

A defendant has a 6th amendment right to confront the witnesses against him.

However, a Defendant does not have a right to confront his accuser if the statements made by the witness are considered non-testimonial.

Crawford is the Supreme Court case that distinguishes out-of-court statements as either "testimonial" and subject to confrontation, or "nontestimonial" and not subject to confrontation. Davis v. Washington came after Crawford to clarify the rules for nontestimonial statements. Through Crawford, and Davis (and lots of additional progeny) it is abundantly clear that any nontestimonial statements are completely outside the scope of the confrontation clause.

- So, what is testimonial? Testimonial statements include those in which "state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." The degree of 'formality' of the statement is not controlling; more important are the State actors (police, prosecutors, etc.), and an objective expectation on the part of the declarant that the statements would be used in subsequent prosecution. Additional types of statements that are considered testimonial are affidavits, certifications, lab reports prepared for evidentiary purposes, testimony at court proceedings, plea allocutions, etc.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004)
Davis v. Washington, 547 U.S. 813 (2006)

- Great, so what is NON-testimonial? NON-testimonial statements are out of court statements that are generally less formal and are not intended to establish past events for a future prosecution. A statement made to a police officer is nontestimonial where the primary purpose of the statement is to aid police to meet an ongoing emergency rather than to establish past events. Statements to a 911 dispatcher or police officer at the scene of a crime in progress are NON-testimonial because the primary purpose of the statements is to address the ongoing emergency. Davis held that a victim's statements to a 911 operator were "speaking about events as they were actually happening rather than describ[ing] past events". Always think buzz word- *ongoing emergency*. Sometimes, non-testimonial statements can evolve into testimonial, meaning you may have to redact out the later portion that became testimonial.
    - How do you know if it's an ongoing emergency or not? Davis established a "primary purpose test" that is an objective test where the court evaluates the purpose that reasonable participants would have had, as ascertained from the parties' own statements and actions and the circumstances in which the encounter occurred. Factors the Court should consider are location (crime scene versus police station), time (during the emergency versus a delayed report), existence of a necessity to "end a threatening situation:, a threat to the public, involvement of a weapon, a victim's medical condition, the need for first responders to judge the existence and magnitude of a continuing threat to the victim/witness and the public by questioning the victim/witness, and the informality of the encounter

On a DV case, unless it is a delayed report, you almost always have an emergency event- there is an emergency for safety of the individuals, to stop the violence, to check welfare, etc. Even if the offender fled, there's nothing stopping them from coming back. Even if the victim is at a neighbor's house, there's nothing stopping the offender from barging in with a firearm. Are the kids safe? The primary purpose of the call is not for furtherance of prosecution, but to deal with the emergency situation. If the emergency event has stopped, that COULD affect whether or not the statement is non-testimonial. In that case, if the emergency event could continue, or start again, the statement should still be considered non-testimonial. On a DWI, could the person continue driving, or try to drive away, are there medical concerns, while on an Assault, could the Defendant start hitting the Victim again, or come back and hit the Victim again, is the Victim bleeding out, etc.

Once you've overcome the Confrontation Objection, you will STILL need hearsay exceptions (as any decent defense lawyer will know). Again, almost every time you are seeking to introduce a 911 call that is non-testimonial because it is an on-going emergency, you will obviously have a present sense impression exception, and likely will also have an excited utterance exception, if not various other exceptions as well (TRE 803).

Any other objection a defense attorney could make at this point should go to the weight of the evidence, and not the admissibility (don't you just love that response!).

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