Court Is In Session: Effective Testifying and Report Writing

Judge Constance Cohen, Retired

Even the finest delivery of services to dependency court involved families may be for naught if the transmission of information to the judge is ineffective. Although social workers, therapists, and others who support the families we serve did not go to school with the hopes of being grilled on the witness stand, judges must depend on their testimony and reports in order to arrive at decisions that will best serve families in dependency court. Judges also rely on reports and testimony to determine whether the federal requirements for reasonable efforts have been satisfied in a timely manner.

REPORTS

Timeliness:

Testimony is often unnecessary if reports are thorough and timely. It is good practice to have clear deadlines for submission of reports to avoid surprises and to obviate the need to testify. A statement in each court order such as "All reports shall be submitted to the Court and all parties no later than seven days before the next hearing" gives everyone fair notice of expectations. In the event that there are unanticipated changes in the seven days before the hearing, the authors should write a short addendum or otherwise notify participants as soon as possible to alert them to the changes. It is especially important to give as much notice as possible when these situations result in substantially altered recommendations.

Case managers who must rely on direct providers' reports to arrive at their overall recommendations may find themselves in a difficult situation if the direct provider cannot provide their reports to parties and the court on time. The lawyers often request a continuance, delaying decision-making and permanency. The parties may require additional court time to present evidence by way of testimony that could have be avoided by the timely filing of a report well done.

The judge may be unhappy that the case manager did not file a timely report even if the delay were caused by the failure of another to provide necessary foundational information. Effective case management calls upon the judge to make timely decisions. Late reports resulting in the need to continue a hearing may result in a cascade of negative consequences, including inconvenience and expense to parties and professionals (e.g., taking time off work without pay, traveling to the courthouse, attorney fees accumulating, and a poor use of time for everyone involved); inability to reschedule the hearing within permanency deadlines; delays that may disqualify the case from receiving federal IVE reimbursements; and, of course, unacceptable limbo for the children and families.

There is a reliable remedy for this problem: the subpoena. Be clear with all providers that it is critical to have their reports or other relevant input by a date certain. Let them

know that while they should always be prepared to testify, a timely, well-written and thorough report often eliminates the need to testify in court or to be deposed. If best efforts fail, notify the attorney representing the agency or other appropriate attorney that the provider needs to be subpoenaed. In most cases, the mere serving of a subpoena will inspire the reporter to immediately file the needed report. It is the rare professional who will choose testifying in Court over filing a report and not having to reschedule clients' appointments. Once the report is made available, there will likely be an agreement to withdraw the subpoena.

If your report must be filed without all the foundational information upon which you are relying, file your report in a timely manner based on the information you have. Clearly point out what you are lacking. It is unwise to tell the judge that you didn't do your work because someone else let you down. If you are expected to make recommendations without complete information, be clear about what facts are missing. For example: "The recommendation to continue fully supervised contact is based, in substantial part, on this author not having received updates from Dad's therapist or the person supervising his visits. This recommendation may change if additional information is provided."

What Judges Want from Reports and Their Authors:

Courts benefit most from reports that provide objective observations. Reports should paint a picture for the judge. Reports should provide the dots; the judge connects them. Reports are most useful when they avoid drawing conclusions. It is important to remember that each reporter has one piece of the puzzle. The judge must consider all the reports and other evidence in arriving at conclusive findings. It is improper for one puzzle piece holder to make sweeping conclusions and recommendations when they do not have the entire picture before them. Credibility is enhanced when everyone sticks to what they know.

For example, it would carry little weight for therapist working with a parent's individual mental health issues to weigh in on a recommendation for unsupervised contact, especially when that therapist has never seen the parent with the child and is unaware of the safety issues observed by the professional supervising contact. Likewise, while it is improper for a foster parent to conclude there is a strong bond, it is proper for the qualified professional who is providing Child / Parent Psychotherapy to render an opinion about the quality of the bond. To venture into territory beyond the expertise of the professional undermines his or her overall credibility.

Your reports should be as balanced as the facts allow. Because the facts which bring families into the child welfare system are generally very dire, it is important to nurture a culture of catching the parent doing something well. Including only negative observations in reports suggests that you are not supporting a successful outcome; that the parent has nothing positive to offer. Nearly every parent has strengths. Even if the parent has missed most of the visits, search out the pearls that do exist, e.g., Mom initiated peek-a-boo. Baby chuckled the first time, and Mom repeated several times. With each successive peek-a-boo, Baby and Mom became more gleeful. Mom then

picked up Baby and hugged and kissed her." This positive acknowledgement can be very powerful. Success breeds success!

