SUGGESTIONS FOR WITNESSES IN FAMILY COURT CHILD WELFARE PROCEEDINGS-(July 8, 2025)

Gene D. Skarin, Attorney

This article attempts to set forth issues which are likely to confront child welfare workers who may be called to testify in Family Court as a witness on a child welfare case. I have made some suggestions and recommendations to try to make the process less traumatic. I believe that an understanding of the people and processes involved should be especially helpful to a witness who has never testified. Although you may suffer from anxiety at the prospect of being called as a witness, testimony by a knowledgeable, truthful, and prepared witness is often critical for the well-being of children and persons who are the subjects of these difficult court cases. We all owe this to the children our society attempts to protect so that each may hopefully achieve a safe and secure home. It is more important to achieve the correct result rather than "winning" the case.

STANDARDS OF EVIDENCE

Most likely, the Burden of Proof is on the Petitioner Commissioner of Social Services. (The NYC ACS Commissioner is a Commissioner of Social Services). At the fact-finding trial of an Article Ten Child Protective Proceeding, the petitioner must prove allegations by a Preponderance of the Evidence. If the petitioner attempts to prove "severe abuse", the petitioner will state that it intends to prove the case by Clear and Convincing Evidence. If the agency seeks to Terminate Parental Rights involuntarily, the case must be proven against each parental respondent by Clear and Convincing evidence. Beyond a Reasonable Doubt is the standard for a Criminal Conviction as well as Family Court JD, PINS and ICWA and TPR cases.

Preponderance of the Evidence

The burden of proof is met when the party with the burden convinces the Court that there is a greater than 50% chance that the allegation is true. This is the burden of proof in a civil trial. The Child Protective Proceeding is a civil trial since there are no criminal penalties.

There is no difference between preponderance of the evidence and **fair** preponderance. Owing to a January 1, 2022, change in the law, to "indicate" an allegation of abuse or maltreatment for the NY State Central Register, a caseworker must find allegations to be true by a fair preponderance rather than "some credible evidence". When a case is subject to an OCFS administrative review and an OCFS fair hearing to challenge an indication, the standard has been fair preponderance for a while so the change in the law makes sense.

Clear and Convincing Evidence

"Clear and Convincing evidence" means that the evidence is highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable. Some people say 66% sure. You will need clear and convincing evidence to prevail on a Termination of Parental Rights case. Also, if the petitioner may seek to prove a severe abuse Article Ten case by that standard which could fast track a TPR based upon SSL §384-b severe abuse. (The court shall inquire of the child protective agency whether such agency intends to prove that the child is a severely or repeatedly abused child.) ICWA cases have a stepped-up standard.

Beyond a Reasonable Doubt

In a criminal case, the prosecution (District Attorney in State Courts or US Attorney in Federal Courts) bears the burden of proving that the defendant is guilty beyond a reasonable doubt. This means that the prosecution must convince the jury (or a Judge if a bench trial) that there is no other reasonable explanation that can come from the evidence presented at trial. As a CPS worker, what happens in a concurrent criminal case may impact on your Family Court case. (For example, if a defendant is found guilty of certain crimes, such could become a basis for a Family Court severe abuse finding through a summary judgment as well as a basis to seek a No Reasonable Efforts to reunite order.)

SUBPOENAS

If you are not party to case, and you receive a "subpoena" for your appearance or your records, you must discuss it with your attorney and supervisor. The subpoena may be seeking information which may be, arguably, "privileged" or confidential under the law and your attorney may want to make a motion to *quash* the subpoena, seek a protective order or contact the attorney or court involved with the subpoena. Your attorney may wish to clarify what exactly is sought or discuss any problems. Perhaps the subpoena was not properly served. The reality is that if you are represented by an attorney, you are likely to be treated better by other attorneys who may be interpreting issues in accordance with their subjective view, which may not be the position of yourself or your agency.

A *Subpoena Duces Tecum* is seeking the production of records, documents, or things alleged to be within your control. A personal subpoena demands production of a person to testify. Ordinarily, if you have records which would aid in your testimony you should bring them with you even though you received only a personal subpoena. Again, the best practice is to run this by your attorney.

If you are not party to case, call and see if you can be left "on call" or "telephone or text message alert" meaning that you commit yourself to be in court within a specified time after being contacted on the specified court date. Sometimes trial attorneys do not have control of this process depending on the practice and protocol of the trial judge. Most judges are accommodating and reasonable, but some are not.

Be aware of the relationship to the case of the attorney who subpoenas you. A subpoena from the District Attorney's office with whom agents for the Commissioner of Social Services is mandated to cooperate, is not the same as a subpoena from a litigant's attorney in a divorce, custody, landlord-tenant, or another case. The fact that there was a previous report of Suspected Child Abuse or Neglect may not be admissible in court unless the judge first rules on the issue. (FCA § 651(a).) The fact that a subpoena is "So Ordered" by the court does not mean that the Judge has ruled on the issue. Again, discuss this with your attorney. NEVER IGNORE A SUBPOENA AND ANY ATTEMPT TO EVADE PERSONAL SERVICE IS NEVER A SMART MOVE.

SELF-PREPARATION FOR YOUR COURT APPEARANCE

CASE RECORDS or OTHER RECORDS

Bring your records with you unless specifically instructed otherwise by your attorney. Find out if the entire record is needed especially if voluminous or not relevant to the court case. This likely will be a printout from Connections.

Have a thorough knowledge of your case records with emphasis on issues relevant to the specific hearing and related information.

Be thoroughly familiar with the record keeping practices and procedures of your agency. This is important when you are "laying a foundation" for a case record when you may not have made some or all the entries. You will be testifying as to the record keeping practices of your agency rather than whether you witnessed how this particular record was made.

Records Kept in the Regular Course of Business (Business Record rule).

In order to qualify a record to be admissible in court as an exception to hearsay rule, a proper foundation for its reception into evidence must be shown. The elements are that:

1. The record was kept in the regular course of business, and

2. It is the regular course of business to keep such records, and

3. Entries made in such records are made at the time of the acts, transactions, occurrences, or events, or within a reasonable time thereafter. (Contemporaneous entry requirement). (How soon an entry must be made is not clearly defined under the law, but the theory is that the entries were made while the memory is still fresh.)

> **OCFS takes the following position regarding records when a child is in foster care in 20-OCFS-INF-11.** OCFS regulation requires that progress notes must be entered as contemporaneously as possible with the occurrence of the event or the receipt of the information, which is to be recorded. Contemporaneous documentation is defined as within **30 days** from when the face-to-face casework contact occurred.

Do not interpret this to mean you have up to thirty days to enter your notes into the record. The Judge on the case may rule that the entry was not made in a timely fashion and exclude such case record or entries at a trial. This would be problematic on a Termination of Parental Rights case where the agency is required to prove its "diligent efforts" and the worker who made the entries is no longer available. Therefore, don't delay making entries into the case record. Conform to your county practices. If you made the entries yourself and are testifying as

to the content, it should not pose a problem other than a cross-examination attack that you were remise in making timely entries.
Caveat: My understanding is that OCFS has backed off from its "entry into the case record-within 30 days" position and now takes no specific position. I believe that is the correct approach since it depends in the Judge. Ask your own attorney for guidance. They reverted to old position

The business records rule pertains to a wide range of entities. However, it is important to note that the NY law and regulations require the keeping of child welfare case records in a certain manner. I believe this legal requirement is more important than just a plain old business record.

Sometimes, the foundational elements can be shown by a written *certification attached to the record* when a live witness with knowledge of the record keeping practices of the agency or institution does not personally testify. For example, Erie County records might be produced in Suffolk County if relevant to a proceeding there. Under the Family Court Act the "head" of the agency must certify or the person to whom such authority has been delegated in writing may certify.

If you have any other notes which you took in the field or otherwise about what was done or said, bring them with you. If your records were previously subpoenaed or subject to a "Demand for Discovery" or a "Notice to Produce", such notes are normally included. The records you made as part of your employer's mission they are NOT personal. If such records were destroyed, opposing counsel is likely to attempt to exploit that fact in an attempt to seriously undermine your testimony even if the official record is consistent with the "field notes". Some counties advise you to destroy field notes after the substance is transferred to the "official" record. Personally, I do not think that is a good practice because it may create an issue for other counsel to exploit. Having said that ask your county lawyer or supervisor what you should do.

