

# Testifying in Court Cases Where Abuse is Alleged

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Professionals who work with children and adolescents quickly discover that child abuse is a common cause of dysfunction in children. These professionals readily accept that becoming familiar with the symptoms and treatment of child abuse is necessary to be a competent child therapist. In recent years it has become clear that a working knowledge of the ground rules for interacting with the legal system is also a critical dimension for health care professionals working in this area.

## **Preliminary Observations:**

It is probably fair to say that most health professionals would prefer to stay as far away as possible from legal proceedings regarding their cases. This is hardly surprising given the fact that the legal dialog seems designed to confuse, the parties are often hostile or emotional, and the proceedings themselves are unfamiliar and confrontational. Add to that the fact that the legal system often appears to have precious little concern for the time and inconvenience of necessary witnesses. All things considered, legal proceedings are not the kinds of affairs to which one could be expected to seek an invitation!

The purpose of this article is not to convince that you should relish such opportunities, but rather to make the terms and proceeding a little less intimidating and, hopefully, to encourage additional efforts to educate yourself regarding the rules and procedures in your particular jurisdiction.

Child abuse allegations may arise from a multitude of situations, and surface in a variety of legal proceedings. For example they may first come to light in the course of counseling sessions with children experiencing emotional difficulties, medical examinations, and child custody proceedings related to divorces or separations, or a myriad other ways. Child abuse allegations may become the subject of criminal investigations and prosecutions, civil suits for recovery of damages, and/or domestic relations proceedings.

Frequently, parties to these actions, usually acting through their attorneys, will decide that

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information, testimony or records of a health professional would be useful to resolution of the case. In this situation there are strong and, in many cases, valid, competing interests which must be weighed to determine **whether** such information is properly disclosable at all, if so, **what kinds** of information are properly disclosable, **to whom** it should be provided, and **when** it is appropriate to do so.

Every state and the federal courts have statutes and court-issued rules of procedure which govern the process of making requests for information from parties and potential witnesses, and the general categories of such information which are available ("discoverable"). However, these rules often are not the full story. The rules of "privilege", (including the doctor/patient and therapist/client privileges) in a particular jurisdiction are not in all cases reduced to statute or regulation. These privileges have their foundation in principles drawn from the English "common law" which form the basis of much of our state law, but are often modified by state statute. These rules and statutes are interpreted and refined by scores of court decisions in each jurisdiction. This court-made law is just as binding as the statutes and court rules, but much harder for a layman, and sometimes even lawyers, to know and apply to a particular case. This circumstance, coupled with the adversarial nature of our court system, explains, in part, why the rules often seem so elusive and unclear.

Despite this, in every state and in federal court, the court rules provide that the parties to the legal proceedings, through their attorneys, are expected to conduct much of the pre-trial discovery of information with a minimum of court supervision. The court is generally becomes involved only when there is a dispute between the parties as to the allowable scope of discovery, or if a non-party resists the requested disclosure.

There are four primary factors which control the type and degree of disclosure which may be required by a health care professional: (1) the type of legal proceeding (i.e., criminal, civil); (2) the parties to the proceeding (that is, who has filed the suit and who is being sued or prosecuted) (3) the stage of the proceeding, and (4) the relationship between the parties, and between the parties and the witnesses. Each of these is briefly addressed below.

**The Nature of the Proceeding.** Legal proceeding may broadly divided into two major categories: criminal and civil. In criminal cases, some governmental entity, (county, state or federal government) is seeking to charge an individual with violation of a criminal statute. Criminal matters generally will be titled ("styled" in legal terminology) as: "State of Maryland vs. Johnny Jones", or "Commonwealth v. Baker".

Civil matters, on the other hand, are generally disputes between two or more private parties, in which one party (the plaintiff) seeks money damages or a court order to compel or to protect against some action by the other party (the defendant). Titles of civil matters will normally have the names of the two private parties, e.g., Debbie Delong v. Henry Delong, or if a minor is a party, "Julie Jones, a *minor*, by her next friend, Sandy Shallot v. Damon Kalot". Juvenile or domestic relations proceeding may be styled "In the Matter of Susan X" or similar terminology.

If you receive a document related to a legal proceeding, it should have the names of the parties and the name of the court in which the proceeding is pending. The name of the court may or may not helpful in identifying the type of case, as many state trial courts handle both civil and

criminal matters, and even juvenile and domestic relations cases.

As a general rule, the scope of pretrial discovery in civil matters is extremely broad. Virtually all information which is logically relevant to the issues in the case, and does not fall within an established privilege, may be reached by pretrial discovery requests. Even evidence or information that would not be admissible at trial because of evidentiary rule may be discoverable -- if it may **lead to the discovery** of admissible evidence. On the other hand, in civil cases the privileges available to protect information from disclosure, such as the doctor-patient and therapist-client privileges, tend to be interpreted more broadly than in criminal matters (that is, more information is protected).

In criminal prosecutions the types of information which must be disclosed to the defendant prior to trial, (discovery), is much more restricted. In most state courts and the federal courts, a criminal defendant may be entitled only to his/her own previous statements, physical evidence, and scientific tests in the hands of the prosecution. However, because of the constitutional requirement that a criminal defendant be confronted with all witnesses against him, the doctor-patient and therapist-client privilege is generally **not recognized** in criminal matters. If your contact with an attorney is in person or by phone, that should be the first question you ask: "What type of proceeding is this?" (Civil, criminal domestic relations, juvenile or family court).

**Parties to the Proceeding** It is important to understand the relationships between the "parties" to the suit or case. That is, in a civil matter, the person who is bringing the suit (the plaintiff) and the person being sued (the defendant); or in the case of a criminal matter, the person being charged (also called the defendant). The relationship between these parties and the existence of a professional relationship with any of them is often critical to determining the right of a particular person to disclosure of information from the doctor, psychologist or therapist.

