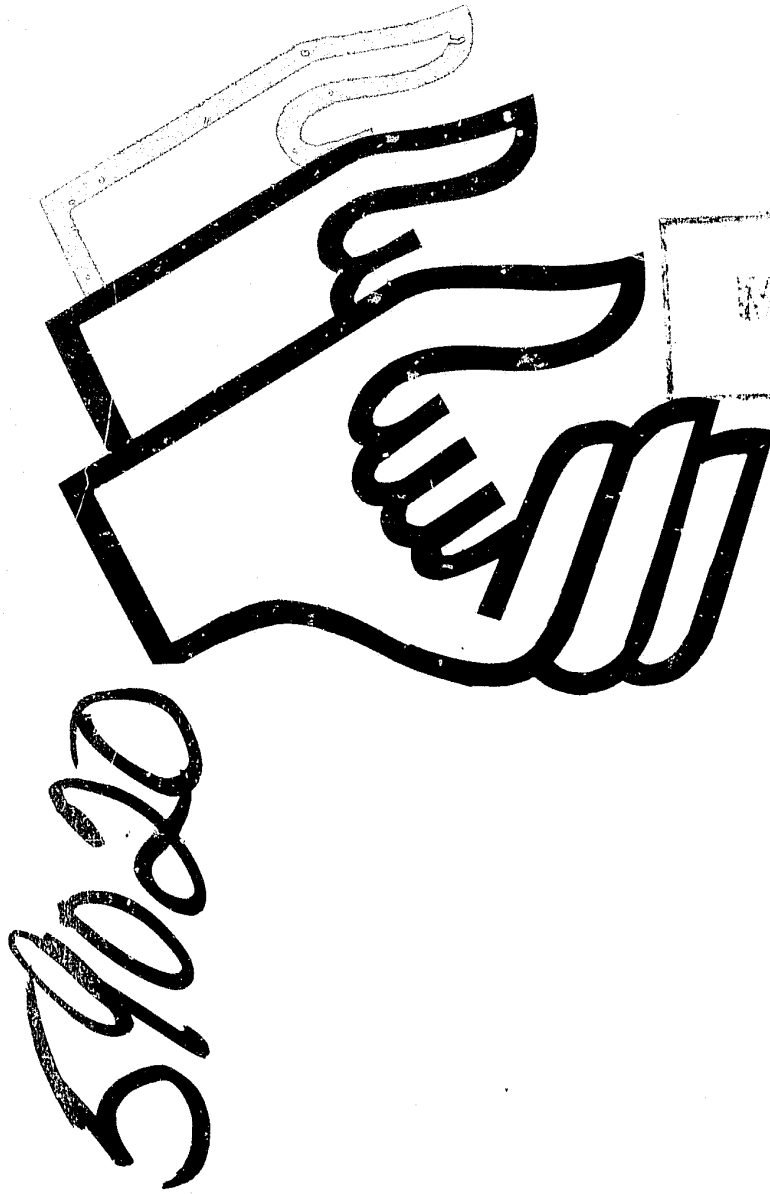
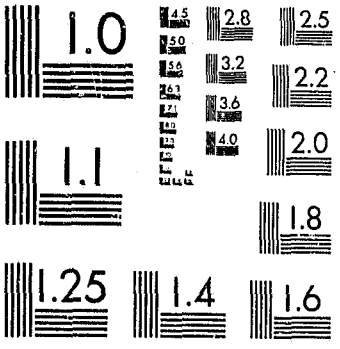
LEGAL ASPECTS of Protective Services for Abused and Neglected Children



Government must stand ready to give protection and help to children who are neglected or abused by their parents or legal guardians. Protective services represent the community's, as well as the agency's, concern for the welfare of children. Since this protection should be available to all children who are abused or neglected, regardless of where they live, it becomes the rightful function of public services.

Mildred Arnold — from "The Scope and Responsibility of Public Child Welfare Services." (Based on a speech given at the Connecticut Conference of Social Work, Hartford, Conn., November 4, 1948.)



The Legal Aspects Of Protective Services For Abused And Neglected Children

A Manual

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FOREWORD

Child abuse and neglect is a growing problem in this country—one that is of deep concern to local communities, to State legislatures and State agencies, and to the Federal Government.

The Congress showed its concern for abused and neglected children with the passage on January 31, 1975, of the Child Abuse Prevention and Treatment Act (P.L. 93-247), and child abuse and neglect has been one of the top priorities of the Department of Health, Education, and Welfare for a number of years.

State departments of public welfare carry the main responsibility for providing protection to abused and neglected children and for helping the parents of these children overcome the serious problems which lead to such abuse and neglect.

In providing protective services, State and local welfare departments encounter many legal aspects of these services. These aspects involve the agency, law enforcement officials, attorneys, and the judicial system.

Social workers providing protective services need training in these legal aspects. They need to understand the law that gives the agency the responsibility for providing these services; they need a clear understanding of parents' and children's rights, since every protective services case has a potential for court action; and they must be thoroughly familiar with due process of law.

In addition, workers need help in understanding the jurisdiction and role of the court, and in knowing how to file a petition, obtain evidence, and prepare for the delivery of testimony. And much more.

In 1975, the Administration for Public Services (then the Public Services Administration) made a grant to the law school of the University of Oregon to develop a manual on the legal aspects of protective services. This manual was to serve as a tool for protective services workers and their supervisors. Barbara A. Caulfield, Assistant Professor of Law, was the Project Director. It should be noted here that the opinions expressed in this manual are those of the author and not necessarily those of HEW.

With this manual, the Administration for Public Services (APS) adds another to its list of publications on the subject of child abuse and neglect. A list of these publications can be found at the back of the manual.

APS hopes that ***The Legal Aspects of Protective Services for Abused and Neglected Children*** will be of practical help to those who carry the heavy burden of protecting these children, helping their families to correct the situations that contribute to the problem, and working effectively with the courts when situations make judicial action necessary.

Ernest L. Osborne

Ernest L. Osborne
Commissioner
Administration for Public Services

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AUTHOR'S ACKNOWLEDGMENTS

My deepest gratitude to the members of the staff of the Administration for Public Services, HEW, who carefully guided this research—especially Mildred M. Arnold, Special Assistant to the Commissioner of APS. In August 1977, Miss Arnold, who devoted half a century to the protection of children and youth in this country, retired. From my staff I want to acknowledge: Mary Lawrence for organizing the subject matter; Milton Jones for legal research and manuscript drafting; Susan Schmerer for legal research and manuscript drafting; Lauri Johnson for data collection and organization management; Dorothea Kenyon for administration, budget management, and supervision of research; Carol Owens for general research, data collection, and manuscript drafting; and Linda Nathan for typing, editing, and proofreading the original manuscript.

I also acknowledge the research and drafting assistance of: Clifford Freeman, Ann Griffith, and Diana Wales, and the directional assistance of Tracy Talkington.

The focus of this manual was directed by the professionals who work daily with families. The following professionals donated hours of their time to define the problems and review drafts of the manual. I thank them. Grace Anders (Salem, Ore.), Mattie Anderson (Brooklyn, N.Y.), Mildred Arnold (Washington, D.C.), Andrew Brown (Juneau, Alaska), Brian Burgess (Medford, Ore.), Jetta Burnier (Hartford, Conn.), Barbara Byron (Birch Run, Mich.), Peter Coolsen (Chicago, Ill.), Robert Downie (Pendelton, Ore.), Rose Ann Emmerich (Madison, Wisc.), Sharon Fee (San Francisco, Calif.), Nancy Fox (Louisville, Ken.), David Gregory (Omak, Wash.), Margaret Harrell (Pittsburgh, Pa.), Lois Harvey (Portland, Ore.), Richard Hays (Omaha, Neb.), Maxwell Howard (Rockville, Md.), Gerald Huntly (Milwaukie, Ore.), Clare Jerdone (Washington, D.C.), Patricia Keith (Morgantown, W.V.), Angela Koenig (New Orleans, La.), Beverley A. Kole (Portland, Ore.), Susan Koplman (Jamaica, N.Y.), Hortense Landau (New York, N.Y.), Myra Lappin (San Antonio, Tex.), Urbana Manion (Warm Springs, Ore.), Lula Martinez (Nyssa, Ore.), Ray Merritt (Portland, Ore.), Marrietta Miller (Phoenix, Ariz.), Ned Morse (Boston, Mass.), Otelia Robinson (Philadelphia, Pa.), Mary Anne Rzegocki (Portland, Ore.), Robert Shackelford (South Beach, Ore.), Kathleen Sherman (Charleston, W.V.), Linda Shrier (Philadelphia, Pa.), Aileen Steeves (Hood River, Ore.), Romana Tanewash (Warm Springs, Ore.), Earl Van Lydegraf (Portland, Ore.), Charles Warren (St. Helens, Ore.), David Weisfield (Miami, Fla.), Prosanna Williams (Warm Springs, Ore.), Sue Winegar (Portland, Ore.), and Sybil Winston (Los Angeles, Calif.).

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Barbara A. Caulfield

November 1, 1976

INTRODUCTION

The extent of child abuse and neglect in the United States is not well documented, although recent studies indicate that the incidence of abuse and neglect is greater than was previously believed, with reports of proven or possible child abuse and neglect being received at an increasing rate.

Testimony by Dr. C.H. Kempe and Dr. R.E. Helfer, in hearings before the Subcommittee on Children and Youth of the Senate Committee on Labor and Public Welfare, concerning the Child Abuse Prevention Act (S. 1191) of 1973, indicates that, nationally, 50,000 to 60,000 reports requiring investigation into possible child abuse are made to authorities every year.[1] Moreover, data from some States demonstrate that more effective administrative procedures result in higher reporting rates. Such data imply that many cases of child abuse and neglect currently go unreported and that, as more effective reporting procedures are instituted, the incidence of reports leading to investigation will increase.[2]

The public's growing awareness of the problem of child abuse and neglect is reflected in the existence of child abuse reporting laws in all 50 States[3] and in Federal action directed at the problem.

On January 31, 1974, P.L. 93-247 (42 USCA §5101 ff)—also known as the Child Abuse Prevention and Treatment Act— was approved. As a result of this act, the Secretary of Health, Education, and Welfare established the National Center on Child Abuse and Neglect. The Center was to:

(1) compile, analyze, and publish research on child abuse and neglect;

(2) maintain an information clearinghouse on programs showing promise of success in preventing, treating, or identifying child abuse and neglect;

(3) compile and publish training materials and programs for personnel engaged in child abuse and neglect work;

(4) provide technical assistance to programs engaged in child abuse and neglect treatment, prevention, and identification;

(5) conduct research into the causes, prevention, treatment, and identification of child abuse and neglect; and

(6) study the national incidence of abuse and neglect, including the extent to which incidents are increasing in number or severity.

The law also provided for the development of demonstration programs and projects, the establishment of multidisciplinary centers to serve in the prevention, treatment, and identification of child abuse and neglect, and for aid to State programs. To these ends, $15 million was appropriated for fiscal year 1974, $20 million for fiscal year 1975, and $25 million for fiscal years 1976 and 1977.

This manual, produced by the Administration for Public Services (HEW), was designed to assist social workers in protective service agencies, particularly State and local public welfare departments. However, the section entitled "More Advanced Legal Concepts" may be of interest to others concerned with this problem.

REFERENCES

1 March 26, 27, 31, and April 24, 1973.

2 Gil, David G., *Violence Against Children*. Sub-

mitted March 26, 1973, as written testimony to the Subcommittee on Children and Youth of the United States Senate Committee on Labor and Public Welfare concerning the Child Abuse Prevention Act (S.1191). This paper was based upon the author's book *Violence Against Children: Physical Child Abuse in the United States.* Cambridge, Mass.: Harvard University Press, 1970.

3 De Francis, Vincent, "The Status of Child Protective Services." In *Helping The Battered Child and His Family.* C. Harry Kempe and Ray E. Helfer; Eds. Philadelphia, Pa.: J.B. Lippincott Co., 1972.

INVESTIGATION AND DIAGNOSIS

- Definition
- Legal Liabilities
- Investigation
- Emergency Pickup
- Civil And Criminal Procedures
- Family Privacy
- Invasion Of Privacy

WORKING DEFINITIONS OF CHILD ABUSE AND NEGLECT

General Definitions

One common definition states that child abuse occurs when a parent or caretaker takes action which causes injury to the child. This can be any act of ***commission***, such as an actual physical attack or the purposeful withholding of food.

Neglect is commonly defined as an act of ***omission*** which causes injury to the child. If the parents did not provide adequate care for their child because they were unable to do so, did not understand the need for the care, or did not have the parenting skills necessary to provide it, this could be termed "neglect."[1]

Many definitions, such as the following one, combine abuse and neglect into one definition:

> **Child abuse and neglect can be broadly defined as those situations (non-accidental) in which a child suffers physical trauma, deprivation of basic physical and developmental needs or mental injury, as a result of an act of omission by a parent, caretaker or legal guardian.[2]**

Both of the general definitions given here are intended to include sexual and emotional abuse or neglect. The definitions used by the courts and statutes may vary from these "working" definitions, and often they may not coincide with social work concepts of abuse and neglect.

Sexual abuse

Sexual abuse is actually a subcategory of physical abuse and could be defined as ". . . utilization of the child for sexual gratification or an adult's permitting another person to so use the child."[3]

Emotional abuse and neglect

Emotional neglect is defined by the American Humane Association as the deprivation suffered by children when their parents do not provide opportunities for the normal experiences producing feelings of being loved and wanted, secure and worthy, which result in the ability to form healthy object relationships (with other people).[4]

Another definition developed by the Child Advocate Association of Chicago defines emotional abuse as "mental injury" and gives the following two examples for purposes of definition:

(1) parent's refusal to recognize and take action to ameliorate a child's emotional disturbance;

(2) gross failure of the parents to meet the emotional needs of the child necessary for normal development (emotional deprivation) often seen along with nutritional neglect.[5]

If a social worker is considering court action for an emotional abuse or neglect case, an analysis of the following four factors may be important before such action is taken:

1. Do the parents demonstrate easily identifiable behaviors that create an environment harmful to the child?
2. Do the child's actions or physical health show observable or measurable effects related to the parents' behavior?
3. If there are effects on the child's actions or physical health, will they create or lead to future serious emotional harm if not treated?

4. Is treatment available to the family from the protective services agency or from the court which could remove, alleviate, or mitigate the emotional harm manifested by the child.

Other categories

Several other special categories fall under abuse and neglect. Some of these are:

Institutional abuse or neglect—abuse or neglect that occurs when institutions or agencies take improper action, or fail to take proper action, with the end result being injury to the child.

Abandonment—when the child's caretaker deserts the child or leaves him or her alone for long periods of time. Such failure to provide adequate care is most often included in the general "neglect" definition.

"Best interest of the child"—when courts remove children or order treatment under the general concept of providing care that is in the "best interest of the child," without using the label of abuse or neglect.

REFERENCES

1 See generally Gil, David G., "A Sociocultural Perspective on Physical Child Abuse." *Child Welfare,* L, 7, 389-395, 1971.

2 Child Advocate Association of Chicago, *Hospital Guidelines for the Management of Suspected Child Abuse and Neglect Cases* (p. 2) (prepublication as of September 1977).

3 Walters, David R., *The Physical and Sexual Abuse of Children:* Causes and Treatment. Bloomington, Ind.: Indiana University Press, 1975.

4 Mulford, Robert M., *Emotional Neglect of Children.* Denver, Colo.: American Humane Association, 1958.

5 Child Advocate Association of Chicago, *op. cit.*

LEGAL LIABILITIES OF SOCIAL WORKERS UNDER REPORTING LAWS

Reporting Laws

Every State now has a child abuse reporting law, although the law varies from State to State. In most jurisdictions, reports from social workers are required: 32 States specifically include social workers among the classes of professionals who must report cases of suspected abuse—often without indicating what persons are encompassed in that term—and 7 other States require mandatory reports from any person who encounters suspected abuse.

Only 11 States and the District of Columbia do not require mandatory reports from social workers, but 3 of this group have statutes allowing voluntary reporting by social workers.[1] One writer recently noted that the current trend is to expand the scope of persons required to report child abuse and neglect, not to narrow the field.[2]

Social workers may encounter occasional difficulties with their legal liability under the reporting laws. This is discussed in the section that follows.

REFERENCES

1 See chart on page 8 of manual; Helfer, Ray E. and Kempe, C. Henry, *The Battered Child*, 2nd ed. (Chicago, Ill.: Univ. of Chicago Press, 1974) Appendix; De Francis, Vincent and Lucht, Carol, *Child Abuse Legislation in the 1970's*, Rev. ed. (Denver, Colo.: American Humane Society, 1974) for a summary of the statutory provisions on the reporting of child abuse. Such information, however, should not be relied upon without additional legal advice from a proper source.

2 Sussman, "Reporting Child Abuse: A Review of the Literature," 8 *Fam. L. Q.* 245, 272 (1974). (Hereafter cited in references as *Sussman.*)

Liability for Reporting

Legislatures have sought to reduce liability of reporters by granting immunity (a protection from legal liability, either total or qualified) to those required to report (see "Immunity" below) and by requiring waiver of any privilege of confidentiality that might exist between the reporter and the client. Persons reporting may have a suit filed against them; but the chances that a suit will result in a decision against a professional making a report are small if the person is immune under a State statute. Some statutes do not even allow the filing of the lawsuit.

The possible lawsuits against a reporting professional are civil suits for defamation of character, invasion of privacy, malicious prosecution, and breach of confidence—and criminal prosecution for defamation of character.[1] The risks of being held liable in these actions are slim, however, since, in each of the above legal actions, the person bringing the lawsuit must prove that the reporter acted with malice, or perhaps with extreme negligence.[2] Malice has been defined as a "sense of spite or an improper motive"[3] and it is a specific intent (state of mind) that is difficult to prove.

Immunity

All States provide some sort of immunity for persons who file reports, and the immunity usually applies to "anyone participating in the filing of a report. . . .[4] This is true even if the report is not required under the reporting law. It is important for a reporter to note the type of protection available in the State in which the report is filed.

To date, nine of the States that require reporting by social workers have granted them unqualified immunity; thus, a social worker ***cannot be sued at all*** for the reporting act or for the contents of the report.[5] Washington State has granted total immunity only from civil actions.

In the rest of the States that require reporting, social workers enjoy a qualified immunity. The most common qualification—found in 23 States—is that the reporter must be acting in good faith.[6] ("Good faith" is a legal concept; see Glossary.) In order to have good faith, the reporter is not required to believe personally beyond a doubt that abuse or neglect has occurred so long as there are reasonable grounds to support a belief that the child has been abused.[7]

A few States require that the reporter act "without malice"[8] rather than in "good faith." This "malice" or "bad faith" standard[9] is a subjective test. The reporter must not use malice or act in bad faith in making the report.

Many States that require "good faith" reporting grant a statutory presumption that the reporter is acting in good faith. A presumption is a legal term used primarily in trials to decide which party has to prove which facts. The exact effect of the presumption will vary from State to State and may be conclusive or rebuttable in nature,[10] but it is always an advantage to have the presumption in your favor. If the presumption is rebuttable, a reporter will be presumed to be acting in good faith until the opposing side in a trial proves otherwise. If the opposing side does not prove that the reporter acted other than in good faith, the reporter wins the case. A conclusive presumption would not leave room for rebuttal at all.

Breach of confidentiality

A breach of confidentiality suit will be unlikely to succeed when the State requires the report by its mandatory reporting law.[11] Recognition of a legal social worker/client privilege for protective service workers is not wide-spread, but, where the privilege against disclosure exists, a specific exception is generally made to allow the disclosure of communications of child abuse and neglect. Therefore, the social worker need entertain few fears of being sued for breach of confidentiality in a State where, by statute, the reporting of child abuse or neglect is either allowed or mandated.

REFERENCES

1 *Sussman* at 293.

2 Paulsen, "Child Abuse Reporting Laws: The Shape of the Legislation," 67 *Column. L. Rev.* 1, 31ff (1967). (Hereafter cited in references as *Paulsen.*)

3 Prosser, W. L., *Handbook of the Law of Torts,* 771-772 (4th ed. 1971). (Hereafter cited in references as *Prosser.*)

4 Helfer and Kempe, *supra.* See, for example, ORS 146.760 and ORS 418.762.

5 Alabama, California, Colorado, Idaho, Illinois, Montana, New York, North Carolina, and Ohio. (See chart on p. 8.)

6 Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

7 *Paulsen* at 13.

8 Indiana, Kansas, North Carolina, and Texas.

9 North Carolina.

10 *McCormick on Evidence* 802-832 (2nd ed. 1972). (Hereafter cited in references as *McCormick.*)

11 *Simson v. Swenson,* 104 Neb. 224, 177 NW 831 (1920), as discussed in *Paulsen* at 32-33.

Liability for Not Reporting

What are the consequences of not reporting a case of suspected abuse or neglect? In 26 States, a person who suspects abuse or neglect but does not report it may be prosecuted for the failure (see chart on p. 8). The punishment for conviction ranges from a $25 minimum fine in New Mexico[1] to a $500 fine and/or 6 months in jail in Alabama[2] and Louisiana.[3]

In Alabama and Washington, the State must

prove that the defendant social worker knew that a report should have been made in order to convict. In a few other jurisdictions, the State must prove that the failure to report was both "knowing and willful;" that is, that the social worker knew that there was a case of abuse or neglect, knew he or she was required to report it, yet deliberately refused to file a report.[4] In 18 States, a social worker who encounters a reportable case of abuse or neglect may be convicted for not reporting it, whether or not the worker knew a report was required and regardless of whether the failure was deliberate or a case of negligence.[5]

The social worker who fails to report a case of suspected child abuse or neglect may also be personally liable in a civil suit for further injury occurring after the report should have been made.

The social worker employed by a governmental subdivision or government agency is in a peculiar position. The worker may be sued personally for failure to perform a legal duty—in this case, the reporting of suspected child abuse or neglect as required by statute—and yet be unable to rely on his/her employer for indemnity (i.e., payment of the judgment against the worker) in those States where the Doctrine of Sovereign Immunity is still alive.

Under the Doctrine of Sovereign Immunity, neither the State nor any of its agencies may be sued, but an employee or public officer of the State or any of its agencies can be sued as an individual. In some States where the government agency is immune, the State may be permitted to carry liability insurance, and, if it does carry insurance, it can be sued. For example, Arkansas, Colorado, and Kansas allow insurance to modify the immunity law.[6] In Kentucky, Connecticut, and other States, a commission has been established to settle or reject claims made against the State.[7]

Many States have waived their immunity by authorizing negligence suits. As a practical matter, in any State which allows a governmental body to be sued, an injured person can file a complaint suing the employing agency, in addition to the employee.

It is a well-settled legal doctrine that an employer is liable for the negligence of its employee, so long as the employee is acting within the scope of employment. Therefore, the employer is indirectly liable, even for an employee's failure to make a report expressly required by statute as long as the State is not immune from suit under the law.

Where the employing agency is held liable, it must pay the amount of the judgment. Some States authorize an agency which does pay to seek reimbursement from the negligent employee, although this rarely occurs.[8] The social worker may also be entitled to seek reimbursement from his/her employer if he or she loses a suit.[9] Reimbursement from the agency is not available where the State can neither be sued nor consent to a suit.

In States without laws requiring reports by certain persons, a plaintiff would have to show that the social worker had a ***duty*** to report that was breached in order to win a suit. The legal duty might arise from general professional responsibility, or it might derive from the social worker's actions. For instance, if the social worker abandoned a family in which abuse or neglect had been recognized, there may be liability for violation of a duty to continue professional assistance once it was begun. The possibility of the person suing a social worker for breach of duty for abandonment and winning the suit is slight.[10]

In States that have mandatory reporting laws, the failure to report may be viewed as raising a presumption of negligence or even as conclusively proving negligence.[11] Once negligence is proven, the case may be lost by the professional who neglected to report. The only issues remaining are whether the failure to report caused the injury and the damages allowed. Therefore, a suit against a worker who did not report would have a greater chance of success in States that impose a statutory reporting duty. However, only two lawsuits of this type have been filed, neither of which was against a social worker and one of which was settled out of court.[12] Therefore, the law has not been tested.

New York State is an exception to the foregoing general discussion. New York provides, by statute, for civil liability for damages caused by the knowing and willful failure to file a report.[13] Where the legislature states a basis for the recovery of damages, courts strictly apply the standard.

REFERENCES

1 N.M. Stats. Annot. 13-14-14.1 (1976).

2 Ala. Code, Tit. 27 §25 (1973 Supp.).

3 LSA-RS 14:403 I (1974).

4 Delaware, Kansas, Kentucky, Louisiana, New York, Oklahoma, South Datota, and Utah.

5 California, Connecticut, Florida, Indiana, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oregon, South Carolina, Tennessee, Wisconsin, and Wyoming.

6 See, for example, Kansas Stats. Ann. 74-4715, 74-4716 (1972); Colo. Rev. Stat. Ann §24-10-104 (1971); Ark. Stat. Ann. §66-3242(1)(1959). In Arkansas, the insurer is sued directly.

7 See, for example, Ky. Rev. Stat. 44.070 (1974) and Conn. Gen. Stat. Ann. §4-141 *et seq.* (1959). In Connecticut, the commission has sole authority to determine the outcome of claims and there is no right of action directly against the State, if the claim is denied, without the commission's approval (C.G.S.A. §4-160). Kentucky permits an appeal from its Board of Claims to the circuit court, but without trial *de novo* (Ky. Rev. Stat. 44.140).

8 *Restatement (Second) of Torts* §895D, comment j at 46 (Tent. Draft No. 19 (1973)).

9 *Prosser* at §131.

10 But see *Landeros v. Flood*, 17 Cal.3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976) holding a physician and hospital liable for failure to diagnose and report a battered child.

11 *Prosser* at 200-201, and *Landeros v. Flood, ibid.*

12 *Landeros v. Flood, ibid.*, and the action by Thomas Robinson's father against four doctors for not reporting the abuse to Thomas as well as against a city and its police chief for not investigating when another doctor did report. This case was settled out of court for a reported $600,000. Noted in *Time Magazine* (Nov. 20, 1974) at 74, as reported in *Sussman* at 297 fn 305, and in Cummins, "Personal Liability for Failing to Report Child Abuse and Neglect" (unpublished paper, 1975).