Find out if the records were subject to pre-trial discovery.
Competent attorneys carefully study records in preparation for a trial. You should be prepared to clarify or explain entries which you made. As to entries made by others, ordinarily you can only speak to the ordinary record keeping practices or protocols of the agency.

Child welfare "confidentiality laws" ordinarily will not preclude discovery of most case material when a case is in court. Subjects of the child abuse/neglect reports (likely the parent) can gain access to certain record information even before court involvement and they have statutory and case law discovery rights when the case is in court. Often certain entries which are not discoverable under the law would be "redacted".

While "Elisa's Law" passed in 1996 modified some previous restrictions, "confidentiality" laws are still overly complicated, and the legislature has never appeared motivated enough to make this area less confusing for those who must deal with these laws on a daily basis. There are separate laws and rules for records which pertain to Preventive Services, Protective Services, Foster Care, Teenage Pregnancy, Family Assessment Response, Mental Health, Medical,

Substance Abuse, Adult Services, Adoption, and Public Assistance. There are special federal laws regarding Drug and Alcohol treatment programs, HIV related information, FERPA (Family Educational Rights and Privacy Act), HIPAA and other issues.

Normal doctor-patient, psychologist-client, social worker-client, rape crisis counselor-client, and marital privileges are statutorily waived in family court child protective proceedings. In a custody case, a court may rule that the need for complete information as to the best interests of a child outweighs a person's confidentiality interests. The better practice is that if in doubt, you should consult your legal counsel.

Never give over your records to anyone absent a valid subpoena, court order, or upon consultation with your attorney. Some records are available if the appropriate person signs a "release". Additionally, some material in the case record may not be subject to discovery (e.g. attorney/client, or information obtained upon a promise of confidentiality) unless a court so rules. Whether or not a particular record is discoverable will often be decided by the Court. CONSULT WITH YOUR ATTORNEY!

Find out the likely hearing issues and pay particular attention to those concerns in your preparation.

Use "post-it notes", or paper clips or the like to help you find important entries. This way you are less likely to waste time when you testify. Do not underline, use highlighters, or otherwise tamper with the original record.

Make a copy of the record in case it is placed into evidence. Circumstances may require that the record be entered into evidence. If you must leave the original try to get a receipt for it from the part court clerk, or alternatively, the agency attorney. When records are placed in evidence, they belong to the court until they are released. * If the case were to be appealed to the Appellate Division, usually all the admitted evidence is forwarded as well as the transcript of the proceeding.

If your records are voluminous, or the entries are not pertinent to the issue to be litigated, email or call the attorney and explain the problem. This way you can clarify if you must bring the entire record or merely relevant portions. Also, you can ascertain if the record is likely to be admitted into evidence and whether you should make a copy. *

If you are able to prepare with the attorney before the hearing date, please do so. Unfortunately, pre-hearing date preparation is often a luxury owing to busy schedules. However, preparation for important court hearings should be given priority. If a case is dismissed or a the Judge rules against DSS based upon inadequate testimony and proof, it is unlikely DSS will get a Do-Over.

Just because an item of information is entered into an official record does not mean it will be admitted into evidence at a specified hearing. Each report or entry in the record is admissible only if it qualifies under the business or agency record statutory exceptions to the hearsay rule. You still should place those entries into the official case record—you are not doing anything

illegal. (If the information is relevant and material, it is your attorney's job to determine how to legally prove that information in court.)

It must be demonstrated that it was within the scope of the entrant's business duty to record the act, transaction, or occurrence or event sought to be admitted. In addition, each participant in the chain producing the record from the initial declarant to the final entrant must be acting within the course of regular business conduct or the declaration must meet some other hearsay exception. The person who recorded had to be under a business duty to do so, and the person who gave the information, must have been under a contemporary business duty to report the occurrence to the entrant as well. That is the informant has personal knowledge of the act, event, condition and he is under a business duty to report it to the entrant.

This is sometimes a difficult rule to apply. Therefore, it is important to identify the sources of all information recorded in the case record. The information may be inadmissible hearsay. The information source may be stating an inadmissible opinion or may not be under a business duty to report to you or the agency. Of course, some information may be admissible at hearings other than the fact-finding hearing. The fact-finding "trial" has more stringent rules as to admissibility.

The New York's Court of Appeals, our highest court, has ruled that the better practice is for the attorneys to put each other on notice so that the records can be reviewed together and agreed objectionable parts "redacted" or "covered up" in some form before they are introduced into evidence. (Matter of Leon RR) Of course, any marking or redacting should be done on a copy of the record, not on the original. If an agreement cannot be reached, the Judge will have to decide which is always interesting since it exposes the judge to disputed entries and if it is decided that the entry should not be used, the judge is supposed to compartmentalize and not factor in that entry at the hearing.

Note that as previously stated at preliminary, permanency, and dispositional hearings, evidence which may be normally inadmissible as "hearsay" may be received if it is material and relevant to the issues. However, the "hearsay" rule, its applications and its exceptions are issues for the attorneys and the courts. Do not let worrying about how the court will decide those issues interfere with your issues as a caseworker, or other professional.

*A NOTE ABOUT CONNECTIONS RECORDS

An electronic record, as defined in Section 102 of NY Technology Law used or stored as such a memorandum or record, shall be admissible as a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained, or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including the lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not [affect] its admissibility.

New York State Technology Law § 306, entitled "Admissibility into Evidence," creates an exception to the best evidence rule:

In any legal proceeding where the provisions of the civil practice law and rules and are applicable, an electronic reproduction or electronic signature may be admitted into evidence pursuant to CPLR 45 including, but not limited to CPLR § 4539, entitled "Reproduction of Original".

PRE-TRIAL RELATIONSHIPS WITH OTHER ATTORNEYS INCLUDING ATTORNEYS FOR CHILDREN (Previously called Law Guardians)

Parties

If you are a "party" to the case (petitioner, or agent for petitioner.), do not talk to opposing attorneys or the child's attorney unless you consult with your own attorney, or it involves matters not at issue before the court such as visitation or other basic information. An attorney, who knowing that you are a represented party in a court proceeding, attempts to communicate with you may be violating ethical prohibitions applicable to all attorneys.

Non-Parties or Non-Party Witnesses

If you are not a party to the case, you are free to make your own decisions as to whether or not to speak with any counsel. It is your choice--you are not required to speak with anyone you don't want to unless it is within the formal framework of an Examination Before Trial or Deposition. In fact, only your own personal or your employer's attorney should tell you that you may not or should not speak with such a party's attorneys. If you have any questions about this, including whether material sought may be confidential; you should contact your own legal people.

You should remember that opposing attorneys, in doing their job, are seeking information to help assess the strengths and weaknesses of the case against their client, or information which may help their side, and to discredit the opposing side. If your testimony would be helpful to their client, the attorney will want it presented in court and take steps to enhance your stature and credibility. If your testimony is not helpful to their case, they will endeavor to minimize its impact which could include attempting to discredit you, your methodology, your education and experience, your abilities, your objectivity, and thus your testimony. If you chose to speak with an adversary's attorney do not be surprised if on cross examination you are asked such questions as "Didn't you tell me on the telephone that .....?"

Sometimes investigators working for such attorneys may call or visit you. If they are ethical, they should disclose for whom they are working. It is your personal choice whether you wish to speak with them or not.

A recent change in the law made any statement you make to anybody regarding a case is admissible in evidence on behalf of an opposing party. While every CPS worker must be truthful, you don't want any statement you make taken out of context. Also be aware of confidentiality laws. You are not free to discuss confidential information with persons not entitled to the information. While you can testify to statements made to you by a respondent

party, others can now testify to statements not only made by you inconsistent with CPS's position in court, but statements made by others by agents or employees within the scope of the relationship.

CPLR§ 4549. Admissibility of an opposing party's statement. A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by a person whom the opposing party authorized to make a statement on the subject or by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship

PREPARATION FOR TESTIFYING WITH ATTORNEY

You may want to prepare your testimony with your attorney. There is nothing illegal or immoral about this practice. However, you should not memorize your testimony. It will seem artificial and not spontaneous which is likely to diminish your credibility with the Judge who assesses the evidence. It is common for attorneys cross examining a witness to ask you if you discussed your testimony with anyone before you testified. Do not be afraid to answer the question honestly. Only a foolish attorney puts an important witness on the witness stand without preparation. Remember that you are going to be swearing to tell the truth!!.

It is not advisable to prepare your testimony with another witness who will also testify at the hearing. This will lead to the impression that you may be conforming your testimony to each other's account rather than drawing upon your own memory. This undermines your testimony.

