

WHEN PROFESSIONALS GO TO COURT: PREPARING TO TESTIFY

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Cases that involve serious parental problems, such as substance abuse, domestic violence, and mental illness, and child welfare issues usually require court action. Mental health and other professionals involved in these cases may be called into court to offer information and testimony to assist the court in its decision-making and, in some cases, to explain or defend their work.

The courtroom is a foreign and sometimes alien environment for most professionals. There are several features of the court process that cause professionals discomfort. First, the structure imposed on communication and procedural requirements may be bewildering to professionals. Moreover in a given case, these rules may vary at different points in the court process. Second, court proceedings are adversarial, and often confrontational. Politeness and sensitivity to the feelings of others pervades most mental health and health care practice. Such norms do not have priority in court. Third, the types of information mental health professionals tend to rely upon, that is second hand accounts, as a rule, are inadmissible in court. Finally, in court the “parties”, that is the parents, the state, and the child, will typically have lawyers to represent and defend them, but usually professionals who are witnesses will not. In some court procedures, mental health and other professionals may feel the need for an advocate.

In order to assist mental health and other professionals as they enter the arena of the courtroom, the following issues related to the courts will be discussed:

- 1. Court systems potentially involved in child welfare cases with parental functioning problems**
- 2. Stages in the court process and evidentiary implications**
- 3. Preparation for professionals to be witnesses**

1. COURT SYSTEMS POTENTIALLY INVOLVED IN A SEXUAL ABUSE CASE

A child welfare case may be handled in at least four different legal arenas. There may be a child protection case, a criminal case, an action in the domestic relations court, and/or a court action involving commitment, for example in the case of a mentally ill parent. In addition, there may be a guardianship action as a means of protecting the child¹. These arenas have different goals, different players, and different standards of proof. Moreover, there may be litigation in two or more arenas simultaneously, necessitating the coordination of these various efforts. In general, cases with serious parental problems and child welfare issues require a multidisciplinary team and a coordinated community approach, especially when there are multiple legal actions.

A. Child Protection Proceedings

Child protection litigation takes place in the Juvenile, Probate, or Family Court, and its primary goal is to protect children from maltreatment. Protection may be necessary to prevent further physical, sexual, or emotional abuse by the child’s parent(s) or other persons in the child’s environment or to prevent further neglect by the child’s parent(s).²

The Child Protective Services (CPS) worker is generally the moving party, who files a petition, chronicling the alleged maltreatment and the section of the law that applies. As a rule, the CPS worker has legal representation from a government attorney. However, in some communities, CPS agencies have their own attorneys, and in others CPS doesn’t consistently have legal representation.

In most states when there is a protection proceeding, the child has a lawyer or a *guardian ad litem*. The *guardian* is supposed to undertake an independent investigation of the matter and advocate for the child’s best interest. There is a debate among those who represent children about whether a child’s attorney should represent the child’s best interests or the child’s wishes.

Parents also have an attorney, who represents their wishes. In many jurisdictions, attorneys will be provided for indigent parents. In child maltreatment cases, the mother and the father may not have the same

¹ For discussion of the issue of guardianship, see the article on Guardianship in this volume.

² Special Federal provisions regarding confidentiality obtain to reporting and petitioning the Juvenile Court in cases where a parent is in a substance abuse treatment program. These are described in the document in this manual related to Confidentiality.

interests, for example in a situation in which the father is the offender and mother is a non-offending parent. Then, each parent may have her/his own attorney.

The standard of proof for temporary jurisdiction in a child protection case is rather low, "preponderance of the evidence", or about 51% probability that the maltreatment occurred. To permanently remove a child and terminate parental rights, the case must be proven by a standard of "clear and convincing evidence" or about 75% probability³.

In a child protection matter, once the case has been proven, and the court has taken jurisdiction, the court can enter orders that separate the child or the offender from the family so that the child is safe. It can also enter orders requiring treatment, controlling visitation, and specifying other intervention, for example parenting classes or substance abuse treatment. Parents, who do not cooperate or who do not benefit from intervention, will be at risk for having their parental rights terminated by the court.