13 N.Y. Soc. Serv. Law § 420(2)(1976).

SOCIAL WORKER'S LIABILITIES AND IMMUNITIES UNDER CHILD ABUSE REPORTING LAWS, AS OF JULY 1976

State	Are social workers mentioned in statute?	Are workers mentioned under another (general) category?	Is there a criminal penalty for not filing a required report?	Is immunity provided for making a report?
ALABAMA	Yes		$500 and/or 6 months	Total
ALASKA	Yes		None	Yes, if acting in good faith
ARIZONA	No	Voluntary		
ARKANSAS	No	Voluntary		
CALIFORNIA	Yes		Misdemeanor	Total
COLORADO	Yes		None	Total
CONNECTICUT	Yes		$500	Yes, if in good faith
DELAWARE	Yes		$50	Yes, if in good faith
DISTRICT OF COLUMBIA	No	No		
FLORIDA	Yes		Misdemeanor	Yes, if in good faith; presumption of good faith
GEORGIA	Yes		None	Yes, if in good faith
HAWAII	Yes		None	Yes, if in good faith
IDAHO	Yes		None	Total
ILLINOIS	Yes		None	Total, with presumption of good faith
INDIANA	No	Yes	$100 or 3 days	Yes, if without malice
IOWA	No	Voluntary		
KANSAS	Yes		Misdemeanor	Yes, if without malice
KENTUCKY	Yes		$100	Yes, if with reasonable cause
LOUISIANA	Yes		$500 and/or 6 months	Yes
MAINE	No	No		
MARYLAND	Yes		None	Yes, if in good faith
MASSACHUSETTS	Yes		None	Yes, if in good faith and with reasonable cause
MICHIGAN	Yes		Misdemeanor	Yes, if in good faith; presumption of good faith
MINNESOTA	No	No		Reported to welfare agency
MISSISSIPPI	No	No		Reported to welfare agency
MISSOURI	Yes		Misdemeanor	Yes, if in good faith
MONTANA	Yes		None	Total, with presumption of good faith
NEBRASKA	Yes		$100	Yes, if in good faith
NEVADA	Yes		Misdemeanor	Yes, if in good faith
NEW HAMPSHIRE	No	Yes	$200 to $500	Yes, if in good faith
NEW JERSEY	No	Yes	Misdemeanor	Total
NEW MEXICO	Yes	Yes	Misdemeanor $25 to $50	Total, if in good faith; presumption of good faith
NEW YORK	Yes		Misdemeanor	Total; statutory liability for failure to report if required
NORTH CAROLINA	Yes		None	Total, unless with malice or bad faith
NORTH DAKOTA	No	No		
OHIO	Yes		$250 and/or 30 days	Total
OKLAHOMA	No	Yes	Misdemeanor	Yes, if in good faith
OREGON	Yes		$250	Yes, if in good faith and with reasonable grounds
PENNSYLVANIA	No	No		
RHODE ISLAND	No	No		
SOUTH CAROLINA	No	No		
SOUTH DAKOTA	Yes	Yes	Misdemeanor	Total, if in good faith
TENNESSEE	No	Yes	$50 and/or 3 months	Total, if in good faith
TEXAS	No	Yes	$500 or 6 months	Total, if without malice
UTAH	No	Yes	Misdemeanor	Yes, if in good faith
VERMONT	No	No		
VIRGINIA	Yes		None	Civil immunity only, if in good faith
WASHINGTON	Yes		Misdemeanor	Civil immunity only, but total
WEST VIRGINIA	Yes		None	Yes, if in good faith; presumtion of good faith
WISCONSIN	Yes		$100 and/or 6 months	Yes, if in good faith
WYOMING	Yes		$100 and/or 6 months	Yes, if in good faith

INVESTIGATION

Fourth and Fifth Amendments to the U.S. Constitution

To date, little attention has been focused on fourth and fifth amendment aspects of child abuse and neglect investigation. As a result, few cases have reached the courts on this issue. However, current and predicted increases in the number of reports requiring investigation make inevitable such constitutional challenges to investigative procedures.

All persons and agencies involved in the investigation of child abuse and neglect should therefore be aware of the possible impact of their activities on fourth and fifth amendment rights of parents and custodians. Unfortunately, this is, at present, a confusing and shifting area of law, and its application to child abuse and neglect is far from clear.

Search and Seizure, and Investigation by Children's Service Agencies

The fourth amendment requires a properly issued warrant before police can conduct searches of persons or property, or seize persons or property, in criminal cases. There are some limited exceptions to this protection (see "More Advanced Legal Concepts: Fourth Amendment—Present Status of Search and Seizure Law," beginning p. 104).

Child abuse and neglect investigations by children's service agencies do not fit within the framework of criminal searches. Child abuse and neglect is a crime in virtually all States, either by special statute or as a type of assault. However, many of the characteristics of a criminal investigation are not present in the social worker's visit to a home where child abuse or neglect is suspected.

The primary concern of child abuse or neglect investigation is not to uncover evidence for use in a criminal prosecution; it is to protect the welfare of the child and, if necessary, to rehabilitate the parent—and rehabilitation is not achieved through criminal conviction and incarceration.

Although the fourth amendment limitations do not apply directly to child abuse and neglect investigations, the U.S. Supreme Court has suggested some guidelines in a very similar type of investigation. In ***Wyman v. James***,[1] the Court held that warrantless visits to welfare recipients' homes do not violate the fourth amendment when:

1. The purpose of the visit is for the welfare of the person visited.
2. The visit was not aimed at criminal prosecution.
3. The welfare recipient had advance notice of the visit.
4. The visit comports with department procedures that

   ensure privacy;

   prohibit forcible entry;

   prohibit use of false pretenses to gain entry;

   prohibit visits after normal working hours.

These indices offer the best guidelines currently available to persons investigating child abuse and neglect, and the visits made should conform as closely as possible to this model in order to avoid fourth amendment constitutional violations. (See section on "More Advanced Legal Concepts: Fourth Amend-

ment—Present Status of Search and Seizure Law" for a discussion of *Wyman*.)

REFERENCE

1 400 U.S. 309 (1971).

Fifth Amendment—Miranda Warnings

The U.S. Constitution provides protection against self-incrimination through the fifth amendment. For child abuse and neglect cases, this protection applies only to criminal prosecutions and investigations which may lead to criminal prosecution.

The Constitution requires that before a person in custody is questioned, that person must be told that he/she has a right to remain silent and that any information which he/she gives can be used in a later criminal prosecution.

In general, the fifth amendment will have no bearing on child neglect or abuse investigations, since these investigations lack either the element of custody or are not used for criminal prosecution. Where it appears that the person being investigated may feel obligated to cooperate with the person making the investigation and the possibility exists of a later criminal prosecution, the social worker should seek further qualified legal guidance. (For a discussion of this problem, see the section entitled "More Advanced Legal Concepts: Fifth Amendment—Miranda Warnings," beginning p. 106.)

Effect of Constitutional Violation—Exclusion of Evidence and §1983 Actions

The main method used by U.S. courts to enforce constitutional principles has been to exclude evidence acquired in violation of fourth and fifth amendment rights. ***Mapp v. Ohio*** made the exclusionary rule applicable to State courts in criminal cases involving evidence seized in violation of the fourth amendment. ***Mapp*** left open the proper course to follow where the evidence is to be used in other than strictly criminal prosecutions.[1] Several cases have held such evidence admissible in civil cases.[2]

When a child abuse or neglect investigation leads to criminal prosecution, the exclusionary rule applies when evidence has been obtained in violation of constitutional guarantees. Its application in noncriminal proceedings is uncertain.

Section 42 U.S.C. 1983 of the Federal civil rights laws may provide for civil action against a social worker who is found to have violated the constitutional rights of another person. The text of this law reads:

> **Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.**

In any case where the social worker feels that he or she may be interfering with the rights of another, for the social worker's own protection, competent legal advice should be sought.

REFERENCES

1 367 US 643 (1961).

2 *Munson v. Munson*, 27 Cal. 2d 659, 166 P. 2d 268 (1946); *Sackler v. Sackler*, 15 NY 2d 40, 203 NE 2d 481 (1964); *Walker v. Penner*, 190 Or. 542, 22[illegible] P.2d 316 (1951).

EMERGENCY PICKUP OF ABUSED OR NEGLECTED CHILDREN

State Statutes

All States have statutes that allow emergency pickup of abused or neglected children. These statutes differ significantly from State to State.

Emergency pickups without parental consent fall into two categories: with a court order and without a court order. Some States provide for both methods, and some permit only those with a court order.

Because of the great variety in statutory patterns, the social worker should research the laws of his/her own State for the specific situations, if any, when the worker may pick up a child without a police officer or other authorized person. The worker should also determine what policy is followed by his/her agency before taking any action in this area, since actions taken in contravention of agency policy could lead to legal liabilities. Consideration should also be given to the nature of the holding facilities available for the child once he or she is picked up.

Emergency Pickup Without a Court Order

BY WHOM: Nearly every State statute names specific persons who are authorized to pick up a child in an emergency situation. Commonly, police or probation officers are authorized. Persons other than police officers authorized to pick up a child vary from State to State (see chart on p. 14).[1]

CHILD'S CONDITION: Most statutes require a child to be in danger in order to be picked up without a court order. Other statutes require abuse or neglect to be present. The most common tests specified by statutes are:

> **In such conditions or surroundings that his or her welfare requires the immediate assumption of his or her custody by the court . . . .**
>
> **or**
>
> **Seriously endangered in his or her surroundings and removal is necessary . . . .** (See chart on p. 14)

Some States allow emergency pickup of a child in situations other than imminent danger.[2]

AFTER PICKUP: Nearly every State has a statute or series of statutes describing precisely what must be done immediately after any emergency pickup without court order in order for the continued retention after pickup to be valid. Because provisions vary greatly, the worker should check the relevant State statute and agency rules for the following:

1. *Notification* of the pickup must be made —
   - (a) *WHO* must be notified? Any or all of the following may need to be notified:
     - (1) Parents.
     - (2) Foster parents.
     - (3) *De facto* parents.
     - (4) Juvenile court.
     - (5) Human services department supervisor or head.
     - (6) District attorney.
   - (b) What are the time limits for notification? (Check both statutes and agency rules.)

2. A *report* of the pickup must be filed —
   (a) To whom: Juvenile court? Central Registry? Children's service agency supervisor or agency head? Other?
   (b) What must report contain?
   (c) Who writes it?
   (d) What is the time limit for filing?

3. *Where* is the child to be detained after an emergency pickup? —
   (a) Threshold question: Can the child be detained if the parent demands the child's release?
   (b) How soon must a child be delivered to the place of detention?
   (c) How long may a child be detained without a hearing?
   (d) May a noncustodial parent care for the child?
   (e) What kind of facility may a child be detained in before the hearing?[3]

REFERENCES

1 Ariz. Rev. Stats. §8-223 (1975 Supp.); Fla. Stats. Ann. §39.03 (1976 Supp.); Or. Rev. Stats. 419.569 (1975); Va. Code Ann. §63.1-248.9 (1975 Supp.); Fla. Stats. Ann. §39.03 (1976 Supp.); Ann. Laws Mass. ch. 119 §513 (1975); Miss. Code Ann. §43-21-11 (1975 Supp.); Mont. Rev. Code §10-1309 (1975 Supp.); N.J. Stats. Ann. §9:6-8.29 (1976 Supp.); Vernon's Texas Code Ann. Family §17.01 (1975 Supp.).

2 See for example, N.C. Gen. Stats. §7A-284 (1969).

3 Some States, by statute, consider jail or prison unsuitable. See, for example, Vernon's Ann. Mo. Stats. §211.151 (1962); Or. Rev. Stats. 419.575 (1975).

Emergency Pickup Pursuant to a Court Order

Some States have statutes authorizing the emergency pickup of an abused or neglected child *only* with an order of the court. In a number of States, this is the only way an emergency pickup of an abused or neglected child may be effective.

THE ORDER: The procedure is similar in every State having this kind of provision, although there may be local variations.

Step 1: A petition is filed, stating that the child is in such circumstances that it is necessary for the court to assume immediate jurisdiction over the child. (The specific terms of this allegation will depend on the specific language of the emergency pickup statute of each State. Most States have statutes stating precisely what information must be in the petition and what the form must be.)

Step 2: At the same time as the petition is filed, a summons, similar to a standard summons, is usually prepared directing the parent, guardian, etc., to appear in court on a specified day for a hearing on the issue of child abuse or neglect. (An emergency summons also states that since the child's circumstances make it necessary for the court to obtain immediate jurisdiction over the child, the court directs the appropriate officer to pick up the child.)

Step 3: The summons is presented to the court, at which time the judge decides whether an emergency pickup is warranted. If it is, the judge writes the authorization for an emergency pickup.

Step 4: The appropriate person (see chart on p. 14) takes the summons to the child's location, presents it to the parent, foster parent, de facto parent, or guardian and picks up the child.

THE PERSON AUTHORIZED TO PERFORM THE PICKUP: The person who is to perform the pickup is designated on the face of the summons itself. Where a statute restricts authority to pick up children in emergencies, only those persons designated on the summons may legally perform this function. Many States

allow only peace officers or sheriffs to pick up children.

Some States (including Alabama, Alaska, Hawaii, Kentucky, Missouri, Nebraska, Nevada, Utah, and Wyoming) authorize anyone the court nominates.[1] In Nevada, this may be any citizen over the age of 18.[2] The court may grant authorization individually on a case-by-case basis or by a general designation. The individual's name may appear on the summons, or the summons may contain general language such as "authorized agent of the Court."

Some statutes direct the officer serving the summons to do the pickup. Who may be an "officer" under this kind of statute is determined by the enabling statute for the State's juvenile court system.

Enabling statutes set forth the roles, rights, and duties of each juvenile court official. In some States, the term "officer" is closely defined. Thus, if social workers are not within the statutory definition of "officer," they probably cannot make an emergency pickup. In some States, the court is granted statutory power to nominate its own officers.

REFERENCES

1 Ala. Code Ann. title 13 §352(8) (1958); Alaska Stats. §47.10.030(c) (1962); Haw. Rev. Stats. §571-23 (1968); Ky. Rev. Stats. 208.090(2) (1972); Vernon's Ann. Mo. Stats. §211.101; 211.111 (1959); Rev. Stat. of Neb. §43-206.01(4); Nev. Rev. Stats. §62-150 (1973); Utah Code Ann. §55-10-87 (1974); Wyo. Stats. Ann. §14-115.14 (1975 Supp.).

2 Nev. Rev. Stats. §62-150 (1973).

Additional Reading

Besharov, Douglas J., *Juvenile Justice Advocacy*. New York: Practicing Law Institute, 1974. (pp. 102-107; 146-154.)

EMERGENCY PICKUP OF ABUSED OR NEGLECTED CHILD, AS OF JULY 1976

STATE	Without court order		With court order	
	Who[1]	Condition[2]	Who[1]	Condition[2]
ALABAMA			P,S	W
ALASKA			S	W
ARIZONA	P,C	I		
ARKANSAS			***	N
CALIFORNIA	P	N		
COLORADO	P,J	E		
CONNECTICUT			P,J,Sh	W
DELAWARE	P	N		
DISTRICT OF COLUMBIA			Sh	W
FLORIDA	P,C,F	I,O		
GEORGIA	P	I		
HAWAII	P	E	P,S	W
IDAHO	P	E	J	W
ILLINOIS	P	N	***	E
INDIANA			Sh	W
IOWA	P	W	Sh	W
KANSAS	P	N	P	N
KENTUCKY			P,S	W
LOUISIANA	P	E	P,J,Sh	A
MAINE			***	A
MARYLAND	P,S	E		
MASSACHUSETTS	F	E		
MICHIGAN	P,J	E		
MINNESOTA			***	W
MISSISSIPPI	F	***	Sh	W,A
MISSOURI			S	W
MONTANA	P,F,L	***	P,F	N
NEBRASKA	P,J	E	S	E
NEVADA	P,J	E	S	W
NEW HAMPSHIRE	P,J	E		
NEW JERSEY	P,J,F	I	***	N
NEW MEXICO	P	I	***	E
NEW YORK			S	N
NORTH CAROLINA			P,S	E,A
NORTH DAKOTA	P,L	I	P	I,E
OHIO	P	I	P	E
OKLAHOMA			***	W
OREGON	P,C,J	E		
PENNSYLVANIA	P,Sh	I		
RHODE ISLAND	P,J	E		
SOUTH CAROLINA			P	E
SOUTH DAKOTA	P,J	E	P	E
TEXAS	P,J,F	E	***	E
TENNESSEE	P,Sh	I	P	W
UTAH	P,J	E	S	W
VERMONT	P	E	P	E
VIRGINIA	P,C	W		
WASHINGTON	P,J	E		
WEST VIRGINIA			***	N
WISCONSIN	P	W	***	W
WYOMING	P	E	S	E

[1]PERSON WHO CAN MAKE THE PICKUP:

- P Peace officer; police officer, law enforcement officer.
- S Any person authorized by juvenile court; any agency, institution, individual.
- C Child protective services worker; youth services worker.
- F Family services worker, department of public welfare worker.
- J Juvenile probation counselor; probation officer.
- Sh Sheriff; officer of the court; U.S. marshall.
- L County attorney; juvenile supervisors appointed by and working for juvenile court.
- O Other than the above.
- *** No mention in statute; general rules apply.

[2]CONDITION OF CHILD THAT JUSTIFIES EMERGENCY PICKUP:

- W In such conditions or surroundings that child's welfare requires immediate assumption of his/her custody.
- I Illness, injury, or in immediate danger.
- N Neglected, dependent, delinquent, abused; dependent-neglected; and immediate removal is necessary to protect health or physical well-being.
- E Seriously endangered in surroundings; surroundings such as to endanger health, morals, welfare; circumstances of home environment may endanger child's health, person, welfare, or property.
- A For child's protection; in the best interest of the child; child needs to be placed in detention or shelter care.
- O Other than above.
- *** No mention in statute; general rules apply.

CRIMINAL AND CIVIL PROCEDURES

Alternative Procedures—Criminal and Civil

Two major concerns are present in the handling of child abuse and neglect cases. First is that of protecting the child, and legal proceedings toward this end usually take the form of intervention by the juvenile court. Second is criminal prosecution of the child abuser where this is necessary.

Numerous practical considerations go into the decision of whether or not to initiate a criminal proceeding. First of all, criminal prosecution is a formal process in which the rights of a criminal defendant are closely guarded. And, second, criminal prosecution requires evidence which establishes beyond a reasonable doubt the culpability of the offender. In a child abuse case, this type of proof is often difficult to obtain, since acts of abuse usually take place in private without outside witnesses, and parents are often mutually protective. Evidence, even when it is sufficient to show abuse, may not be sufficient to indicate which parent is the offender.

An unsuccessful prosecution can result in further hazards to the child should the abuser choose to vent on the child his or her anger and frustration arising from the criminal charge. And successful prosecution can lead to the breakup of the family without concern for the impact this may have upon the child, and whether other means, such as family treatment, might better meet the child's needs.

Fear of prosecution for child abuse or neglect may prevent a parent from seeking personal help. It may also make parents reluctant to seek medical or psychological help for the child—a factor which can, in a crisis situation, literally put the child's life in jeopardy.

Criminal procedure—characteristics

Criminal prosecution may be instituted under criminal statutes that deal with such actions as assault, battery, contributing to delinquency, sexual abuse, or homicide. Some States have created the separate crime of child abuse or cruelty to children. Mississippi is one such State.[1]

The Mississippi statute is in two sections: the first makes acting, or failing to act, in a manner which tends to contribute to the abuse or neglect of a child a misdemeanor. The penalty is a fine of not more than $500. This section can also be used, of course, to enforce the reporting of child abuse and neglect. The second section provides that:

> **Any person who shall intentionally burn or torture or, except in self defense, or in order to prevent bodily harm to a third party, whip, strike or otherwise abuse or mutilate any child and where such abuse or mutilation results in the fracture of any bone, the mutilation, disfigurement or destruction of any part of the body of such child, shall be guilty of felonious abuse and/or battery of a child, and upon conviction may be punished by imprisonment in the penitentiary for not more than twenty (20) years.[2]**

The actions covered by this section also fall under the usual criminal provisions for assault and battery; nevertheless, legislatures in a number of States have chosen to focus on child abuse or neglect by the enactment of special criminal legislation.

In a criminal prosecution for child abuse or neglect, the defendant is entitled to the full protections guaranteed by the fourth, fifth, and

sixth amendments of the Constitution through rules developed to ensure their implementation.

Investigation of child abuse or neglect, when criminal prosecution is involved, is subject to strict constraints imposed by the Constitution, and these are put into effect by the exclusionary rule. In simple terms, any evidence obtained in violation of constitutional provisions may not be used for criminal prosecution; it is excluded as evidence from the courtroom. Thus, searches, seizures, and investigations must be accomplished within constitutional limits.[3] (See section on constitutional rights and investigation.)

Court procedure includes criminal trial formalities: right to a jury; strict adherence to rules of evidence; right to cross-examination; right to appointed counsel; right to a public and speedy trial; and the highest standard of proof (that is, beyond a reasonable doubt). Because each element that goes to make up the crime must be proven beyond a reasonable doubt, the prosecution must prove that the defendant intentionally committed each element. Without such proof, the prosecution will be unsuccessful. And there is no second chance to try again, since the Constitution prohibits placing a defendant in double jeopardy. Even if successful, the results of criminal prosecution, such as punishment, incarceration in a penal institution, or rehabilitation, are directed at the defendant rather than at the broader problem.

REFERENCES

1 Miss. Code Ann. §43-21-27 (Supp. 1975).

2 *Ibid.*

3 *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); and related cases. See sections on search, seizure, and *Miranda* in child abuse and neglect proceedings.

Civil procedure—characteristics

The usual manner of dealing with child abuse or neglect is through the juvenile court process. Here, the focus is upon the welfare of the child in the total context of the family.

The juvenile court process is not as easy to characterize as is the criminal process. First of all, procedures and the rights granted to the participants vary widely from State to State and are currently in a state of flux. Constitutional rights of parents, children, and alleged abusers are also in a state of confusion and await clarification by the U.S. Supreme Court. (See "Elements of the Adjudicative and Dispositional Stages in Court," beginning p. 33.)

Of major importance for the social worker are the differences between criminal and juvenile court proceedings—differences even more marked in abuse and neglect proceedings than in delinquency hearings.

Commentators often refer to the juvenile court process as "informal" when compared to criminal proceedings. While the specifics vary from State to State, as a general rule strict adherence to criminal procedure is relinquished; the goal is treatment rather than incarceration.

Juvenile courts utilize a range of dispositions available to rehabilitate the child and the family, the most extreme remedy being permanent removal of the child from the home and termination of parental rights. A more frequent remedy is temporary removal, with the requirement that, pending the child's return, the parents undergo therapy. As an alternative—perhaps the one most frequently utilized—the child may remain in the family home under supervision of the court.

A few States have statutory requirements that apply when a child is allowed to remain in the home after an adjudicatory finding of abuse or neglect. California law provides, for example, that when a child is found to be within the jurisdiction of the juvenile court because his or her home is unfit by reason of neglect, cruelty, depravity, or physical abuse, the parents shall be required to participate in a counseling program to be provided by an appropriate agency, designated by the court.[1]

REFERENCE

1 California Welfare and Institutions Code, §727 (Supp. 1975) and §600(d) (1972).

Statutory Definitions

Because States, by statute, currently define abuse and neglect in broad language, such statutes are susceptible to misapplication, particularly in cases involving families with cultural mores distinct from the majority community. Typical of such statutes is §600 of California's Welfare and Institutions Code. Under this provision, a child is considered to be dependent:

> (a) Who is in need of proper and effective parental care or control and has no parent or guardian, willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control.
>
> (b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.
>
> (c) Who is physically dangerous to the public because of mental or physical deficiency, disorder or abnormality.
>
> (d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is in.[1]

Such broad statutory provisions may be necessary to allow examination of the facts of each situation. Critics challenge such statutes as unconstitutionally vague. They contend that vague statutes invite misuse and increase the likelihood of intervention which itself may be harmful to the child; also that vague statutes permit decisions to be based on the personal views of judges and social workers. These critics therefore urge more specific statutory definitions, with emphasis on identifiable harm to the child as a prerequisite to a finding of abuse or neglect.[2]

Obviously, the development of a workable definition of neglect or dependency is one of the major policy problems that juvenile courts face today.

REFERENCES

1 California Welfare and Institutions Code, §600 (1972).

2 See Wald, Michael, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 *Stanford L. Rev.* 985 (1975); Levine, Richard S., "Caveat Parens: A Demystification of the Child Protection System," 35 *U. Pitt. L. Rev.* 1 (1973).

FAMILY PRIVACY

According to the U.S. Supreme Court, parents have the right, protected by the 14th amendment, to rear their children as they see fit without interference by the State, at least insofar as that interference does not infringe on the parents' right to have their child attend a private school[1] or be taught a foreign language.[2]

Although the Supreme Court has held that family privacy is "of similar order and magnitude as the fundamental rights specifically protected," by the U.S. Constitution,[3] no Supreme Court case has directly examined the issue of family privacy against a child's welfare in an abuse or neglect context.

REFERENCES

1 *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

2 *Myer v. Nebraska,* 262 U.S. 390 (1923).

3 *Griswald v. Connecticut,* 381 U.S. 479 (1965) at 495ff.

INVASION OF PRIVACY

Agency personnel involved in child abuse and neglect investigations frequently voice concern that investigative methods may violate the client's legally protected right to privacy. This makes it essential for social workers to be aware of relevant privacy rights which courts uphold and to recognize the potential impact of these rights on agency investigations.

The worker can use the following general guidelines to determine the permissible bounds of investigative methods:

1. Would a reasonable person in the same circumstances find the worker's conduct objectionable?
2. Is the worker's conduct malicious?
3. Is the investigation limited to acquiring necessary information?
4. Is there a less intrusive means of acquiring the necessary information?
5. Is there an overriding public interest in the acquisition of the information sought?