Examples of Reporting Do's and Don't's Include:

Write "Baby made consistent eye contact with mom and consistently smiled and cooed"; **not** "Mom and Baby appear to have a good bond and attachment."

Write "When Baby began to fuss, Dad did not check her diaper or determine if it was time to feed her. He put her in her car seat to let her cry it out"; **not** Dad was unable to read Baby's cues.

Write "Mom has attended AA/NA three times in the past two months. She has been residing with known drug users for the past three months. She last spoke with her sponsor two months ago. She has not provided drug screens since the last court hearing", **not** "I have concerns about Mom's commitment to recovery."

Write "Dad missed scheduled visits on March 5 (overslept), March 10 (overslept), March 13 (forgot), March 16 (transportation failed), and March 22 (overslept)"; not "Dad appears to have lost interest in visiting his son consistently."

The federal law requires that a case permanency plan be filed every six months. In Safe Babies Court Team cases, which are generally involved in court events every thirty (30) days, it is not necessary to file a case permanency plan at every hearing. The judge and agency should work together to develop a mutually agreeable process for reporting at hearings that do not require a full plan. It may be useful to develop a template for "interim" or "addendum" reports. For example:

NAME(S) OF CHILD(REN)
DATE(S) BIRTH
PARENTS' NAMES
CUSTODIAN(S)
DATE OF REMOVAL
PROGRESS SINCE THE LAST HEARING (Provide a brief statement to update Court)
- FAMILY CONTACT
- CHILD-PARENT PSYCHOTHERAPY
- SUBSTANCE ABUSE TREATMENT / RECOVERY
- INDIVIDUAL THERAPY
- FAMILY TEAM MEETING
- HOUSING
- EMPLOYMENT
- OTHER

RECOMMENDATIONS

Whether a full case plan or addendum report, the importance of providing reports that are informative and professional cannot be overstated. Form **and** substance count.

Proofread, proofread, proofread! Preparers who struggle with writing skills should seek proofreading assistance from a supervisor or peer to provide the Court with the most organized and professional report possible. A poorly written report may convey the same information as a well-written one but receive less weight from the judge. Lack of attention to detail may cause others to infer sloppiness in the service provided. And, no one enjoys being cross examined by an attorney who might spend substantial time pointing out incomplete sentences, double negatives, poor spelling, and general disorganization line by line.

Parents and others are often overwhelmed by the reports they receive. Remember the audience for which you are writing. While it is important to meet all the state and federal requirements for case plans, it is just as important to communicate effectively with everyone involved. Don't bury the recommendations on page 11 of a 16-page report. List the actions / recommendations expected of everyone in understandable language either at the beginning or end of the report. Or, make an extra copy of the "to do" list and hand it separately to the parent; create a succinct list they could tape to the refrigerator.

If a party is not fluent in English or has learning challenges that prevent them from reading and understanding written documents, inform the Court of the issue. Then, identify in the report who will be responsible for reading and explaining the documents to them. Be on the alert for such challenges as FASD and tailor the "refrigerator list" accordingly. Some adults are not able to juggle more than three to five requirements simultaneously. They may feel instantly defeated by a list of 12 things to do before the next court hearing. Work with professionals to design a different format that will better serve these parties.

Know that judges generally understand that even the most diligent professional will make mistakes. The reputation you have established will go a long way in mitigating consequences. I.e., the professional with a solid reputation for superb writing and promptness will fare much better in the wake of an isolated incident of falling short than will someone who has not demonstrated consistent quality and reliability.

When you have erred, it is almost always appropriate to "fall on your sword" before being castigated in open court. At the beginning of the hearing, admit your error and apologize to the Court and everyone involved. For example: "I wish to apologize to the Court and parties for my failure to provide the Case Plan at least seven days prior to trial. When I realized I had missed the deadline, I contacted all parties with my recommendations so they would not face surprises today in court. I then immediately drafted and sent the Case Plan out as soon as possible, four days before the hearing. I did not enter the last order correctly and it didn't appear on my calendar. I have already discussed this error with my supervisor and we have determined a better process for me to follow that will help prevent similar problems from occurring in the future."