For example, if you have been retained by a county agency or the prosecutor's office to conduct a physical or mental examination of a child, the normal doctor/psychologist/therapist-patient relationship is generally not formed, or if it exists, it does so subject to a number of limitations. In such circumstances, the privilege to withhold information regarding diagnosis normally does not exist; therefore, both parties to the proceeding may be able to gain access to your testimony and reports. On the other extreme, if you have been seeing a particular child for treatment on a private basis and now one party to divorce or child custody proceedings seeks to force disclosure or testimony, the privilege may well protect much of that relationship.

The scope of pre-trial discovery in civil matters **between parties** to the actions is generally much broader than it is with regard to **third parties** (anyone not a plaintiff or defendant), including potential witnesses. In all jurisdictions detailed written questions, called "interrogatories", may be directed to an adverse (the opposing) party, as well as requests for production of documents, admissions of particular facts, as well as depositions (out of court oral examination under oath, discussed below).

Therefore, when you are first contacted or receive a letter or subpoena you should carefully inquire or note the identities of the parties to the proceeding and their relationship to each other, if that is not apparent. If you are contacted by an attorney for a party, you should ask him/her to explain fully the nature of the proceeding and the parties -- none of that is confidential and this information is a matter of record in the proceeding.

**The Stage of the Proceeding.** The next factor which is important in deciding upon an appropriate response is the stage of the proceeding. If your testimony or documents are being sought at trial, then the matter is clearly subject to the direct supervision of a judge. However, as noted above, before the case comes to trial in both criminal and civil cases there is a period set aside for pretrial discovery, to allow the parties to learn some of the factual details of the adverse party's case. This done in order to avoid surprise at trial, which has the potential for either causing unfairness or causing delay during trial (to allow the surprised party time to prepare to respond). Discovery also useful to narrow the issues which are actually in dispute prior to trial.

Again, in civil matters pretrial discovery is both more extensive and more varied. Generally a civil defendant may not only request information and documents in the hands of the other party, but also, without court approval, subject non-party witnesses to oral examination under oath, referred to as a "deposition". In some jurisdictions, requests for documents may be directed to a non-party, but this is rare.

**Informal Requests for Interviews.** A request to submit to an interview or to provide other information may come in the form of a personal or telephone request from an attorney for the prosecutor's office, from counsel for criminal defendant or either party in a civil matter. You should be aware that you under no legal compulsion to talk to such individuals. If you decide to do so, you should be particularly careful that your client or the client's legal representative has consented to any disclosures and it would violate no professional ethical standards to do so, and that your client or his/her legal representative has consented if necessary. This is not to suggest that it is never appropriate to accede to such an informal request, but only that you should first consider the interests of your client and seek legal advice if you have any uncertainty regarding the propriety of the disclosure. You should be aware that if the attorney seeking to interview you is representing a criminal defendant, it would be unethical for the prosecuting attorney to instruct or request you not to speak with the defendant's attorney (although in most cases the prosecutor would almost certainly prefer you decline such a request).

Never talk to an attorney over the phone about the details of your treatment unless you are absolutely sure of his/her identity, and of whom he/she represents. Otherwise, you might inadvertently disclose privileged or confidential information. In addition to informal requests, parties may seek your information or documents by the established pretrial discovery procedures.

**Deposition Subpoenas.** As noted previously, much of pretrial discovery is intended to take place according to the procedural rules of the court and between the party's attorneys, without court supervision. Therefore it is standard practice for an attorney to issue a subpoena to a potential witness requesting him/her to appear and/or to produce documents and records at a deposition (referred to as a "subpoena duces tecum") without approval by any judicial officer. In many jurisdictions, these subpoenas are issued *in blank* by the clerk of the court, for the attorney to fill in the name of the witness and any documents sought by the subpoena. Therefore, the scope such a deposition subpoena or subpoena duces tecum is only limited by the imagination and, hopefully, the ethics, of the issuing attorney. Invariably, such subpoenas contain printed warnings stating that failure to respond as ordered will result in severe penalties and will put the non-responding witness at risk of being held in contempt of court.

Do not produce treatment notes or anything protected by privacy laws without first checking on the laws of your state and your professional ethics. Be especially careful about releasing any notes of group, family or marriage counseling without the permission of all parties, since this may be prohibited in your state. Although such subpoenas must, in fact, be responded to in some manner, and strictly within the stated time-frame, it is quite proper for a witness, usually through legal counsel, to request the court to modify or cancel ("quash" in legal jargon) such a subpoena. This is appropriate if it is seeking information protected by legal or ethical privileges or if it is over broad or burdensome (by requesting more records or information than is necessary). Prior to producing information requested by subpoena, ask for legal advice from your personal attorney, or discuss the matter with the attorney representing the child or the attorney representing the state or county. If you believe that complying with a subpoena would violate professional ethics, write a letter to the court stating that concern. You may also find it advisable to notify the other attorneys involved in the case before responding to a subpoena, especially the child's guardian ad litem. ***Do not, however, ignore a subpoena just because you believe that it requires an improper disclosure; you must respond in some manner within the time stated in the subpoena.***

**Depositions.** This is one of the most frequently encountered discovery tools in civil matters. Depositions normally involve: (1) taking testimony (sometimes referred to as oral examination), (2) in an out-of-court setting, usually in a lawyer's office or at the place of business of the potential witness, (3) with the parties and/or their attorney's present, (4) under oath, and (5) with a court reporter recording the testimony. In civil matters these pretrial depositions are often admissible at trial in lieu of live testimony, particularly if the location of the trial is in geographical location a substantial distance from the residence or office of the witness. In criminal matters, pretrial depositions are rarely allowed and are usually only available when the courts specifically approves the deposition for some compelling reason -- such as the likely unavailability of the witness because of illness or death.