The major form of privacy invasion that may occur in a child abuse or neglect investigation is intrusion. Intrusion is a shorthand legal term for invasion of a person's solitude or seclusion.[1] The invasion may be physical; but intrusion also includes wiretapping, eavesdropping, the unauthorized prying into private records (e.g., bank accounts), and other forms of invasion that are not physical in nature.[2]

While this area of the law is still in a developmental stage, it can generally be said that the criterion used to decide whether or not legal action can be brought for invasion of privacy is if it would be highly objectionable to a reasonable person.[3] Some investigative methods have been found legally acceptable

under the reasonableness test, including the Social Security Administration's receipt of hospital records to determine Medicare or Medicaid benefits[4] and welfare officials' receipt of information about clients from psychiatric caseworkers.[5]

Some invasions of privacy are held not actionable (i.e., do not provide grounds for legal action) because the courts find an overriding public interest in obtaining the information. For instance, courts have held that investigative surveillance activities such as "shadowing" and the making of motion pictures do not constitute an actionable invasion of privacy in personal injury cases because the public has a legitimate interest in ensuring that personal injury claims are valid.[6] Behavior that is malicious or not limited to conduct reasonably aimed at obtaining needed information is impermissible, even when public interest is great.[7]

REFERENCES

1 See, in general, *Prosser* at §117.

2 For example, *Brex v. Smith* 104 N.J. Eq. 386, 146, A34 (1929) (private bank accounts); *Zimmermann v. Wilson*, 81 F2d 847 (3rd Cir. 1936) (taxpayers' bank and broker records).

3 *Prosser* at 808. See also *Froelich v. Adair*, 213 Kan. 357, 516 P2d 993 (1973).

4 *Benjamin v. Ribicoff*, 205 F. Supp. 532 (D. Mass. 1962).

5 *Belmont v. California State Personnel Board*, 36 Cal. App. 3d 518, 111 Cal. Rptr. 607 (1974).

6 *Tucker v. American Employers' Insurance Co.* 171 So.2d 437 (Fla. App., 1965).

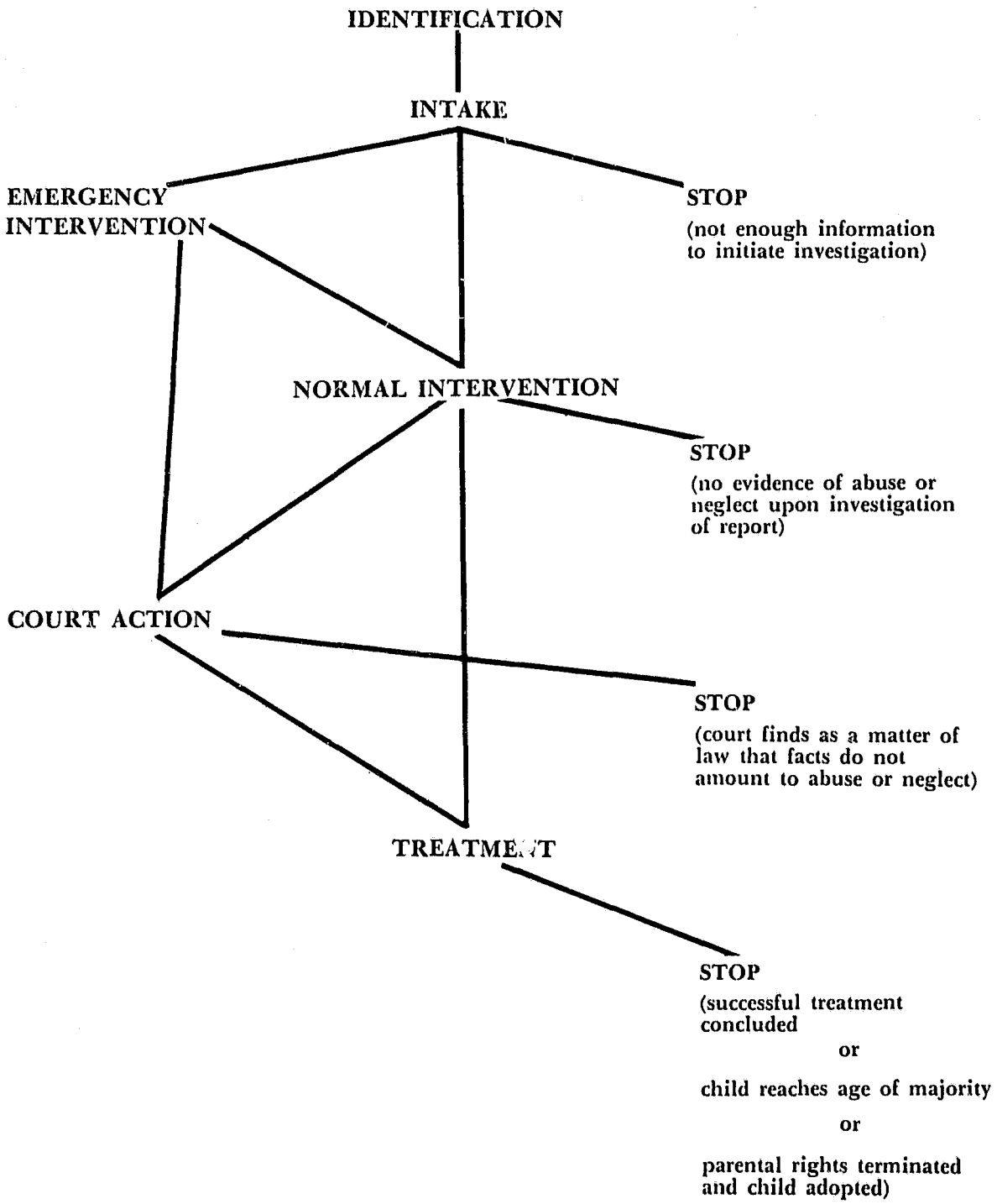
7 See *Pinkerton National Detective Agency Inc. v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963). (Insurance company hired a private detective agency to constantly shadow a woman, in a manner calculated to frighten her into dropping the personal injury lawsuit she had filed against the insured.)

EVALUATION FOR COURT: WHEN TO GO TO COURT

- Case Management and Court Action (Schematic Representation)
- When to go to Court: Introductory Overview

CASE MANAGEMENT AND COURT ACTION

(A Schematic Representation)



PRELIMINARY CONSIDERATIONS

When to Go to Court—Introductory Overview

General guidelines

One of the biggest problems the social worker faces is deciding when to go to court. Serious and/or continuing physical abuse, of course, clearly warrants the use of the court's authority for the child's protection. However, many cases, particularly those involving neglect, are less clear.

Generally speaking, court action should be considered to remove a child temporarily or permanently from the home or to obtain adequate treatment if:

1. The child is in imminent danger of harm.
2. Attempts at treatment have failed, and parents have not made progress toward providing adequate care for the child.

Beyond these very general guidelines, the social worker should consider the following specific factors in deciding whether or not to petition the court for permanent or temporary custody, for protective supervision, or for returning the child to the home:

1. Necessity for emergency care for the child away from his/her parents because of conditions dangerous to the child's physical, moral, mental, or emotional well-being, and because parents are unable or unwilling to use the help offered to change the situation.
2. Inability or unwillingness of the child's parents, guardian, or other custodian to discharge their responsibility to and for the child because of incarceration, hospitalization, or physical, mental, or emotional incapacity.
3. Abandonment or desertion of the child.
4. Necessity for review of the child's legal status.[1]
5. Availability of other agency methods of handling the case; for example, a change of caseworker.
6. Possibility of the agency (public or private) losing the case. (There may be little point in taking a case to court to ask for removal; in such a case, the worker may decide to seek alternative ways of handling the situation.)
7. Possibility that treatment, which has been unobtainable through the agency's resources, can be obtained by a court order; for example, out-of-State treatment that is available pursuant to court order.

The social worker should also bear in mind that going to court has a number of negative aspects. Aside from the more obvious problems of procedural complexity and legal pitfalls, the social worker should also weigh in the balance the effects that facing the court can have upon the individuals involved.

Court proceedings, even in juvenile or family court, tend to be adversarial in nature and can result in disruption of the client-family and family member-family relationships. An unsuccessful attempt to involve the court in child protection matters—i.e., when the court finds insufficient evidence to warrant its interven-

tion—can also lead to total rejection of agency help in the future.

REFERENCE

1 Child Welfare League of America, "Protective Services and the Court." In *Standards for Child Protective Services.* New York: The League, 1973. (p. 46.)

Safety of the Home

Lack of home safety is a major factor in deciding when to go to court. Dr. Ray Helfer lists some of the following criteria for assessing the safety to a child of his/her home.[1]

1. Do the parents or caretaker have a support system that includes relationships with other people (friends, neighbors, families) who can "bail them out" in a crisis? This is based on the premise that socially isolated parents who do not feel there is anyone they can ask for help are more likely to vent their frustrations on their children.
2. Is the spouse helpful? If the spouse appears to be sensitive to the needs of the other parent and offers help in stressful situations, this increases the likelihood that the home will be a safe place for the child.
3. Is child-parent role reversal low? Role reversal denotes interaction between parent and child in which the child actually is taking care of the parent's needs rather than the reverse. (Helfer says that some role reversal—i.e., child taking role of parent and vice versa—exists in every home. However, the less role reversal, the safer the home for the child.)
4. Is there a "special" child? The child who is the target of the abuse is often viewed by parents as "special" or somehow different (in a negative way) in physical appearance, personality, etc., than other family members.
5. Are there frequent or ongoing crises in the home? (Crisis is broadly defined by Helfer as almost any stress-producing factor that triggers child abuse and neglect. Crises range from losing a job to visiting in-laws.)
6. Do parents indicate that, most of the time, they enjoy the child's presence?

Many other factors, of course, may affect the safety of the home. The list used here is presented to offer an example of how the social worker might begin to assess home safety.

REFERENCE

1 See generally *A Self Instructional Program on Child Abuse and Neglect,* units 1 and 2. (Copyright 1974 by Ray Helfer, M.D., Professor of Human Development, College of Human Medicine, Michigan State University, East Lansing, Mich. 48824.)

Social Worker/Client Relationship

A good social worker/client relationship is one in which both can agree on the desired course of action and proceed toward a jointly identified goal with willingness and cooperation on both sides.

The resolution of parental child abuse and neglect requires parents to change their behavior toward their children and to alter what are often deeply rooted attitudes toward childrearing. If the cooperation of parents can be obtained without court intervention, and if the child does not appear to be in immediate danger by remaining in the home situation, then court action is unnecessary and not recommended. However, court action will probably be necessary if the social worker determines that the child should be removed from the home situation and voluntary release of the child by the parents is not possible.

Social workers generally agree that it is possible to use the court system to require parents to participate in treatment programs. But there is no consensus on the ***advisability*** of

using such court action (or threats of court action) to achieve rehabilitative ends.

Most social workers feel that court action should not be undertaken until all other agency alternatives have been tried or are not feasible. Then, if attempts at voluntary treatment fail, court action may become necessary.[1]

Should agency efforts at rehabilitation fail, it may become necessary to ask the court for assistance in establishing: (1) an alternate living situation for the child (e.g., foster care, adoption, emancipation) through a court petition, (2) a court ordered treatment plan, or (3) protective supervision for the child. But any decision to request action from the court should be preceded by a consideration of the State's or agency's ability to provide a better alternative for the child.

Another area that bears mention here is institutional abuse. If the child has suffered injury due to negligence on the part of an institution (schools, social services, etc.), court action may be necessary to require compensation or treatment for the injured child.

REFERENCE

1 Fay, Shirl E., "The Social Worker's Use of the Court." In *Child Abuse Intervention and Treatment.* Nancy B. Ebeling and Deborah A. Hill, Eds. Acton, Mass.: Publishing Sciences Group, Inc., 1975.

Additional Reading

Becker, Thomas T., *Child Protective Services and the Law.* Denver, Colo.: American Humane Association, 1968.

———, "Protecting Legal Rights Through Judicial Process." In *Second National Symposium on Child Abuse.* Denver, Colo.: American Humane Association, 1973. (p. 47.)

De Francis, Vincent, *The Court and Protective Services: Their Respective Roles.* Denver, Colo.: American Humane Association (n.d.).

Fay, Shirl E., "The Social Worker's Use of the Court." In *Child Abuse Intervention and Treatment.* Nancy B. Ebeling and Deborah A. Hill, Eds. Action, Mass: Publishing Sciences Group, Inc., 1975.

Katz, Sanford N., *When Parents Fail.* Boston, Mass.: Beacon Press, 1971.

Wagner, Hon. Robert H., "The Role of the Court." In *A National Symposium on Child Abuse.* Denver, Colo.: American Humane Association, 1975. (pp. 57-58.)

TRIAL

- Overview of Court Procedure
- Elements of the Adjudicative and Dispositional Hearings In Juvenile Court Child Abuse and Neglect Proceedings
- Witnesses
- Evidence

OVERVIEW OF COURT PROCEDURE

Jurisdiction of the Juvenile Court

The juvenile courts of each State have jurisdiction over persons under the age of 18 years in the following circumstances:

(1) Commission of a criminal offense.

(2) Commission of a noncriminal act if the act endangers the health and welfare of the juvenile or other persons, such acts including:

  (a) running away from home,

  (b) chronic truancy from school, and

  (c) incorrigibility.

(3) Dependence on the State for provision of health and welfare services.

(4) Neglect resulting in deprivation of health and welfare.

(5) Abuse resulting in injury to the child.

The jurisdictional element may alternatively be viewed as being of two types:

(1) Jurisdiction over juveniles in trouble because of their actions, and

(2) Jurisdiction over juveniles who may need the aid of the court due to the action or inaction of others.

It is the second type of jurisdiction that is typically present in child abuse and neglect cases.

In order to treat or care for a young person, the juvenile court must first establish the young person as a ward of the court. Admissions by the child that he or she is in need of a court appointed guardian, or admissions by the parents to the same effect, are likely to be given considerable weight by the court. Wardship can, of course, also be established in the absence of such admissions after a hearing on the facts (the adjudication hearing).

Preliminary hearing or custody hearing

Before the adjudication hearing occurs, a hearing is held for the child who is to remain in the custody of someone besides a parent prior to or during the period of the adjudication hearing. This hearing is necessary so that a judge may decide if the child can remain in shelter care while the hearing is prepared.

The worker or the district attorney for the State must present information to establish for the judge that it is necessary to the child's welfare to remain in the custody of the State. Such information includes a summary of the facts, conditions, or circumstances which led the worker to believe that custody outside the home was and continues to be necessary for the child. These circumstances may be that the child is in danger of further physical or emotional harm or that the parent is unable to adequately care for the child.

Witnesses may be called to support the worker's findings, if the judge so requires or if local practice expects witnesses to be called. At the end of the preliminary or custody hearing, the judge will rule where the child will remain.

Although what happens in court when a trial begins may look confusing, the order and procedure are generally consistent and formalized.

The hearing begins when the judge or bailiff, depending on local procedure, calls the case name and determines that all the parties and their attorneys are present.

Pretrial Matters

There may be some pretrial matters to be resolved, such as:

1. Continuances, if one of the parties needs more time to prepare the case.
2. Admission of the petition, if one of the parties decides not to contest the factfinding but has previously indicated to the court that he/she would contest the court's jurisdiction.
3. Miscellaneous issues previously raised that the judge rules on now, such as the admissibility of certain evidence or availability of witnesses.
4. Formal court procedures such as court intake and docket calls.

Formal Trial or Adjudication

After the pretrial matters, the formal trial or adjudicatory hearing begins.

What has been described is a formal hearing. A hearing in juvenile court may lack some of the following procedures due to local practice:

A. Questioning Witnesses

The questioning of each witness follows this order:

1. Direct examination (by attorney calling the witness to testify).
2. Cross-examination (by opposing attorney).
3. Rebuttal or redirect examination (a second direct examination by attorney calling the witness on the issues raised during the cross-examination).
4. Recross examination (a second cross-examination by opposing attorney on issues raised in redirect examination).

The State calls its witnesses and offers its evidence first. The State questions each of its witnesses on direct examination. These questions are designed to elicit all pertinent facts in the witness' knowledge.

When the State has asked its witness all its questions, then the attorney for each other party (parents and, in some jurisdictions, the child) may cross-examine the witness. (Cross-examination is designed to discover any untruths or weaknesses in the witness' testimony.)

Leading questions are permitted. (Leading questions contain the answer to the question, thus requiring only a "Yes" or "No" response; they are not usually allowed during direct examination.)

Example:

Q. Is it regular procedure at Family Services, Mrs. Gregory, to advise parents involved in a child abuse investigation to take a few days to collect their thoughts?

Leading questions are often allowed by the court during direct examination where the witness is a child needing help in formulating a useful response.

In most States, questions may be asked on cross-examination only on the same subjects covered during direct examination. If the opposing side wishes to elicit information on different subjects, it must call the witness itself, when its time comes.

After all cross-examination is completed, then the State may ask rebuttal (sometimes called redirect) questions. Rebuttal questions func-

tion to show, wherever possible, that the apparent untruths and weaknesses discovered on cross-examination are not damaging to the State's case. The scope of the rebuttal is limited to the subjects dealt with on cross-examination.

After all rebuttal or redirect examination is completed, the opposing counsel may conduct a recross-examination, asking leading questions on subjects covered during the redirect or rebuttal examination. The questioning of the witness is then complete. The judge may question the witness at any time, interrupting the questions of the attorneys.

After the State has called its witnesses, then each other party in the case is given the opportunity to call witnesses on his or her behalf. Each of these witnesses is questioned in turn by direct examination, cross-examination, and rebuttal examination. After each party has called all of his/her witnesses, the party rests. Once a party has rested, he/she will ordinarily not be permitted to call any other witnesses.

B. Objections

If one side believes that any question or tactic by the examining attorney is improper, that side must object. The attorney makes an objection by standing up and saying, "I object," or "Objection," and then stating the reason for the objection. Among other things, the objection may be to the relevancy of the information desired or to the form of the question. For example, if a leading question has been asked on direct examination, there may be an objection because the form of the question is wrong for direct examination. As noted above, leading questions are usually allowed only on cross-examination.

When an objection is made, the judge may rule immediately by sustaining or overruling the objection, or the judge may ask the examiner for his or her reasons why the objection should be overruled. If the judge overrules the objection, the witness is allowed to answer the question because the judge disagrees with the attorney objecting or with the reason for the objection. If the judge sustains the objection, the witness may not answer the question because the judge agrees with the attorney objecting that the question is improper under the law.

Generally, it is the responsibility of each attorney to point out to the judge the points of law involved in the issue and in whose favor the ruling should be. Eventually, the judge will decide whether or not that question may be asked and answered, and the hearing will procced.

C. Motions

After all sides have rested and no more witnesses are to be called, there is opportunity for making additional motions and for discussing unclear matters. At this time, the defending party may move for a dismissal of some or all of the petition if he/she believes that the State has not adequately proved its case. Or a motion may be made for a mistrial based on some of the judge's rulings that one side may feel were completely erroneous. The judge will rule on each of these motions.

D. Judge's Finding of Fact

The next stage is for the judge to make his or her findings of fact. Depending on the complexity of the facts, the judge may take time to go over the case and the evidence before making a decision or may even request proposed findings of fact from each side. The judge takes the case "under advisement," meaning he/she will rule at a later date. Or the judge may rule immediately.

If the judge determines that, based on the facts presented, no abuse or neglect has occurred, the case is over. If the judge determines that the child has been abused or neglected, the court assumes jurisdiction over the child who is declared a ward of the court. The court will then determine subsequent disposition of the child and family.

In some States, disposition will entail a delay of a few days to several months while the social services agency investigates the family situation and reports back to the court with a recommendation as to what should be done to treat the family and to protect the child. In other States, dispositional recommendations are made at the close of the adjudicatory hearing, and there is no delay.

Disposition

At the dispositional hearing, each alternative treatment is presented to the court. If the social worker and parents agree on appropriate treatment, the judge usually accepts this recommendation and orders the treatment by court decree. If the parties disagree on the best treatment program the judge makes the choice he/she considers best for the child. Possibly all alternatives will be rejected if the judge thinks that none will accomplish treatment for the family.

Appeal from Adjudication

An appeal may be made from the adjudication hearing. Where juvenile courts do not keep a record of the proceedings, the first appeal is normally to a State trial court. This appeal is ***de novo***. In a true ***de novo*** hearing, all the facts, evidence, and witnesses are presented over again, much like a replay, although some States vary from this in practice.

The State trial court will keep a record of the proceedings which will be sent to the appellate court. Any disputed questions about the admissibility of evidence in the juvenile or family court hearing are resolved in the trial court.

If the judge (with a record of the proceeding available) finds abuse or neglect, this decision may be appealed directly to a State appellate court. This appeal is not ordinarily ***de novo***; that is, appellate court judges will not rehear the facts, call witnesses, or decide if, in their opinion, there was abuse or neglect. Appellate courts review the record of the proceeding, sometimes called the "court transcript." Appellate courts can reverse the trial court and remand the case for a rehearing, or they can affirm the trial court.

An appellate court will reverse a trial court for one of the following reasons:

1. Insufficient evidence was presented to support the judge's findings in the trial court.

or

2. An error of procedure or evidence occurred which contributed to the decision, and without the error the decision might have been different. However, if the trial judge's mistake in procedure or evidence rulings made no difference in the outcome, then the decision will not be reversed on that ground because the appellate court can find that an error is "harmless" to the case.

or

3. There was an error in fairness or treatment of parties that was prejudicial or of such a nature that the basis of the decision is questioned. Reversals in this area may be for unconstitutional discrimination or because the judge took a partisan rather than a neutral role in the proceedings.

or

4. There was an error as to the law to be applied, either in its interpretation or constitutionality.

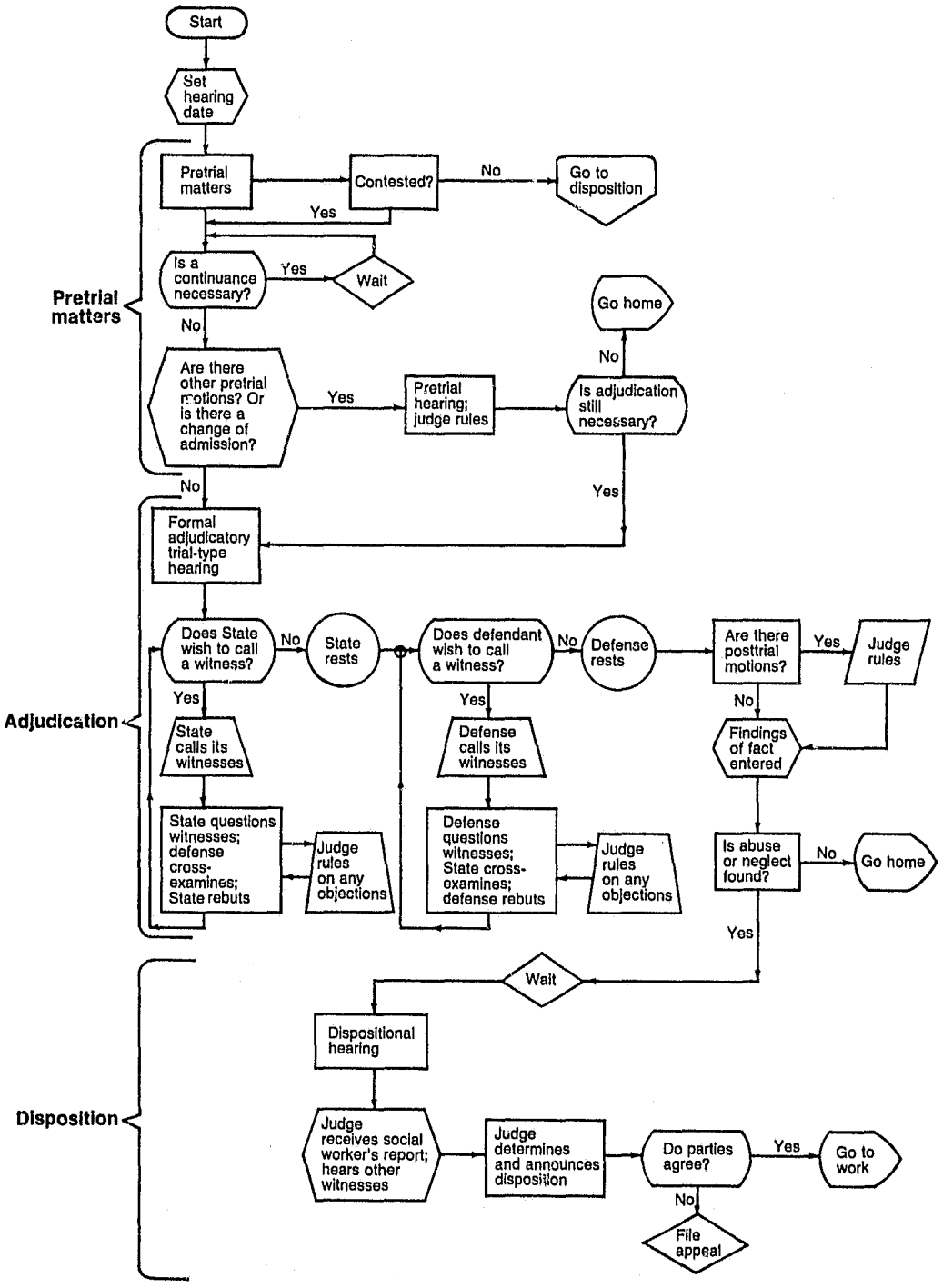
During the appeal, the child may be placed temporarily outside the home, or other interim arrangements may be made.

If the appellate court reverses the trial court, the decision of the trial court is invalid and a new hearing must be held. The disposition or treatment plan is also invalid. The family must be returned to its status before the first hearing began until a new hearing and disposition are held.

If the appellate court affirms the trial judge's decision, then the appellate court approves of the judge's decision and procedures. However, the party appealing the case may appeal the appellate court decision to the Supreme Court of the State.

Few cases are accepted for review by State Supreme Courts once they have been reviewed by State appellate courts. In some States, appeal is direct from the juvenile court to the State Supreme Court with no intervening appellate courts.