TESTIFYING

It is important to be familiar with courtroom etiquette. No two courtrooms operate exactly the same. Judges are individuals who bring their own personalities and expectations to their work. For example, one judge may forbid people to go in and out of the courtroom during a hearing while another may be comfortable with quiet and respectful movement. It is always a good idea to check in with court staff or attorneys who are familiar with the expectations of each judge and adjust accordingly.

It is also important to familiarize yourself with the vocabulary of the courtroom:

Mini Glossary

Adjudication: The hearing during which the Court determines whether the dependency petition is sustained by clear and convincing evidence. If the allegations of the case are satisfied, the Court takes jurisdiction of the case and schedules disposition, reviews, and permanency hearings until the case is resolved. The Petitioner has the burden of proving the allegations. If the Court finds that the allegations are not satisfied, the case is dismissed and there is no further court involvement.

Adoption and Safe Families Act of 1997 (ASFA): Federal legislation to improve the safety of children, to promote permanent homes for children in a timely manner, and to support families. Failure to comply with substantive and deadline requirements may result in a reduction in the amount of reimbursement the State is able to draw down from federal IVE resources.

Court Appointed Special Advocate (CASA): A trained volunteer who attends hearings, conducts independent investigations, writes reports, and independently represents the child's voice in court. In some situations, CASA's also serve as the child's Guardian ad litem.

Child Abuse Prevention Treatment Act (CAPTA): A far-reaching federal mandate that includes, in part, requirements for GaL training and entitlements to services for abused children. States accepting IVE draw-downs are required to comply with CAPTA.

Deposition: Formal discovery during which the sworn witness provides a recorded statement prior to the hearing. Generally all the attorneys are present and the parties may also be there. The judge does not attend. Carefully review a transcript of your deposition prior to testifying in order to avoid being unnecessarily impeached with inconsistencies. Failure to review your statements and reports before a hearing may cause you to appear unprepared or uncaring.

Disposition: If the child is adjudicated to be a dependent child, the Court next schedules a disposition hearing. The first Case Permanency Plan is presented at this hearing.

***Ex parte* Communication:** Communication of any kind with the Court that do not include all parties. Such communications are generally unethical; however, some exceptions apply when the issue is immediate child safety.

Fostering Connections Act: Federal legislation that requires, in part, relative notification of a removal and sibling contact.

Guardian ad Litem (GaL): The Child's Attorney and GaL can be the same person, especially in cases involving non-verbal children. The GaL advocates for the best interest of the child, and make recommendations based upon seeing the child in the home, interviewing providers and caretakers, and reading reports. The child's lawyer advocates for what the child wants.

Individuals with Disabilities Act (IDEA): Part C of the IDEA guarantees entitlements to qualifying children under the age of 3 for services such as developmental screening, speech and hearing evaluation and services, etc..

Interstate Compact Placement of Children (ICPC): A child cannot be transferred to the custody of a person residing in another state unless there is an approved home study in the receiving state and their state child welfare agency accepts the case.

Indian Child Welfare Act (ICWA): In 1978, the federal Indian Child Welfare Act was enacted to protect American Indian children and families involved in Juvenile Court proceedings. When children who qualify for the protections of ICWA are placed out of care of parents, numerous requirements apply. These include, but are not limited to placement priorities, expert testimony (even in the event of a stipulation), and active (not just reasonable) efforts to maintain custody with a parent or to reunify.

Reasonable Efforts: Federal law requires the State to make reasonable efforts to reunify the family safely and eliminate the need for removal by offering services tailored to meet the family's needs. Failure to make reasonable efforts can delay permanency and eliminate the IVE reimbursement for the case. Judges must make reasonable efforts findings in their orders within sixty days of removal and at least every six months thereafter for the life of the case.

TIPS FOR TESTIFYING

Tell the truth. Testify accurately about what you know. Do not embellish or allow suggestive questioning to lead you astray. Don't say what you think the judge or lawyer wants to hear. Be accurate.

Be prepared. Prepare for every hearing as if you knew you were going to be vigorously cross-examined by the most skilled attorney in the state. Anticipate and memorize

critical information, e.g., number of times you met with client, last appointment with client, age of client, etc.. Bring relevant reports and notes.

Establish your expertise. Memorize your education and experience qualifications and job description and convey them with confidence.

Write, speak, and dress professionally. You are the expert; present yourself as such.