THE COURT DAY

Dress appropriately for Court. Despite whatever idealistic view you may have about it being more important what is said rather than how you dress, judgments about people are influenced by their appearance and Judges are no exception. Ask yourself if your attire will help or hinder the case.

Do not chew gum. It will not enhance your stature as a witness, and you will feel like you are in the third grade when you are required to place the gum in a piece of paper and throw it out.

If under subpoena, bring it with you and check in with the court officer or the person who "calls the case" at the appropriate court room or "part". If you are an agency worker or have been specifically subpoenaed by an attorney, meet the attorney at the prearranged time and place. AGAIN, CONSULT WITH YOUR ATTORNEY FIRST.

If you will be testifying in court for the first time for your own attorney or a non-adverse attorney, you may want to inform them of that fact. Ordinarily, he or she will be more careful in preparing you and in explaining what to expect in the court room. If you are to testify in support of the attorney's position, he or she has an interest in your being the best witness

possible. It might a smart idea to ask to see the courtroom in advance of your testifying. Ideally, you may want to shadow another worker not only to see the courtroom but to check out an appearance and possible testimony.

Ask who will be in the courtroom and their role if you do not know. You may want to know something about the style and what to expect of other attorneys in the court room.

Try to prepare with your attorney if you haven't done so already. If you did so already, doing so again will not be harmful. Your attorney will be able to tell you the questions that s/he will likely ask on direct examination. This way you know what is coming and what you need to review and concentrate on. Your attorney can also tell you of the anticipated cross examination since family court attorneys who appear regularly know each other well. Same goes for the child's attorney.

Ask the attorney what to expect of the judge so you will not be surprised. A judge's style, manner, intelligence, and temperament can seriously influence your testimony. Most judges attempt to do their job as best they can under adverse, overcrowded, and overworked conditions. Their decisions on factual and legal issues affecting a child and family's future are critical. Therefore, it is not surprising if they get testy at times considering their awesome responsibilities. Most judges are caring, decent, intelligent, and hard working. Most possess common sense, attempt to treat everyone fairly, and have a good judicial temperament. However, some do not fit this mold. Nevertheless, judges have great responsibilities and powers, and you must be respectful at all times. Judges have the power to hold people in contempt of court for the willful failure to obey lawful court orders or to impose monetary "sanctions" for a variety of reasons. Any claimed misuse of judicial power or other inappropriate judicial conduct would have to be addressed on appeal to a higher court or by a complaint to the New York State Committee on Judicial Conduct. It is the judge's job to be fair and impartial and conduct hearings in conformity with the statutory and binding precedents from higher courts, regulations, rules and the US and State Constitutions.

Never attempt to communicate with the Judge who will hear the case outside the framework of the court proceeding It is improper, unethical, and most likely illegal.

Do not be surprised if the case is adjourned or settled at the last minute. Most Child Protective cases are resolved without a trial. (Not so much with Termination of Parental Rights cases unless settled with a conditional surrender or a promise of a suspended judgement.)

PERSONNEL IN THE COURT ROOM

Judge: **An elected judicial official (appointed by the Mayor in NYC) who decides the case and issues appropriate orders. Decides disputed issues of fact ("bench trial") and law. Rules on motions and controls conduct of those in court through threats of or the actual use of contempt powers, and sanctions. The Judge's powers are set forth in the law and in the NY State Constitution. The Family Court is a court of limited jurisdiction. For example, the Family Court cannot grant a divorce.**

Court Attorney(Law Assistant) for a Judge: **Often involved in settlement conferences, dealing with pretrial discovery, and scheduling court date issues. They might do legal research for their Judge and help write decisions.**

Court Attorney Referee: **An attorney who works with a Judge who might hear Permanency Hearings or Custody Cases. Parties must agree that the case may be heard by this individual. An aggrieved party may file objections with the Judge who may rule differently or affirm the decision of the Referee.**

Clerk of Court: Court official who performs the administrative functions relating to the court and its proceedings. There might be a clerk in the part or courtroom who prepares court order for the Judge to sign. Each court has a Chief Clerk. There will be a Clerk's Office and a record room.

Court Officers: They control the security in the courthouse and the court room. Ordinarily, they are in charge of getting personnel ready to come into the court room on a given case. They "call" the case, transport prisoners to and from court detention facilities, swear-in witnesses, and often carry exhibits about the court room when an attorney seeks to have such admitted into evidence. Each court has their own protocols.

Court Reporter: Since Family Court is a "court of record", the person makes the stenographic transcript of the record. The record is a necessity for an appeal. Today, many proceedings are mechanically recorded in lieu of being recorded by court reporters. The microphones you see are just to record voices, they will not amplify so you should speak up. A record of the proceeding would be called the "minutes". A transcription of the "minutes" can be ordered for the appeal or for other purposes.

Petitioner's Attorney: Represents the interests of the Petitioner before the court. Often the Attorney for the Commissioner of the Administration for Children's Services (or County Commissioner) is the petitioner's attorney on a child protective proceeding or a Termination of Parental Rights case. Many foster care agencies have their own attorneys on Permanency Hearing, TPR's or other proceedings.

Respondent(s) Attorney: Represents a respondent who is defending the case. If they are from the assigned counsel panel, they are often referred to as an "18 b" attorney since that is the section of the NY County law which authorizes the city or county to pay for the representation. They may be privately retained or from a Public Defender's office. When there are two or more respondents, and a public defender is representing one, another attorney may be assigned. Often this is called a "conflict" attorney meaning one attorney cannot represent both parties since there is a real or potential conflict of interests

Attorney for the Child(ren) (AFC) previously known as a "Law Guardian": A court assigned attorney who represents the independent legal interests of the subject child before the court. In New York City, the AFC most often will be from the Juvenile Rights Division of the Legal Aid Society or Lawyers For Children. Outside NYC, or if there is a conflict the AFC may be

assigned from the 18 B panel. Consistent with the child's capacities, the AFC will advocate for the child's wishes but may substitute judgment if the what the child wants is not in the child's best interests.

Attorney for a Non-Respondent Parent: A parent who is not named as a respondent has the right to participate in a case and may be assigned a lawyer if qualified.

Attorney for the Foster Parents: At certain proceedings, for example a Permanency Hearing or a TPR, a foster parent or has a right to appear and participate as a "party". Foster parents' rights kick in at certain proceedings and when they have the child in care for more than one year. However, foster parents do not have the right to participate at the fact-finding stage of a TPR. However, some judges may allow them to chime in.

Intervenors: Some relatives may seek to intervene on a proceeding. Additionally, some relatives or others suitable persons may file for temporary or final custody and/or guardianship of a child. Not everyone has this right. This person may or may not have "standing" to file or intervene.

Others:
Probation Department Representative: This Probation Department Liaison Officer is usually not involved with case unless the court has ordered the child protective agency to do a child protective investigation on a Juvenile Delinquency, Person in Need of Supervision, or another type case.

Frequently, other attorneys not involved with your case may be sitting in the court room waiting for their cases to be called or just hanging out.

The Family Court is open to the public. The general public may be excluded only if the judge presiding determines on a case-by-case basis that such exclusion is warranted in an individual case. This could be when a participant objects for cause. If you are a caseworker, despite the fact that the media may be present, you cannot speak with them about a case since child welfare confidential laws still apply. Reporters can be subject to restrictions imposed by the Judge or the law which may create some constitutional issues. Such rulings are subject to Appellate review.

TRIAL PROCEDURE

The case is called into courtroom by the Court Officer. Court Clerk, or bailiff.

Counsel, parties, and witnesses "note (their) appearances"(state name, agency, who they are representing, address if appropriate)

The Judge may inquire about the issues before the court including a possible settlement to avoid a trial. There may be a bench conference, or the attorneys and judge may retire to the robing room to discuss possible resolution of the case. This is why you must discuss possible settlement parameters with your attorney should there by a conference with the court.

ORDER OF THE TRIAL

Usually upon motion, every non-party witness is excluded from courtroom unless there is no objection to their remaining. (Caseworkers as agents for the Commissioner should be allowed to stay.) Under the Judge's own evidence guide, A court may not exclude from the courtroom: (a) a party in a civil trial and a defendant in a criminal trial, unless the party or defendant has waived or forfeited the right to be present; or

(c) a person whose presence is shown by a party to be essential to the presentation of the party's case. A caseworker is an agent of the commissioner. Court of Appeals precedent which holds that " 'a person whose presence is shown by a party to be essential to the presentation of the party's cause' " is generally exempt from the exclusion requirement. I take the position that a caseworker is essential in aiding the attorney before the court.