Attorneys use depositions to determine what a particular witness knows that would be helpful or damaging to their position, and also to attempt to assess the credibility and weight a witness' testimony might be given at trial. Sometimes, a deposition is little more than fishing expedition in which the attorney really has little idea what the witness knows about the issues. In other cases, the attorney requesting the deposition may have already been furnished a summary of witness' expected trial testimony -- or may know from talking to the client or others what the witness is likely to say. Neither of these circumstances makes the deposition improper. As noted above, in civil matters discovery is very liberal and even matters that may not be admissible at trial, or worthy of calling a witness at trial, are proper subjects for discovery.

You should keep in mind that no matter how cordial and friendly the attorney(s) appear to be, a deposition is part and parcel of an adversarial proceeding, not much different than testifying in court. Therefore you should not let down your guard. Never volunteer any information not asked for directly. Do not bring notes or other materials to the deposition that you do not want to surrender to the attorneys, if requested. You are ***not required to*** review your notes in order to refresh your recollection before a deposition and it is acceptable to respond, "I don't remember", when that is the case. However, if you are not prepared and therefore cannot answer many questions, or answer them in a vague manner, you run a risk that your later trial testimony, if given in greater detail, will be challenged. If, during your trial testimony, you

contradict the answers you gave in the deposition, the opposing attorney can use your answers at the deposition to cross-exam you and, to the extent there are inconsistencies, to challenge your trial testimony. This is called "impeachment" or "impeaching a witness".

**Grand Jury Proceedings.** Many states and the federal government require that prior to an individual being tried for a felony (a crime punishable by more than one year in jail); the matter must be reviewed by a grand jury. A grand jury is simply a number of citizens from the local area selected to sit as a group and determine if there is "probable cause" or "reasonable grounds" to believe the person suspected of committing a particular crime did so.

These individuals meet for a set number of weeks and/or days to hear evidence about criminal activity. The grand jury operates somewhat independently, but under the general supervision of the court in their jurisdiction. The prosecutor coordinates the presentation of the evidence to the grand jury; summons witnesses to testify, usually by subpoena; and otherwise presents evidence of the crime. The prosecutor questions grand jury witnesses and the members of the grand jury may also ask questions. Neither the suspect nor his/her attorney is entitled to be present during these proceedings. Although the prosecutor is allowed to present the evidence and provide advice to the grand jury on law and procedure, he/she is not allowed to be present during as members of the grand jury discuss the testimony. After hearing the evidence, the grand jury votes. If they believe there is probable cause to believe the suspect committed the crime, they vote to indict, referred to as returning a "true bill". If not, they will decline to indict and return what is known as a "no bill".

## **Trial Proceedings**

What follows in a list with a brief discussion of some of the terms and issues that are frequently encountered in connection with trial and related procedures.

**Scheduling testimony:** Many legal proceedings are re-scheduled at the last minute. Hearing, trials and other proceeding are often postponed at the request of a party, by the judge because of court schedules, or delayed by the unavailability of a key witness. Once the trial or legal proceeding is under way, the testimony of witnesses may take more or less time than was anticipated. Rarely will your testimony be required at the precise time or date first scheduled. Therefore, do not automatically cancel your clients or leave your day free for that day. Rather than waiting long hours in court, you may ask that you be kept apprised of how the case is proceeding and be allowed to stand by in your office subject to call with a few hours notice. Usually, but not always, this courtesy will be extended to expert witnesses. Ask that clients call before coming to their scheduled appointments to see if you have been called to court. By determining the amount of time it will take you to get to the courthouse, and asking that you be notified when the time you will be needed becomes fairly firm, you will save many hours of canceled appointments and wasted time in the courthouse waiting room.

**Voir Dire:** This is the term used to describe two different but related processes. The first is the screening of potential trial jury members, usually by the judge with participation by the attorney in the case, before they are selected for duty.

Voir dire is also used to describe the process used by the court to review the qualifications of expert witnesses before they are allowed to testify. Generally this consists of questioning of the

proposed expert regarding his/her education, training and experience, to satisfy the court that the witness should be allowed to testify. This may be conducted outside the presence of the jury, or while they are present, depending on the local court rules and the preference of the presiding judge. If you are questioned with the jury out of the room, let the attorney who requested your testimony know that it is vital that you be allowed to present all important credentials while the jury is present. The opposing attorney may wish to 'stipulate' to your credentials, that is, he/she would agree you are an expert making it unnecessary to list your credentials in open court. Attorneys sometimes do this because they would rather that the jury did not hear the witnesses credentials, since credentials indicating extensive training and experience might result in the jury giving additional credibility to their testimony.

It is important to make sure that a jury understands what makes you an expert. While giving your experience and training, include all training and experience that is relevant to your ability to testify as an expert. However, never exaggerate your credentials. An intentional misrepresentation is perjury, a criminal act, and an exaggeration is certainly unethical and misleading to the judge and jury. Shaving the truth invariably returns to haunt you and may keep you from ever testifying again. It is acceptable, however, not to volunteer your deficiencies, e.g., lack of experience or training in a particular area.

**Guardian ad litem:** This is an attorney appointed by the court in civil cases to represent the interests of a child. This often occurs when parents are in conflict, such as in a bitter divorce, when child abuse allegations might result in a change of the living arrangement of the child, or when a child is in foster care. It is important to recognize that in any domestic relations matter which involves a child there are at least three interested parties -- the two parties to the suit and the state. With regard to the interests of a minor, the state will take notice anytime there is a perceived risk that the best interests of the child might not be adequately protected by the parties in the legal proceeding.