FLOW CHART: OVERVIEW OF COURT PROCEDURE



ELEMENTS OF THE ADJUDICATIVE AND DISPOSITIONAL STAGES IN COURT

Juvenile Procedure—General Characteristics

Juvenile court proceedings for child abuse or neglect vary throughout the United States. The State courts, guided by recent U.S. Supreme Court decisions, have adopted fairly uniform proceedings for delinquency hearings, but the content and procedure of child abuse and neglect hearings remain relatively unsettled. While procedural requirements and rights of the various parties differ from State to State, procedural requirements are defined by the U.S. Supreme Court.

In general, juvenile court proceedings are bifurcated, meaning they involve (1) ***adjudication*** and (2) ***disposition***. These two stages can be likened to the criminal trial process in which the first stage of the proceeding, the adjudicatory stage, is the counterpart of the criminal trial itself. The purpose of this stage is factfinding. The second stage of juvenile disposition can be likened to the sentencing stage of a criminal trial, except that the focus is on a disposition which will best further the welfare of the child.

The two stages of juvenile proceedings can also be described in the following manner: factfinding, followed by remedial action; or jurisdictional hearing (to establish if the court has power to act) followed by disposition. Each stage has its own procedural aspects, consistent with its purpose.

Adjudicative Stage

Notice

Parents have a due process right to notice and an opportunity to be heard in any proceeding involving parental rights. *Notice* requires being informed that a hearing is to take place, the time it will be held, and the proposed subject matter. For example, both parents have a right to notice of a juvenile court hearing concerning the pending adoption of their child.[1] Even where the parents are not married, the U.S. Supreme Court has found that the father has a substantial interest at stake and that his child may not be declared dependent without a due process hearing.[2]

REFERENCES

1 *Armstrong v. Manzo*, 380 U.S. 545 (1965).

2 *Stanley v. Illinois*, 405 U.S. 645 (1972).

Additional Reading

Levine, Richard S., "Caveat Parens: A Demystification of the Child Protection System," Vol. 35, *University of Pittsburg Law Review*, p. 1 (35 *U. Pitt. L. Rev.* 1 (1973)) is a provocative analysis of children's services procedures, and personnel and parental rights.

Right to counsel

The right to counsel in juvenile proceedings varies on a State-to-State basis. When the outcome of an adjudicatory delinquency hearing may be confinement of the juvenile, counsel is mandatory.[1] Some States grant a general statutory right to counsel without indicating the types of proceedings the statute includes.[2] Whether or not the right applies to other than adjudicatory delinquency hearings remains unclear under such statutes.

Some States specifically provide that the child has a right to be represented by counsel in dependency or neglect proceedings.[3] Other jurisdictions provide that in dependency or neglect proceedings, the parent is entitled to counsel, including appointed counsel if the parent is indigent.[4]

Several courts have recently held that right to counsel in abuse and neglect proceedings is required by due process and equal protection provisions of the Constitution.[5]

In short, no consensus has been reached about either the parent's or the child's right to counsel in dependency or neglect hearings,[6] although the trend is to guarantee it. Support for the right of parents to counsel comes from the U.S. Supreme Court cases which held that parental rights are fundamental and essential,[7] and that due process requires a right to counsel when fundamental rights may be violated.

Parents may retain counsel on their own to represent them. However, if parents do not retain their own counsel, the court is not required to appoint or provide counsel for them from court funds unless this is required by State statute. Parents may always retain counsel for the child, but the court is required to appoint counsel only in those cases that the State codes list.

The U.S. Constitution requires counsel in all juvenile delinquency adjudication. Often a court will appoint a guardian ***ad litem*** for the child; this is a person who is appointed to represent the child in particular litigation rather than the guardian of the person. Guardians at law ***(ad litem)*** protect the legal rights of the child, whereas guardians of the person protect the physical and emotional well-being of the child. Guardians ***ad litem*** are usually lawyers appointed by the court when the best interest of the child requires it.

REFERENCES

1 *In re Gault*, 387 U.S. 1 (1967).

2 See Ill. Ann. Stat. Ch. 37 §701-20(1) (1976 Supp.); W. Va. Code Ann. §49-5-10 (1976).

3 See Colo. Rev. Stat. Ann. §19-1-106(1) (1973); Ga. Code Ann. §24A-2001(a) (Supp. 1975).

4 N.Y. Fam. Ct. Act §§ 261, 262 (1975).

5 See *Chambers v. District Court of Dubuque County*, 261 Iowa 31, 152 N.W.2d 818 (1967).

6 See "A Recommendation For Court-Appointed Counsel in Child Abuse Proceedings," 46 *Miss. L. J.* 1072 (1975); "Neglected Children and Their Parents in Indiana," 7 *Ind. L. Rev.* 1048 (1974); "Dependency Hearings: What Rights for the Parents?" *6 U.C.D. L. Rev.* 240 (1973); "Representation in Child-Neglect Cases: Are Parents Neglected?" 4 Col. *J. of Law and Soc. Problems* 230 (1968).

7 See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *May v. Anderson*, 345 U.S. 528 (1953).

Right to a Jury

A jury trial is not constitutionally required in juvenile court.[1] However, a State, by law, may provide jury trials in juvenile hearings. A number of States do require them, either by statute or by judicial decision, usually upon request of a party.[2]

REFERENCES

1 *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

2 See Colo. Rev. Stat. Ann. §19-1-106(4) (1975 Supp.); Okla. Stat. Ann. tit. 10 §1110 (Supp. 1974); *R.L.R. v. State*, 487 P.2d 27 (Alaska 1971); *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).

Confrontation and cross-examination

To date, the U.S. Supreme Court has not held that a juvenile, who is the subject of abuse and/or neglect hearings, has a right under the sixth amendment to confront and cross-examine witnesses. The States, by statute or by court decision, may grant this right in such hearings.[1] In cases where commitment to a secure juvenile institution is possible, the State is required to provide for cross-examination and confrontation of witnesses.[2]

REFERENCES

1 E.g., *In re Baum*, 8 Wash. App. 337, 506 P.2d 323 (1973); Kan. Stat. Ann. 38-813 (1973).

2 *In re Gault*, 387 U.S. 1 (1967).

Judge disqualification

A judge may be disqualified from presiding in a juvenile dependency or neglect hearing. Such disqualification is usually because of personal bias. Prior exposure to the case is not a basis for disqualification.[1]

Most States provide that juvenile court judges may be disqualified in accordance with the rules for other civil cases in the jurisdiction.[2] Thus, a judge may be disqualified for financial interest in a case, bias against a party in the case, a bias for a party in the case, or blood relationship to a party in the case.

In civil cases, it is not always necessary to use disqualification to bring about a change of judges. Here, the parties can ask for a change in venue, so that the hearing is moved to another location.

Changes in venue are allowed where prejudice is present in the local area or where the case was originally brought in the wrong forum; i.e., the wrong county. Changes in venue are sometimes permitted in juvenile cases,[3] but at least one State court has found no statutory or constitutional right to such a change in juvenile cases.[4]

REFERENCES

1 *In re A.*, 65 Misc.2d 1034, 319 N.Y.S.2d 691 (1971).

2 See *State ex rel R.L.W. v. Billings*, 451 S.W.2d 125 (Mo. 1970); *Frazier v. Stanley*, 83 NM 719, 497 P.2d 230 (1972); *McDaniel v. McDaniel*, 64 Wash. 2d 273, 391 P.2d 191 (1964).

3 See *State ex rel R.L.W. v. Billings*, 451 S.W.2d 125 (1970); *State v. Lake Juvenile Court*, 248 Ind. 324, 228 N.E.2d 16 (1967).

4 *In re Fletcher*, 251 Md 520, 248 A.2d 364 (1968).

Standard of proof

As a general rule, the standard of proof required in dependency or neglect cases is either "clear and convincing evidence" or the less strict "preponderance of the evidence" standard.

The highest standard of proof required in United States' courts is "beyond a reasonable doubt." This is the standard in criminal proceedings and in all juvenile delinquency proceedings that could result in incarceration. The intermediate standard of proof is that of "clear and convincing evidence," and the least strict standard is "preponderance of the evidence."

The beyond the reasonable doubt test requires that the evidence point to one conclusion; it leaves no reasonable doubt about that conclusion in order to be followed. The clear and convincing test requires that the evidence clearly point to one conclusion in order to be followed. And the preponderance test means that, after all the evidence is weighed, the outcome will be in favor of the side which has presented the most convincing evidence.

Some States provide that in dependency and neglect hearings, the standard of proof is "clear and convincing evidence" (the intermediate standard of proof).[1] Other States require only the "preponderance" test,[2] which is also the test normally applied in civil proceedings. The U.S. Supreme Court has held that proof beyond a reasonable doubt is required in juvenile delinquency hearings, but it left open the standards to be used in other types of cases.[3]

STANDARDS OF PROOF

Standard of proof	Delinquency hearing	Dependency or neglect	Adult criminal	Civil cases
Beyond a reasonable doubt (most proof required)	X		X	
Clear and convincing (intermediate proof required)		X (some States)		
Preponderance (least proof required)		X (some States)		X

REFERENCES

1 See Ga. Code Ann. §24A-2201(c) (Supp. 1975); N.M. Stat. Ann. §13-14-28(F) (1976 replacement

volume); *In re J.Z.*, 190 N.W.2d 27 (N.D. 1971); *In re Henderson*, Iowa, 199 N.W.2d 111 (1972); *In re Sego*, 82 Wash. 2d 736, 513 P.2d 831 (1973).

2 See S.D. Compiled Laws Ann. §26-8-22-10 (Supp. 1975); Wyo. Stat. Ann. §14-115.26 (Supp. 1975); *Evans v. Moore*, 472 S.W.2d 540 (Tex. Cw App. 1971); *In re R.K.*, 31 Colo. App. 459, 505 P.2d 37 (1972).

3 *In re Winship*, 397 U.S. 358 (1970). *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Ia. 1975) citing *In re Winship* held that the clear and convincing test is required in cases terminating parental rights. See also *Matter of Robert P.*, 61 Cal. App. 2d 310, 132 Cal. Rptr. 5 (1976) holding that the clear and convincing test is required in a dependency hearing. Contra is *In re J.R.*, 87 Misc. 2d, 900, 386 N.Y.S. 2nd 774 (1976) upholding the constitutionality of the preponderance test in a child abuse case.

Rules of evidence

No consistent rules are followed by all the States for admissibility of evidence in juvenile court proceedings. Rules differ from State to State, but, within a particular State, the rules are the same for every juvenile court.

Statutory rules.—A few States have statutes that prescribe evidentiary standards. Some statutes provide that evidence must be competent, relevant, and material.[1] In California, evidence, in order to be admissible in a juvenile neglect proceeding, must be "legally admissible" in civil cases.[2] Illinois distinguishes between delinquency proceedings and proceedings involving neglect or dependency, requiring that the rules of evidence for criminal cases apply to the delinquency, while dependency hearings follow rules of evidence for civil cases.[3]

Court rules.—Most courts hold that the usual rules of evidence for civil proceedings (including the exclusion of hearsay) apply to juvenile court hearings.[4] In the past, however, a few courts have held that juvenile court hearings are so special in nature that the usual rules of evidence do not apply.[5]

Social study reports.—Courts are in almost unanimous agreement that at least one type of material is not admissible in the adjudicatory stage of a bifurcated juvenile court proceeding: the social study or report intended for dispositional use. Such reports usually contain a large amount of hearsay. Appellate courts, finding that the use of these reports by a judge at the adjudicatory stage directly affects the fairness of the hearing, have reversed juvenile courts which have used such reports at that stage.[6]

REFERENCES

1 E.g., N.M. Stat. Ann. §13-14-28 (E)-(F) (1976 replacement volume); Wyo. Stat. Ann. §14-115. 27 (Supp. 1975).

2 California Welfare and Institutions Code, §701 (1972).

3 Ill. Ann. Stat. Ch. 37 §704-6 (1972).

4 E.g., *In re Ross*, 45 Wash. 2d 654, 277 P.2d 335 (1954).

5 E.g., *In re Holmes*, 379 Pa. 599, 109 A.2d 523 (1954).

6 E.g., *In re R.*, 1 Cal. 3d 855, 83 Cal. Rptr. 671, 464 P.2d 127 (1970).

Discovery

Discovery is the system of pretrial procedures that enables the parties involved in a court proceeding to "discover" the positions taken by the other parties and the facts which those parties believe support their positions. The methods used in discovery include interrogatories (written questions to be answered by the party to which they are submitted), physical examinations of evidence and persons, oral depositions (statements taken under oath), the surrendering of copies of documents, and requests for admission.

No consistent rule has been developed to cover the use of discovery in child neglect/dependency hearings. The workers should check with the attorneys at the juvenile court concerning the rules for the local jurisdiction.

Dispositional Stage

Introduction

The dispositional stage of the bifurcated juvenile court proceeding takes place after

adjudication. At the dispositional hearing, the juvenile court determines the steps to be taken in the child's best interest.

A substantial number of States require, by statute, a separate dispositional hearing.[1] In other States, disposition immediately follows adjudication. This is a matter of local custom, and the worker should inquire about this procedure.

The U.S. Supreme Court has specifically refrained from commenting on the elements necessary to ensure due process at the dispositional stage of juvenile proceedings. However, the Court commented that the dispositional stage of juvenile proceedings poses unique legal problems.[2]

REFERENCES

1 E.g., Ga. Code Ann. §24A-2201(b)-(c) (Supp. 1975); Ill. Stat. Ann. ch. 37 §705-1 (1972).

2 *In re Gault*, 387 U.S. 1 (1967).

Right to counsel

The right to counsel at this stage of the proceeding is governed by the individual State's rules regarding counsel at the adjudicatory stage. Where counsel is provided at the first stage, the right is usually extended to the dispositional stage.[1]

REFERENCE

1 See S.D. Comp. Laws Ann. §26-8-22.1 (1975 Supp.); Utah Code Ann. §55-10-96 (1974 replacement volume); Ill. Ann. Stat. Ch. 37 §701-20(1) (1975 Supp.); W. Va. Code Ann. §49-5-10 (1976).

Evidence

Generally speaking, at the dispositional stage of a juvenile proceeding, evidence may be considered that could not properly be admitted at the adjudicatory stage. The most important evidence of this type is the protective service worker's social report.

The social report must be accurate and complete; otherwise, any disposition based on it is open to legal challenge.[1] Such reports contain hearsay and information that can be crucial in deciding proper remedial disposition.

Must dispositional evidence be made available to the parties? According to prevailing practice, a party in a juvenile court proceeding should be given access to the evidence so that he or she may intelligently cross-examine it at trial.[2]

REFERENCES

1 *In re Smith*, 21 App. Div 2d. 737, 249 N.Y.S.2d 1016 (1964).

2 See *State v. Lance*, 23 Utah 2d 407, 464 P.2d 395 (1970).

Additional Reading

Note, "Discovery Rights in Juvenile Proceedings," 7 *University of San Francisco Law Review* 333 (Fall 1973).

Note, "Toward a Code of Discovery in Juvenile Delinquency Proceedings," 50 *Indiana Law Journal* 808 (Summer 1975).

AT TRIAL—WITNESSES

Kinds of Witnesses

In general, witnesses can be divided into two major classes:

1. Lay witnesses.
2. Expert witnesses.

Lay witnesses do not have any specialized knowledge or skill in a subject, whereas expert witnesses, because of their training or experience, are called upon to give testimony about aspects of a case that lie within their fields of expertise.

The same person may be a lay witness in some contexts and an expert in another. The basic difference between the two major classes of witnesses is whether or not they can give their opinions and inferences as testimony at trial.

Persons who testify at a court hearing or trial are generally required to have firsthand knowledge of the facts about which they are testifying. Testimony must be based on knowledge drawn from direct sensory perceptions—what the witness actually saw or heard, etc. Ordinarily a witness is prohibited from testifying about anything other than personal observations. However, due to the special ability of expert witnesses to aid the court, this rule does not apply.

Experts are called as witnesses precisely because, in their particular areas of expertise, they can reach conclusions beyond the skill of judge or jury. Therefore, expert witnesses are allowed to state their opinions and inferences in their areas of expertise while lay witnesses are not.

Additional Reading

Bernstein, "The Social Worker as a Courtroom Witness," 56 *Social Casework* 521 (Nov. 1975).

Gair, "Selecting and Preparing Expert Witnesses," 2 *Am. Jur. Trials* 585.

Testimony of lay witnesses

Lay witnesses may not testify about inferences or conclusions they have drawn from the facts observed, no matter how obvious the conclusions may seem to be. If it is truly an inescapable conclusion, the jury will reach it. The theory behind this rule is that it is the function and sole province of the trier of fact to draw conclusions from the facts presented during the hearing.

In practice, the difference between observed facts and inferences from observations may be slight, and many statements are admitted that arguably might be considered lay opinions. For example, testimony that the parent deliberately interfered with the social worker's investigation can be considered an opinion.

Testimony such as, "The parent was uncooperative" would be subject to objection in many courts. However, testimony describing the parent's uncooperative behavior may suggest as strongly the same conclusion without being subject to objection by the opposing side.

Some courts permit lay witnesses to testify to a conclusion such as "uncooperativeness" after having stated the facts relied upon.[1] It is safest to describe the facts in detail.

REFERENCE

1 *McCormick* at 25, 26.

Character witnesses

Subject to some exceptions, the character and reputation of a person in a civil hearing are

considered irrelevant and unnecessary evidence. Character and reputation, therefore, are usually not admissible.[1] However, where the character of a person is an issue in the case, such evidence is admissible.[2]

In a dependency hearing, if the fitness of a child's home is related directly to the character of the parents, evidence to show character, good or bad, is relevant and admissible.[3]

The usual method of showing good or bad character in either a civil or a criminal hearing is testimony about the person's reputation.[4] Reputation is the generally accepted view of a person by his/her own community.

Rumors are not admissible testimony; nor is personal opinion about a party. Evidence of specific acts by a person whose character is in question is not generally admissible for the purpose of showing general character. This is because an examination of specific acts may be unfair or may tend to raise irrelevant issues.[5] The modern trend, however, is to allow evidence of specific acts to prove character when it is an essential element of a claim, charge, or defense.[6]

A witness who is called for the purpose of giving reputation testimony will generally be asked to testify about the following:

1. Character witness' own qualifications.
2. Association with the party.
3. Knowledge of the party's reputation.

The witness' own qualifications are given to help the jury judge the reliability of the testimony, and his or her association with the party is described to show that the witness is in a position to know the party's reputation in the community. Finally, the attorney asks questions to show that the witness has heard the reputation of the party discussed by members of the community.

Community ordinarily refers to a person's home neighborhood. However, in some States, coworkers, relatives, old school friends, and others who live in different neighborhoods may be included.

The basic questions by which reputation testimony is elicited are:[7]

Q. Do you know the reputation of _____ in the community?

Q. What is that reputation?

REFERENCES

1 *Thompson v. Bowie*, 71 U.S. (4 Wall) 463 (1866).

2 *Thompson v. Bowie*, 71 U.S. (4 Wall) 463 (1866); *McCormick* at 443.

3 *Wilson v. Wilson*, 128 Mont. 511, 278 P.2d 219 (1954). Character held admissible as evidence in child custody proceedings.

4 *Richmond v. City of Norwich*, 96 Conn. 582, 115 A. 11 (1921).

5 *Richmond v. City of Norwich, ibid.; Michelson v. United States*, 335 U.S. 469 (1948).

6 *Federal Rules of Evidence* 405(b).

7 *United States v. White*, 225 F. Supp. 514 (D.D.C. 1963).

Role of the expert witness

An expert witness is any person who possesses skill or learning in a particular field that exceeds the skill of the ordinary person. The expert's higher level of specialized knowledge or experience allows the expert to draw inferences or conclusions for the judge that the judge could not draw alone.

As with any other evidence, the judge weighs the expert's testimony and can disregard it, except where a statute requires the judge to use the expert's testimony. For example, in California, expert testimony that a person is ***not*** the father of a certain child is made conclusive by statute.[1]

An expert's opinion can be challenged by the opposing attorney.[2]

The expert assists the lawyer in preparation or settlement of a case before trial.[3] The lawyer is not as knowledgeable as the social worker about social work aspects of a case or as familiar with the facts of the case. Therefore, the social worker can assist the lawyer by

pointing out significant issues, identifying treatment programs, and outlining the facts of the case.

The worker's status as an "expert witness" in the field of social services may increase the ability of the worker to persuade persons to reach agreements without involving extended court hearings.[4] This role of the social worker is more common where the investigating worker is also the worker who is present at the court hearing.

REFERENCES

1 McCoid, "Opinion Evidence and Expert Witnesses," 2 *U.C.L.A. L. Rev.* 356, 366 (1955).

2 *Smith v. Hobart Mfg. Co.*, 185 F. Supp. 751 (E.D. Pa., 1960).

3 Gair, "Selecting and Preparing Expert Witnesses," 2 *Am. Jur. Trials* 585.

4 Bernstein, "The Social Worker as a Courtroom Witness," 56 *Social Casework* 521, 523 (Nov. 1975).

Who can be an expert witness?

Any person can be an expert if he or she possesses a sufficiently high level of expertise in a field so that the judge feels this person's informed opinions will aid in arriving at the right decision. While some people are well-recognized as experts in their field, an expert witness need not be world-renowned or the author of a textbook. The witness may have gained his/her superior knowledge from practical experience, formal education, or a combination of both.[1]

The expert need not be the "best" expert on the subject; nor is it required that the expert's views reflect only those that are well-settled in the field.[2] If the witness is qualified but belongs to a controversial school of professional thought, he/she may qualify to express professional opinions. The judge will determine to what extent those opinions are to be relied upon in reaching a decision.

In addition to experts called by parties, the court itself may appoint an expert witness. Such a witness has to be qualified but is not associated with either side to the litigation. While being appointed by the court may increase the expert's prestige in the jury's eyes (if there is a jury), the court's expert may be cross-examined by both parties.

All experts are required to testify that, in their opinion, a "reasonable degree of certainty" exists. The judge decides what the reasonable degree of certainty will be for the particular case.

REFERENCES

1 *McCormick* at 30.

2 *People v. Williams*, 6 N.Y. 2d 18, 159 N.E.2d 549, 187 N.Y.S.2d 750 (1959). Cert. denied 361 U.S. 920.

Subject matter for expert testimony

The expert may offer opinions in the area of his/her expertise only. Outside the expert's specialty, he/she is on the same footing as a lay witness.

Subject matter so intimately bound up in a science, profession, business, or occupation that it is beyond the knowledge of the average lay person is the province of the expert witness.[1] If the subject is one where an expert is needed to investigate facts but where an ordinary person can reach an independent conclusion once the facts are made known, the expert will not be allowed to draw inferences for the judge.[2] For example, only specially trained professionals can interpret X-ray films; they can point out abnormalities and give an opinion as to what sort of force produced them. Whether or not the force used constitutes abuse is a matter for the trier of fact and not a subject for proper expert testimony.

Expert testimony is most commonly used when the evaluation and understanding of scientific facts depend on specialized training. Here, the expert's opinion is required, since an ordinary person cannot draw accurate inferences.

Social sciences as well as natural and physical sciences are susceptible to expert evidence. For example, a social worker with sufficient experience in the field of psychology and sociology was permitted to testify as an expert witness about her opinions and recommendations for disposition in a neglect case. Her qualification as an expert was based on her lengthy experience in preparing court reports regarding investigations of family life and environment.[3]

A few courts will admit expert testimony on subjects of which ordinary persons have an understanding. The standard for admission in these rare cases depends on how useful the expert's opinion will be in clarifying the judge's basic understanding.[4]

A witness may not give opinion evidence as an expert if the judge believes that the state of learning in the field "does not permit a reasonable opinion to be asserted even by an expert."[5] For example, a qualified expert may be prevented from giving an opinion on the presence or absence of emotional neglect, if the judge believes that no one can properly define and identify a case of emotional neglect.

REFERENCES

1 *McCormick* at 29.

2 Van Voorhis, "Expert Opinion Evidence," 13 *N.Y.L.F.* 651, 655 (1968).

3 *Moss v. Moss*, 135 Ga. App. 401, 218 S.E.2d 93, 96 (1975).

4 Cleary and Strong, *Evidence: Cases, Materials, Problems* (2d ed. 1975). Note at 471.

5 *McCormick* at 31.

Procedure in qualifying as an expert witness

A proper foundation must be presented before an expert can give an opinion. The person offering the expert's testimony must prove to the satisfaction of the court that:

(1) The subject matter is an area where the judge or jury will require expert assistance, and

(2) That this particular person is sufficiently qualified to provide assistance.[1]

The person offering the expert's textimony is called "the proponent."

1. Formal introduction of subject matter

The subject matter about which the expert will testify must have been formally introduced into evidence, and all underlying facts necessary for the expert to draw an opinion must be in evidence. These facts provide a background for the expert's testimony.

If the expert is someone with firsthand knowledge, such as the investigating caseworker, he/she can often testify to enough facts to introduce the subject matter and to allow the judge to determine if an expert opinion is necessary. If the expert has no firsthand knowledge, the background facts are placed in evidence by other witnesses.

Expert testimony may be excluded as speculation if, because of insufficient evidence, the judge or jury is unable to test the expert's credibility.[2] Sometimes it may be absolutely necessary for the expert to testify before all the foundation facts are in evidence. For example, this may be necessary in a lengthy trial where witnesses live out of town and cannot be at the hearing at the most appropriate time. In such a case, the party wishing to have the expert testify should present to the judge the following information: (1) What the missing facts are; (2) How they will be supplied; and (3) Why the expert must testify before these facts are proven. The party should then request the court to allow the expert to testify. The judge may admit the expert testimony, subject to a stipulation that the testimony will be struck from the record and will not be considered in arriving at a decision if the missing facts are not proven later.

2. Proving the expert's qualifications

Once the subject matter foundation is properly presented, the expert's qualifications must be shown. The expert vouches for him or herself by stating his/her credentials.

The proponent will question the witness so as to elicit the credentials as responses to general questions. Credentials may include experience, areas of specialty, relationship of the expert's specialty to the subject matter, degrees the expert has earned, contributions to professional publications, and membership in professional societies.