Sometimes other pretrial motions are made which the court will rule upon.

OPENING STATEMENT

This is a synopsis of what the petitioner, respondent(s), AFC intends to prove or refute at trial. It is not "evidence". It gives the trier of fact a general idea of what the case is all about. Since there is no jury in Family Court, opening statements are rare. (Often a Judge may want to speak to the lawyers outside of the court room to see if they can get a last-minute settlement, narrow issues, and assess what the evidence likely will be and how much time will be needed for the trial.)

PETITIONER'S DIRECT CASE

Witness # 1 is called to the witness stand.

Witness examination

Oath or affirmation administered. (in NYC often parties are sworn in after they note their appearance rather than right before they testify.)

Direct examination by petitioner's attorney.

Cross examination by respondent(s) attorney(s): If there are two respondents there will be two cross examinations.

AFC examination (usually like a cross exam)

Redirect examination by petitioner's attorney. (if appropriate)
(To clarify or challenge points made on cross examination))

Recross by respondent(s) attorney(s). (if appropriate)

AFC's Recross examination.

The Judge may ask questions at any time to clarify information or to explore new areas. Since the Judge is the person who decides the issues of fact, these questions are the probably the most important. Judges must be fair and impartial.

The witness may be used to "lay foundations" for documentary and/or physical evidence or to testify as a link in the "chain of possession" of an item.

The witness is excused unless stated otherwise. Often a caseworker is the first witness to be called and then they sit next to or near their attorney. As previously stated, if a Judge attempts to remove the caseworker from the courtroom, a vigorous argument should be made by your attorney saying that caseworkers are agents of the Commissioner party to the case. This would be contrary to the NYS Office of Court Administration's Evidence guide.

(2) A court may not exclude from the courtroom:
(a) a party in a civil trial and a defendant in a criminal trial unless the party or defendant has waived or forfeited the right to be present.
(b) when a party is not a natural person, an officer or employee of the party designated as its representative by its attorney; or
(c) a person whose presence is shown by a party to be essential to the presentation of the party's case.

<u>Witness # 2 is called to the stand</u>

The same procedures are used as to all witnesses.

<u>Other Evidence:</u>

Expert Testimony: While caseworkers are mostly "fact" witnesses and are restricted from venturing their subjective opinions, often expert witnesses are involved and will testify as to their opinions. Examples: Physicians, Mental Health Professionals, Educators, Child Development, Social Workers, Domestic Violence counselors, etc.
The court will rule on whether they will let a witness testify as an "expert". Lawyers may or may not contest whether a witness is an expert.

Documentary evidence

Physical evidence

Such evidence may be presented either through live testimony or "certification" of records which authenticates the exhibit without live testimony.

Judicial Notice of prior court findings.

Proof of relevant judicial decisions from other courts (criminal and/or civil).

When no further witnesses will be called, the petitioner tells the court he or she has no further direct case.

"PRIMA FACIE" CASE MOTION

The respondent may move to dismiss all or part of the petition based upon a failure to make out a *prima facie* case. There may be some arguments, the Judge may deny the motion which means the case continues or grant all or part of the motion. If the petition is dismissed the case is over and has been resolved in favor of the respondent. (Prima Facie: In both civil and criminal law, the term is used to denote that, upon initial examination, a legal claim has sufficient evidence to proceed to trial or judgment.)

RESPONDENT'S DIRECT CASE

Each respondent has the opportunity to present witnesses and other evidence in defense of the case. The same witness examination order prevails except now the respondent's counsel is asking non-leading questions on direct examination. Petitioner's counsel cross examines as does the AFC.

ATTORNEY FOR THE CHILD (AFC) MAY PRESENT A DIRECT CASE-(not often)

The AFC may wish to present his/her own direct case and the other attorneys will have the opportunity to cross examine such witnesses.

REBUTTAL CASE

The parties may be permitted to present other evidence in rebuttal with appropriate opportunity to challenge the testimony or evidence presented through recalling witnesses or presenting other evidence.

ALL SIDES REST

MOTIONS AT THE CLOSE OF THE ENTIRE CASE

CLOSING ARGUMENTS

An argument about what the evidence revealed or failed to reveal and the reasonable inferences to be drawn from the evidence. Usually, the respondent's attorney speaks first, then the AFC and then the petitioner. Often the AFC will articulate the child's wishes at the closing argument.

DECISION OF THE COURT (Fact Finding Hearing)

Often the Judge will render the decision immediately. Sometimes the Judge will "reserve decision" to review the evidence and render the decision at a later time.

The Judge renders the decision based upon the applicable standard of evidence which is Preponderance (or Clear and Convincing on a severe abuse case). This could include:

Sustaining the petition by making a fact-finding determination.

Dismissing the petition.

Dismissing some allegations and making a finding on some.

Making a lesser finding. (Neglect instead of abuse, abuse rather than severe abuse)

Dismissing allegations as to one respondent but "finding" as to another respondent.

Dismissing a neglect case based upon court intervention is no longer necessary (Rare)

Dismissing or sustaining petition as to an individual subject child who are named. The Judge usually sets forth on the record the basis for the decision.

If the court makes a finding, the court will rule as to continued status of the children taking into consideration factual findings made at the hearing.

Please note that once the court makes a finding, the standard for removal is no longer "imminent danger". Rather it is "there is a substantial probability that the final order of disposition will be an order of placement under FCA 1055. On the other hand, if a child previously was on removal status, the court may return a child if after hearing the evidence at the fact-finding hearing, the court no longer believes the child to be in imminent danger or the court is not likely to place the child at disposition

The court may then inquire if there exists a proposed disposition or the court may order pre-dispositional hearing reports ("I and R") and, if appropriate, Mental Health Studies of the respondent and/or children. The court then sets an adjourned date for a dispositional hearing which would likely be the previously selected "date certain "when children are in out of home care. The court may likely combine a dispositional hearing with a Permanency Hearing and/or a previously filed Custody or Guardianship petition.

If the Judge dismisses a child protective case where the children were previously on court ordered remand/placement and not in the care of the respondent, if the dismissal would have the effect of returning the child(ren), there is an automatic stay to the return until 5 p.m. the next court day unless waived in writing or in open court. This allows for a "Stay" application to be made to the appropriate Appellate Division on notice to all parties. For good cause, the Appellate Division can stay the court order returning the child until a further decision from that court. Decisions of the Family Court can be appealed by any party to the appropriate Appellate Division.

THE WITNESS ON THE STAND

Preliminary Matters

When it is your turn to testify, you will be called into the court room where you will be directed to the witness stand. You will be asked to raise your right hand and administered the oath where you will "swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth." You should look directly at the person swearing you or the judge and answer that you will. You will be directed to sit and direct examination will commence. You have an option to "affirm" to tell the truth rather than swear. Same thing. If you knowingly fail to tell the truth, you could be subject to a perjury prosecution, job loss, or possibly civil damages

Be aware that your credibility will be judged not only upon your words, but your sincerity and body language.

You may be nervous but remember that you are not on trial although at times you may feel you are when the court and attorneys question your judgments, conclusions, or your credibility. The court has a difficult job to do and to fully explore your position or testimony is part of the truth finding process.

Do not be influenced by the sometimes-apparent animosity between opposing counsel. Such in court behavior is usually zealous advocacy aimed at trying to impress the Judge or a client or to intimidate a witness. Often these same battling attorneys go to lunch together.

TIPS ON TESTIFYING

Preparation is key.

REREAD THE PETITION. (Especially at a Fact-Finding Hearing)
You can see where your likely testimony is relevant to prove certain allegations. Also, remember that the Judge must decide if the petition is sustained or dismissed based upon the evidence presented through testimony and exhibits. The petition is not as relevant at preliminary hearings where the issue usually involves temporary safety interventions (imminent danger, reasonable efforts, best interests) or post fact finding dispositional hearings dealing mainly with the best interests of the child and final court orders.

Prepare yourself by rereading your case record since most likely opposing counsel and the child's attorney have a redacted copy from which they are likely to ask questions.

Prepare with your supervisors clarifying your desired outcomes from the hearing and discuss possible acceptable settlements since often there will be last second negotiations.

Prepare with your attorney going over likely direct examination questions, anticipated cross examination questions, and Judge's questions and concerns. It is always a good idea to reread the petition to see where you may fit in and what evidence a Judge has to evaluate before making a decision.