**Direct and Cross-examination:** Direct examination simply refers to the questioning of a witness by the attorney who called the witness to the stand. Cross-examination is the opportunity of the attorney for the other party to question the witness following the direct testimony. The form of the questioning and the subject matter of the questions which may be asked of witnesses are different on direct and cross-examination. This can sometimes be confusing for witnesses.

Generally, on direct examination, you may not be asked "leading questions". A leading question is one in which the answer is suggested by the question itself. As an example: "Isn't it true, Dr. Davis, that you in fact never even met with Susan before you wrote your report and have yet to meet with her privately?" The concern with leading questions is that by allowing a question that can be answered by a simple "yes" or "no", and which even suggests the answer wanted, the attorney rather than the witness may be testifying! This type of question, although not proper on direct examination, is perfectly proper on cross-examination, assuming the facts as stated in the question or either correct or in dispute.

In contrast to leading questions, questions which allow a witness to respond in a narrative form are generally not objectionable, even on direct examination. For example, if you are testifying for the state, the prosecutor may ask you open-ended questions which allow you to provide a detailed answer regarding all your dealings with or treatment of a client. A prosecutor might

begin by asking, "Did there come a time when you met Angie Smith" and following an affirmative answer, then, "Can you tell the court about that?" (open-ended question). As opposed to "You met Angie Smith on Christmas Eve of 1993 in front of your house, didn't you?" (leading question).

In addition to being able to ask leading questions on cross-examination, the attorney is allowed to attempt to "impeach" (refute or discredit) the witness' testimony. This can be done in a number of ways, but one of the most frequent approaches is to attempt to find inconsistencies within the direct testimony, or between the direct testimony and the witness' statements on cross-examination. Another common technique is to highlight any inconsistencies between the witness' statements at earlier depositions or hearing, or even out-of-court statements by the witness. (Most out-of-court statements would be inadmissible as "hearsay", but an exception exists to allow prior inconsistent statements of a trial witness for the purpose of impeaching the witness).

Skilled trial attorneys often use particular questioning techniques to attempt to shake or confuse an adverse witness (one who might give damaging testimony to their case) or to undermine the credibility of his/her testimony. Some of these techniques are allowable, as they are considered part of the adversarial process, in which each party is entitled to question and challenge the other party's evidence. However, some of these techniques are not appropriate and are subject to a timely objection by the opposing attorney.

An experienced expert witness may be able to utilize the cross examination as a good vehicle for placing additional information into evidence. In direct testimony, you may have forgotten to include important information, a question which would have allowed this information into evidence may not have been asked, or the opposing attorney's objection may have kept out some information. Attorneys often lack understanding of the therapy process or abuse allegations, and therefore unintentionally ask questions in cross-examination that allow a professional witness to interject important information. Do not be afraid to attempt to testify to important facts; the attorney can will object to your testimony if one of them believes it is inappropriate and the judge can rule on whether it is admissible.

### **Understanding the Language used in Cross-Examination:**

Attorneys often have standard questions and techniques that they have learned to use in court and in depositions. If you understand these questions, you will be able to respond more appropriately. The following are the most common questions with some examples of responses:

**"So we can assume that"** - This statement often precedes a question during cross examination which distorts information provided in direct testimony, by drawing conclusions that you did not make. You might reply, "No, you can't assume that at all. As I have stated before..."

**"What would you say if I told you that..."** Attorneys occasionally ask a question that states, as fact, information that is either incorrect or at least has not been testified to earlier in the trial. For example, the attorney might ask, "What would you say if I told you that Jane had previously told two therapists that her mother wanted her to lie about her father sexually abusing her?" The attorney might make this up to mislead the expert witness into believing that this is a fact

and hoping the expert will respond to it as fact. A variation on this same theme is for the attorney to summarize former testimony, but to leave out a critical fact. As an example: "Dr. Davis, you said that you diagnosed Amy as having Post Traumatic Stress Disorder because she had nightmares". Dr. Davis: "I did not say that. I said that I diagnosed Amy as having Post Traumatic Stress Disorder because of the following symptoms: poor concentration, anger..... nightmares were only one of these symptoms." These are called "**misleading questions**", and are not proper.

A somewhat similar technique is for the attorney to sum up a series of facts which are already in the record in the trial, but then to draw a conclusion from them and attempt to get the witness to agree with the conclusion. This what is referred to as an "**argumentative question**", because it indirectly attempts to influence the judge or jury by asserting facts or conclusions in the guise of asking a question. Argumentative questions are not allowed and should be objected to by the other attorney. If you are asked such a question, you should pause before answering (always a good procedure after any question) to allow time for the other attorney to object. If he/she does not, and you do not believe what the attorney stated is correct, you should turn to the judge and tell him/her you are confused by the question and ask if you are required to answer it. For example, "Dr. Jackson, you said that John was confused, had sleep problems, and was wetting his bed because he was emotionally disturbed...." Dr. Jackson: "I said that John was confused, had sleep problems and was wetting the bed. I did not say he was emotionally disturbed."

As opposed to argumentative questions, attorneys are allowed to ask expert witnesses ***hypothetical questions***, so long as the facts on which the hypothetical is based are already in evidence. These may be asked on cross-examination in an attempt to cast doubt on the witness's expertise, or to attempt to confuse and rattle the witness. Although they are not legally objectionable, it is often preferable to try to avoid answering them. For example, "What if Jane were eight years old and living with her mother rather than her father and of normal intelligence rather than gifted; do you still believe that she would have said the same things?" You might reply, "I'm only here to testify as to the things of which I have direct knowledge." If the attorney persists, you can ask the judge, "Your honor, am I required to answer that question?"