The opposing side then has the right to question the expert on his/her qualifications. The opponent may stipulate as to these qualifications to avoid overimpressing the jury with a long list of honors. A well-recognized figure might not be challenged. However, a less recognized expert should anticipate challenges to credentials and should be prepared to overcome any doubts the objector might raise in the judge's mind.

The judge has wide discretion in accepting or rejecting testimony from a particular expert, and rejection of expert testimony or failure to give weight to it will rarely be grounds for a successful appeal.[3]

REFERENCES

1 *Smith v. Hobart Mfg. Co.*, 185 F. Supp. 751 (E.D. Pa., 1960).

2 *Van Voorhis, supra,* at 651, 657.

3 Annot. 166 *A.I.R. 1067 (1947).*

Eliciting expert testimony

After the judge determines that the expert's opinions are admissible, the attorney offering the testimony questions the expert. First, the proponent must show that the expert is familiar with the facts—by having been present in the courtroom when evidence was presented, by firsthand knowledge, or by reading pertinent records and files.

Where the expert has firsthand knowledge, some courts require the expert to state the facts used in arriving at the conclusions. Some courts permit inference in testimony without the witness stating the underlying facts.[1]

Where the expert has no firsthand knowledge and has made no independent investigation, questioning is in the form of hypothetical questions. A hypothetical question states the important facts in evidence and asks the expert to assume the truth of those facts; for instance, a diagnosis, prognosis for recovery, or other professional conclusion. In form, it looks like this: Assuming facts A, B, and C to be true, what is your expert opinion on Y? The question must rely on facts or inferences supported by some evidence. Many hypothetical questions are intricate statements several pages long. Many States permit simpler forms of questions.[2]

Under the more liberal rules, the expert is not presented with a lengthy list of all facts of the case. Rather, the expert is questioned briefly about general familiarity with the facts and then asked for conclusions.

It is the opponent's responsibility to cross-examine the expert about premises and facts relied upon and to bring out any inconsistencies, unorthodox theories, or incomplete considerations. The opponent may ask the expert for an opinion based upon the opponent's version of the facts in the case. But whether or not the hypothetical question form is used, the cross-examining lawyer will question the expert about his/her conclusions.

Expert testimony can be contradicted by the testimony of other experts who arrive at different conclusions from the same set of facts. The trier of fact then must decide which expert is more credible.

While an expert may be subpoenaed to testify, the expert cannot be compelled to give an expert opinion.[3]

REFERENCES

1 *McCormick* at 31, 32.

2 *Rabata v. Dohner*, 45 Wis. 2d 111, 172 N.W.2d 409, 418 (1969); *McCormick* at 36-41. The *Rabata* case notes, in rejecting the requirement that a question be stated in hypothetical form, that California, New Jersey, New York, and various other States, and the *Federal Rules of Evidence*, had already taken the same step.

3 *Van Voorhis, supra,* at 651, 658.

Limitations on social worker expert testimony

The social worker, if qualified by experience and training, can testify as an expert witness. In some States, the recommendations of the investigative social services agency are entitled to *great* weight in the decisionmaking process.[1] Social workers in Georgia can qualify as expert witnesses to advise the trier of fact on the conclusions to be drawn from investigative facts.[2]

When a social worker who is not the investigative caseworker testifies, conclusions are likely to be based on the files and records of another worker. These records, as hearsay, may be inadmissible into evidence (see sections on "Hearsay Evidence"). If the files are inadmissible as evidence, most courts will not permit the social worker to answer questions based on their contents.[3] However, the testimony may be permitted if the social worker can supplement knowledge gained from the files with firsthand knowledge. For example, if the social worker interviewed or counseled the alleged abusive parent prior to testifying, the testimony may be allowed.[4]

REFERENCES

1 *Fulton v. Schneider*, 130 Ga. App. 274, 202 S.E.2d 706 (1973). The court in this case affirmed the trial court's reliance on the social worker's report in an adoption case without mentioning if the worker qualified as an expert. Expert status does not seem crucial to the holding.

2 *Moss v. Moss*, 135 Ga. App. 401, 218 S.E.2d 93 (1975).

3 *McCormick* at 36.

4 *McCormick* at 37.

Examples of Expert and Nonexpert Testimony

Example I

NONEXPERT: A. The child had welts and bruises on his back and buttocks.

B. The child had extensive welts and bruises on his torso.

EXPERT: C. There were fresh welts on the child's back that appeared to have been caused by a whipping with a thong approximately 12 inches long. There were also bruises in various stages of healing. Some appeared fresh, and approximately 20 percent were from wounds inflicted as long as 10 days before my examination.

This expert was qualified to testify because of knowledge of medical symptoms and the pathology of trauma. The expert testimony adds more than merely additional details; it gives the court an expert's opinion on the cause of injury, the type of instrument used, and the relative time the injury was inflicted. A lay witness is prohibited from giving such an opinion.

Example II

NONEXPERT: A. A lot of times, I've seen the mother put away a whole six-pack of beer and then go off to the store for some more.

B. I see the mother every afternoon when school gets out, and she's always drunk.

CHARACTER WITNESS: C. The mother has a reputation in the community for being a wino.

EXPERT: D. The mother drinks quite heavily and seems to have a strong dependency on alcohol. She frequently drinks to the point of unconsciousness. However, with a proper treatment program, such as AA, to teach her how to control

her drinking, I believe Mrs. C. would be capable of assuming her parental duties.

Usually a lay witness cannot give opinion testimony. "Drunkenness," however, is a conclusion that any lay person can draw, under a widely recognized exception to the opinion rule. Two other topics about which a lay witness can give an opinion are "craziness" and the speed of a moving vehicle.

Although one's reputation is really composed of the opinions of others, it is not excluded from evidence under either opinion or hearsay rules. Only a member of the neighborhood or community of the person in question may testify as to reputation. Therefore, reputation evidence is given by a lay witness rather than by an expert.

A witness who testifies about a party's reputation is termed a "character witness." Reputation testimony does not include the character witness' personal opinion; only community opinion about character is admissible. A person may not testify about his/her own reputation.

The expert in the last example was qualified in the areas of alcohol abuse and treatment or as a medical expert. Expert testimony is valuable here because the expert can draw conclusions about alcohol dependency and its extent and correctibility.

Example III

EXPERT:

A. I went out to the house once and saw that the children were dressed in dirty clothing. They were without socks or sweaters, although it was quite chilly outside—about 50 degrees, I think. I looked over the file that the regular caseworker put together (previously authenticated at the trial) and noted that he had seen the children similarly underdressed on several occasions. Also, the school reports showed that the children had high absentee rates—averaging 12 days a month during this past winter—and all due to illness. Neither of the children had any serious illnesses—just a 4-month-long series of colds and influenza, according to the school report. There was no record of their being taken to a doctor. From this and other information, I conclude that the children are being neglected.

B. I examined the X-rays of this child taken by the X-ray technician. They showed that the long bones of both arms were broken and that two of the bones that were broken this time had suffered prior fractures—on three different occasions each. In addition, there were hairline fractures of three ribs, incurred recent to the examination, and hairline fractures of six other ribs that were in various stages of healing. It is difficult to state how long ago those injuries occurred. The recent three fractures were of the type caused by repeated beating with a blunt instrument, such as a stick.

Neither of the above statements can be offered by a lay witness; only an expert can give this kind of testimony. Statement A, involving conclusions based on information collected by others, can only be given by an expert since the firsthand observations are insufficient to justify the conclusion.

Although a statement may be perfectly acceptable as expert testimony, it may not carry

much weight with the judge. Statement A is one that may be disregarded in the decision-making process because there are so many variables that might have accounted for the observations. The children, for example, might have been properly dressed but may have taken off their sweaters. Or the children's illnesses might have been caused by poor sanitation practices—not necessarily by parental neglect.

Statement B involves the interpretation of scientific facts; thus, only a trained, and therefore expert, specialist can read an X-ray.

SUMMARY COMPARISON OF TYPES OF TESTIMONY

Lay Testimony

Kind of testimony:

- Direct observations.
- What witness saw, heard, smelled, or felt.
- Cannot give an opinion except on drunkenness, craziness, or speed of moving vehicle.
- Only qualification is that witness observed something.

Character Testimony

Kind of testimony:

- Reputation in the community.
- Only qualification is familiarity with how person is regarded by neighbors.
- Usually not admitted into evidence unless person's character is an issue in the case. (The veracity of a witness is always at issue so that reputation for truthfulness is allowable.)

Expert Testimony

Kind of testimony:

- Assists court by giving opinions in specialized areas.
- Expert's qualifications must be proved to judge's satisfaction.
- Expert does not have to be famous or "world-renowned," does not need to have firsthand knowledge, and can give opinion only in area of expertise.
- Can be contradicted or supported by other experts.
- May be examined by use of "hypothetical questions."
- Opinion usually not binding on judge or jury.

Sequestration of Witnesses

Are witnesses present throughout a trial?

Generally, a witness may be present throughout a trial; however, the court may order witnesses to leave the courtroom while the trial is in progress. This is called an order of sequestration of witnesses.

Sequestration serves to ensure that a witness' testimony will truthfully reflect the person's personal observations and that the witness will not be influenced by the testimony of other witnesses. The principle applies to both civil and criminal trials.

In the majority of States, granting a party's motion to exclude witnesses is a matter within the discretion of the trial judge. The judge in these jurisdictions will then consider the likelihood of perjured testimony and the policy favoring public trials. In addition, the court may order sequestration on its own motion if the judge sees a need. In practice, the court rarely denies a motion in a criminal case, but may deny it in a civil one if the party requesting sequestration does not show a very good reason.

The defendant in some jurisdictions has the right, which the court cannot refuse, to demand sequestration. If the prosecution or opponent objects, the objector must show good cause to deny the motion for sequestration; it must also be shown that having all the witnesses present will not prejudice the defendant in any way.

The motion for and order of sequester must be made at the appropriate time—usually either at the very beginning of the trial or before the attorneys begin their opening statements. Even where sequestration is a matter of right, it can be denied if requested too late. Typically, the jury is not present during any debate on the question.

Who is affected by the sequestration order?

The sequestration order applies to all persons who are going to be called to testify during the trial. Sequestration does not apply to spectators.

The order to sequester does not apply to the defendant in a criminal case or to a party in a civil one. The order also will not apply to the lawyer for any party or to a criminal defendant's attorney.

The court may also exercise its discretion to allow certain other individuals to remain in the courtroom. Medical experts are often allowed to remain, especially when they are not the treating physicians. Other expert witnesses who are acting in an advisory capacity may be allowed to remain in the courtroom after showing the judge good cause for them to remain; the judge must also be convinced that their presence will not prejudice the defendant. Thus, a social worker who is qualified to the court as a disinterested expert witness ***may*** be permitted to remain during the testimony of other witnesses if the court orders it.

Effect of a violation of the order

A witness subject to a sequestration order must leave the courtroom and must stay out until called to testify. When testimony is complete, the witness should not remain in the courtroom even if he or she has been excused from testifying further because he/she may possibly be called again.

A witness who has violated the sequestration order may not be allowed to testify, or the testimony of the witness may be removed from the record. This may be done by the trial judge if the prejudice to the opposing party is significant and if it results from the breach of the order to sequester witnesses.

The parties and their lawyers are responsible for assuring compliance with the sequestration order. If a witness deliberately disobeys the order, he or she can be found in contempt of court. This sanction also applies to any lawyer or party who aided or abetted the violation.

The witness often will be permitted to testify if the violation was wholly inadvertent, or if neither the party nor his/her lawyer knew or consented to the violation. The trial judge will consider the likelihood that the witness actually heard testimony or was influenced by what he/she heard.

Additional Reading

Wigmore on Evidence, Vol. 6 §§1837-1838 (3d ed. 1940).

The Child Witness

Competence

A recurring problem in child abuse or neglect cases—or, for that matter, in any situation where a child's testimony is sought—is that of the child's ability to testify. The test used in Federal courts to determine whether or not a child should be allowed to testify was articulated by the U.S. Supreme Court in the 1895 case of ***Wheeler v. United States***. In that case, the Court held that a 5½-year-old boy would be allowed to testify in a murder trial.[1] The Court said:

> **. . . [The] boy was not by reason of his youth, as a matter of law, absolutely dis-**

qualified as a witness. . . . While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends upon the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous. . . .[2]

Using this test, courts have allowed testimony by children of varying ages to be used in a wide variety of cases. In ***In re Lewis***, a 4½-year-old girl was allowed to give testimony concerning an indecent assault, the review court holding that this was not an abuse of the trial judge's discretion.[3] In ***West v. Sinclair Refining Co.***, a 6-year-old was allowed to testify as a witness to a gasoline tank overflow that resulted in the death of her father when it exploded.[4] In cases both civil and criminal, regardless of the age of the child, the test has been the same; namely, the capacity of the individual child to testify.[5]

A child who is very young at the time of the event giving rise to the trial may be allowed to testify later. The judge is required to determine the child's capacity as a witness through questions to the child before ruling.[6]

The child's capacity to testify can be broken into a number of elements to be examined before admitting a child's testimony into evidence. They are:

1. The ability to receive an accurate impression of the event in question at the time of its occurrence.
2. The ability to remember the event accurately.
3. The ability to relate the event to the court at the time of trial.[7]

A child may be competent to testify to occurrences that he or she remembers, even though they happened at a time when the child was too immature to testify.[8] The younger the child, the more difficult it is for the court to determine his/her intelligence and capacity to understand and relate the truth.[9] Even if a child is initially found competent to testify, the court may strike the testimony and instruct the jury to disregard it if, in testifying, the child shows a lack of capacity.[10]

Many States have a statute specifying that children under the age of 10 are incompetent to testify if they appear unable to receive a true impression of the facts or to relate them accurately. This type of statute does not appear to affect the common law rule that a child is competent who is found to be able to receive true impressions and to accurately relate them at a later time.[11] It has been said by some authorities that, under such statutes, a child under the age of 10 is presumed unable to testify, while a child over the age of 10 is presumed able to testify.[12] But in spite of this type of statute, a person over age 10 can be found to be incompetent to testify if he or she lacks the capacity to perceive, remember, and relate accurately or to understand the obligation under oath to tell the truth.[13]

REFERENCES

1 *Wheeler v. United States*, 159 U.S. 523 (1895).

2 *Wheeler v. United States*, 159 U.S. 523 (1895) at 524-525.

3 *In re Lewis*, 88 A.2d 582 (D.C. App. 1952).

4 *West v. Sinclair Refining Company*, 90 F. Supp. 307, (W.D. Mo. 1950).

5 See also *Taitano v. Government of Guam*, 187 F. Supp. 75 (D. Guam, 1960); *Doran v. United States*, 205 F2d 717 (D.C. Cir. 1953), Cert. denied 346 U.S. 828; *Pocatello v. United States*, 394 F2d 115 (9th Cir. 1968); *Webster v. Peyton*, 294 F.S. 1359 (E.D. Va., 1968); *United States v. Spoonhunter*, 476 F2d 1050 (10th Cir. 1973).

6 *Huprich v. Paul W. Varga and Sons, Inc.*, 3 Ohio St. 2d 87, 209 N.E.2d 390 (1965). The witness in this case was age 4 at the time of the

occurrence and age 13 at the time of the trial. See also *Bradburn v. Peacock*, 135 C.A.2d 161, 286 P.2d 972 (1955): error to exclude boy age 3½ at time of occurrence and age 5 at time of trial without examination into his competency.

7 *People v. Delaney*, 199 P. 896 (Cal. App. 3d, 1921); *State v. Segerberg*, 131 Conn. 546, 41 A.2d. 101 (1945); *Bradburn v. Peacock*, 135 C.A.2d. 161, 286 P.2d. 972 (1955).

8 *Bradburn v. Peacock*, 135 C.A.2d. 161 286 P.2d. 972 (1955).

9 *State v. Smith*, 3 Wn.2d. 543, 101 P.2d. 298 (1940).

10 *Macale v. Lynch*, 110 Wash. 444, 449, 188 P. 517, 51b (1920); *State v. Smith*, 3 Wa.2d. 543, 101 P.2d. 298 (1940).

11 *People v. Cook*, 136 C.A.2d 442, 288 P.2d. 602 (1955); *People v. Polak*, 165 C.A.2d. 226, 331 P.2d 662 (1958); *Litzkuhn v. Clark*, 85 Ariz. 355, 339 P.2d 389 (1959).

12 *West v. Sinclair Refining Co.*, 90 F. Supp. 307 (D.C. Mo. 1950), construing the Missouri Statute; *Bowman v. Bowman*, 118 Ind. App. 137, 77 N.E.2d 900 (1948); *Burt v. Burt*, 48 Wyo. 19, 41 P.2d 524 (1935).

13 *Lamden v. St. Louis S.R. Co.*, 115 Ark. 238, 170 S.W. 1001 (1914); *Lee v. Missouri P.R. Co.*, 67 Kan. 402, 73 P. 110 (1903); *Davenport v. King Electric Co.*, 242 Mo. 111, 145 S.W. 454 (1912); *People v. Delaney*, 199 P. 896 (Cal. App. 1921).

Oath

One element the U.S. Supreme Court mentioned in the ***Wheeler*** case has given the courts some trouble; namely, the ability of a child witness to understand the obligation of an oath. Some of the older cases indicate that, in order to be a competent witness, the child must believe in a scheme of divine punishment for violation of the oath.[1] But the view today is generally that no religious basis is needed in order to have a sense of obligation to tell the truth. The modern view rests on the U.S. Constitution.[2]

Today, it is sufficient that the child understand the difference between truth and falsehood, believe that he/she has a duty to tell the truth, and believe that he/she can expect punishment if he/she testifies falsely.

The child does not need to be able to define an oath or understand its legal or religious significance.[3] Where the child does not initially understand the obligation to tell the truth, he or she may be instructed by the judge; if the judge is satisfied that the instruction is understood, the child's testimony may be admitted.[4]

REFERENCES

1 *McCuff v. State*, 88 Ala. 147, 7 So. 35 (1889).

2 *Leahman v. Broughton*, 196 Icy 146, 244 S.W. 403 (1922); *People v. Zeezich*, 61 Utah 61, 210 P. 927 (1922); *Clark v. Finnegan*, 127 Iowa 644, 103 N.W. 970 (1905).

3 *State v. Collier*, 23 Wn. 2d. 678, 162 P.2d. 267 (1945); *People v. Delaney*, 52 Cal. Ap. 765, 199 P. 896 (1921).

4 *McAmore v. Wiley*, 49 Ill. Ap. 615 (1893). See also *Wigmore on Evidence*, Vol. 6, 306, §1821 (3d ed. 1940). For a more readable commentary, see Dickens, *Bleak House*, Chapter XI; also quoted in *Wigmore* at 305.

Procedure for determining competence

The examination of the child for competence is made when the child is offered as a witness. Generally, the examination is handled by the judge, though sometimes a judge may allow counsel to participate in the questioning. The actual form of the examination rests with the court's discretion.[1]

Some authorities believe that the examination should take place in the presence of the jury, since this would give jury members a greater opportunity to observe the child and determine the weight they will give to the child's testimony.

The actual issue of competence is for the court to determine, and determining the competency of the child in front of the jury may allow its members to hear prejudicial testimony that they must shortly thereafter be instructed not to consider if the child is found to be unable to testify.

The usual and best procedure is to examine the child for competence outside the presence of the jury.

Once the child is determined competent to testify, the attorney presenting the child as a witness asks the child questions framed to demonstrate to the jury the capacities of the witness. On cross-examination, opposing counsel will seek to discredit the child's testimony. Thus, the matter of competency is handled in front of the jury as it would be for an adult witness.

Essentially, then, the judge will determine, without the presence of the jury, whether or not the child is qualified to testify at all. If qualified, the attorneys will question the child in front of the jury who will decide how much weight to give to the testimony.

The purpose of the examination by the court is to determine that the child had the ability to accurately observe the event in question at the time it occurred, the ability to remember the event accurately, the ability to relate the event to the court, and that the child understands the obligation to tell the truth.[2] For this purpose, questions about the child or the child's environment are allowed.

Questions about the child and about the child's home and school serve to indicate that he/she can understand simple questions. Questions about past incidents serve to indicate the child's ability to observe, remember, and relate what was observed, and to indicate the child's general intelligence. Finally, questions are asked about the child's understanding of the difference between truth and falsehood and about the duty to tell the truth. While questioning will vary somewhat depending on the age of the child and the peculiar circumstances involved, typical questions are:

Q. What is your name?

Q. What are the names of your mother and father?

Q. Where do you live?

Q. How old are you?

Q. What school do you go to?

Q. What is the name of your teacher?

Q. Can you spell your name?

Q. When is your birthday?

Q. Do you know what building you are in now?

Q. Do you know the difference between the truth and a lie?

Q. Do you understand that you have to tell the truth here?

Q. Do you know that you may be punished if you don't tell the truth?

Q. Will you tell the truth?

REFERENCES

1 *Henderson v. United States*, 218 F.2d. 14 (3rd Cir. 1954).

2 *Commonwealth v. Ault*, 228 Pa. Super. 353, 323 A.2d. 33 (1974).

How to Be a Good Witness—Pointers for the Protective Services Worker

Preparing to testify

You, as a protective services worker, may often appear in court, either as a lay witness or as an expert. You may be nervous in anticipation of the experience. Such anxiety over a courtroom appearance is normal.

The material that follows is designed to give you pointers on common concerns of witnesses.

1. **Dress appropriately.**

Your personal appearance is important. Because courts tend to be conservative, you should dress in business rather than casual attire.

2. **Prepare ahead of time.**

You know in advance when you will be called to testify. Use the time while you are waiting to refresh your memory and recall details about the events related to the case. Review these events in your mind; go over your notes. Don't expect to extensively use your notes at trial,

although they may be used, if necessary, to refresh your memory. A witness is generally expected to testify from memory.

3. **Don't memorize your testimony.**

Review your expected testimony mentally. It is not a good idea to prepare a script; spontaneous responses are more believable and less likely to be shaken on cross-examination.

How to be nervous and not show it

1. **Expect to feel anxious.**

You will probably feel a sense of anxiety when you are called into the courtroom from the corridor. It is always a shock to see the judge, lawyers, and clients sitting in their respective places—and all of them will watch you as you enter.

It is important to remember that the judge and lawyers observe every witness as he/she approaches the witness stand. This is not unusual or due to something wrong with the witness. However, it is easy to feel stared down at this point. Just be prepared for the occurrence, making every effort to remember that this is how judges and lawyers view every witness, that it has nothing to do with any particular characteristics you may have.

You should look directly back at the judge and lawyers—just as you would if you were speaking to them. Don't avoid their glance. You will find this approach relaxing.

2. **Be prepared to answer the oath.**

The oath will probably be administered while you are sitting in the witness stand. Some jurisdictions, however, administer the oath while the witness stands before the judge's bench.

Since your mind is apt to race ahead to the testimony, you may be startled unnecessarily by the bailiff's appearance to swear you to tell the truth. Remember to look for the bailiff and watch his/her signals so you know where to stand or sit while the oath is administered.

3. **Get ready to answer the first question.**

You will feel a special kind of nervousness when you take the witness stand. At this point, the most common symptoms of nervousness are: (1) perceptual problems in the courtroom (especially of sight), (2) lowering of the voice, (3) slumping in the witness chair, (4) speaking rapidly, (5) speaking in a monotone, and (6) inability to recognize anyone in the courtroom.

Although you may really know the lawyer and client, you may not recognize them. To overcome these possible symptoms, take the following steps:

- Sit with your back straight, taking care not to allow your shoulders to slump or your body to slide down in the chair. If you begin the slumping and sliding process, the natural desire you have to get out of the spotlight will keep you slumping and sliding. Start out straight and you have a better chance of staying that way. A curled up witness may not make as good an impression on the judge as an erect witness.

- Look around the room to orient yourself. Look at each of the walls you can see in your line of vision without turning around. Look at each wall separately.

If you are really nervous, the courtroom may seem huge and cavernous. You may experience tunnel vision where you see only the lawyer about to question you or your unhappy client—just as if they were at the end of a tunnel.

To avoid the nervous overemphasis of the scene, you need to reorient yourself to the entire room and to the people in it. Therefore, any technique that serves to reacquaint you with the room and the people is helpful. A simple technique is to look at the wall to your left, to the back of the courtroom, and to your right. Look at each person separately in the room.

4. **Speak a little louder and slower than you feel is necessary.**

Everyone lowers the voice and speeds up the rate of talking when on the witness stand. But what you should strive for is to speak somewhat louder and slower than you may think is necessary under the circumstances.

Concentrate on making each word heard. But avoid long pauses between your words, phrases, or sentences. Moderation is the keyword in your effort to overcome nervousness.

How to answer questions

1. **Be sincere and dignified—but warm.**

Trials are inappropriate settings in which to inject humor or comic relief. The image you want to project is one of sincerity and dignified warmth.

This case—as are all cases—is a serious matter. But it is also a human one in which you have a genuine concern for the people involved.

Your projection of a humane attitude may assist the judge in evaluating your credibility in a positive manner. A concerned appearance on the stand usually makes a better impression than does a frozen or calculating one.

2. **Speak clearly and distinctly.**

The judge, attorneys, and jury (if it's a jury trial) have to hear your response; also the court reporter if a record is being made of the hearing. So speak clearly and distinctly—in a voice that is probably louder than the one you use in ordinary conversation.

You must give a spoken answer; nodding or shaking your head, gesturing, gasping, and other nonverbal communications will not be accepted as answers.

3. **Use appropriate language.**

Use ordinary English words with which you are comfortable. Slang, jargon, and words with unfamiliar meanings should be avoided. If you use technical terminology, explain its meaning to the judge.

Often, you can check beforehand with the attorney who is calling you as a witness to identify some of the technical phrases that need to be explained.

4. **Answer the question that was asked.**

You must listen to each question so you know what information is appropriate. For example:

> Q. Where do you reside?

That means: Where do you live now—address or city; it does not mean every place you have lived since elementary school.

> Q. You stated that you are a licensed social worker. Where did you take your training?