A good direct examination will emphasize issues relating to:

WHO? WHAT? WHERE? WHEN? HOW? And WHY?

Always tell the truth.

You take an oath and perjury is a crime. If you do not wish to "swear" to tell the truth, indicate to the court that you wish to "affirm" instead. You want to earn a reputation as an honest, competent, and fair caseworker which will follow you on all your cases. You never want to be perceived as lazy and dishonest. Judges do talk to each other as to their experiences when you appear before them. These cases deal with highly sensitive and important issues, and we want to achieve that appropriate outcome consistent with child safety our case goals.

Listen to the question.

Answer honestly even if the answer is not helpful to your case. If court believes you are less than objective, your credibility may be irreparably harmed along with your case. Never filter out the positives.

Testify to what you know

Testify to what you know, and not necessarily to what you believe unless you are qualified as an expert in the area or the question calls for your belief or opinion (usually improper) and you wish to tell it to the court and nobody objects, or the objection is overruled.

Let the attorneys and Judge worry about the Rules of Evidence. Do not be surprised if a Judge does not strictly adhere to the technical rules of evidence.

If an "objection" is made, wait for a ruling before answering.

"Sustained" means do not answer the question.

"Overruled" means you may answer the question if you can.

If you believe a question is objectionable, you may want to wait before answering to see if an objection is made. If the objection is not made, or made and overruled, you will have to answer the question. Some questions are not objectionable although the answer may harm your position on a case. You cannot look to the attorney who called you for help. The judge is likely to notice, and it may harm your testimony or credibility.

If you are asked a question which you know calls for an answer which is inadmissible hearsay, if an objection is not made answer the question. If the answer is objectionable, counsel may "move to strike" the answer or bypass the objection if the issue is not important or the answer gives that attorney a strategic advantage by allowing exploration of an area where "the door has been opened".

Objections are often intentionally bypassed because:

The answer opens an area or issue for possible cross examination which may not have been ordinarily available, or

The answer is not likely to be harmful, or

The attorney chooses not to object too frequently so that when an objection is made, the judge is likely to give it greater consideration.

The attorney is happy the opposing attorney's questions are delving into an insignificant issue and a sustained objection may cause they attorney to examine more significant issues.

Sometimes objections are not made because the attorney may be inexperienced, intimidated by a controlling judge, or plain incompetent. Also, any answer to the question may not hurt the case. A judge may object to a question on their own to "protect the record" even if counsel does not object.

Many judges believe that since there is no jury, they are not likely to be swayed or prejudiced by improper evidence. This is principle of jurisprudence may be represented by the judicial ruling of, "I'll allow it."

Objections are made:

To preserve issues for appeal, and/or

To attempt to prevent improper evidence from being presented, and/or

To disrupt the examining attorney and/or the witness.

Ordinarily, you testify from your own memory as to what you observed, heard, touched, tasted, smelled, or did rather than what someone else told you orally or in writing unless you are at a preliminary hearing, or it is an exception to the hearsay rule.

It is a good idea to prepare a written factual summary for your own use on the witness stand indicating anticipated relevant information and/or where such information is in the case record. However, be aware that the other lawyers are permitted to examine anything you use on the stand.

Try to answer with the most important information first just in case your answer is cut off prematurely. Key information should stir the judge's interest. Often judges get tired and impatient and size up a witness within the first few minutes of testimony. The witness should get to main points quickly. If emphasis is on less important points, the court may believe you are wasting time, or your case may be weak.

It is important to be as accurate as possible. Do not speculate or guess at an answer.

Only answer the question asked, and do not volunteer information. However, give complete answers.

Paint word pictures especially on issues of space, distances, or time. If you are estimating, be sure to indicate that it is an estimate. For example, you may be asked about lighting conditions when you made an observation. Often defense counsel may question your sight on cross-examination to try to lessen your testimony. Consider the direct examination question about sight, lighting, etc. a preemptive strike at possible cross-examination questions.

If you do not remember something that you once knew, answer "I do not recall." However, if you answer this way too frequently, the court may believe you are being too coy or "stonewalling". This may harm your credibility.

If you have notes or a case record which will help refresh your recollection you should answer, "I do not recall but I do have notes or a case record which should help me remember." The attorney then asks permission if you can use such documents to "refresh your recollection". If the judge allows you to look at the document, you should do so and testify from memory. If your memory is not refreshed, your attorney may try to introduce the document as a "Past Recollection Recorded" or a Business/Agency/Medical record.(this is further detailed below)

If you do not know the answer, do not guess. Answer "I do not know."

If you do not understand a question answer, "Could you please repeat the question?" or "I do not understand the question." The judge may direct the attorney to rephrase the question.

If you missed part of the question, or you are not sure exactly what the question is, politely ask, "Could you please repeat the question?".

Think of the question before you answer.

If you are sure of an answer, do not hedge by beginning your responses with "I think" or "I believe". However, if you are not that sure of the answer, do not convey impression that you are sure.

If you are unable to answer "yes" or "no" say, "I cannot fairly answer that question "yes" or "no". " If the judge rules that you must give a "yes" or "no" answer, do so. If you can honestly answer the question either way, select the least favorable response which should force other

questions which will permit you to fully explain your response. Also, be aware that you should get the opportunity to explain further later upon redirect examination.

Be objective and straight forward with your answers to questions since it will likely enhance your credibility. Do not exaggerate since your credibility could be harmed and taint all of your testimony.

Correct any mistakes or misstatements immediately.

Judges and attorneys remember from case to case and your reputation as a honest caseworker or witness will follow you. That reputation often will be enough to sway a judge one way or another in the future. Also, Judges gossip among themselves as to your honesty and competence. Same goes for all attorneys. A positive reputation for honesty, fairness and competence is critical.

Stay calm and answer at your own pace. Do not let cross examining counsel "get on a roll".

If you are nervous, take a breath before answering a question.

Never argue with the attorney questioning you. It is more important to convince the judge to agree with your position than to win over opposing counsel.

Do not lose your temper or get into a clash of egos with an attorney, even if he/she is obnoxious and condescending. Remain professional and calm. Understand that the attorney must represent his or her client's position within the bounds of the law. The judge is charged with setting the appropriate parameters of the questions and the behavior of attorneys and witnesses appearing before them. Cases often become highly emotional since they involve difficult issues. Reasonable people differ as to what happened factually and what should be done in the future to attempt to improve or rehabilitate the family situation. Losing you temper will not enhance your credibility.

Never challenge the power of the court. Disrespect to the court could lead to a contempt of court
citation. This could include fines and/or imprisonment. Remember that you are playing in the lawyer's ballpark and, as such, you are at a disadvantage.

Do not joke around or give "wise ass" answers.

If a personal question is asked, hopefully your attorney will make an objection. Pause if your attorney is inattentive or sleeping. This may get his or her attention. If that fails, you may try asking the judge, (at the risk of getting him or her angry) "Is my personal life really relevant to the issues here?" Sometimes a judge may believe that your personal life, if relevant, is a fair area for cross examination. If the judge orders you to answer, you probably should. If you refuse to answer when ordered to do so, you risk being cited for "contempt" of court and you could be subject to fine or imprisonment.

Speak louder than you believe is necessary. Speak to the person farthest away in courtroom. Sometimes the positioning of the questioner will help you to aim your testimony in the right direction.

Other Issues

LEADING QUESTIONS

Your attorney, or the one who calls you to testify, cannot lead you on direct examination although leading questions are allowed for transitional purposes, preliminary or undisputed matter and for asking foundation questions for placing into evidence certain documents, records, photos, or things. They are also permitted if you are deemed or declared a "hostile witness".

Transitory questions take your testimony from one point to another. "After speaking with the respondent, did you have occasion to speak with child Mary?" or "I bring your attention to your visit to the Smith home on January 5th, 2020." Judges are often inconsistent in their rulings about leading questions. If you are asked a leading question by your attorney and the judge "sustains" the objection, no matter what the next question is, answer the first question. Usually, the attorney is attempting to have you testify as to an important element of the case. You must read the clues and rethink your previous response or lack thereof.

Of course, all of your answers must be truthful, and you should never let yourself be lead to answering untruthfully or so as to misrepresent a fact.

Often a good direct examination consists of the attorney asking repeatedly, "Tell us what happened next?". This way the witness is testifying in his/her own words, there is no issue about leading, and the emphasis is on the answers of the witness and not the question.