Multiple or compound questions, requiring answers to several different issues contain in one question, are confusing and are not allowable. Each question should present only one issue. If an attorney presents a question which seems to go on and on, you should hesitate, and look in the direction of the other attorney or judge before answering. If no objection is forthcoming, and you are concerned about being able to answer it clearly, one technique which often works is to ask the attorney to repeat it. Often the attorney will have forgotten what they asked or not be able to reconstruct it the same way again and will just say "never mind", and move on. You can also respond "I do not understand the question" or politely ask the attorney and/or the judge if the series of questions could be rephrased as separate questions.

**"How much are you being paid for your testimony?"** A possible response: "I am being paid nothing for my testimony. I am being paid for my time; my professional opinion is never for sale."

**"You've never testified, for the defense, have you?"** This question is often asked of therapists who only see victims or children. Possible answer: "I see mostly victims in my

practice, so I often testify in their behalf. My testimony is not for sale to the highest bidder. I only testify to what I believe to be the truth and the truth doesn't change according to which side I am on." It is important to let the court and/or jury understand that you are not a "hired gun", an expert who will testify to whatever an attorney wishes them to say for the right amount of money. If true, you need to make the point that you only testify when you believe abuse has occurred, and that cases in which you believe abuse has not occurred do not tend to be criminally prosecuted. Therefore, the fact that you have seldom or ever testified for the defense does not indicate a bias.

**“Are you a child advocate?”** Attorneys often ask this of a witness whose testimony favors a child. Many jury members do not understand the reasoning behind the question. “Could you please define child advocate?” is a way of responding that allows your answer to this question to be tailored to the attorney’s definition and informs the jury what is meant, as well. “If your definition defines child advocate as someone who would not tell the truth in a legal setting, then ‘no’, I am not a child advocate. If your definition means that I care about children, then ‘yes’ I am a child advocate.”

**"Is the psychological test you used valid?"** Psychologists are often asked about test validity ( Ziskin, 1981) by attorneys who do not understand the many dimensions that validity may take. If asked a question about test validity, one possible answer is, "What kind of validity are you referring to; content, criterion, face?" This usually ends further questions on validity (Shapiro, 1986).

**"Yes" or "No" Set Questions** Attorneys may sometimes try to get a witness in a "yes set" or "no set." They do this by firing a series of questions at a witness rapidly, all of which they believe will have a 'yes'(or "no") answer. They then slip one question in that they want answered in the same way, but which likely would be answered differently by the witness. Be careful; take your time, so that you do not automatically give an answer that does not reflect the truth. Attorneys may also try to get a “yes” answer by saying “right” at the end of the question. “You asked leading questions to confuse the child, right!” Be aware when the word “right” is placed at the end of a question so you can make sure you answer truthfully.

If you are experienced at testifying, more complete information might be given when questions are not answered in a "yes-no" way. Provide the information and then answer "yes" or "no". If the attorney demands that you only answer "yes" or "no" to their question, you may turn to the judge and ask, "Your honor, Mrs. Jones is asking that I give a 'yes-no' answer, and I feel that this type of answer would distort the information that I am trying to give. Could I be allowed to give more than a one word answer to this question?"

**Fast pace questions:** Attorneys may try to push a witness to speak quickly, without thinking. Be slow and methodical in answering questions if you need to be. It is preferable to think about your answer and be correct, rather than to answer quickly and be incorrect. You have the right to indicate that you need to review your notes before answering a question, i.e., "Could I have a minute to review my notes?" It is also permissible to state that you do not remember what happened or what was said, if this is in fact true.

**Questions outside the scope of the court proceedings:** You do not have to automatically answer everything an attorney asks you. For example, if asked, "Were you sexually abused when you were a child?" wait for the attorney who called you to object to the question. If he/she

does not seem to be paying attention, turn to the judge and ask, "Your honor, do I have to answer this question?" If the judge directs you to answer, then you must, but he/she often will rule that you do not have to respond. Attorneys may also ask questions which violate privilege or privacy laws or ethics. An appropriate response might be: "Your honor, because of the rules of confidentiality imposed by my profession, I cannot properly answer that question."

**Questions about future behavior.** Never attempt to predict future behavior. No one has ever been able to reliably predict human behavior and research reveals that professional therapists are often worse predictors than the general public. If you try, the opposing attorney may ask for research to support the assertion that professionals can accurately predict behavior. Following this, he/she may produce research indicating it can't be done. Possible answer: "No one has yet been able to accurately predict behavior of an individual." You may then qualify your answer. Example: "It depends on too many variables, such as what is happening in their life, alcohol or drug abuse, etc. I will say that based on the behavior of the other offenders I have seen in therapy, I am concerned that this man will again abuse boys if he is allowed to be a Scout Leader."

**"Is it possible that..." questions.** These questions demonstrate the possibility that there are other ways the event could have happened. One reply might be: "Almost anything is possible, but this is not very probable."

### **Other helpful information:**

**Educate the judge and the jury:** Use your testimony to educate the jury about Post traumatic stress disorder, how abuse is diagnosed, the effect of abuse on behavior and school performance, how children remember, etc. It is very helpful to bring charts and graphs to help illustrate the important points of your testimony; often courts have someone whose job it is to design graphics for trial and who can create the materials you request. Make sure that you know how to explain these concepts clearly, so that when you provide this information to the court or the jury, you will appear competent and confident.