That means formal schooling in social work—not the elementary and high schools you attended or the degrees you received that do not relate to your professional skills.

> Q. What did you and Mary Jones talk about during your first interview?

Give the time, date, and place of the conversation; then tell the substance of the conversation or topics discussed.

Ordinarily you will not have to mention discussing such things as the weather or bus schedules or other items that have no bearing on the professional contact. You might summarize these kinds of conversations by saying you "chatted briefly" or "discussed other matters" so the examiner can explore them if he/she feels they may be relevant.

Be alert to the kind of response desired. Direct examination usually calls for narrative responses, whereas cross-examination normally asks for a "Yes" or "No" or other very short answer.

A common error of the witness is double-thinking or overthinking the question. To help avoid this, pause before answering a ques-

tion, and try to keep your brain from overextending the questioner's meaning.

Avoid off-hand responses; likewise, too technical ones in attempting to draw meaning from the question.

The English language does not change because it is spoken in a courtroom. For example, if the questioner asks: Were you at the home of Mrs. Smith on August 29, 1976? this does not mean: Were you ***in*** the home; did you remain in the home any significant length of time. It simply asks if you were ***at*** that house—inside, outside, or on the street in front of the house at any time that day.

5. **Let the attorney develop your testimony.**

This applies to both direct and cross-examination. For example:

> Q. Do you remember an interview with Mary Jones on Monday, April 15, at 10:15 a.m.?

The best response is "Yes" or "No."

In the next question, the examining attorney may ask you to narrate the substance or circumstances of the interview. The purpose of the first question may be to prepare a foundation before introducing the significant part of your testimony. This is the trial attorney's job; don't jump ahead.

6. **If you don't know the answer to a question, say so. Don't guess.**

If you cannot remember, it is better to say so than to speculate. You may remember the answer later during your testimony; if so, the attorney questioning you may reask the question. Do not rely, however, on the use of "I don't remember" or "I don't know" to avoid answering difficult or indelicate questions. If you are the eyewitness of child abuse, you will not be an effective witness if you cannot remember details.

7. **Don't make your testimony conform to other testimony you have heard.**

You are called to testify regarding what you observed or what your opinion is. Different eyewitnesses can have different impressions of the same event. You are not expected to agree with or parrot someone else's testimony; the other person may be wrong. You can discuss discrepancies with your attorney, but this is done outside the courtroom.

You may be under a sequestration order to avoid influence to change your story. Obey the order and do not discuss the case with other witnesses. (See chapter on "Sequestering of Witnesses.")

8. **When answering questions, look at the person asking the questions or at the trier of fact.**

You are testifying in order to impart information to the trier of fact who will use it to determine the outcome. If you always look over at your lawyer before answering another attorney's question, it will look as if you are waiting to be coached.

You are an impartial witness; you are not supposed to "win" the case for either side.

9. **Tell the truth.**

Pure and simple. Let the chips fall where they may. Do not attempt to color your answers to fit the outcome of the case you believe is most fair or just.

It is natural to feel like an advocate for a certain outcome; but you are a better witness if you are an impartial one.

A slight shift in emphasis on cross-examination in an attempt to advocate a certain outcome can backfire, giving opposing counsel a basis to argue that you are biased. This may put a dent in your credibility.

The lawyer is there to argue the case; you are there to impartially report facts to the judge. If a truthful answer seems to hurt the lawyer who

asked you to testify, this should not be your concern. You are there to tell the facts.

How to survive cross-examination

Cross-examination is a necessary part of the judicial process; it is also an inherent part of the American system of justice which is adversarial. In this system, each side is obligated to attempt to throw a different light on the testimony of a witness.

All lawyers in the American system are required to cross-examine witnesses. Such cross-examination is not used against you personally; it is practiced on all witnesses and the more important the witness, the more vigorous the cross-examination.

Here are a few points on cross-examination.

1. **Tell the truth.**

As noted above (under "How to Answer Questions"), don't speculate when you can't remember. Stick to what you actually do recall.

The cross-examiner may attempt to suggest details to you that you do not remember and that you did not state on direct examination. Do not follow the cross-examiner's leading question into an answer. For example, the cross-examiner may present a question in such a way that it seems imminently logical. However, if that is not what you remember, do not agree with the cross-examiner. Your suggestibility may cause you to change your answers without realizing it.

For example:

> Q. You saw blood flowing from the arm of Jane Smith after she was hit by the hammer, didn't you?
>
> The witness thinks, *"Well, I saw Jane hit with the hammer. I don't remember the blood . . . but there must have been some. I'll say yes."*
>
> A. Yes

The witness in this example may, in fact, have been too far away to see the blood, and that is why the witness did not remember seeing any. This distance perception problem will be argued by the cross-examiner as impeaching the witness' believability. Or it may be that the skin was not broken because the force was not great enough. In this case, the witness will be impeached because a doctor will testify to the fact of no blood loss.

2. **Be very careful about what you say and how you say it.**

Even a friendly cross-examiner looks for inconsistencies by which to trip you whenever possible. Remember:

- Listen to the question.
- Make sure you understand what is being asked.
- Don't volunteer information that is not asked for. (Volunteering provides the cross-examiner with additional opportunities to try to confuse you.)
- Don't explain why you know something unless you are asked.
- The attorney offering your testimony has a chance to ask additional questions after cross-examination to clear up any problems.

3. **Listen carefully to the question; don't answer it unless you are sure you understand it.**

If you don't understand the question, ask the questioner to rephrase it, or say you don't understand what information is being asked for. This situation can easily arise on cross-examination since leading questions (that is, questions suggesting the answer) are permitted. (Leading questions are prohibited on direct examination of the witness.)

4. **If a question has two parts requiring different answers, answer it in two parts.**

Many times, cross-examiners ask compound questions. Do not answer a partially untrue question with a yes.

When responding to a compound question, divide the question into parts and then answer it. For example:

Q. Is it not true that you drove to the Smiths' home on August 16, 1976, stormed inside, and immediately picked up their child, Mary Smith?

A. There are three parts to that question, and each part has a different answer. I did go to the Smith home, but I spoke with Mrs. Smith on the porch for 15 minutes. Then we spoke in her livingroom for another 15 minutes. After that, she allowed me to take custody of Mary.

Do not begin your answer with "Yes," because the attorney may cut you short and not allow you to complete your response, thus giving an erroneous impression of your actions.

5. **Keep calm.**

Do not lose your temper at questions you consider impertinent or offensive. Exercise absolute self-control. If you maintain your composure, you will be less likely to become confused and be inconsistent. Also, outbursts of anger or temper do not enhance the witness' credibility.

If the questioning *is* improper, your attorney will object. Pause long enough before answering to allow the objection to be made. But don't pause so long that you appear hesitant or unsure.

Some questions are simply nasty. These should be handled with tact and truth. Here is an example.

Q. Have you stopped beating your own children, Mr. Jones?

A. Well, I never have beaten my children. There is nothing to stop because I have never begun to beat them in the first place.

6. **Answer positively rather than doubtfully.**

Qualifiers such as:

"I think..."

"To the best of my recollection..."

"I guess..."

weaken the impact of your testimony. Be forthright if you know the answer. If you don't know the answer, say so.

7. **Testify to distances by pointing out objects in the courtroom.**

Most people have difficulty in estimating distance in feet or yards. If you are not good at estimating distance, refer to an object in the courtroom to clarify distance in your testimony. For example:

Q. How far from the house was Mr. Smith standing?

A. I can't say how many feet, but it was from here where I'm sitting to where Mr. Jones is sitting now.

The number of feet or yards will then be measured.

8. **Don't get caught in the "yes or no" problem.**

If on cross-examination the opposing attorney asks a question and ends it with "Answer yes or no," don't feel obliged to do so if you feel that such an answer would be misleading. Begin your answer with "Well, that needs explaining." The attorney may object and the court may even require you to give a yes or no answer; but the jury will understand your position and look forward to your explanation when your attorney clarifies the situation on redirect examination.

9. **Admit your beliefs or sympathy honestly.**

Often, a witness will be asked a question regarding sympathy for one side or the other in the case. It would be absurd to deny an obvious sympathy, and honest admission of favoritism will not discredit a witness. This is very different from coloring answers because of favoritism.

When an attorney shows that a witness will change testimony because of feelings about a case, the attorney is showing that the feelings of the witness are affecting his/her testimony. This is bias which can damage credibility.

Merely stating obvious or natural feelings will not discredit you, as it has not been demonstrated that your natural feelings have affected your testimony. For example:

Q. Do you have a feeling as to how you would like this case to come out?

A. Yes, I'm afraid I do.

Q. You would like the State to get custody of little Mary and remove her from her mother, wouldn't you?

A. Yes, I feel that way. But I have answered all of your questions as honestly as I possibly could. I have told the truth.

10. **If you are testifying as an expert, be prepared to reconcile or distinguish your opinion from opposing schools of thought.**

If you have to research your professional opponent's arguments, do so ahead of time. The attorney calling an expert expects the expert to assist in the preparation of the technical part of the case.

When ***you're*** the expert, it means you must polish up your expertise. This may entail reviewing textbooks and training manuals, reading about new developments in your field with which you are unfamiliar, taking advantage of a conveniently timed workshop or internal training session, and conferring with colleagues.

Generally, do whatever is necessary to brush up your professional knowledge and skills so that when you are asked for your opinion, you can answer with authority and confidence, knowing that you are current and knowledgeable in your area of special competence.

11. **Don't close yourself off from supplying additional details.**

Avoid ending your testimony with finality, such as "And that's all there is." Later, if you remember something that ought to be added, you may find yourself offering excuses for your earlier lapse. It is better to offer no comment.

12. **Don't be rushed.**

Cross-examination is typically fast-paced so that the lying witness has no time to calculate an answer. But the sincere witness may need time to make a careful and complete answer.

If the examiner interrupts your answer with a new question, it is generally better to complete the response you began before going on to something new.

As noted above, if questioning is improper, your attorney will object, and a slight pause from you will give your attorney opportunity to object. If an objection is made, stop, even in midword.

13. **Don't get caught by a trick question.**

If you are asked, "Are you being paid to testify?" remember that it is acceptable for experts to be paid and that, in most jurisdictions, lay witnesses receive statutory per diem and/or mileage allowances for the inconvenience.

If you are being paid to testify, say so and explain. For example: "I am being paid a fee of twenty dollars."

If the expert is being paid his/her normal consultation rate, the expert should state this. Of course, if the answer is no, say "No."

To the question, "Who told you to say that?" you should state that you were told to tell the truth.

You may be asked, "Have you discussed this case with anyone?" And since you naturally have discussed the case with the attorney for your side, say so. Also, name your supervisor

and anyone else with whom you have discussed the case.

How to explain the results of your investigation

1. **Check with the attorney for your side before you testify.**

The attorney offering your testimony should go over with you the information he/she wishes to elicit on direct examination and the information you have to offer. You should inform the attorney of any problems you see in the case or in the agency investigation. Adverse information and weaknesses should be disclosed beforehand; the witness stand is no place to spring a surprise.

2. **Organize your material and your thoughts.**

Your testimony will probably fall into one or more of the categories listed below. Your preparation should be different for each of your three functions:

(a) **Personal observations** — Prepare to testify from memory with little, if any, reference to your notes. If the investigation covered a long period of time prior to the hearing, you can prepare a separate sheet; for example, a list of the chronology of events. This short summary can be used to jog your memory on the stand, plus help keep your thoughts and recollections organized.

Opposing counsel and the judge will probably look at your list, but it will not usually be introduced as evidence in the case unless it differs from your oral testimony. As noted earlier, memorize the facts, but avoid sounding as though you were giving a recitation.

(b) **Expert conclusions** — As an expert, you should be prepared to explain:

(1) Your professional qualifications; e.g., your educational degrees, length and extent of experience, special training, membership in professional associations.

(2) The professional theories and approaches you used in forming your opinion.

(3) The common theories and approaches you rejected.

(4) Your investigative method and how it is similar to, or different from, that of other caseworkers.

(5) What opinions you formed and why. This will be the major portion of your testimony as an expert.

(c) **Reading investigate reports** — Portions on your case file may have qualified to be admitted into evidence as regularly-kept business records (see section on "Regularly-Kept Business Records," beginning p. 67). If so, you may be asked to read aloud your notes as well as other caseworkers' notes to the judge.

Prepare by being thoroughly familiar with the contents and organization of the file. Make sure you can read any handwritten parts, and doublecheck the contents to see if any correspondence or notes have been omitted.

You should be able to explain briefly the method for production, transcription, and processing of a case file in your office.

3. **Choose a simple and logical structure.**

Chronological order is probably the most common structure for organizing your material. You will want an organizational format that is natural for you and clear to everyone else. The simpler, the better.

4. **At the trial, speak carefully and loud enough to be heard.**

You may want to reveiw the section on "How to Answer Questions," particularly points 1, 2, and 3.

Let the attorney control the development of your testimony.

6. **Stop talking when there is an objection.**

Maintain your composure when there is an objection from the attorney, but do not finish your sentence. The judge will rule to sustain or overrule the objection. If it is overruled, you can go on; but, usually, either the judge or the examining attorney will instruct you to continue. Above all, don't worry too much about what may have been objectionable.

Additional Reading

Heffron, Floyd N., *The Officer in the Courtroom.* (Oxford: Blackwell Scientific Publications, 1955.) Chapter V, "The Officer's Testimony," contains numerous hints to help any witness relax and be effective on the stand.

Novok, Danile A., "Presenting a Plaintiff's Case." 5 *Am. Jur. Trials* 611 (1966). See especially "Preparation of Witnesses" (Sections 1-9) and "Types of Witnesses" (Sections 10-19).

Redfield, Roy A., *Cross-Examination and the Witness.* (Mundelein, Ill.: Callaghan, 1963.) See especially Chapter 13, "A Word for the Witness."

Tierney, Kevin, *How To Be A Witness.* Dobbs Ferry, N.Y.: Oceana Publications, 1971.

AT TRIAL—EVIDENCE

Medical Records

Privilege and admissibility

During an abuse or neglect investigation, the caseworker may discover medical information that will aid in the identification and resolution of the family's problems. Such information includes a family medical history, a school doctor's report, hospital admitting records, report of a psychologist's or psychiatrist's consultation, X-ray charts, or the results of diagnostic tests performed by a hospital or doctor.

Some of this information will not be available to the investigator for use at the trial because of the widespread recognition of a patient's privilege to keep information he or she has furnished to a doctor for diagnosis or treatment from being disclosed at trial. In fact, the doctor may not discuss with anyone the substance of the professional relationship.

The medical profession itself has a professional ethic prohibiting idle conversation about patients. But in addition to this professional ethic is the legal restriction under which it is a crime for a doctor to disclose any confidential information about his/her patient without the patient's permission.

Medical practitioners felt they could not reliably and successfully treat a patient who, because of fear of exposure, might not reveal important medical information.[1] Thus, the privilege exists to satisfy a public policy favoring full and free disclosure by a patient to a doctor.

Some States also provide a similar privilege for patients of nurses, psychologists, psychiatrists, and other professionals who have a relationship comparable to that between medical doctor and patient. Other States do not recognize any privilege at all.

Where a privilege exists at law, the professional is not permitted to testify without the patient's permission, even under subpoena in court.

In the large majority of the States, child abuse and neglect reporting laws effectively eliminate the doctor/patient privilege with respect to

communications and information obtained by a doctor in examining an abused or neglected child. Thus, information from the treating physician or the hospital records ***relating to an abused or neglected child*** will not be privileged in any subsequent litigation on the issue. This means the doctor may testify, and relevant medical information may be used in a preliminary hearing, adjudication hearing, termination, or custody trial, or in a criminal abuse prosecution.[2]

Reporting statutes, however, normally do not eliminate the privilege for medical information concerning the parent or abuser in an abuse case; they only eliminate the privilege as it applies to the child-victim of abuse. The privilege thus belongs to the patient—whether the patient knows it or not—and the doctor or psychologist may not waive it; only the patient can do this.

Generally speaking, therefore, medical information obtained by a medical practitioner about the parent in the course of a professional relationship with that parent will not be usable at trial unless the parent consents to its use or waives the right to the privilege.

Consent can be obtained directly by an authorization or written permission. In some States, indirect consent is automatically obtained if the patient puts his/her medical condition at issue in the litigation. ***Waiver*** may be expressed, or it may be implied from the circumstances. For instance, if the parent is informed in advance that his/her doctor will be testifying at a jurisdictional neglect hearing, and then the parent is present at the trial but does not assert his/her privilege, the privilege will be considered waived in some States.

The actual information that is privileged is ***all*** information related to the diagnosis, treatment, and prognosis of the patient. Information such as the fact that a particular patient consulted with the doctor or the date of professional consultation is not privileged. A doctor may not be prohibited from testifying, for instance, to the fact that he/she saw the parent on a certain number of occasions.[3]

REFERENCES

1 *McCormick* at 213.

2 Note, "Privileged Communications—Abrogation of the Physician-Patient Privilege to Protect the Battered Child," 15 *DePaul L. Rev.* 453, 454-455 (1966). De Francis and Lucht, *Child Abuse Legislation in the 1970's, op. cit.* (pp. 12, 13, 334.)

3 *McCormick* at 215-216.

When medical information is admissible

Often a State or private agency arranges a medical examination, either at a hospital or by a private physician, in order to confirm suspected child abuse or neglect. The most common use of medical examination records is to document the condition of the child.[1]

Much of the information in hospital or medical records is, of course, pure hearsay. Ordinarily, such secondhand information is not admissible at trial.

However, because of the general reliability of records prepared for business purposes not intended for potential litigation, there are three exceptions to the hearsay rule under which hospital records normally qualify as admissible evidence. These are (1) the "regularly-kept business records" exception, (2) the Business Records Act exception, and (3) the "official statements" exception. All States have one of these exceptions available.

1. Regularly-Kept Business Records

The regularly-kept business records exception developed out of the "shopbook rule" of the common law which allowed business records that were regularly and currently maintained within the course of the business to be used as evidence. The elements of the regularly-kept business records exception are:

- The entries must be original records made in the routine of the business. A hospital normally qualifies as a business for this exception.

- The entries must have been based on the personal knowledge of the recorder or of someone who, having a duty to do so, reported the information to the recorder based on the reporter's personal knowledge.

- The entries must have been made at or near the time of the transaction recorded. It must be the practice of the hospital to make this kind of record accurately, promptly, and routinely.[2]

2. **Business Records Statute**

The second exception to the hearsay rule and the one under which records are most commonly admitted is the Business Records Act. This is the State statute version of the regularly-kept business records exception.

The Business Records Act, which has been enacted in various forms in nearly every State, enumerates the requirements that must be met before the records can be admitted into evidence:

- The entries must have been made in the routine of a business.
- They must have been based on the personal knowledge of the recorder or of the person providing the information to the recorder.
- They must have been recorded promptly at the time of the transaction.

The custodian of the records, usually a hospital administrator, can testify that these statutory requirements are met. In the case of hospital bills, direct testimony may not be required[3] since it is common knowledge that hospitals routinely submit bills for service.[4] If the hospital records or the medical records fit within the requirements of the statutes, then the records can be admitted as evidence at trial.[5]

3. **Official Statements**

The third exception to the hearsay rule is the official statements exception. Written statements of public officials who have a duty to make such statements, if made with firsthand knowledge of the facts, are admissible into evidence at trial despite the hearsay nature of the records.[6] Thus, if a director of a State hospital is a public official with the duty to record child abuse or neglect reports, then records of such reports can be admitted into evidence under the official statements exception. The official duty to record can be based either upon a statute or a professional duty.[7]

Hospital records, in order to be admitted into evidence, must have been made at or near the time of the patient visit or examination. Information added to the files later will not be admissible because it is presumed that trustworthiness decreases the farther away an entry is made from the original time of the examination.

Where part of a hospital record is admissible and part is not, the part that is inadmissible can be omitted by deleting it, so that only the part that is "good" evidence will be considered at trial. For example, if a hospital official adds personal conclusions about an investigation at a later time, these conclusions must be omitted when the records are admitted into evidence.[8] Omission can be accomplished by blocking out a sentence, paragraph, or page.

REFERENCES

1 Hastings, "Discovery and Evaluation of Medical Records," 15 *Am. Jur. Trials* 373, 379. (1968).

2 *McCormick* at 717-728, 730.

3 *Salotti v. Seaboard Coastline Railroad Co.*, 293 Ala. 1, 299 So.2d 695 (1974); *Thomas v. Owens*, 28 Md. App. 442, 346 A.2d 662 (1975); Catalano, "Introducing and Marking Exhibits," 5 *Am. Jur. Trials* 553 (1966 and 1975 supp.).

4 *Thomas v. Owens, ibd.*, 346 A.2d at 667.

5 Levine, "Hospital Records." *Trial Lawyer Guide* 89, 90 (1957).

6 *McCormick* at 735.

7 *McCormick* at 736.

8 *Krestview Nursing Home, Inc. v. Synowiec*,— Fla. ____, *317 So.2d 94, 96 (Fla. App. June 1975).*

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Reporting statutes, however, normally do not eliminate the privilege for medical information concerning the parent or abuser in an abuse case; they only eliminate the privilege as it applies to the child-victim of abuse. The privilege thus belongs to the patient—whether the patient knows it or not—and the doctor or psychologist may not waive it; only the patient can do this.

Generally speaking, therefore, medical information obtained by a medical practitioner about the parent in the course of a professional relationship with that parent will not be usable at trial unless the parent consents to its use or waives the right to the privilege.

Consent can be obtained directly by an authorization or written permission. In some States, indirect consent is automatically obtained if the patient puts his/her medical condition at issue in the litigation. ***Waiver*** may be expressed, or it may be implied from the circumstances. For instance, if the parent is informed in advance that his/her doctor will be testifying at a jurisdictional neglect hearing, and then the parent is present at the trial but does not assert his/her privilege, the privilege will be considered waived in some States.

The actual information that is privileged is ***all*** information related to the diagnosis, treatment, and prognosis of the patient. Information such as the fact that a particular patient consulted with the doctor or the date of professional consultation is not privileged. A doctor may not be prohibited from testifying, for instance, to the fact that he/she saw the parent on a certain number of occasions.[3]

REFERENCES

1 *McCormick* at 213.

2 Note, "Privileged Communications—Abrogation of the Physician-Patient Privilege to Protect the Battered Child," 15 *DePaul L. Rev.* 453, 454-455 (1966). De Francis and Lucht, *Child Abuse Legislation in the 1970's, op. cit.* (pp. 12, 13, 334.)

3 *McCormick* at 215-216.

When medical information is admissible

Often a State or private agency arranges a medical examination, either at a hospital or by a private physician, in order to confirm suspected child abuse or neglect. The most common use of medical examination records is to document the condition of the child.[1]

Much of the information in hospital or medical records is, of course, pure hearsay. Ordinarily, such secondhand information is not admissible at trial.

However, because of the general reliability of records prepared for business purposes not intended for potential litigation, there are three exceptions to the hearsay rule under which hospital records normally qualify as admissible evidence. These are (1) the "regularly-kept business records" exception, (2) the Business Records Act exception, and (3) the "official statements" exception. All States have one of these exceptions available.

1. Regularly-Kept Business Records

The regularly-kept business records exception developed out of the "shopbook rule" of the common law which allowed business records that were regularly and currently maintained within the course of the business to be used as evidence. The elements of the regularly-kept business records exception are:

- The entries must be original records made in the routine of the business. A hospital normally qualifies as a business for this exception.

- The entries must have been based on the personal knowledge of the recorder or of someone who, having a duty to do so, reported the information to the recorder based on the reporter's personal knowledge.

- The entries must have been made at or near the time of the transaction recorded. It must be the practice of the hospital to make this kind of record accurately, promptly, and routinely.[2]

2. **Business Records Statute**

The second exception to the hearsay rule and the one under which records are most commonly admitted is the Business Records Act. This is the State statute version of the regularly-kept business records exception.

The Business Records Act, which has been enacted in various forms in nearly every State, enumerates the requirements that must be met before the records can be admitted into evidence:

- The entries must have been made in the routine of a business.
- They must have been based on the personal knowledge of the recorder or of the person providing the information to the recorder.
- They must have been recorded promptly at the time of the transaction.

The custodian of the records, usually a hospital administrator, can testify that these statutory requirements are met. In the case of hospital bills, direct testimony may not be required[3] since it is common knowledge that hospitals routinely submit bills for service.[4] If the hospital records or the medical records fit within the requirements of the statutes, then the records can be admitted as evidence at trial.[5]

3. **Official Statements**

The third exception to the hearsay rule is the official statements exception. Written statements of public officials who have a duty to make such statements, if made with firsthand knowledge of the facts, are admissible into evidence at trial despite the hearsay nature of the records.[6] Thus, if a director of a State hospital is a public official with the duty to record child abuse or neglect reports, then records of such reports can be admitted into evidence under the official statements exception. The official duty to record can be based either upon a statute or a professional duty.[7]

Hospital records, in order to be admitted into evidence, must have been made at or near the time of the patient visit or examination. Information added to the files later will not be admissible because it is presumed that trustworthiness decreases the farther away an entry is made from the original time of the examination.

Where part of a hospital record is admissible and part is not, the part that is inadmissible can be omitted by deleting it, so that only the part that is "good" evidence will be considered at trial. For example, if a hospital official adds personal conclusions about an investigation at a later time, these conclusions must be omitted when the records are admitted into evidence.[8] Omission can be accomplished by blocking out a sentence, paragraph, or page.

REFERENCES

1 Hastings, "Discovery and Evaluation of Medical Records," 15 *Am. Jur. Trials* 373, 379. (1968).

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3 *Salotti v. Seaboard Coastline Railroad Co.*, 293 Ala. 1, 299 So.2d 695 (1974); *Thomas v. Owens*, 28 Md. App. 442, 346 A.2d 662 (1975); Catalano, "Introducing and Marking Exhibits," 5 *Am. Jur. Trials* 553 (1966 and 1975 supp.).

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4 *Thomas v. Owens, ibd.*, 346 A.2d at 667.

5 Levine, "Hospital Records." *Trial Lawyer Guide* 89, 90 (1957).

6 *McCormick* at 735.

7 *McCormick* at 736.