Most judges prefer question and answer testimony rather than a long narrative answer to a question.

Good cross-examining technique will consist of mostly leading questions. Smart attorneys want to control responses and do not want witnesses to explain their answers. The attorney would like to get the witness to agree with him or her on points which are helpful to their side of the case and may attempt to "put words into the mouth" of the witness through leading questions.

JUDGE'S QUESTIONS

Often the judge will ask questions to clarify or to bring out further information. These questions are most important in Family Court because the judge not only determines the law, but also makes the findings of fact. Since the case depends on persuading the judge to agree with one position over the other, your answer could be highly influential in the determination.

TELEPHONE CONVERSATIONS

A witness must ordinarily be able to identify a speaker's voice to be permitted to testify as to the substance of a telephone conversation. The knowledge of the voice can be based upon comparisons with the voice obtained after the conversation as well as before. Circumstantial evidence can be presented that the substance of the conversation would likely only be known to the alleged speaker.

TESTIFYING AS TO CONVERSATIONS

Use of quotes whenever necessary, especially on critical matters like the child's statements, parental explanations or admissions, and statements from physicians, other service providers or witnesses. It is also important to remember the question asked and the individual response.

After setting forth the time and place of the conversation, the usual question will be "What did you say to him and what did he say to you?"

STATEMENTS MADE TO PHYSICIANS FOR DIAGNOSIS AND TREATMENT

This is a recognized exception to the hearsay rule in New York While an out of court statement of a child is admissible in a child protective case, corroboration is needed. If the statement is made to a Physician for purposes of diagnosis, the statement may be admitted without the corroboration requirement. Therefore, it is important to try to learn the circumstances and context of the statement. This also may be relevant as to other statements which could be exceptions to the hearsay rule including "excited utterances" and Present Sense Impressions.

OBSERVATIONS OF SPEAKER'S EMOTIONAL STATE

Certain out of court statements may be admissible in evidence as an exception to the hearsay rule based upon the emotional circumstances of the statement. While out of court statements of children are admissible in evidence, they need corroboration in court. However, certain "Excited Utterances" may be admissible and be deemed credible evidence in court.

Excited Utterance

A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event is admissible, irrespective of whether the declarant is available as a witness, provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication. An out of court statement of a child is admissible as an exception to the hearsay rule but you will need some corroboration to get a finding of abuse or neglect. The excited utterance exception may obviate the need for corroboration.

USE OF NOTES ON THE WITNESS STAND

You can make a "crib" sheet concerning important information for use on the witness stand which other counsel have a right to see if and when you use it. You may use such sheets to

refresh recollection **but be aware of your judge's practice on the use of notes and refreshing recollection. Black letter law says one thing, but the judge may rule differently since they have wide discretion concerning the conduct of the trial.**

TESTIFYING FROM MEMORY and the
USE OF A WRITING OR SOMETHING TO REFRESH RECOLLECTION

You ordinarily testify to your own observations and recollections of an event. You ordinarily must testify from memory although you may ask permission to refresh your recollection if you do not recall something specifically. If the judge grants you the permission you need, you should look at whatever you are using (notes, case record, etc.), put them away and then testify from memory. The item that is used is not evidence but merely something which triggers the memory. However, if there are concerns that your memory is not refreshed but you are merely reciting what is on the paper, a judge can order the testimony stricken. Also, as previously stated, anything that is used to "refresh recollection" can be examined by the other attorneys for use on cross examination to test whether the witness really had an independent recollection of the evidence presented. No one expects you to memorize phone numbers, addresses, detailed and complicated materials. Each judge has their own protocol as to this issue. It is better to be accurate in your testimony by using your notes or case record than engaging in some memory game with the court. However, if you need to refresh your recollection as to everything, or refresh your recollection as to major issues on the case, it may diminish the credibility of your testimony.

PAST RECOLLECTION RECORDED

If your memory is not refreshed despite attempting to refresh your recollection from some document you made nearly contemporaneously with the act, transaction, of event observed, the document may be entered into evidence if the attorney persuades the judge that it meets the test of a past recollection recorded. Alternatively, placing the underlying case record into evidence if that was the document used to refresh recollection may resolve the problem. However, the major difference is that in past recollection recorded, the witness made the recording or caused it to be made from personal knowledge whereas the case record and business record hearsay exception is broader.

EXPERT WITNESSES, in brief.

Most witnesses are "fact" witnesses meaning they ordinarily do not render opinion testimony. However, an expert may testify as to their opinions within their area of expertise. However, before the purported expert can testify, the judge must be convinced that this person possesses the knowledge, skill, experience, training and education to qualify as an expert on the subject at hand. In addition, the subject must be within a legally recognized discipline. (For example, polygraphs are not admissible in court although they are often used in corporate and law enforcement settings) An expert witness should ordinarily not have a partisan position since the

testimony is offered to allow the court to take into consideration specialized "opinions" arrived at scientifically or through appropriate methodology, to help the court to determine issues before the court. In fact, any bias, or hostility, or "advocacy" position for one side could be viewed by the trier of fact as less than objective and, therefore, less trustworthy.

Rarely will the Family Court allow a case worker to testify as an expert. Although a caseworker may gather information from many sources to make the required assessments, much of this information will be inadmissible hearsay at a fact finding hearing. An expert is permitted to rely upon information supplied by others in formulating an opinion which can be stated in court. However, that outside information would not be admissible for the truth unless it would come into evidence under another exception to the hearsay rule.

Conclusion

Since Family Court is a court of record, your testimony is part of the record so don't be surprised if you are asked questions which might have be previously asked at other hearings about your experience, and what you observed or learned. The Judge must make his/her decision based upon the legally admissible evidence in the record.

Attorneys must gather and present evidence in support of a client's position on a case. It is the hope that the evidence presented, the arguments made, and the resulting inferences drawn will persuade the Family Court judge to decide a case fairly and in the best interests of the child. The testimony of a carefully prepared and conscientious witness is important to achieve the desired and just result mandated by public policy and the law.

Revised: January 21, 2025

Real World Court Appearances

Gene D Skarin, Attorney

Always check in with your attorney about what is likely to occur in court today Will it be a hearing or just exchanging information with the court ?

Court's Attitude You May Encounter

Judges have grave responsibilities as do caseworkers. Their decisions likely will impact families and children. Some Judges grant lots of leeway to respondents and their attorneys since for the most part they are the ones on trial and have a major stake in the court's outcome. Often, they will show more impatience with DSS than they do with respondents. Often the Judge may express displeasure with DSS's (ACS's) performance. Some criticisms are fair, and some are not. The burden of proof is on the government child protective services. Respondents may be disadvantaged and poor, lacking the resources to best defend a case brought by the government. The court will want to assure that the case has merit before issuing and order. Make sure that you diligently follow court orders and communicate with your attorney of any problems with compliance.

Respect the fact that attorneys for the respondent(s) and the child(ren) have a duty to represent their clients within the bounds of the law. Same goes for your county's attorney as well as the child's attorney.

Your Physical Appearance

Please dress professionally. If you were going to a job interview, how would you dress?

Your demeanor is confident, respectful, and understanding of the seriousness of the issues to be discussed and decided.

More about Your Demeanor: (It is more than just your words)

How you carry yourself, your behavior, your bearing, your manner and appearance as a witness- in short, your 'demeanor'- is a part of the evidence. The words used are by no means all that the court relies on in deciding about the veracity of your testimony. The Judge takes into consideration a whole nexus of sense impressions which they get from a witness. This not only includes how you appear and testify on the witness stand but how you appear

in court even sitting by your attorney and listening to the proceedings. Never shake your head. make a face or do an eye-roll in response to what is happening in court.

What actually happens in the courtroom?

The case will be called by a court officer or bailiff: Example: "All parties on the Jones case, please step into the courtroom."

When you are asked to "note your appearance".

Normally all attorneys state their names, addresses and then others. (You ONLY give your title and office address.)

When it comes to be your turn:

You give your name, title, agency, and acknowledge the judge. ("Good morning, your honor".)

If the case not going forward for any number of reasons.

Often a case is not ready to go forward on a given day. If the case can be adjourned prior to the court date, great. An attorney can be unavailable due to sickness, another case, an emergency, etc. Same goes for necessary witnesses. The Judge may not be available to hear a case. Make sure the court factors in your availability in setting an adjourned date.