Be sure you understand the questions. Do not guess. If you do not know the answer, say you don't know. This is especially true if you are presented with an incomplete hypothetical. If you don't understand the question fully, ask the person to rephrase it.

Control the pace. Rapid fire questions do not have to be answered rapidly. Take the time you need to respond thoughtfully and thoroughly.

Correct the record if necessary. It enhances your credibility. E.g., "I need to correct my earlier statement about the child's age. I misspoke. He is 6, not 4."

Avoid distracting mannerisms. Be yourself but tone down hand gestures if you typically "talk with your hands." Don't shake your leg...your upper body will also move.

Testify convincingly. Preparedness will lead to confidence. Maintain appropriate eye contact and tone. Avoid "upspeak", or statements that sound like questions. Avoid using "like", "um", "yep", etc..

Avoid sarcasm and humor. Always be courteous. Even in situations where others may be setting a different tone, maintain a professional one.

Give up the obvious. Questions that begin with "Is it possible....", "Are you 100% certain..." , etc. are red flags.

Keep your cool and maintain a calm and professional demeanor. Always be courteous. If you allow yourself to lose your composure on the stand during vigorous examination, the parent's complaints that you are short-fused, impatient, etc. may carry significant weight with the judge. Consistently model the respect and control you seek in others.

Speak clearly and in plain English. Avoid acronyms and ten-dollar words. Always answer questions audibly, not with a nod or "uh huh".

Never speak while someone else is speaking. If an attorney makes an objection wait until the judge tells you whether you should answer it or not before responding.

Relate objective observations unless asked for an opinion or conclusion. E.g., instead of "There is a good attachment", paint a picture: "When I observed mom and baby last Friday, he smiled and reached for her face when she picked him up."

Keep the court reporter happy. Slow down. Spell unusual names and technical terms. Avoid acronyms. Use the microphone. If the court reporter is asked to read back a question, give him/her enough time to resume reporting before speaking again.

Answer the question as asked. Listen carefully. Ask for a repeat if you didn't catch it all the first time. Do not give more information than is requested. Avoid narrative responses. If the question should be answered with a "yes" or "no", do so. If it can't, be brief. If the opposing attorney cuts you off, another attorney will likely give you the opportunity to expand your testimony.

Do not look for assistance answering questions. The answer needs to be from you alone. If you need to refresh your recollection by referring to your report or notes, ask the judge for permission to review them before doing so. Remember that counsel may have the right to review your notes if you refer to them while testifying.

Avoid bantering or sharing personal information with colleagues off the record. Others are listening. It is patently unprofessional and insensitive to be chatting with another professional about how your children surprised you with breakfast in bed for Mother's Day in the presence of a parent from whom children have been removed. Likewise, avoid talking about your social activities within earshot of parties. If dad's attorney overhears you saying how you got "wasted" Saturday night at your college reunion, it will not only reduce your credibility but may cause you to be embarrassed on the stand.

Familiarize yourself and comply with local courtroom etiquette. It can vary from courtroom to courtroom.

Familiarize yourself and comply with confidentiality requirements. State rules may differ from federal law. The rules may also vary depending on the type of hearing involved.

Familiarize yourself with the rules of evidence. For example, the rules of admissible evidence at an adjudicatory hearing may be more restrictive than at a review hearing. Avoid referrals to hearsay unless you are satisfied they will be admissible.

When possible, meet with the attorney who subpoenaed you prior to the hearing. Your attorney will benefit from your coaching to highlight the information the judge should have. The attorney can help prepare you substantively as well as alert you to particular quirks you may encounter.

Protect your personal information. If asked for your address, provide a professional address only. Do not give your home address. If you work from your home, obtain and use a post office box. Most judges will find your marital status and/or whether or not you have children of your own to be irrelevant. If asked any question that calls for personal information you would rather not provide, it is usually acceptable to respond with, "I am uncomfortable providing that personal information." Talk to your legal representative before the hearing regarding a given judge's position on this issue.

In general, do not answer a question with a question unless you need clarification.

Be wary of ostensibly chummy conversations in the hallway. You may say something on the stand that is inconsistent with what you shared in the hallway when your guard was down. For example, saying, "If your client would just get rid of that drug-dealing boyfriend, she could get her kids back," could create problems for you later. First, clearly maintain the position that it is never up to a witness whether and when reunification occurs; it is up to the judge. You don't know whether the judge would agree with your recommendation. Second, it is misleading in most cases to suggest that there is only one condition preventing reunification. Keep in mind that seemingly friendly conversations may be fishing expeditions for information or statements that could be used against you in Court.