**Support your position with research.** The National Center for the Prosecution of Child Abuse is a particularly useful source. They will provide research for prosecutors of child abuse. The service is free and located in Virginia; phone # 703 549-4253. The National Center for Missing and Exploited Children publishes manuals on many areas involving abuse (1-800-843-5678). The American Professional Society on the Abuse of Children (312 554-0166) publishes a quarterly review with a variety of research on child abuse to keep its members up to date. This is particularly helpful in staying current with research in the field and for use in testimony. Be prepared, when testifying about child abuse, to explain how you decide if a child is making up abuse allegations. Never say that children can't or don't make up such matters, because occasionally they do.

**Do not be alarmed when an attorney (either in court or to the media) accuses you of making up allegations** or forcing the child to say things in order to further your career. It is a fairly common tactic to attack the motivations of an expert witness. Attorneys are taught to begin by attacking the credentials of expert witnesses (Ziskin, 1981). If this doesn't bar a witness from testifying, the attorney may attack your actual testimony. If the attorney makes

little progress in doing this, he/she may then attack you personally (Shapiro, 1986). For example: "Dr. Davis is an arm of the police" or "Dr. Davis and Mrs. Jackson are making up these allegations because they are ambitious and aggressive therapists". If you are being attacked personally, take some solace in understanding that this means that the opposing attorney is probably having trouble finding holes in your factual testimony.

**Don't be afraid to occasionally interject humor into the proceedings.** It gives balance to the testimony especially if the facts are very depressing.

**Remember the names of the attorneys and the judge.** Write them down, if necessary. When attorneys try to put words in your mouth or are obnoxious, first wait for the attorney who subpoenaed you to object. If they do not, address the obnoxious attorney by name in a calm and polite manner, looking at them directly: "Mrs. Jones, I believe I have already answered that question for you on numerous occasions today. My answer is still the same. Jane told me repeatedly about her uncle abusing her, without my asking her direct questions."

**Give structure to direct questions.** Prosecutors and attorneys representing abused children are usually overworked, and rarely have enough time to spend on each of their cases. They often appreciate a list of the questions or areas that you feel are important to be covered in your testimony. This attorney will often structure your questions in a different way, but most appreciate help to make sure that all important areas to be covered in questioning are brought to their attention. Be careful of the material that you bring to the witness stand. In most courts, the attorneys are entitled, upon request, to review any notes or papers to which a witness refers during testimony.

**Preparation for testifying.** Be cautious about testifying unless the attorney who is calling you prepares you for the testimony (tells you what questions he/she intends to ask you and inquires about your expected answers). An attorney who does not prepare you will be unable to insure that you are testifying to everything that is important. Attorneys are taught never to ask a witness a question they already know the answer. But like most rules, this one is not always followed.

**Use cross examinations questions to support your position:** Defense attorney: "When I questioned the witnesses (John, age 7), he consistently used the same terms to describe the abuse. This proves he's been coached, doesn't it?" Therapist: "I'm glad you noticed that. Many of my colleagues are terrified to testify in court, and this fear affects their language. This child has repeatedly told me he is afraid to testify. Fear usually constricts language. By using the same words again and again, this child demonstrates his fear by constricting his language, as I would have expected him to do."

**Be able to explain why you proceeded in certain ways:** Defense attorney: "You didn't interview the abuser to see what he would say about these abuse allegations, did you?" One appropriate answer would be that when you asked the accused abuser for an interview, his/her attorney refused to allow it, if that is the case. Another might be: "I was asked to evaluate the victim. I am a therapist and it is not my job to interview everyone involved in this case. I can only testify as to my evaluation of the victim ...."

**"How do you know this child isn't lying or hasn't been coached to say these things?"**

Make sure that you are familiar with research in this field so that you can competently answer this question. Books such as, The Suggestibility of Children's Recollections; Therapist: "I base my conclusions about the truth of a child's allegations on many factors; the language of the child; the consistency of their story; the emotions attached to their allegations; the specific acts described by the child; the drawings and psychological tests administered; and the symptoms or pathology displayed by the child. In this case, Angel described sexual acts explicitly and demonstrated them with dolls; she drew pictures of the abuse; the language she used to describe the sexual acts was age appropriate; she disclosed over a long period of time, which is clearly typical; she constantly showed extreme anxiety and fear during the initial therapy sessions while disclosing and she had symptoms consistent with PTSD. For that reason, it is my opinion that she has not been coached."

**Do you believe the victim?** In many states an expert witness is not allowed to state in a court proceeding whether he/she believes the victim is telling the truth, as that is considered to be an issue solely for the jury or the court to determine. In other jurisdictions expert witnesses are allowed to express such an opinion. You should find out what the rule is in your state. Do not inadvertently say you believe the victim as this could be grounds for a mistrial.

**Review all relevant documents:** It is often helpful to review all reports related to the case and to talk to everyone possible that is involved. In this way, your opinion is supported by other evidence and you won't be surprised by facts contained in reports which directly contradict your testimony. If there are conflicts in the reports or what has been said, be prepared to explain how you dealt with these conflicts in coming to your conclusion.

**Rarely provide raw test data to an attorney:** Ethical rules in most states would prohibit the providing of raw test data to someone not qualified to interpret it (American Psychological Association, 1998). However, an attorney can retain a psychologist trained to interpret these tests to assist in the matter. If this is done, the raw test data can be given directly to this professional. Check with your state ethics guidelines.

**Body Language:** Body language is extremely important in court and depositions. Try not to cross your arms in front of your body; this is a defensive position and implies that the attorney threatens you. (Never let them know they threaten you, even if they do.) Keep your arms uncrossed, perhaps holding your notes. Sit straight and look competent.