8 *Krestview Nursing Home, Inc. v. Synowiec*,— Fla. ____, *317 So.2d 94, 96 (Fla. App. June 1975).*

What medical records can prove

Under the three exceptions to the hearsay rule, only medical information relating to diagnosis or treatment will be admitted.[1] Any information apart from a diagnosis of the condition of the child may be excluded.

In order to be admissible into evidence, entries must be "germane to the diagnosis and treatment" of the child.[2] While conclusions about who caused the injury, for example, go beyond the mere reporting of observed medical facts and may therefore be excluded from testimony and from written reports submitted as evidence, general statements as to causation are usually admissible; e.g., "I was in an auto accident."

In a child abuse case, it is likely that most of the treating practitioner's notes about the child's injuries will be admissible—especially in the case of a child too young to talk—since they are necessary and relevant to ascertain the nature and extent of the injuries. Notations such as the apparent mental state of the parent who brought the child to the hospital are not admissible because the parent's mental state is not necessarily relevant to the treatment of the child.

Similarly, a notation in the record that the treating physician checked with the local child welfare services department and discovered that a previous report of child abuse had been made may not be admitted into evidence under this rule, unless the proponent can make a strong showing that the question of prior abuse of the child is relevant to the treatment of the child for this particular injury.[3]

Statements by a parent about his/her own conduct, such as that he or she beat the child—if made to a physician and included in the medical file—may be admissible to prove cause of injury despite the obvious hearsay character of such statements. Although technically not medical information and therefore not admissible under the regularly-kept business records exception, such statements may fail under other hearsay exceptions (see section on "Admissions" beginning p. 65). If so, the parent's admissions and statements against his/her own interest will be admitted into evidence.

As a general rule, nonmedical information contained in hospital or medical records is not admitted into evidence because it is not within the regular course of a hospital's or a doctor's business to make notations and keep records of nonmedical information. The exception to this, of course, is when the keeping of such records is necessary and germane to the diagnosis and treatment of a particular patient's condition.

Hospital records can also be used to show the past and present course of treatment where this is relevant and where the record is made in the ordinary course of business.[4] Thus, hospital records showing past treatment of the child for similar sorts of injuries may prove useful in determining whether or not abuse has occurred over a long period of time.

REFERENCES

1 *Durress v. Dupree*, 287 Ala, 524, 253 So.2d 31 (1971).

2 *Wadena v. Bush*, 305 Minn, 134, 232 N.W.2d 753, 757 (Aug. 1975).

3 In New York, where there is a statute providing that abuse of one child is probative evidence of abuse of another child, a Family Court admitted the records after a showing that the records were recent; the total evidence, though, was held inadequate to support a final termination of parental rights. *In re Maria Anthony*, 81 Misc. 2d 342, 366 N.Y.S.2d 333 (1975).

4 *Levine, supra*, at 110.

Refreshing the witness' memory

Because the passage of time tends to dim recollection, physicians frequently are unable to remember the exact details of a particular patient's consultation or injuries. It is important, however, for the witness to testify precisely about the injury or consultation.

If necessary, witnesses at trial may refer to their own notes to reinforce their testimony, or they

may use them as "moral support." Personal notes may also be used to refresh a witness' recollection when he/she cannot remember a particular fact. Under this rule, a doctor can review a patient's file to bring the forgotten information to mind. The evidence, however, is what the witness remembers and says on the witness stand—not the contents of the files. Essentially, then, notes can be used to refresh the memory but not to substitute for it.

The opposing party must be allowed to see the witness' notes and use them for cross-examination; the notes may also be offered into evidence to highlight any discrepancies that may exist between the notes and the witness' refreshed memory.[1] A party may request to see notes used in preparing for trial testimony or in testifying.

REFERENCE

1 See generally *McCormick* at 14-19.

Medical records and independent testimony

A doctor's testimony may duplicate information found in hospital records. This occurs if a witness has independent, firsthand knowledge of a fact. The witness may testify about this, regardless of whether or not a written version in a report is admissible. For example, the attending physician may testify about an abused child's replies to the physician's questions concerning the cause of his/her injuries.[1]

REFERENCE

1 *Mikel v. Flatbush General Hospital*, 49 A.D.2d 581, 370 N.Y.S.2d 162 (App. Div., July 1975).

Medical records in the absence of independent recollection

If the medical records information is important but the doctor cannot truthfully say that he/she remembers the information after a review of pertinent notes, the notes may be introduced as evidence as an exception to the hearsay rule known as "past recollection recorded." The medical records can be used to prove the facts contained in them, without the doctor being able to remember the information so long as it is shown:

(1) that the doctor who made the notes has no independent recollection of the facts;

(2) that a review did not refresh the doctor's memory;

(3) that the notes were correct when made;

(4) that the notes were made at the time of the examination, when the doctor's memory was clear;[1] and

(5) that the significance of any symbols or abbreviations in the report can be explained.[2]

The past recollection recorded exception may be used to advantage in situations where the notes are not admissible under the regularly-kept business records exception or the Business Records Act.

REFERENCES

1 *McCormick* at 712; generally 712-716.

2 This requirement was added in *Wilkinson v. Mullen*, 27 Ill. App. 3d 804, 327 N.E.2d 433, 436 (April 1975) regarding a police officer's reliance on his report; seems one that might be required of technical medical reports in order to make them useful to a judge who needs assistance in understanding medical jargon.

Medical testimony used to impeach or refute witnesses

Medical information is particularly useful in cross-examining the treating physician. It may also be used during cross-examination of a witness who is not a medical practitioner.[1]

The cross-examiner may use a witness' own notes to show significant differences between testimony the witness gave earlier and what the witness remembers under cross-examination.

Medical information may be used to challenge nonmedical testimony. For instance, if a neighbor testifies at an adjudicatory hearing that the child's parent was "drunk all the time," the cross-examiner may show that the neighbor's knowledge of physiological symptoms of drunkenness is not sufficient to allow the neighbor to judge drunkenness. The neighbor's testimony may be challenged by testimony from medical professionals to show that the parent had a physical problem not related to alcohol or that the parent was not an alcoholic.

REFERENCE

1 See *Bray v. Kloberdans*, 531 P.2d 395 (Colo. App., 1974) (not officially published).

Medical data to support or refute the testimony of an expert

A witness who gives an expert opinion regarding a patient should state the particular facts upon which the opinion is based (see section on "Role of the Expert Witness"). Ordinarily, the relevant hospital or consultation records will be admitted into evidence before the expert testifies.[1] If, for example, a child has been beaten severely enough to cause repeated fractures, the treating doctor will explain the X-ray films to the court. The doctor's interpretation can clarify the judge's understanding of the injury; it may also challenge a parent's contrary explanation of the injury. While the doctor usually cannot state for certain that abuse exists, the medical testimony often acts to eliminate accidental causes.

Medical testimony may also pinpoint a person who is responsible for the child's injury. For example, X-rays can show a frequency and intensity of injury which could only be caused by someone who had regular control of the child.

A pathologist or coroner who performs an autopsy may offer valuable information not only about the cause of death but also about the progress of symptoms prior to death. In one case, a pathologist gave detailed information about the child's symptoms during the 8-hour period before she was brought to the hospital. He stated she must have complained of great pain, then vomited, and eventually fallen into a semi- or unconscious state. This evidence helped to convince the jury that even though the mother was not the abuser, the child's mother not only knew of her injuries, but also that they were serious enough to warrant taking the child to the hospital.[2]

Medical information can also be used at the dispositional hearing to support or negate the suitability of various treatment alternatives. Psychological reports, for instance, may be used to evaluate the effects of separating the child from the family.

Medical specialists may serve to direct the court's attention to the need for treatment of learning disabilities or of mental or physical conditions that otherwise would go unattended.

REFERENCES

1 Rheingold, "Basis of Medical Testimony," 6 *Am. Jur. Trials* 109, 155 (1967).

2 *Fabritz v. State*, 351 A.2d 477 (Md. Ct. of Spec. Apls., Jan. 1976).

Additional Reading

Hastings, Lawrence V., "Discovery and Evaluation of Medical Records," 15 *Am. Jur. Trials*, begin p. 373 (1968).

Rheingold, Paul D., "Basis of Medical Testimony," 6 *Am. Jur. Trials*, begin p. 109 (1967).

The Hearsay Rule

Definition of hearsay

Hearsay is:

A statement

(1) not made in court,

(2) made when the declarant could not be cross-examined, and

(3) offered in court secondhand as evidence of the truth of its content.[1]

If the statement is made outside of court, the trier of fact is unable to evaluate it. Normally, judges and juries evaluate the personal credibility of a witness as a part of the factfinding process. Personal credibility or believability depends on such factors as the witness' perception, memory, articulateness, veracity, and demeanor (i.e., how the witness looks while testifying).[2]

Perception, which refers to how accurately the witness perceived the event, depends on factors such as:

- distance from the event;
- outside interference or distractions;
- witness' physical condition;
- any perceptual disabilities of witness;
- time of day or night.

The problem with hearsay is that the trier of fact cannot use these factors to evaluate the believability of the person who first made the statement. Only the witness in the courtroom who is repeating the statement can be evaluated, and this witness has only secondhand knowledge of the event.

Suppose the witness in court is a social worker reporting ***what a neighbor said about a family***. Even though the worker may have heard the neighbor correctly, clearly recalls the interview, can articulate precisely what was said, and has no reason to lie, the trier of fact still has no way to evaluate the neighbor's credibility. The neighbor may have incorrectly observed or may have a reason to lie. It is the absent neighbor's communication that is being used as evidence, not really the social worker's. Therefore, the judge is left without any means of deciding whether or not the neighbor is to be believed. Only the worker observed the neighbor.

Memory, which involves how well the witness remembers what was perceived, can be distorted by excitement over the incident or by the simple passing of time. For instance, if the neighbor who saw the incident then viewed a sensational television report about it, his/her memory could be distorted by the report's sensationalism.

Articulateness entails the witness' ability to correctly communicate an experience to others. It depends on factors such as ability to speak without hesitation in the narration; use of accurate, understandable language instead of professional jargon or "street" slang; and willingness to provide supporting details as well as general statements. Our hypothetical neighbor-witness would be more believable if, instead of referring to the beating only as being "knocked about," he or she specified how many times the child was hit and on what parts of the body.

Veracity refers to the witness' apparent objectivity; it includes questions such as apparent personal involvement or lack of reason to lie.[3] If the neighbor who allegedly saw the abuse had a longstanding and well-known dislike for the parents, this bias could color the testimony, making it less believable.

Demeanor is the witness' voluntary conduct on the witness stand—the "sweaty palms and shifting eyes" approach to trustworthiness.

A witness testifying in court is required to swear or affirm that the truth will be told. The purpose of the affirmation is to impress upon the witness the importance of testifying truthfully.

The oath functions, first, to call to mind religious or moral prohibitions against lying and, second, to remind the witness that giving false testimony while under oath is a crime carrying severe punishment.[4]

Since hearsay involves quoting a statement made by a person who was not under oath when the statement was made, the out-of-court declarant was under no reminder or compulsion to tell the truth.[5]

The reliability of testimony is usually tested by cross-examination of the witness. For the benefit of the trier of fact in the Anglo-American judicial system, cross-examination is the primary method for exposing falsehood, error, or weakness in testimony.[6]

The hearsay rule will exclude hearsay testimony only if the secondhand, out-of-court statement is being used in court to prove that what the statement communicates is true.[7] The rule does not operate against testimony offered for other purposes. This element is best explained by examples.

Examples of hearsay

Example 1

The witness, a classmate of an allegedly neglected 7-year-old, testifies:

Kathy came to school on March 10, and during recess I heard her tell the teacher this story: that her parents had gone away 4 days earlier and left her and her younger brother alone.

Kathy also said that they ran out of food after 2 days and hadn't eaten since then. I guess the parents came home; but, on April 2, I heard Kathy tell the teacher that the same thing had happened again.

This testimony is inadmissible as evidence to prove the truth of the statements made in the testimony: that the parents, in fact, twice left their two young children unattended and without food for long periods of time. This hearsay evidence is unreliable as proof because the witness might not have heard Kathy correctly, or might be embellishing the story, or there might be a reasonable explanation, or maybe Kathy just made up the apparent abandonment to explain being late to school.

The witness' testimony, however, could be admitted as proof of other facts; for instance, that Kathy was in school and not truant on March 10 and April 2, or that the schoolteacher had notice of a reportable case of child neglect. Kathy is not on the witness stand; her classmate is repeating Kathy's statement secondhand.

Example 2

Same as Example 1, except that the witness is the schoolteacher repeating with Kathy said.

Admissibility of the statement made by Kathy is not affected by the fact that the teacher to whom Kathy spoke is recounting the incident. The teacher is still repeating Kathy's statement secondhand, which means the teacher is giving hearsay testimony. The statement is still unreliable to prove that the parents, in fact, neglected the children.

If the court considers Kathy a party in the hearing, the testimony of either the classmate or the teacher is admissible even though it is hearsay. The court allows the hearsay evidence under the ***Admissions Exception to the Hearsay Rule*** (the section on hearsay exceptions follows). Some States (for instance, Oregon) consider allegedly neglected children to be parties in neglect and termination of parental rights hearings.[8]

REFERENCES

1 Based on *McCormick on Evidence* at 584 and *Federal Rules of Evidence*, Rule 801. These and all citations to the Federal Rules are based on *Moore's Federal Practice Rules Pamphlet* Vol. 2 (1975). (Hereafter cited in references as *Moore's.*)

2 *McCormick* at 581; Waltz, Jon R., *Criminal Evidence.* Chicago, Ill.: Nelson-Hall, Co., 1975. (Hereafter cited in references as *Waltz.*)

3 *Government of the Virgin Islands v. Aquino*, 378 F2d 540 (3rd Cir. 1967).

4 Perjury is generally considered a felony subject to heavy penalties. Compare 1 to 14 years in prison in California (Cal. Penal Code §§118, 126 (1970)); up to a $2,500 fine and/or 5 years imprisonment in Oregon (Or. Rev. Stats. 162.065, 161.605 (1975)); $5,000 fine and/or 1 to 5 years in prison in New Mexico (N.M. Stats. Ann. §§40A-25-1, 40A-29-3 (1953)); up to 7 years imprisonment in New York (N.Y. Penal Law §§210.15, 70.00 (McKinney, 1975).

5 *McCormick* at 582; *Federal Rules of Evidence*, Rule 603, Advisory Committee's Note, cited in *Moore's* at 607.

6 *Anderson v. United States*, 417 U.S. 211, 94 S.Ct. 2253, 41 L. Ed. 2d 20 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L.

Ed.2d 297 (1973); *McCormick* at 43. Sequestration of witnesses, discussed earlier in this manual, is the second major truth-testing mechanism.

7 *Anderson v. United States*, ibid.

8 *State v. McMaster*, 259 Or. 291, 296, 486 P.2d 567 (1971); Rule 26(a), Uniform Juvenile Court Act, cited in *State ex rel Juvenile Dept. of Multnomah County v. Wade*, 19 Or. App. 314, 527 P.2d 753, 757 (1974).

Additional Reading

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Waltz, Jon R., *Criminal Evidence*. Chicago, Ill.: Nelson-Hall, Co., 1975.

Exceptions to the Hearsay Rule

Prior recollection recorded

Sometimes a witness can no longer recollect an event at the time of trial but made notes about the incident at the time it occurred. Notes contemporaneously made may be admitted into evidence (i.e., read aloud at trial) as an exception to the hearsay rule, if the witness testifies that:

1. He or she at one time had firsthand knowledge of the event.
2. Now does not remember.
3. The notes were made when his/her memory of the event was fresh.
4. The notes were accurate when made.[1]

Some States (e.g., Oregon, Colorado, Maryland) do not require the witness to testify that he/she can no longer remember in order to read the notes into evidence.[2] (See "Medical Records in the Absence of Independent Recollection," on p. 61.

REFERENCES

1 *Federal Rules of Evidence*, Rule 803(5).

2 *State v. Sutton*, 253 Or. 24, 450 P.2d 748 (1969).

Admissions

Admissions are statements made by a party to the action, and a party is a person with an interest at risk in the legal proceedings.

Children, parents, and legally recognized custodians are parties in neglect or abuse proceedings. While statements a party makes out of court are admissible as evidence ***against*** that party—even when repeated secondhand by someone else—a party's out-of-court statements which aid the party's side of the case are usually ***not*** admissible. The reason for this difference is that the party can testify in court to favorable facts, but probably would not repeat unfavorable statements.

Testimony can be offered ***against*** a party whether or not the party is available in the court to testify.[1] Even though testimony about what the party said is secondhand information and therefore hearsay, it is permitted under this exception to the hearsay rule.

REFERENCE

1 Binder, David F., *The Hearsay Handbook* Colorado Springs, Colo.: Shepard's, Inc., 1975. (Hereafter cited in references as *Binder*.)

Characteristics of admissions

To qualify as an admission, a statement need not actually be against the interest of the person who originally made it; but it must meet the following requirements:

1. The person who originally made the statement (the declarant) must be a party to the action.
2. The statement must be repeated in court by a witness who heard the statement made by the party.
3. The statement must be used against the side of the case of the person who made the statement originally.
4. The statement can be used only against the person who made it; it cannot be used against other parties on the same side of the case, even though it is against their interest too.

Sometimes, testimony will be excluded totally because of its extremely prejudicial nature. For example, the confession of one defendant in a conspiracy trial has been wholly excluded because the jury may use it against the other defendant who did not make the confession.[1]

REFERENCE

1 *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968).

Use of admissions

Admissions can be offered against a criminal defendant, except that illegally obtained admissions must be rejected (suppressed).[1]

An admission is not necessarily a confession. For example, if the evidence in a burglary case clearly established that the burglar wore white gloves and the defendant at trial denies ever owning a pair of white gloves like those worn by the burglar, the court will admit testimony that the defendant was heard to have said a week before the crime, "I just went downtown and bought myself a pair of fine white gloves; I always like to have a pair of white gloves around."

A guilty plea to a criminal charge can be used against that person in a later action involving the same fact situation.[2] For instance, if a person pleads guilty to criminal child abuse—although it is hearsay in a later action—that plea may be offered as evidence in a subsequent hearing in juvenile court to determine jurisdiction over the child, or in a hearing on termination of parental rights.

If a parent confesses to a social worker that he/she abused the child, the social worker can repeat the statement in court, even if no criminal prosecution is involved. The parent's admission is allowed as evidence to prove the fact that the parent committed the act, and the admission can be used in any subsequent hearing.

To be admissible testimony, such an admission must be made by a party to the action. A noncustodian of the child may be the abuser without being a party to the court action. Even if the noncustodian abuser makes a statement of admission out of court, the communication cannot be repeated secondhand in court because it does not concern a party.

REFERENCES

1 *Mapp v. Ohio* 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961).

2 *Boshnack v. World Wide Rent-a-Car, Inc.*, 195 So.2d 216 (Fla., 1967) *McCormick* at 635.

Admission by silence

A party, by being silent, can adopt a statement made by another in his/her presence so long as it is shown that the party heard the statement, understood it, and could have objected to it but did not.[1] Being silent shows agreement with what the other person says—in effect, it makes the statement one's own.

For example, a social worker may testify that, in a conversation with both parents of an allegedly abused child, the mother stated that the father "would often get very mad at the child and whip her with his belt for things like not having the table set, being slow to take a bath, and especially for 'talking back.' Sometimes he would hit the kid 20 times before he stopped." This testimony is admissible against the father as an adopted admission since he was in the same room and, under the circumstances, could be expected to deny the statement if it were untrue.[2] The testimony could not be admitted if the father:

(1) was not present;

(2) did not hear the statement;[3]

(3) if he had previously consulted an attorney who advised him to say nothing.[4]

REFERENCES

1 *State v. O'Brien*, 262 or 30, 496 P.2d 191 (1972).

2 *People v. Preston*, 9 Cal. 3d 308, 107 Cal. Rptr. 300, 508 P.2d 300 (1973).

3 *Schlichenmayer v. Luithle*, 221 N.W.2d 77 (N.D. 1974).

4 *Commonwealth v. Burke*, 339 Mass. 521, 159 N.E.2d 856 (1959).

Regularly-kept business records

Characteristics

To qualify under the hearsay exception, records must:

1. Be kept in the regular course of business.
2. Be made at or near the time of the transaction.
3. Be entered by someone with firsthand knowledge of the business.

At common law, the person making the entry had to be unavailable, but this requirement has been generally disregarded with the advent of modern recordkeeping systems. Today the court requires the custodian of the records to lay the necessary foundation.[1] (See section "When Medical Information Is Admissible," beginning p. 58. The information is also applicable to social agency files and the records of profitmaking enterprises.)

If information is not part of a regularly-kept recording system, it is not admissible under this hearsay exception. For instance, a bystander has no public or business duty to provide information to a social worker. The bystander's hearsay (secondhand when repeated in court) statements, therefore, are not admissible as part of the regularly-kept business records exception to the hearsay rule.[2]

Social workers, as a part of their professional duty, take careful notes during investigative interviews, and these notes become part of the client's file. Even though technically hearsay, the notes are admissible into evidence at trial because they normally meet and match the definition of regularly-kept business records.

REFERENCES

1 Advisory Committee's Note to Rule 803(6), *Moore's* at 843.

2 By analogy to the leading case on police investigative reports, *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930).

Absence of regularly-kept business records

The absence of an entry in a business record may be used as evidence that an event did ***not*** occur. In one prosecution for interstate transportation of a stolen car, the State introduced the computer records of the rental agency that owned the car. The records showed that the car was returned to New York and that there was no lease agreement on the car between the date the car was reported as missing and the date the car was recovered in Arizona. The absence of a lease agreement was allowed as part of the proof that the car was stolen.[1]

REFERENCE

1 *United States v. DeGeorgia*, 420 F.2d 889 (9th Cir. 1969).

Records as hearsay exception

The records of a regularly conducted business activity may be admitted into evidence to prove facts in issue. These records are considered reliable because:

1. The records are systematically compiled and checked.
2. The business is a continuing activity.
3. The business had a duty to keep an accurate record of transactions.

How to keep records that qualify as business records or regularly-kept records

1. Records should describe one of the following in detail so that they stand alone without the need for interpretation:

- an act,
- a condition,
- an event.

The record will be required to stand alone in court once it is admitted. Therefore, conclusions such as "The condition of the house on June 1, 1976, was filthy" will not be sufficient. The record must describe the condition of the house: "The living room area was covered with newspapers upon which were deposited dog feces and urine. The kitchen sink was piled with dishes upon which mold had formed, etc."

2. Records such as the one being offered into evidence must be kept as a part of the regular course of business of the office. Records kept occasionally of similar events or conditions are not acceptable; they must be kept regularly as part of a system of recordkeeping in the office. Transcribed notes of social workers in most agencies qualify under this section.

3. The record must be made at or near the time of the act, condition, or event. This is the most difficult requirement for most records of social work agencies to meet. If a worker makes an entry into the file, describing from memory an event that occurred 6 months earlier, the record will *not* qualify as a business record. Because an entry must be made at or near the time of the event, 6 months is too great a time to wait.

If an entry is constructed from handwritten notes and dictated for typing into the file, it has a better chance of qualifying as a business record. However, the longer a worker delays in making an entry, the greater the chance that it will not be admitted.

Whether or not a worker has waited too long to make an entry is up to the judge presiding over the case in which the record is offered. The main test the judge will use is whether the record is still reliable information considering the delay in making its entry.

If a social worker makes 5 visits per day and waits 10 days to make an entry from memory, there are 49 other entries with which he/she could confuse the entry attempted to be made from memory. Therefore, 1 week may be too long to wait to construct a record from memory.

Although handwritten notes that are later elaborated upon during dictation are more reliable, even these notes lose their reliability if the delay in transcription stretches into months. Especially vulnerable to attack under this requirement is the practice of dictating files prior to court hearings from notes stretching over the past year. One may not even represent that such transcriptions are the official record due to the likelihood of major inaccuracies.

How to get a record admitted into evidence

Some person familiar with the procedure and system for creating the record must take the witness stand and testify to the following:

1. The person must identify the record—

   This is the file on the Jones family kept by the Lynville office of the Children's Services Division. The record covers the years 1970 through 1976.

2. The method of preparing the record must be described—

   In the Lynville office, records are created from dictation by social workers of client contacts. Each worker dictates from notes of client contacts weekly. Each worker checks typed dictation of notes. File clerks enter the dictation into the appropriate files. All files are kept in the central file room or cabinet.

3. The time of preparation of the record is stated—

   Records are created within one week of client contact from notes taken by the worker during the client contact.

4. The recordkeeping is a part of the business of the office—

   It is a regular part of the profession of social work and the business of the Lynville office to create and maintain client contact records for the purpose of future judgments or questions regarding the client.

If the question has not yet come up in court regarding records, it is still the requirement of the law to keep records in a certain manner if they are to be admitted into evidence. The question could come up in the future, and there is no way to make a record comply once it is created in an unacceptable manner.

Excited utterance

An excited utterance is a spontaneous remark "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[1]

Courts consider excited utterances reliable because the person making the remark does so in reaction to the "stress of excitement" and, having no time to reflect, cannot dissemble the emotions caused by the event or condition. Therefore, statements made some time after an event do not qualify; nor do statements in the form of a narrative or explanation of past events. On this basis, a statement, made at the dinner table by a husband to a wife, that he had injured his head at work earlier that day cannot be repeated in court by the wife under the excited utterance rule. The husband's statement is inadmissible as hearsay.

To be an excited utterance, a remark must have ***all*** the following characteristics:

1. It must be made at the same time as the exciting event which produced it or so shortly thereafter that the person making it is still subject to the excitement caused by the event.

2. It must relate to the exciting event. (Most courts do not require that the statement describe the event,[2] but, in some States, such as South Carolina, Wisconsin, Iowa, and Texas, this requirement has been imposed.[3])

3. The person making the remark must have personal knowledge of the event to which he/she is reacting. For example, a girl's statement on the telephone to her boyfriend that she heard "Mommy and Daddy fighting downstairs" was held inadmissible as evidence that "Daddy" killed "Mommy," since the daughter had no personal knowledge of what happened.[4] If the daughter exclaimed, "Daddy's pointing a gun at Mommy!" the listener would be allowed to repeat her exclamation as part of his testimony in court. What he heard her say would be admissible even though hearsay, because her knowledge of the event was firsthand.