If respondent does not appear, what do you know about that.
Any previous contacts to share with the court?
If the children are at home, is the parent complying with court orders?
If the child is in care, how are the visits going?
Did you try to confirm with the respondent the court date.
Have you checked out possible relatives as potential childcare resources.

THE APPLICATION OF THE RULES OF EVIDENCE WHEN A CASEWORKER TESTIFIES.

Assuming this is a fact-finding hearing where the standard is material, relevant and competent meaning hearsay is not allowed unless such evidence is a exception to the hearsay rule.

ADMISSIONS OR STATEMENTS OF THE RESPONDENT

If the parent is a respondent and if he or she speaks to you about a matter, whatever this respondent says to you may be testified to in court by you or the person that heard it. This is similar to a "confession" in criminal law, whereby someone admits to matters implicating himself in criminal conduct. So far, a caseworker does not have to give "Miranda" warnings to persons subject to an investigation or advise them that anything they say may be used against them, etc. Therefore, if the mother tells you that she lost control and burned the child's hand when she found the child playing with matches, you can testify in court to this "admission". However, if the mother's friend tells you that the mother told her that she burned the child's hand, at a fact-finding hearing this would be inadmissible "hearsay". In order to be able to use this statement at a fact-finding hearing as opposed to any other hearing (1027, 1028, dispositional, etc.), the mother's friend who heard this statement would have to be called as a witness subject to cross examination.

Example of Questioning by the Petitioner's Attorney:

Q. Mr. Caseworker, as part of your investigation of the allegations contained in the "Report of Suspected Child Abuse or Maltreatment", did you have occasion to speak with Ms. Subject about the allegations?

A. Yes.

Q. When did you speak with her?

A: On March 6, 2024, at 9:30 a.m.

Q. Where did this conversation take place?

A. At my office at 150 Main St, Schelpville, NY

Q. What did you say to her and what did she say to you?

A. I asked her, "how did your child, Mary, get the 2nd and 3rd degree burns to her left hand"? She said that "Mary was playing with matches and I told her before over and over again not to play with matches so I took her hand and put it over the burner on the stove to show her what could happen if she plays with matches. I don't want her

to burn down the place". She also said, “I was sorry I did it but Mary just won't listen." (Use quotes whenever feasible)

OUT OF COURT STATEMENTS OF THE CHILD

This rule of evidence is unique to the child protective proceeding. The law states that "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect". This means that when you question a child about injuries (or his or her treatment), and the child gives you answers, you can testify in court to those answers even though the statement would otherwise clearly be inadmissible hearsay. However, some corroboration of the child's statement is needed in order to prove the case. Exactly what constitutes "corroboration" (other evidence tending to prove the same facts), hasn't been fully clarified by the higher courts. [Note: Certain other "hearsay" is admissible as an "exception" to the hearsay rule; and the courts spend much of their time trying to interpret this rule.] In sum, if the child tells you, for example, that she was injured when her mother put her hand over the stove after she was playing with matches, you can testify in court to this statement.

Example:

Q. Did you have occasion to speak with the child Mary about her left hand?

(Who, what, where, when, why, how questions?)

Q. What did you say to the child and what did the child say to you?

A. I asked her "what happened to your hand?" Mary told me, "My mother burned me when I was playing with matches."

Q. What else did you say to her?

A. I asked her when and where it happened? She told me it happened last Tuesday in the kitchen.

DERIVATIVE ABUSE OR NEGLECT

Assume that a parent has 4 children, ages 1, 2, 3, and 4, and the 3-year-old is brought to a hospital in an abused condition which apparently was sustained while in the care and custody of the mother. Your investigation reveals that the other children are in perfect health and do not appear to have been directly abused or neglected themselves. Can you or the court act regarding these other children?

Clearly, the answer is "YES". The fact that child number 3 was injured is reflective of the mother's fitness or unfitness; and the court must determine not only whether abuse or neglect exists, but whether in the future it is likely to exist. This can also be called "anticipatory abuse or neglect", a concept which is unique to this area of law.

The law states that "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of the (respondent)". This is admissible as some evidence.

There may not necessarily be an automatic finding on the remaining children, but the court is free to give whatever weight it desires to the abuse or neglect of the target child and the danger, if any, posed to the remaining children. Not only is this principle in the statutory law, but it is reflected in the court-made case law.

PRIOR CONDUCT TOWARDS A CHILD

The fact that a child has been previously injured under suspicious circumstances may be relevant as to whether the present complaint of child abuse is true. Evidence of the parent's prior conduct toward the child is admissible to demonstrate that the injuries were not accidental or the result of innocent or justifiable conduct.

For example, if at 6 months of age the child has several bruises or marks on him and the parent states that there was an accident, a later parental explanation that injuries to the child at 10 months of age were also accidental may allow the judge to draw an inference that the child's injuries are by other than accidental means.
This principle is recognized in this area of the law by the highest court in New York State. (If your lawyer doubts you, the case is People v Henson) Courts have recognized that this type of evidence is highly relevant since these injuries are sustained behind closed doors with no available witnesses willing or capable to come forward.

RES IPSA LOQUITUR

This is a legal term meaning the "thing speaks for itself". If you are walking by a construction site run by the XYZ Company, and you are hit on the head with a hammer apparently dropped from an upper floor, you can sue the construction company for your damages although you do not know specifically who may have injured you. The theory is that the XYZ Company was in control of the hammer, and they had to be negligent in causing it to drop and hit you in the head. This concept has been borrowed by the child protective field and is incorporated in the Family Court Act.

Therefore, if at the relevant time, the child sustained injuries or was in such a condition as would ordinarily not be sustained or exist except by the conduct of the parents, it shall be "prima facie" (on its face--without hearing the other side) evidence of child abuse or neglect. The parent is then given the opportunity to explain or refute this evidence.

The actual law reads: "Proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person legally responsible for the care of such child shall be prima facie evidence of child abuse or neglect, of the parent or other person legally responsible". This is similar to the term "Battered Child Syndrome" which is an accepted medical diagnosis recognized by courts. The key element here is that it is <u>not</u> an opinion by the doctor (or other "qualified" expert) as to whether any particular person has done anything. Rather, it simply indicates that a child of tender years who is found with a certain type of injury or injuries has not sustained those injuries by accidental means. This, coupled with the fact that the child was injured while in the care and custody of the parents, can permit the court to infer not only that the child's injuries were not accidental, but that they occurred at the culpable hands of the parents.

<u>EXCITED UTTERANCES (OR SPONTANEOUS DECLARATIONS)</u>

This is an "exception" to the hearsay rule whereby a statement is made by someone describing a startling event or condition while that person is under the stress or excitement caused by the event or condition. The courts consider the statement reliable because the remark is made in reaction to the stress of the excitement, without time to reflect, fabricate or embellish.

The court test is whether the declarant was so influenced by the excitement and shock or event that it is probable he or she spoke impulsively and without reflection rather than with deliberation. The courts reason that such statements contain a high

degree of trustworthiness and express the real tenor of the declarant's belief as to the facts just observed by him. The statement may then be received in evidence as testimony to those facts. It is for the trial judge to apply the test. The statement can be made by someone who is not a party, and who does not take the stand.

As a caseworker, if you hear statements made which were induced by the stressful situation, it is likely that you will be able to testify as to what you heard. If a child tells you something under stress and the event has just transpired, and if the child has personal knowledge of the underlying facts, you can probably testify to it even if the child later recants what is stated. Additionally, the statement should come into evidence not merely as a "prior statement made by the child" which requires corroboration, but as an "excited utterance".
A possible example of such a statement: "Daddy just threw the baby out the window!"

OFFICIAL CASE RECORDS OR OTHER HOSPITAL OR AGENCY RECORDS

Records kept in the "regular course of business" are also admissible in evidence as exceptions to the hearsay rule. This does not mean that whatever is written in the case record becomes "proof" of whatever it refers to. Whether or not certain entries are admissible as "proof" is up to the court. The application of the rule is too complicated to deal with here. Suffice it to say that the entries you make in the case records should be made at the time of, or shortly thereafter, the acts, transactions, occurrences, or events which are noted therein. Your entries should be specific so as to answer the "who, what, where, when, how, why" questions.

When you testify, if you cannot remember at times, specific details, the court may allow you to use portions of the record (or any other writing) to "refresh your recollection". If your recollection is not refreshed, then it is possible that the paper itself may be admissible in evidence as a "past recollection recorded" if it meets certain tests. However, a "business record" is not necessarily a "past recollection recorded".

