

**STATE COURT ADMINISTRATIVE OFFICE,
CHILD WELFARE SERVICES DIVISION
AND
GOVERNOR'S TASK FORCE ON CHILD ABUSE AND NEGLECT**

**Taking the Terror out of Testifying: Tips for
Nonattorneys who Testify in Child Welfare Proceedings**

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**“I’ve learned that people will forget what you said,
People will forget what you did,
But people will never forget how you made them feel.”**

- Anonymous

“People only hear what they understand.”

- Jason Bloom, Jury Consultant

IT IS - WHAT IT IS

The reality of the courtroom is that the “truth” in the courtroom is whatever the trier of fact believes it to be. Is that “fair?” – “fair” is a place they sell cotton candy. This is why testimony and how it is perceived is critical to the case.

THE ADVERSARIAL PROCESS

The adversarial process is a term used to describe a procedure that sets up a specific and focused conflict, often taking place in the form of a perceived game. Placed in a competitive dyad, one often seeks to apply the role of victor and failure.

The adversarial process is based on the proposition that while both sides are critical of one another’s case, in such a fray, the truth will come out. The adversarial process allows each side to argue and question their opponent’s assertion. The keys to success in this process are preparation and maintaining one’s professionalism.

PREPARING TO TESTIFY

“It is not the will to win that is important, it is the will to prepare to win that is important.”

- Bobby Knight

The fact finder, or jury present with many preconceived notions on who you are and the job that you do. They base their information on their own their own personal experiences mixed with all that they have read or watched in various media outlets. In order to present to the fact-finder with credibility you must be first perceived as a professional person.

- Your testimony begins the first time you start an investigation, write a report, or accumulate information. This is all subject to discovery and becomes the premise for the defense attorney's cross examination.
- Your reports should be objective, descriptive, and concise. Be prepared to defend your report in the courtroom. Your report should communicate facts and details without forming conclusions.
- Know the file. Do you know your file and can you articulate the evidence in the file in order to support your contention.
- Speak with your attorney prior to the hearing. Even a small amount of time can be well spent to assure that you share important information and share the same goals in the case.
- Prepare, Prepare, Prepare, create a timeline, time chart, or diagram. These devices have the ability to summarize and visualize testimony. This can be especially useful to fact patterns which have occurred over a long duration.
- Practice out loud. Hear yourself describing your case. Talk to co-workers about your case so you can practice hearing yourself articulate the case. When you take the stand this should not be the first time you hear yourself describing your case.
- Relax the night before the hearing. Preparation is the best defense to stress. Pamper yourself and avoid compounding the stress.

DAY OF HEARING

- Get up early and review, eat something, as if you are about to take a test.
- Dress appropriately and professionally. You want to convey that you understand the importance of this proceeding and you take it seriously.

- Get to court early in order to meet with attorney and to avoid extra unnecessary stress.

EVIDENCE

Direct Evidence

- Direct evidence is evidence about what we actually see or hear. For example, if you look outside and see rain falling, that is direct evidence that it is raining. (CJI2d 4.3).

Circumstantial Evidence

- Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if you see a person come in from outside wearing a raincoat covered with small drops of water that would be circumstantial evidence that it is raining. (CJI2d 4.3)

Testimony

- The case worker testimony is a narrative which highlights the strength of the case. The testimony should be given in a professional objective manner and have a conversational flow.
- The testimony and investigation should appear objective attempting to find the truth and protect the innocent.
- The case worker should speak clearly, dress professionally, avoid arguing, and be very prepared.
- The case worker should be familiar with the question concerning foundations of exhibits and demonstrative evidence.
- The case worker can testify to the nature of the investigation and how the investigation led to a theory of the case. The investigation is the gathering of information. The content of that information in “**hearsay.**”

Hearsay

- An out of court statement offered for the truth of the matter asserted.

- Generally, testifying to what was said by someone else is inadmissible.
- This can include non-verbal conduct which is meant to assert something.
- Statements said out of court can be defined as non-hearsay or there may be an exception to the statement.
- The attorney should be aware of who said what and who saw what.
- An admission of a party-opponent is defined as not hearsay.
- Various other exceptions may include excited utterance, business records, statements made for purposes of medical diagnosis, and present sense impression.

Exhibits and Foundations

- Any item introduced by a party to be published by the trier of fact must be moved into court after proper foundation has been laid.
- Photographs - is the photograph a “fair and accurate representation” of the scene it depicts at that date and time.
- Documents – the document must be relevant and foundation must be laid as to the credibility of the document. Hearsay applies to documents.
- Diagrams – a diagram must be a “fair and accurate representation” of what it depicts. If the diagram is depicting specific measurements it may have to be to scale.

Demonstrative Evidence

- Demonstrative evidence should be used to clearly too memorably convey the theme or concept of the case.
- There are five broad purposes for the use of demonstrative evidence: (1) to organize facts and themes, (2) to explain scientific or technical information, (3) to make your facts and themes “stick” (i.e., more memorable), (4) to reinforce key concepts or themes and (5) to refresh jurors’ memories in long trials. Demonstrative evidence is not a substitute for evidence. (*Using Demonstrative Evidence to Win by Trey Cox, Trial Practice Journal, Volume 22, No. 3 Fall 2008*)
- Charts, graphs, pie charts, and diagrams can summarize

information which allows the jury to visualize the results allowing them to easily understand the point.