**Focus on the Judge and/or the Jury:** If the trial does not have a jury, look at the judge during your testimony. Learn his/her name and use this name sometimes in your answers. If the judge seems not to be listening to you, ask for a drink of water or clear your throat. If a jury is present, it often helps to look directly at the jury and form a positive relationship with them. You might look at the attorney as he/she asks the question, but turn to the judge or jury while answering. The attorney who is attempting to attack or minimize the effect of your testimony will sometimes position him/herself directly between you and the jury in an effort to distract you and divert your focus from the jury, as a way of preventing such a relationship from forming.

**Obnoxious or Hostile Attorneys:** Act and speak as if you are an authority and you will generally be regarded as such. Do not be obnoxious or hostile. Even if an attorney becomes hostile and/or offensive, maintain your professional demeanor. Attorneys sometimes try to cause an expert witness to lose composure by acting obnoxious in their questioning. They do

this because they know that a judge or jury usually finds the testimony of an expert witness less credible if he/she appears angry and out of control. It is well to keep in mind that juries, and even experienced judges, have certain expectations regarding particular types of witnesses. If an attorney appears overbearing or obnoxious, the jury may excuse that as part of his/her role as an aggressive advocate for their client. However, they expect a doctor or therapist to be even-handed, professional and cool under pressure. If you do not meet that expectation, it may damage the credibility of your testimony. Additionally, if an attorney becomes angry at you during the cross-examination, he/she may begin to ask questions that allow you to testify to evidence that would not have been introduced had not anger clouded his or her judgment.

Many professionals are so intimidated by the court process that they let people demand of them behavior, documents and answers that they would rarely provide in other situations. Do not be afraid to "take on" the attorneys if you believe they are unjustified in their position. The judge will be the final authority; you can write or verbally request during court proceedings that you not have to comply with demands or questions. For example: Attorney: "Did Angel's grandmother disclose sexual abuse in her own childhood?" Therapist: "That information is protected by the laws of confidentiality and I can not answer that question".

**Dress:** If you are a woman testifying in a jury trial, try to keep your outfit simple and professional. Do not wear extravagant jewelry; keep your make-up and hairstyle simple. Men should wear clothing consistent with good business attire in their geographic area. Follow the same rules about jewelry and hairstyles. Remember that your aim is to avoid making jury members think of you as too affluent, depressed, or peculiar in any way.

**Written Reports:** A report for the court should generally be brief and to the point. Resist the temptation to tell the judge what to do when writing a report (this tends to offend judges). Instead, it is preferable to offer your observations and the factors you feel should be considered in making a decision.

If you write something that could be misinterpreted, explain what you mean. For example, "Susan, who is three, could not explain verbally what the teenager had done to her. She was able to show what was done on the anatomically correct dolls by undressing the dolls and inserting the penis of the male doll into the female doll's vagina. She did not know the names of sexual body parts or that she was demonstrating sexual intercourse. It is clearly typical of a three-year-old to be able to demonstrate behavior that she does not have the vocabulary to explain verbally."

Many professionals expect their report to substitute for direct testimony. Although this may occasionally happen in simple civil cases, criminal cases have far different requirements (Morgan, 1992). Because the stakes are higher in a criminal case (jail time or death) and the Constitution guarantees the accused an opportunity to be confronted by his/her accuser(s), it is virtually certain that live testimony at trial will be required.

**Resumes and Vitae:** Have a resume or vita that details all of your relevant experience, workshops and training you've attended, training that you have given, and your publications. Supply this resume to both sides. Any published materials you claim in your vita to have authored may be requested by either attorney, and you must supply them (although you may ask for payment to cover costs). Also be aware that anything you put on your vita may be

challenged by an attorney willing to spend time trying to find credentials that are mis-stated. Make sure that dates, organizations, training and honors are precisely correct before supplying your vita to an attorney.

**Treatment Notes:** All treatment notes on a child or adolescent who is alleging abuse may have to be produced in a court proceeding. It is important to be aware of this possibility. It may be best to use therapy notes to write the comments made in session, either summarizing them, or better, using direct quotes with quotation marks around them. Do not change the allegations to your words. For example, if the child says, "he peed in my mouth," write that instead of, "child made allegations of fellatio." If you record allegations in your own words, they may be excluded as evidence, because hearsay laws require that the therapist inform the court what was heard, not what was summarized in the therapist's own words. It is best to write down the allegations as the child makes them, not from memory later, as memory may fail to recall the exact words of the child. (If you report in court that you wrote your notes later, the opposing attorney may challenge your memory). It may be wise to leave opinions out of treatment notes, saving these for summary or testimony. In other words, report what the patient says happened in your treatment notes, but leave out your opinions related to the allegations. Ethics require that when providing copies of treatment notes that you blackout any information that does not directly relate to the court proceedings (American Psychological Association, 1998).

In many states if the therapist is qualified as an expert by the court, statements regarding abuse made by the child to the therapist during therapy sessions are admissible at trial. Judges may hold pre-trial hearings to decide which statements made in therapy will be admissible in trial. A Prince George's County, Maryland judge refused to admit allegations of a child into evidence that were made during a therapy session when the therapist indicated in her notes that the "client was prepared for police involvement in this session." The judge ruled that the therapist was preparing the child for the police interview, and that this was outside of the scope of "therapy". In the same trial, a brother and sister were making allegations of sexual abuse which was being video recorded with a police officer in the room. The judge concluded that the presence of a police officer meant that this was not a therapy session (State of Maryland v. Karen Bethea; Circuit Ct., Prince George's County, CT 88-2284B, 1989). Based on this, you should ensure that the sessions are, in fact, therapy, even if they focus is on helping a child who is afraid of testifying or discussing the matter in a protective service interview. Remember that the way you state information in your treatment notes may be misinterpreted, so be clear in your descriptions. You may want to put question marks (rather than what you said) for the questions that you ask a child, since it often is impossible to write everything both you and the child says as it occurs in a therapy session or interview. If you put question marks rather than the words you asked a child, then your questions cannot be used against you in the court process. On the other hand, the defense may challenge your lack of detail because they cannot challenge your questions. There are advantages and disadvantages to either approach.