B. Criminal Prosecution

Criminal prosecution occurs in the criminal court. The goal of a criminal case is to do something to the offender, not necessarily to do something for the victim. Generally, successful criminal prosecution means punishing the offender and protecting society from him or her, by incarceration. However, depending upon the crime (e.g. a sex offense, domestic violence, a substance abuse related crime), local practice, and community resources, part of the individual's sentence may involve treatment or rehabilitation. Except in the instance of sexual abuse and severe physical abuse, child maltreatment cases are not ordinarily criminally prosecuted. However, when legal intervention is pursued in domestic violence cases, it is usually through a criminal proceeding. In addition, if a parent, who is a substance abuser, engages in drug related crimes, these will be dealt with in the criminal court.

In a criminal case, the police take evidence from their investigation to the prosecutor, who, in a criminal case, acts on behalf of "the people". The prosecutor then makes a decision whether or not to prosecute the alleged offender. This decision tends to be based upon the strength of the legal evidence, rather than on what would be beneficial to the child.

In criminal cases, there are generally just two attorneys involved, the prosecutor and the defendant's attorney. What this means is that children, who may be witnesses against their abusers, have no one to independently protect them in court.

The standard of proof in a criminal proceeding is quite high, "beyond a reasonable doubt" or about 95% probability the accused committed the crime. Thus, the judge or jury must be virtually certain that the individual committed the crime in the manner alleged.

C. Child Custody or Visitation Proceeding

When parents divorce or when they are not married, but there are disputes over custody and contact involving their children, the domestic relations or divorce court has jurisdiction. The domestic relations court is likely to become involved in a child welfare case when the parental relationship has dissolved, and there are accusations made by one or both parents against the other. For example, accusations of parental substance abuse or mental health problems that are potentially harmful to the child, or concerns about actual child maltreatment may cause a parent to take action in the domestic relations court. Concerns about potential or actual harm to the child may arise when parents are in the process of divorcing or later on after a divorce. The decisions made by the judge may relate to custody and visitation, or there may be later litigation to change custody and/or visitation. Cases where parents are divorced or divorcing and there are allegations of parental misconduct, particularly sexual abuse, are often responded to with great skepticism. Although a parent who is alienated from an ex-partner may have a tendency to misconstrue information or may have an interest in making a false allegation, there are also characteristics of divorce, single parent status, and blended families that increase risk for child maltreatment and endangerment. Thus, allegations in divorce should be taken seriously and carefully investigated.

The goal of the divorce court, when children are involved, is to resolve issues of custody, child support, and visitation. As a consequence, this court may not see its role as deciding whether or not a child is endangered or has been abused. However, the court may ask a professional with mental health training to

³ Cases in the state court falling under the jurisdiction of the Indian Child Welfare Act require higher standards of proof: clear and convincing evidence for temporary jurisdiction, and beyond a reasonable doubt (95% probability) for termination of parental rights.

perform an assessment and make recommendations about custody and visitation to the court. This assessment may address issues of endangerment and maltreatment. In addition, mental health professionals, involved in delivering services and treatment to children or parents, may be subpoenaed to provide court testimony in a domestic relations matter.

As a rule, each of the child's parents will have legal representation. However, there is usually no statutory provision for attorneys if the parents have no funds. Consequently, sometimes they act on their own behalf. There is also no statutory provision for legal representation for children, who may, as a result become pawns in parental disputes. However, states may have provisions to appoint *guardians ad litem* for children in contested custody and visitation cases. Usually both the decision to appoint and the choice of the guardian are at the discretion of the judge.

Decisions about children that are made in divorce proceedings are supposed to reflect the "child's best interest". The evidentiary standard for proving facts is "preponderance of the evidence", unless the lawyer is trying to prove it is in the child's best interest to change custody. In that instance, the standard of proof is "clear and convincing evidence"⁴.