Lay Witnesses v Expert Witnesses

- Testimony is governed by rule MRE 701:

“If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”

- The lay witness is not allowed to speculate, draw conclusions, or hypothesize;
- Expert testimony is governed by rule MRE 702:

“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

- The expert witness has the power to speculate, draw conclusions, and answer hypothetical questions.

CORROBORATIVE EVIDENCE

- The effective investigation of a difficult fact pattern depends on finding evidence that supports facts known with additional authority.
- This corroborative evidence can be found by way of any of the previously discussed types of evidence.
- The evidence should support or disprove facts already known. The more facts which support an issue for the jury, the easier

that fact is understood by the jury. Facts which disprove a known fact create confusion for the trier of fact.

THE DIRECT EXAMINATION PROCEDURE

- Direct examination is followed by cross-examination. Cross examination may be followed by re-direct and re-cross.

DIRECT EXAMINATION IS ALL ABOUT THE WITNESS

“Professionalism: It is NOT the job you DO; it’s HOW you DO the job.”

In order to be found prepared, credible, and professional a witness must testify with confidence. The testimony should be told in an active voice, rather than a passive voice. The testimony must be loud enough to be heard and slow and deliberate enough to be understood. The witness must testify with confidence. The fact-finder will trust the professional which appears confident and prepared.

The discussion of the six

- (1) Who
- (2) What
- (3) When
- (4) Where
- (5) Explain
- (6) Describe – Which incorporates describing detail and demeanor without drawing conclusions

- An effective direct examination is a compelling conversation.
- Leading questions are not allowed, the witness must do the testifying
- Listen carefully to the question.

- If you don't understand the question, the correct answer is "I don't understand."
- If you don't know the answer, the correct answer is "I don't know the answer."
- Stay in your expertise – don't speculate - watch stray opinions
- If you made a mistake or omission – admit it – a mistake will be forgiven but a denial will not.
- Recognize the presence of the jury and acknowledge.
- Be aware of body language.
- Refrain from shoptalk or jargon.
- Remember if you're being candid there are no wrong answers.
- Refrain from generalizations; they will make you vulnerable under cross-examination. Confine your answers to evidence and fact based responses.

REFRESHING MEMORY

The credible, prepared, and professional witness can generally testify without notes. However, if the case involves a detailed fact pattern over a long amount of time, the witness may request to take a file up to the stand and refer to the file at the discretion of the court. Occasionally, the prepared witness may just forget a detail. When this happens, the attorney may ask to refresh the memory of the witness with a document.

CROSS EXAMINATION

Cross examination provides the defense attorney the opportunity to challenge your facts, statements, and credibility. Attorneys are supposed to zealously represent their client. Cross examination is not personal; it feels personal because the attorney wants you to appear defensive. When you present as defensive, you become an advocate.

“Law school taught me one thing: How to make two situations that are exactly the same and show how they are different.”

- Hart Pomerantz

“Courage is grace under pressure”

- Ernest Hemingway

IT IS ALL ABOUT THE ATTORNEY

This is when the attorney asks leading questions, in essence testifies, and proceeds to use the witness to make the case. There are various cross-examination techniques, but the two most common are a destructive cross exam (uncomfortable but easy) and a concession based cross-exam (comfortable but dangerous).

- Only answer the question asked.
- Only provide the necessary information and nothing else.
- Watch for the six discussed in direct examination.
- Watch for your opening of the six – this is when the attorney has lost control.
- Professionalism requires that you DO NOT argue with lawyer even if the lawyer is prodding you.
- Refrain from sarcasm, humor, cute answers. Stay the most professional person in the courtroom, even when others are not.
- Refrain from facial expressions, eye rolling, and demonstrative movement.
- Admit mistakes and/or inconsistencies with candor.

- Don't be afraid of short answers, silence is OK.
- Cross-examination techniques include taking facts out of chronological order.
- Cross-examination techniques include asking the same question in different forms.
- Don't allow attorneys to take you into a different set of expertise.
- If you are answering yes to every question – WATCH OUT – the cross which makes you comfortable is the most dangerous cross examination.

COMMON CROSS-EXAMINATION TOPICS

Protective Services

- Quality of the Investigation. The investigation went too fast, was sloppy, or only investigated the petitioner's point of view.
- Failure to investigate all theories of the case, not only what you believe but disproving the unbelievable theory of the case.
- The case was personal or biased, and therefore not professional.
- Cross-examination on irrelevant details.
- Failed to follow proper procedures and protocol.

Foster Care

- Problems with programming or reunification plan.
- The case is personalized or biased.
- Fail to follow proper procedures and protocol.
- Funding issues in regard to the plan.

OBJECTIONS

An attorney may object for a number of reasons: for impact, disruption, and tactical purposes. The witness should immediately stop testifying and listen to the nature of the objection and the court's ruling on the objection. The court's ruling will allow the witness to understand what was or was not objectionable, which could be valuable information to the witness.

IN CONCLUSION

The testimony in child protective proceedings requires you testify in a credible, prepared, and professional manner. Every opportunity to testify is analogous to an extremely important test. However, as long as you tell the truth and testify in a professional and courteous manner, it is a test you cannot fail.