And, of course:
RULE #1: **Don't tick off the judge.**
RULE #2: **See Rule #1**

The value of being prepared cannot be over-emphasized. Murphy's Law prevails. It will often be the case for which you are the least prepared that will suddenly become contested and require your testimony. The old law school adage for trial lawyers also applies: If you have the facts, argue the facts; if you don't have the facts, argue the law; if you have neither the facts nor the law, attack the witness. If you are solidly prepared, confident and calm, and start to feel like you are being "picked on" by the attorney questioning you, you may be justified in patting yourself of the back for a job well done.

It is axiomatic that a lawyer should never ask a question to which s/he does not know the answer, particularly on cross examination. However, the lawyer who has neither the facts nor the law, may pose questions such as, "You didn't help Mom with finding safe housing, did you?" Hopefully, you can calmly respond, "Yes, I drove her to the domestic abuse shelter and helped her fill out the application."

It is also important to avoid taking any perceived attacks from attorney who opposes your position personally. Remember that an attorney's ethical duty and responsibility to zealously represent their clients within the bounds of the law. It is their challenge to present a picture that places their clients in the most favorable light possible without misleading the judge. When a parent has done very little to comply with the case plan, a bit of grandstanding might even come in to play to maintain the client's trust and

confidence in the lawyer. You may hear questions such as, “But Dad hasn’t had any other arrests for drug dealing since the last court hearing, has he, yes or no?”

You should also keep in mind that the lawyer who is grilling you on one case one day may be your strongest ally in another case the next day. It is the nature of their work and should not be taken personally.

IN CONCLUSION

Reports and testimony that provide the Court with objective facts support judicial decision making that is well-grounded. Decisions are only as sound as the facts upon which they are based. Courts depend on professionals to provide them with the information they need to make timely decisions that support safety, permanency, and well-being.

Your reports and testimony should represent an opportunity to cast a welcome spotlight on the work you have done in the case. You are the expert. No one else can influence the outcome of a case more. If you have done your very best, you will likely get that same sense of satisfaction that you did in school when you knew you nailed the exam; when you scored the highest grade on your research paper; or when you excelled in your sport or art. When you have done your very best for the family, and have effectively communicated your findings and recommendations to the decision maker, everyone wins. j

TIPS FOR TESTIFYING

Prepared by Constance Cohen - Retired Juvenile Judge

Tell the truth. Testify accurately about what you know. Do not embellish or allow suggestive questioning to lead you astray. Don't say what you think the judge or lawyer wants to hear. Be accurate.

Be prepared. Prepare for every hearing as if you knew you were going to be vigorously cross-examined by the most feared attorney in the state. Anticipate and memorize critical information, e.g., number of times you met with client, last appointment with client, age of client, etc.. Bring relevant reports and notes.

Establish your expertise. Memorize your qualifications and job description and convey them with confidence.

Write, speak, and dress professionally. You are the expert; present yourself as such.

Be sure you understand the questions. Do not guess. If you do not know the answer, say you don't know. This is especially true if you are presented with an incomplete hypothetical. If you don't understand the question fully, ask the person to rephrase it.

Control the pace. Rapid fire questions do not have to be answered rapidly. Take time.

Correct the record if necessary. It enhances your credibility. E.g., "I need to correct my earlier statement about the child's age. I misspoke. He is 6, not 4."

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Avoid sarcasm, humor and surprises. Always be courteous.

Give up the obvious. Questions that begin with "Is it possible....", "Are you 100% certain..." , etc. are red flags.

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Familiarize yourself and comply with confidentiality requirements. State rules may differ from federal law. The rules may also vary depending on the type of case involved.

When possible, meet with the attorney who subpoenaed you prior to the hearing. They can help prepare you substantively as well as alert you to particular quirks you may encounter.

In general, do not answer a question with a question unless you need clarification. An exception: most courts will not require you to provide personal information. E.g., if asked for your home address, offer your professional address. Personal questions such as "Do you have any children of your own?" are generally irrelevant.

Remember this old law school adage: If the facts are on your side, argue the facts; if you don't have the facts, argue the law. If you have neither the facts nor the law, attack the witness.

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