Now that I have thoroughly confused you, it is important to remember that you often will be testifying to matters contained within a case record which may have taken place months or years ago. If a prior caseworker had the case, and made the appropriate entries, the fact that this person is not testifying in open court subject to cross examination will not affect the admissibility into evidence of the "business record". However, the court is free to give this evidence as much or as little weight

as it deems appropriate. Similarly, your own entries may be relevant proof in a court case long after you are gone from the agency. That is why it is essential case records be kept properly and in accordance with relevant laws, regulations, policies and procedures.

Example:

Q. Are you the caseworker presently assigned to the Smith case?

A. Yes

Q. Did your agency keep a case record on this case?

A. Yes

Q. Do you have it with you?

A. Yes

I ask that this item be marked petitioner's Number "1" for identification. (The court reporter writes "Petitioner's '1' for ID" on the exhibit or affixes a label.)

Q. I show you what has been marked as petitioner's number "1" for identification? Please tell the court what that is?

A. It is the DSS/ (ACS) case record regarding the Smith family

Q. Is this record kept in the regular course of business at your agency?

A. Yes

Q. Is it the regular course of business to keep such records?

A. Yes.

Q. Are the entries made in such records made at or around the time of the acts, transactions, occurrences, or events, which are noted therein?

A. Yes.

Q. I offer this record into evidence as a record which has been kept in the regular course of business....

(Any objections to the record, or part of the record would be raised here. (If questions are asked of you here this is called a "voir dire" which is a mini hearing on whether the record may be admitted) Depending on the type of hearing, portions of the record may not be admissible under the rules of evidence.)

Reports of Suspected Child Abuse or Maltreatment From Mandated Reporters

Any report which has been filed with the State Central Register by a mandated reporter is admissible into evidence during a child protective proceeding. Of course. if a report was previously "unfounded" such a report will not be admissible since it should have been expunged. (or "sealed" after February 12, 1996) Courts differ on what evidentiary weight should be afforded such reports. The safest way to view the report is as a trigger to the child protective investigation. Most testimony should reflect evidence uncovered during the investigation.

Example: (report can be marked Petitioner's number ___ for identification)

Q. Are you the ACS caseworker on the Smith case?

A. Yes

Q. How did your agency become aware of this case?

A. CPS (ACS) received a Report of Suspected Child Abuse or Maltreatment (now called an Intake Report in the Connections system) from the New York State Central Register.

Q. I ask that the witness be shown what has been marked Petitioner's _1 for identification, Please tell the court what that is.

A. It is the Report of Suspected Child Abuse or Maltreatment my agency received from the SCR filed by Police Office Jones of the 19th Precinct.

DLS Attorney: I offer this document into evidence. (There may be issues about whether the report is indicated or unfounded, or since the document is clearly hearsay, just what weight should be afforded the substance of the assertions made in the document).

Privileged Communications waived under FCA §1046(a)(vii).

Doctor/Patient, Husband/Wife (now should be within a marriage relationship), Social worker/Client, Psychologist/Client, Rape Crisis Counselor/ Client)

Q. After receiving the Report of Suspected Child Abuse or Maltreatment, did you undertake an investigation of the allegations?

A. Yes

Q. Who did you contact?

A. I spoke to the source of the report Dr. McHugh from Pediatrics from Bellevue Hospital when I visited child Mary at the hospital? (Preliminary hearings only: otherwise, the content of what the Dr. said would be inadmissible hearsay)

Q. When did you visit the child?

A. At about 10 a.m. on March 4, 2024

Q. When did you speak with Dr. McHugh?

A. About 10:30 in the morning on March 4, 2024.

Q. What did you say to Dr. McHugh and what did she say to you?

A. I asked her what was her diagnosis of child Mary? She told me that Mary has 2nd and 3rd degree burns to her left hand in addition to a red mark consistent with an adult hand print across the left side of the child's face.

Q. Did you ask her if she had an opinion on how a child were to get such a mark?

A. Yes, she told me that the mark was consistent with external trauma caused by a slap since she could see the outline of the palm of the hand and fingers on the child's face.

(To reiterate: This would not be admissible at a fact-finding hearing through the testimony of the caseworker since it is inadmissible hearsay and there may be issues relating to the qualifications of the Doctor to render such and opinion which the court would have to rule upon. However, this is typical testimony at a 1027 or 1028 Preliminary hearing.)

Parental Use of Drugs

Proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug, or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program. P**rovided however, the sole fact that an individual consumes cannabis, without a separate finding that the child's physical mental or emotional condition was impaired or is in imminent danger of becoming impaired established by a fair preponderance of the evidence shall not be sufficient to establish prima facie evidence of neglect**; and

Note: If you find the above statement to be incomprehensible and unreadable, it is word for word from the Family Court Act. If a person is in a program, I would argue that they must be successfully participating in a program. If the use of cannabis has or is impacting on a parent's ability to care, it likely is a case. The tricky part always is the "risk of" cases.

YOUR OWN OBSERVATIONS AND REFRESHING RECOLLECTION

A witness can ordinarily testify as to the observations they made.

Q. Did you have occasion to make a home visit during early December 2024.

A. Yes

Q. When

WHAT IF THE WITNESS DOES NOT REMEMBER CERTAIN

INFORMATION?

A. I don't remember the specific date, but it is noted in my case record?

Q. Your honor, may the witness REFRESH HER(HIS) RECOLLECTION?

A. Judge: Yes, (if he does not recall the specific date...of course, counsel may see anything which the witness uses...)

A. It was on December 5, 2024, at about 11 a.m.

Q. What, if anything, did you observe at that time?

A. I observed that Ms. Subject's household had soiled diapers on the living room floor; there were broken glass bottles on the kitchen table; cockroaches were crawling on the baby; the apartment had no heat, and the windows were wide open and there were no window guards. Additionally, I observed about 14 empty beer cans on the kitchen floor. When I spoke with Ms. Subject, she smelled of alcohol and when she tried to sit down, she fell off the chair and hit her head on a table.

Q. What, if anything, did you do then?

A. After seeing that she did not appear to be hurt, I told Ms. Subject that I believe she needs help with her apparent excessive use of alcohol, and I offered to get her immediate medical care. Additionally, I offered to help get her enrolled in an alcohol treatment program.

CAVEAT: this should not happen on direct examination if you were adequately prepared by your attorney. You should have been told the questions that will be asked on direct examination so nothing should be a surprise. Of course, things don't always go as planned.

WHAT IF YOUR MEMORY IS NOT REFRESHED?
YOUR ATTORNEY MAY SEEK TO PRESENT DOCUMENTARY EVIDENCE AS A PAST RECOLLECTION RECORDED.

Q: So you say that you don't remember the event? When you made the observations or had the conversations, do you document the results?

A: Yes, the next day I enter the information into the record.

Q: Do you have those entries with you now?

A. Your honor, I offer these entries as a past recollection recorded. (Of course, if it was a DSS record it likely could also come into as a business record with the proper foundation)

The rule: A memorandum or record made or adopted by a witness concerning a matter about which that witness had knowledge, but about which the witness lacks sufficient present recollection to enable the witness to testify fully and accurately, even after reading the memorandum or record, is admissible, provided:
(a) the memorandum or record was made or adopted by the witness when the matter was fresh in the witness's memory and
(b) the witness testifies that the memorandum or record correctly represented the witness's knowledge and recollection when made.

PHOTOGRAPHS

Assuming the caseworker saw the visible trauma of the 2nd and 3rd degree burns to the child's left hand.

The attorney asks that the item (photo) be marked for identification if it has not been pre marked.

Q. I show you what has been marked as Petitioner's 2 for Identification. Can you tell the court what that is?

A. Is it a photograph of Mary's left hand as I observed it on December 9, 2024 at Bellevue Hospital around 2 p.m.

Q. Is this photo a fair and accurate representation of the child's hand as you saw it on December 9, 2024?

A. Yes.

DLS Attorney: I offer this photograph marked Petitioner's Number 2 for Identification into evidence?

Judge: Have you shown it to respondent's counsel and the Attorney for the Child?

DLS Attorney: Yes

AFC: I have no objection.

Respondent's Attorney: I have seen it. May I conduct a Voir Dire?

Judge: Yes, etc.

What do we want from the court in the way of court orders?

Are you prepared to discuss settlements even in the middle of the trial?
What if the Judge is pushing a ACD?

Have you discussed this with your supervisor?

Setting an adjourned date

Which days are you good for and what days are not.