D. Commitment and guardianships

The probate court involuntarily commits mentally ill adults, who may be parents, and sometimes children. Guardianship of an incapacitated adult can be a basis for juvenile court wardship. Thus, the probate court can be involved in cases with child welfare issues and mental health problems. Mental health professionals usually play a key role in involuntary commitment, because the court requires an opinion from mental health professionals that the individual is a danger to himself or to others.

2. STAGES IN THE COURT PROCESS AND EVIDENTIARY IMPLICATIONS

Litigation is further complicated by the fact that there are various stages of the legal process. Moreover, the kind of evidence that will be admitted will change depending upon the court and the stage of the court process.

A. Types of Court Hearings

The stages of litigation and the terms used for them will vary somewhat from jurisdiction to jurisdiction, as well as by type of case (e.g. criminal, child protection, etc.). However, there are three general types of court hearings⁵.

1. The Preliminary Hearing

This is a hearing in which the judge decides whether there is sufficient evidence to go forward with a trial. Usually some evidence is offered at this hearing, but generally mental health and health care professionals are not called to testify.

2. The Trial or Adjudication

At this hearing the evidence is presented to prove and refute whatever charges have been made. This is the hearing at which professionals involved in the case are most likely to be called to testify. After all the evidence has been heard, the judge or jury decides whether the evidence supports or does not support the charges.

3. The Disposition

If the case is proven, there is a dispositional hearing, at which the judge decides what the remedy should be. Because of the wide range of possible litigation, dispositions can be quite varied. All of the following are possible dispositions. In a child protection case, the judge might order all the family into treatment. In a criminal case, the offender could receive a jail or prison sentence. In a divorce case, the judge might order a

⁴ . K.C. Faller, Understanding Child Sexual Maltreatment. (Newbury Park, CA.: Sage Books, 1990).

⁵ In some states, criminal cases and, in a few, civil cases as well, will be reviewed by a Grand Jury, which decides whether or not there is sufficient evidence for an indictment. In addition, in child protection cases, there will be review hearings after the initial disposition, which may alter the judge's original dispositional order, and there will usually be a separate termination of parental rights hearing. And many courts use pre-trial conferences or hearings to try to facilitate a settlement between the parties.

non-custodial parent's visits with the child to be supervised. And in civil commitment case, a judge might involuntarily commit a parent to a mental institution for 60 days.

In addition, in most types of court cases, there may be several hearings that precede and follow the formal trial process. For example, in a divorce case, there may be hearings when parents are alleged to have violated visitation provisions or when a non-custodial parent is behind on paying child support. In a child protection case, once there has been an adjudication, there are statutorily required review hearings to monitor the progress of the case.

B. The Rules of Evidence

Professionals who will testify need to know something about the rules of evidence and how they impact on admissibility of certain kinds of evidence at various stages of the court process. Specifically, they should be aware of what hearsay is and what exceptions to the hearsay rule apply in the court proceedings in which they testify.

Anything the professional has directly ascertained with any of his/her senses, can be testified to in court. That is anything the professional has seen, heard, smelled, tasted, or felt. Hearsay is any secondhand information or an out of court statement offered "to prove the truth of the matter asserted"⁶. Nevertheless, even hearsay may be admissible if it is offered for some other purpose, for example, as the basis for forming an expert opinion. The child's statements to professionals about maltreatment and observations of children's behaviors made by caretakers and reported to professionals are all hearsay, but may be admissible because they are used to form an expert opinion.

Moreover, there are exceptions to the hearsay rule that may apply. The following exceptions are useful in child welfare cases. Certain conditions, not listed here, apply to the use of each exception.

1. The excited utterance exception

This exception would allow testimony by an adult about a child's spontaneous disclosure of maltreatment soon after the fact and when the child was still in an excited state. Although the child's excited utterances may be made to professionals, they are more likely to be made to caretakers, for instance to mothers.

2. Statements made in the course of medical diagnosis and treatment

Information elicited by a medical professional from someone he/she is treating is admissible in court. This exception is made because it is assumed that what a patient tells his/her doctor is inherently truthful. In some jurisdictions, this exception has been applied to professionals other than doctors.