Some courts only allow a therapist to testify to abuse allegations given spontaneously by the child, that is, not the result of any questioning about the matter. It is helpful, therefore, to indicate those statements which were uttered without questions or leads from you. It is often useful to have children draw their abuser and/or what happened during the abuse; these pictures can support the treatment notes regarding the allegations of the child. Not only can the picture depict what the child says took place; it can also show the victim's rage, fear of an abuser, the details of the abuse, etc. Label any drawings created during sessions with the date

and what the child states they have drawn.

If you use anatomically correct dolls, you should keep detailed records on how you used them in session as well as the training you have had to use these dolls with children alleging abuse (American Psychological Association, 1992). Be aware that dolls or other items used as illustrations of your testimony may be entered into evidence by the court and retained until the proceeding is over or until the appeals have been complete.

If you feel that the child is responding to abuse by distorting perceptions or getting confused, determine whether you believe the abuse has caused these perceptual distortions. Children of dysfunctional families are often taught to disregard what is happening in their environment, and reflect this lack of clarity in psychological testing. It is, therefore, important to be careful about labeling a child schizophrenic or a multiple personality, unless you are sure of this diagnosis. By saying that the child is out of contact with reality, you might cause his/her allegations to be doubted. Remember that abuse can cause a child to appear temporarily very disturbed, suicidal or psychotic. Post Traumatic Stress Disorder, which is common in abused children causes thought disorders, memory problems, articulation difficulties, and problems with attention and concentration. (Van der Kolk, 1996). Therefore, consider the diagnosis of Post Traumatic Stress Disorder for abuse victims (Perry, 1993; Simon, 1995), if the criteria of the DSM IV are met (American Psychiatric Association, 1994). Before testifying, indicate in your notes the details in each session that support this diagnosis.

**Subpoenaed treatment notes.** Do not supply your treatment notes to any attorney simply because they issue a subpoena for them. As stated previously, you must consider the ethical and legal considerations of supplying these notes. Therapists should have signed authorization from patient or guardian that they understand the limits of confidentiality (American Psychological Association, 1998). You can summarize your treatment notes, black out irrelevant details or refuse to provide them. If you decide that it is appropriate to refuse to provide your treatment notes or a portion of them, write a letter to the court indicating the basis for your action, and send a copy to each of the attorneys in the case.

**Taped treatment sessions:** More and more states are passing laws requiring audio and/or videotapes of therapy sessions in which children are questioned about being abused. If you decide to videotape a therapy session, make sure you get written permission from the parent, guardian, or, in the case of foster children, their attorneys. Numerous problems have arisen when professionals questioned young children in ways that were considered suggestive, resulting in doubts about the validity of the child's allegations of sexual abuse. Be sure to get advice from someone who has successfully videotaped children being questioned about abuse before attempting to make a video to be used as evidence. It should be noted that some professionals, especially police officers such as Rick Cage of the Montgomery County, MD Police Department (1991), have made excellent videotapes that, when viewed by perpetrators, induced a confession.

**Dealing with the accused sexual abuser:** Many experts advise against interviewing or evaluating an accused sexual abuser. Psychological testing, psychiatric evaluations and clinical interviews have not been shown to be effective in determining if someone is or is not a child abuser (Murphy, Rau & Worley, 1994). There is simply no test that can definitively ascertain whether a person abused a child on a particular occasion. Professionals who work regularly

work with convicted and admitted child sexual abusers find that the majority of them are master manipulators and liars (Groth, 1986; Jensen & Jewell, 1983; Meloy, 1991). This makes it virtually impossible to determine by interviews and testing whether the person being accused is truly innocent or is simply a skillful liar. You should also be aware that there are many types of abusers, and many individuals who abuse children are not classic pedophiles. Some abusers do not see children as a primary sexual motivator; they are simply sexually or morally indiscriminate and therefore regard children as targets of opportunity (Lanning, 1989).

Be aware that the lack of attraction of the accused abuser to children as sex objects or the fact that child pornography does not appear to be present in a matter, does rule out child abuse. Obtain a copy of Child Molesters from the National Center for Missing and Exploited Children to learn more about characteristics of child abusers. The first copy is free.

Professional ethics require that you interview both parents if you make recommendations as to which would be the best parent (American Psychological Association, 1998; Melton, et. al., 1987). Be sure that you are familiar with and are following your ethical guidelines and laws of your state when you are working with abused children. Get permissions signed, as required by your state laws. Some abusers harass professionals who have worked with their children by suing them or making requests to their professional or licensing organizations that they be disciplined. Staying in strict compliance with the law and following your ethical standards will put you at far less risk. Don't let your emotional involvement in a matter influence your professional judgment and encourage you to behave inappropriately or unethically.

**Feelings about the legal process:** Mental health professionals sometimes become enraged, depressed or frustrated when dealing with the legal system. They feel it is unfair and that many criminals escape punishment. Whether or not this is the case, it is simply much more productive to direct your anger toward sharpening your skills to deal with the system. Generally, the more knowledgeable and comfortable you are about your role in the legal process, the better the results. Learn why there are certain laws and rules, and try to make sense out of them. If you think they are unfair to either the alleged victim or the accused, or don't protect others adequately, work to get the laws changed. In short, direct your anger toward working more effectively within the system or changing it, rather than letting the system push you into inappropriate or unethical behavior.

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