3. The tender years exception

This exception allows an adult witness to testify to a statement made by a young child if the judge decides it is appropriate for the adult to provide this testimony.

4. Business records

This exception allows for the admission of case records and reports, provided proof is offered that they are regularly and systematically kept. This exception can be used to enter into evidence therapists' notes or reports based upon mental health evaluations.

5. Reliable statement exception

A statement that the judge views as inherently reliable. This exception can be characterized as the exception of last resort, relied upon by the judge, to allow important evidence when other exceptions do not apply.

As alluded to earlier, an expert witness, who is allowed to provide opinion testimony, can base her/his opinion on hearsay. The expert can often recount the hearsay that is the basis of her/his opinion, but this account does not imply or prove that the hearsay is true.

Hearsay exceptions vary from state to state. Therefore, professionals must be familiar with those which apply in their states. Further, hearsay rules, that is the exclusion of hearsay, are more rigorously adhered to at the trial stage of a court proceeding and hearsay rules may be relaxed at other stages. Thus, a physician's affidavit might be used instead of her/his testimony in a preliminary hearing in a protection case. Similarly, the opinions of many professionals might be incorporated in a pre-sentence investigation report in

⁶Federal Rule of Evidence 801(c).

a criminal case, thus avoiding protracted testimony at disposition. Finally, the rules of evidence are more stringently applied in criminal cases than in civil litigation.

These are general guidelines regarding hearsay and its exceptions. However, they can only help the witness anticipate that some of what they would like to say may not be allowed. Often the witness will not know what will be admissible until she/he is on the stand, when the attorneys raise objections to certain testimony, and the judge rules what testimony is admissible.

C. PROFESSIONALS AS WITNESSES IN CHILD WELFARE CASES

Mental health and other professionals often struggle with what level of responsibility they should feel in the court process. At one extreme, professionals may feel they have major responsibility for the court proceedings, that is for making sure that all the appropriate witnesses are called and the court makes the right decision. At the other extreme, professionals may feel their only role is to answer questions when they come to court. Arguably, neither of these positions represents best practice. Witnesses are not responsible for the entire case or court process, but they do have a responsibility to do the best job they can with their part of the case, their testimony.

The key to quality testimony and psychic survival in court is thorough preparation. Professionals need to know the facts of the case; decide upon their opinions about the facts and the case; decide the essential points of their testimony; and anticipate the questions they will be asked on cross examination. Professionals should expect to spend two to three hours of preparation for every hour on the stand. Each of the topics just mentioned will be reviewed.

1. The Facts of the Case

Most child welfare cases have a history. It is important to memorize the names, ages, and grades of the children; when adults met, were married, and divorced; what the specific allegations of parental misconduct and maltreatment are and the context of their occurrence; and the particulars of other important events in the case. Professionals should also appreciate the gaps in their knowledge about the case.

This kind of preparation will enable witnesses to provide testimony that is informed and precise. It will protect the professional from having to rummage through the case record looking for information, a practice which may result in the perception the witness lacks full command of the case. In addition, careful review of the case will help the professional avoid making errors or being tripped up by an attorney with unanticipated questions that call upon factual knowledge.

2. Professional Opinion

There is one major difference between a material witness and an expert witness: the expert may give opinion testimony in a substantive area (e.g. child welfare). A person becomes an expert by virtue of her/his education or experience; however, it is much easier to be qualified as an expert with an advanced degree. The judge decides whether the witness qualifies as an expert.

Professionals testifying as expert witnesses in situations of possible child maltreatment should have formed an opinion or opinions about the case. Opinions may relate to a number of issues, and appropriate issues will depend upon the individual's profession. The most common issues for child welfare cases are whether the child has been maltreated and future risk for child maltreatment. Other issues about which professionals might have opinions are where the child should be placed, what sort of treatment is needed for parents or children, and what kind of visits with the parents are indicated.

The issue of partisanship can be a very troubling one for mental health and other witnesses, especially because the courtroom is so adversarial. It is important for professionals to appreciate that the entirety of their opinions usually will not completely support the positions of any of the attorneys involved. For example, in a child protection case, an attorney representing the child protection agency may want a mental health professional to only talk about the parent's negative characteristics. A competent mental health professional likely will see both positives and negatives in parents, even if the professional decides the parents are abusive.

A useful position for mental health witnesses is to recognize that they are partisan, but to their opinions and consequent recommendations about the case, not toward one side or the other.

Moreover, since these opinions and recommendations will take into account, for example positive and negative aspects of the parents, there is no reason for mental health witnesses not to share these observations with the court. In addition, presenting a balanced picture of family members will indicate lack of bias and enhance the mental health professional's credibility.

Professionals must not only be prepared to give opinions, but to explain the basis for their opinions. Professionals must go beyond "because I said so". Generally, the basis of an opinion includes factual material about the case and a methodology for analyzing the material. It is important to provide a rationale for the methodology employed and to be able to cite any relevant research.

3. Essential Points to Be Communicated to the Court

People's lives and behavior are very complex. The courtroom is not well suited to communicating these complexities. A professional's discipline and its subtleties may be unknown to the factfinder, whether a judge or a jury, and the factfinder may find it difficult to absorb all the information put forth at a trial.

Therefore, witnesses, particularly expert witnesses, should decide beforehand the essential points they want to communicate to the court (and eliminate less important ones). Sometimes a written list is useful. Usually there will be one attorney whose position is more congruent with the professional's or who has called the professional to testify. The witness should let the attorney know what questions to ask to communicate these essential points. However, it is also a good strategy while testifying, to look for opportunities to make these points on both direct exam and cross examination.

4. Anticipate Cross-examination

Because the courtroom is adversarial, witnesses should expect to be cross-examined about their opinions and recommendations. Moreover, in virtually every case, the professional's opinions and/or work on the case will be objectionable to one party or the other and have some vulnerabilities. Witnesses should think about these issues ahead of time and decide how they will respond to questions about them. They need not be defensive, but rather honestly concede any differences of opinion or vulnerabilities.

It is useful to remember, in most cases, the attorney's goal for cross examination is to elicit material supportive of his/her client. If the professional's opinion reflects badly upon the attorney's client, he/she will use cross-examination to try to discredit the professional and/or his/her testimony and/or as an opportunity to elicit or reinforce testimony that is supportive of his/her client.

The challenges experienced during cross are of two types, those that attack the professional and those that attack the testimony. Within these two categories are subcategories. Challenges aimed at the professional as an individual will relate to credentials, possible personal biases, and sometimes personal life. For example, common queries made of mental health professionals are, in how many cases did you confirm and disconfirm child abuse, and how many times have you testified on behalf of persons accused of harming their children versus how many times for the state or child protective services.

Challenges to the professional's testimony are likely to include the following: inadequacies in the fact-finding (e.g. the professional did not interview the father), facts the professional did not know, facts not considered in forming an opinion, and misinterpretation of the data. In addition, cross-examination may involve the lawyer challenging procedures or conclusions by reference to the literature in the field. This is called cross examination by "learned treatise". The lawyer may begin by asking the witness if he/she is familiar with a particular work and whether the author is respected in the field. Then a passage is cited to support an assertion that the witness has erred in some way.

Before going to court, the professional should think through the case carefully considering possible challenges and responses. It is also helpful to remember, when on the witness stand, that it is not the attorney asking questions who needs to be persuaded. It is the judge or jury. Witnesses should not let their desire to win in the "duel" with the lawyer make them overstate their opinions or distort the facts of the case. Finally, when being vigorously cross-examined, mental health and other professionals should remember "don't take it personally".

4. CONCLUSION

Although most mental health and other professionals would not choose testifying in court as a realm in which to practice, they nevertheless should endeavor to learn the rules and procedures and to prepare thoroughly before going to court. Taking these important steps is essential for best practice on behalf of children and families.