REFERENCES

1 *Federal Rules of Evidence*, Rule 803(2).

2 *Murphy Auto Parts Co. v. Ball*, 249 F.2d 508 (D.C. cir. 1957).

3 *Binder* at 45.

4 *Montesi v. State*, 220 Tenn. 354, 417 S.W.2d 554 (1967).

Official records

Public records are excepted from the hearsay rule; therefore, they are allowed as evidence on the theory that:

> **. . . their character as public records required by law to be kept, the official character of their contents entered under the sanction of public duty, the obvious necessity for regular contemporaneous entries in them, and the reduction to a minimum of motive on the part of public officials and employees to either make false entries or to omit proper ones, all unite to make these books admissible as unusually trustworthy sources of evidence.**[1]

Public records vary according to the public body keeping them. They include:

- Collections of data, such as birth and death records, and a child abuse registry.
- Daily operating records, such as hospital bills or agency payroll files.[2]
- Investigative records, such as a social worker's contact file or a fire department investigation report.

Most States have statutes governing the admissibility of official records and certificates. The statutes explicitly state the kinds of

records that will be excepted; i.e., allowed as evidence under exceptions to the hearsay rule.[3]

Like business records, official records can be double hearsay. Generally, the typical child abuse registry is proof only that a report was filed—not that abuse actually occurred. Similarly, a fire department's report is proof of whatever the investigator observed—not of the substance of remarks made by anyone else. The admissible portion is the part that consists of facts noticed and recorded within the scope of the agency's official duty; it is not everything in the official report.[4]

REFERENCES

1 *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128-129, 39 S.Ct. 407, 63 L.Ed. 889 (1919).

2 *Thomas v. Owens*, 28 Md. App. 442, 346 A.2d 662 (1975).

3 *McCormick* at 735.

4 *Westinghouse Electric Corp. v. Dolly Madison Leasing and Furniture Corp.*, 42 Ohio St. 2d 122, 326 N.E.2d 651, 657 (1975).

Additional Reading

Binder, David F., *The Hearsay Handbook*. Colorado Springs, Colo.: Shepard's, Inc., 1975.

Statements regarding medical diagnosis or treatment

It is generally accepted that statements made by a patient to a doctor for the purpose of diagnosis and treatment are not subject to the hearsay rule. Courts consider such statements trustworthy because the patient's desire to be helped is presumably stronger than his/her motivation to lie.[1]

Statements admissible into evidence under this hearsay exception are those that relate to the patient's physical and emotional state. As explained in the section on the use of medical records, some statements relating to the cause of injury are not relevant to medical treatment. If the main reason for consulting a physician is to provide information so that the physician can testify at trial, then the patient's statements about his/her condition are not admissible. The reliability of statements made to a doctor in preparation for trial is suspect; therefore, the hearsay rule applies.[2]

The physician may use and, if necessary, repeat other persons' statements that form the basis of his/her expert opinion. Physicians, of course, may be chosen to help each party.

REFERENCES

1 *McCormick* at 690.

2 *Federal Rules of Evidence* 803(3) might, however, be used to make such a statement if it concerned a condition existing at the time the statement was made.

Practical tips to the social worker

1. When you intend to rely on a hearsay exception, make sure ***before*** the hearsay testimony is offered that the proper background facts are in evidence. For if an adequate foundation has not been prepared, testimony that legally should be admitted will be excluded. For example, a social worker who wishes to read into the record a colleague's notes on the case will not be permitted to do so until all the elements qualifying the notes as a regularly-kept business record have been established. The testifying worker first must establish that these are the original notes, taken at the time of the interview with the client, perhaps transcribed shortly after the contact, and kept under the agency's control at all times.

2. When you are a witness, try to eliminate secondhand information as much as possible so that the flow of your testimony is not interrupted by frequent objections from opposing counsel.

3. Whether you are a witness or are conducting the hearing for the State, you should be familiar with your local juvenile court's approach to hearsay. The rules in this manual cover general principles, but, in different States

as well as in local courts, judges often exercise discretion in their control of a trial. It is best to know ahead of time how your judge views the particular portion of the hearsay rule with which you are concerned.

Elimination of Privileges at Hearings

Protection of relationships

Generally, no person can refuse to give testimony in court. All courts (and many administrative agencies) have the power, by means of subpoena, to compel people to appear in court and to testify to any and all information they know about a case. Failure to appear or testify can be punished by a citation for contempt of court.

A few persons and relationships are considered so special that the law exempts them from the general rule. The legal term for these exceptions is ***privilege***—the most familiar of these privileges being a person's right to refuse to give self-incriminating testimony (embodied in the fifth amendment to the U.S. Constitution).

Historically, spouses could not testify for or against each other, though this privilege has been modified considerably. Among the other relationships commonly protected by privilege are those between minister and penitent, attorney and client, and doctor and patient. The privacy and confidence of these relationships was thought so fundamentally necessary that even the truth-seeking function of a trial took a subordinate role.[1]

Modern statutes now recognize other confidential relationships, including communications to social workers, journalists, psychotherapists, accountants, secretaries, and school counselors.[2] It is best to check your own State statutes and case decisions to see which privileges may be invoked in your jurisdiction.

The effect of these privileges is to exclude testimony that probably would, if admitted, provide meaningful evidence to the judge or jury. For this reason, the privileges that do exist are often interpreted narrowly in order to admit testimony that is considered unprivileged. For example, an attorney cannot disclose confidential information obtained from the client, but the attorney may disclose facts that can be observed publicly;[3] for instance, the client's height and weight.

This chapter analyzes those privileges most commonly encountered in civil child abuse and neglect hearings. The chart at the end of the chapter identifies States where privileges are no longer available to exclude evidence in these hearings.

REFERENCES

1 *State v. 62.96247 Acres of Land in New Castle County*, 193 A.2d 799 (Del. Sup. 1963).

2 *McCormick* at 156-160; 8 *Wigmore on Evidence* §2286 (McNaughton Rev. 1961).

3 *United States v. Kendrick*, 331 F.2d 110 (4th Cir. 1964).

Who can assert the privilege?

The person who can assert the privilege of the protected professional relationship is called the holder—the only one who can prevent the privileged testimony from being admitted.

The holder can consent expressly to the disclosure, or can waive the right to object. Waiver can occur when:

1. The holder testifies to the substance of the communication, or
2. Privileged testimony comes out at trial, and the holder does not promptly object, or
3. The holder calls as a witness the person who was spoken to in confidence.

In the protected professional relationship, the client or patient is ordinarily the holder of the privilege. If the client consents to the disclosure or waives the right to object, the professional (doctor, attorney, priest) may not refuse to disclose the information. A psychotherapist, for instance, may be cited for contempt of court for refusing to testify to the substance of his/her client's confidence when the client has consented; that the information might embarrass the client is irrelevant.[1]

EXAMPLES OF HEARSAY RULE EXCEPTIONS IN TESTIMONY

Secondhand information	Admissible?	Appropriate hearsay rule exception	Comments
Parent admitted abusing child to social worker.	Yes.	Admissions.	Only if parent is a party to the action.
Mother exclaims spontaneously to doctor who is beginning to treat her abused child: "Oh, my God. Have I killed my poor baby?"	Yes.	Excited utterance.	Even if mother is not a party.
Neighbor told social worker he saw babysitter leave child in hallway for 4 hours in the evening. Social worker testifies.	No.		No guarantee of truthfulness or completeness of neighbor's statement unless neighbor testifies.
Certified copy of child's birth certificate.	Yes.	Official records.	
Hospital records show child brought in 4 times in 6 months with severe head injuries.	Yes.	Regularly-kept business records.	
Parent tells doctor treating child for severe head injuries that child "falls from her crib all the time."	Yes.	(1) Statement for medical treatment or diagnosis. (2) Admission.	Only if parent is a party to the action.
Definition of terms from *Encyclopedia of Social Work.*	Yes.	Learned writing.	Not as substantive evidence.

If the holder does not consent or waive the right to consent, the professional may ***not*** testify. Even if the confidential information would provide information unobtainable elsewhere, and even if the professional believes the client would be unhurt or helped by disclosures, the professional must withhold the information.

If both professional and client have the privilege, then both must consent. In States, such as Mississippi[2] and New Jersey,[3] a spouse cannot be forced to testify against the other spouse, and the other spouse can object to the spouse's testifying. In these States, both spouses hold a privilege, and both must consent to the testimony before it can be admitted.

REFERENCES

1 *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

2 Miss. Code Ann. §13-1-5 (1972). (Criminal prosecutions for child neglect or nonsupport of children are exceptions.)

3 New Jersey Stats. Ann. §2A: 84A-17 (2) (1976). (Offenses committed against the children of the spouse are exceptions.)

Testimonial privilege

Very few States now grant any person the right to refuse to testify when subpoenaed. Many States have a statute that specifically denies the

right to refuse to be a witness, through language such as:

> **Except as otherwise provided by statute, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and . . . (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing. . . .** (Kansas Stats. Ann. 60-407 (1963)).

The only testimonial privileges now encountered with any frequency are those mentioned in the introduction to this chapter and:

1. The privilege of a criminal defendant not to testify at his/her own trial;
2. The privilege of any person not to have to testify in any hearing to any matter that might lead to his/her prosecution for a crime;
3. A spouse's privilege not to testify against the other spouse;
4. A spouse's privilege to prevent his/her spouse from testifying when the first spouse is a party litigant or criminal defendant.

Testimonial privilege relates to a person's right to refuse to testify when that person has relevant information and is legally competent to take the stand. (Competency refers to legal qualifications.)

A competent witness is one whom the law permits to testify, and, as in the Kansas statute quoted above, generally any person is qualified to be a witness. Persons who lack the ability to relate their observations or to distinguish truth from falsehood are often disqualified, or incompetent, as witnesses.[1] The list of incompetent witnesses is quite short, typically including:

1. Very young children (see section on the child witness, beginning p. 40);
2. Persons who lack the mental capacity to understand an oath or affirmation;
3. Persons who have been convicted of perjury.

The judge determines if it is worthwhile for the court to hear a witness whose competency is challenged.

In some States, the testimonial and communications privileges (section on confidential communications follows) are granted in language making the witness incompetent, unless the holder consents.[2] The effect is the same as a general privilege to refuse to testify.

REFERENCES

1 *McCormick* at 139-150.

2 For example, West Virginia declares that attorneys and physicians are incompetent witnesses concerning a professional communication and diagnosis and treatment (W. Va. Code §§50-6-10(c) and (e) (1976)).

Confidential communications

Most privileges are granted to preserve the privacy of confidential communications. Therefore, to fall within the protection of the privilege, there must be a communication, made in the course of a protected relationship, in a private setting.

A communication typically consists of spoken or written words, but it may also be nonverbal expressions where these are intended "to convey a meaning or message to the other [person]."[1] Acts are ordinarily not protected as communications, but some States protect acts done by one spouse in the sole company of the other spouse.[2]

Since the law protects the special relationship, the communication must be made within that relationship. For example, communications to one's attorney are privileged, but confidences to the opposing party's attorney are not protected since no trust exists outside the relationship with one's own attorney.

The confidential communication must be made privately. What a person tells his/her own attorney is not privileged if the communication is made in front of other people at a party. A communication not intended to be private and confidential will not be protected by a privilege.

A communication, however, that was intended to be private but was intercepted may still be protected because the legal solutions to eavesdropping are changing. At first, courts permitted the eavesdropper to testify to the information that the privileged person had a right to withhold.[3] Now that eavesdroppers can use sophisticated electronic surveillance devices against which the ordinary person cannot take reasonable precautions, courts are more and more willing to protect communications that were intended to be private.[4]

REFERENCES

1 *McCormick* at 163-165.

2 For example, *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172 (1949).

3 *Commonwealth v. Griffin*, 110 Mass. 181 (1872); *Hammons v. State*, 73 Ark. 495, 84 S.W. 718 (1905).

4 *McCormick* at 154.

Husband/wife privileges

The husband/wife privilege is actually five privileges that appear in most States in various combinations:

1. A privilege not to testify against one's spouse (held by spouse who is the witness testifying).
2. A privilege not to testify at all at the trial of one's spouse (held by spouse who is the witness testifying).
3. A privilege not to have one's spouse testify against oneself (held by spouse who is ***not*** the witness testifying).
4. A privilege not to expose one spouse to testifying at all at the other spouse's trial (held by spouse who is ***not*** the witness testifying).
5. A privilege not to reveal confidential communications made by one's spouse during the marriage.

The first four privileges function to prevent a person's spouse from testifying at all. They originate in two ancient common law doctrines: that a party is legally incompetent to testify in his/her own defense, and that husband and wife are one person.[1] Today the privilege is retained in the interests of protecting marital harmony,[2] or, at least, by not adding to already existing marital disharmony by setting spouse against spouse in a court of law.[3]

It is important to note which spouse is the holder for each of the four testimonial privileges. In the first and second, it is the witness-spouse, and not the other spouse, who holds the privilege and who, therefore, determines whether the evidence will be available. If, for example, a husband wishes to testify for or against his wife, he can, and the wife's objections are irrelevant.

In the third and fourth privileges listed above, the nontestifying spouse is the holder, and, no matter how voluntarily the witness-spouse takes the stand, the testimony will be excluded.[4] In some States, the first and third privileges are both applicable; in these jurisdictions, both spouses must consent to the introduction of the testimony.

The spouse not testifying does not have to be a party to the action. It may be that the spouse is a witness. If a witness is testifying falsely, his/her spouse may have information proving the perjury.[5] The husband/wife privilege may exclude the spouse's evidence.

In order to invoke a husband/wife testimonial privilege, the parties must be actually married.[6] This is not true of the husband/wife privilege for confidential communications. Since this privilege protects confidences made between married people, the spouses must have been married when the communication was made, but divorce or the death of one will not, ordinarily, permit the other to reveal the secrets. The person who holds the privilege is the spouse who made the confidential communication. In the case of a conversation involving reciprocal confidences, both spouses must consent.[7]

The privilege for confidential communications only protects private communications. If there is no testimonial privilege, the spouse or

former spouse may testify to unprivileged information, as discussed above.

The husband/wife privileges have special applicability to child abuse and neglect proceedings. Traditionally, the privileges have not been available in criminal prosecutions when one spouse is accused of a crime against the other spouse.

A crime against the child of either spouse is considered equivalent to a crime against one's spouse.[8] In these cases, the elimination of the privilege is justified on the grounds that a serious crime against a child is an offense against family harmony and society, and the parents are the only persons with firsthand and long-term information.[9]

This reasoning is even more compelling in civil abuse and neglect proceedings where the focus is on the child's welfare rather than on punishment for a crime. For this reason, most States removed the husband/wife privileges in all proceedings resulting from reports of abuse or neglect. Only nine States allow the privilege for confidential communications to be invoked in these hearings,[10] and only eight allow the protection of testimonial privileges.[11] Where the privilege remains, the general rules apply, but, where the privilege has been removed, either spouse may be compelled to testify just as with any other witness.

REFERENCES

1 *Hawkins v. United States*, 358 U.S.74, 79 S. Ct. 136, 3 L.Ed.2d 125 (1958).

2 *Ibid.*

3 *Ibid.*

4 *Ibid.*

5 For an interesting account by an experienced trial lawyer of just this situation, see Bailey, F. Lee, *For the Defense.* New York: Athenium Press, 1975. (pp. 301-313.)

6 *McCormick* at 167.

7 *McCormick* at 169-170.

8 *People v. Miller*, 16 Mich. App. 647, 168 N.W.2d 408 (1969); *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965); *State v. Kollenborn*, 304 S.W.2d 855 (Mo. 1957); *Chamberlain v. State*, 348 P.2d 280 (Wyo. 1960).

9 *United States v. Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975).

10 Georgia, Illinois, Maryland, Nebraska, Utah, Vermont, Washington, West Virginia, and Wisconsin.

11 Georgia, Maryland, Pennsylvania, Utah, Vermont, Washington, West Virginia, and Wisconsin.

Attorney/client privilege

The privilege granted the attorney/client relationship is probably the oldest in history; it was already in existence during the reign of Elizabeth I of England.[1]

The purpose of the attorney/client privilege is to promote the fullest disclosure by a client to his/her attorney in order to secure the most just and efficient handling of claims.[2] Under this privilege, the client is free to tell the lawyer everything, since the lawyer will be absolutely prohibited from repeating any part of it.

The client is the holder of the privilege, as is true with most protected professional relationships.

The professional relationship exists whenever a person consults a lawyer for legal advice. Even if the lawyer decides not to take the case, or if the client does not pay a fee, the consultation will be privileged.[3]

Not everything an attorney does will amount to legal consultation, however, and not all privileged communications are protected, including the lawyer's legal advice.[4] The protection, for example, does not extend to readily observable facts about the client; nor, ordinarily, to the identity of the client whom the attorney is representing.[5]

One may not freely ask a lawyer for advice on how to commit a crime; therefore, consultations concerning contemplated crime and fraud are not privileged. For example, if a person confesses to his attorney that he shot his wife, that is privileged; but, if the attorney tells

him to get rid of the murder weapon, that is a suppression of evidence and is not privileged.

The interviews, notes, and memoranda placed in an attorney's files as a case develops are often not protected by the attorney/client privilege. However, this work product is generally protected from disclosure in recognition of the attorney's need for privacy in preparation for trial.[6] The "work-product exception," as this is called, operates as a qualified privilege primarily to protect the privacy of an attorney's case development from an opposing attorney.

Confidentiality is essential to the attorney/client privilege. And the presence of the attorney's secretary or law clerk when the communication is made does not destroy this confidentiality.

At the other extreme, cornering an attorney at a party will not result in a protected communication. However, consultation in the attorney's office, with no one else but the client's relatives or a close friend, will be privileged if it appears that the client intended to speak in confidence and that the presence of the others was necessary to the consultation. For example, when a mother accompanied her young daughter to an attorney to discuss the girl's seduction, the consultation was held privileged since the mother's presence and participation was "appropriate and necessary" to open conversation between the girl and her attorney.[7]

If two or more people jointly consult an attorney, that conversation is still confidential and protected, except in an action by one client against the other.[8]

The States and Federal courts recognize the attorney/client privilege in both civil and criminal hearings. Only Alabama, Massachusetts, and Nevada have specifically abolished this privilege in child abuse and neglect determinations. In addition, Kansas, Mississippi, Montana, New Jersey, New Mexico, and Oklahoma may have abolished this privilege by means of language abrogating "the physician/patient privileges and similar privileges or rules against disclosure" in child abuse and neglect cases. Since the "similar privilege" or "related privilege" found in New Jersey has not been interpreted by court decision, we do not know if the attorney/client privilege is similar to that of the physician/patient.

In all jurisdictions other than these few, the traditional rules apply to generally "seal the attorney's lips" and exclude from evidence information imparted to an attorney by his/her client, whether the client is the parent or the child.

REFERENCES

1 *Wigmore* at §2290.

2 *McCormick* at 175.

3 *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894).

4 *American Cyanimid Co. v. Hercules Power Co.*, 211 F. Supp. 85 (D.C. Del. 1962).

5 *In re Richardson*, 31 N.J. 391, 157A.2d 695 (1960); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). In the latter case, the court recognized the general rule stated in the test but refused to compel disclosure of the client's identity when no litigation or claim was being made. The attorney, Baird, delivered to the Internal Revenue Service an amount designated as additional taxes owed by an undisclosed taxpayer. (The government was understandably frustrated by the anonymous payment, since it probably suspected an I.R.S. audit would uncover that even more tax money was owed to the U.S. Treasury.)

6 *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L.Ed.2d 451 (1947).

7 *Bowers v. State*, 29 Ohio St., 542 (1876), as cited in *McCormick* at 189, Notes 85 and 86.

8 *McCormick* at 189.

Physician/patient privilege*

The term "physician" generally includes all medical doctors—general practitioners as well as specialists in areas such as psychiatry, pediatrics, and opthalmology. Generally, dentists are not considered physicians entitled to the physician/patient privilege.

*The effect and scope of the privilege favoring the disclosure of confidential information by doctors was discussed in the chapter on the use of medical records at trial.

Courts see the medical profession as the primary profession to encounter and recognize child abuse or neglect. Doctors were, in fact, the first to have the legal obligation to report abuse cases.

To allow courts to use evidence known to the physician, almost every State eliminated the patient/physician privilege in abuse and neglect hearings. Only California, Illinois, Vermont, and West Virginia permit any claim of privilege to be asserted. In Illinois, this privilege is waived for any person (including medical personnel) making a report,[1] and in Vermont the privilege does not apply to information concerning children who may be victims of a crime.[2]

REFERENCES

1 Ill. Ann. Stat. Ch. 23 §2060 (Smith-Hurd 1975 Supp.).

2 Vermont Stats. Ann. tit. 12 §1612 (1975 Supp.).

Psychotherapist/client privilege

Many States recognize the special need to protect from disclosure the unguarded statements made by a disturbed or depressed person to his/her counselor. Particularly in child abuse and neglect situations, the abuser is likely to seek counseling in an effort to prevent future acts of abuse and/or neglect.

Though skeptics question the extent to which clients rely on privilege to prevent disclosure of their secrets, professionals fear that disclosure may lead to negative reactions by the client, may be perceived as betrayal, or may interfere with future therapy.[1]

Psychiatrists qualify for a privilege in all States protecting the doctor/patient relationship. Some States, including California, Connecticut, Florida, Illinois, Maine, Maryland, Massachusetts, Michigan, and New Mexico,[2] grant a special and separate privilege to psychiatrists and psychotherapists and their clients.

Psychologists are granted a privilege against disclosure of clients' communications in 29 States.[3] Generally, the privilege is given to licensed or certified psychologists. In States (such as Oregon) which license only persons who have a Ph.D. in psychology, psychologists without this degree cannot claim a privilege in any judicial hearing. Iowa alone among the States grants a privilege to "counselors."[4]

The term "counselor" usually includes persons with less than a Ph.D. However, even this broad term usually does not include members of "support groups" such as Parents Anonymous. Where the privilege exists, it typically belongs to the client.

Generally, the client's consent is not required when his/her mental or emotional state is an issue in the case. Thus, if an abusing parent claimed temporary insanity as a defense to a criminal prosecution, the parent's psychotherapist could be compelled to disclose confidential communications that related to the defense; a claim of privilege would be ungrounded.

The professional relationship exists when the therapist is consulted for diagnosis and treatment of an emotional problem. As with the physician/patient privilege, there is no privilege between client and therapist when the therapist is consulted solely for his/her expert testimony and not for treatment.[5]

If, for the court, an alleged abuser agrees to a psychological examination—by a court-appointed therapist, by a therapist of his/her own choosing, or by a protective services therapist—the results of this examination are admissible evidence, even where psychotherapists are privileged.

Many States that recognize a privilege for psychologists do not recognize that privilege in abuse and neglect hearings, feeling that reporting and diagnosing the problem is of greater importance than "counseling and treating people whose mental or emotional problems cause them to inflict such abuse."[6] However, 18 States[7] feel that destroying a client's confidence in his/her therapist, who may be treating the problem, is not warranted by the possibility of obtaining evidence from mental health practitioners.

REFERENCES

1 Remarks made at the National Retrieval Workshop, Eugene, Oregon, March 8-9, 1976.

2 Calif. Evid. Code §1010 et. seq. (1976 Supp.); Conn. Gen. Stat. Ann. §52-146e (1976 Supp.); Fla. Stats. Ann. §90.242 (1976 Supp.); Ill. Ann. Stat. Ch. 51 §5.2 (Smith-Hurd 1975 Supp.); Ky. Rev. Stats. 421.215 (1970); 16 Me. Rev. Stats. Ann. §60 (1975 Supp.); Md. Ann. Code Cts. & Jud. Proceedings §9-109 (1974); Mass. Ann. Laws Ch. 233 §20B (1974); *People v. Plummer*, 37 Mich. App. 657, 195 N.W.2d 328 (1972); New Mex. Stats. Ann. §20-4-504 (1975 Supp.).

3 Alaska Stat. §08.86.200 (1962); Ariz. Rev. Stat. Ann. 32-2085 (1975 Supp.); Calif. Evid. Code §1010 (1976 Supp.); Colo. Rev. Stat. Ann. 13-90-107 (1)(g) (1973); Conn. Gen. Stats. Ann. §52-146C (1976 Supp.); Fla. Stats. Ann. 490.32 (1976 Supp.); Ga. Code Ann. §84-3118 (1974); Idaho Rev. Code 9-203(6) (1975 Supp.) (school psychologists only); Ill. Ann. Stat. ch. 91-½ §406 (Smith Hurd 1966); Ind. Code §25-33-1-17 (1974); Iowa §622.10 (1976 Supp.); Kan. Stats. Ann. §74-5323 (1972); La. Rev. Stats—Rev. Stat. 37:2366 (1974); Md. Ann. Code Cts. & Jud. Proceedings §9-109 (1974); Minn. Stats. Ann. 595.02(7) (1976 Supp.); Miss. Code Ann. §73-31-29 (1972); Mont. Rev. Code Ann. §66-3212 (1975 Supp.); Neb. Rev. Stats. §27-504 (1975 Supp.); N.H. Rev. Stats. Ann. 330-A:19 (1955); N.J. Stats. Ann. 45:14B-28 (1975 Supp.); New Mex. Stats. Ann. 20-4-504 (1975 Supp.); N.Y. Civ. Practice Law & Rules §4508 (1975 Supp.); N.C. Gen. Stats. §8-53.3 (1969); Ohio Rev. Code §4732.19 (1975 Supp.); Ore. Rev. Stats. 44.040 (1)(h)(1975); Tenn. Code Ann. §63-1117 (1955); Utah Code Ann. §58-25-8 (1975 Supp.); Wash. Rev. Code Wash. Ann. 18.83.110 (1975 Supp.); Wyo. §33-343.4 (1975 Supp.).

4 Iowa §622.10 (1976 Supp.)

5 *Massey v. State*, 226 Ga. 703, 177 S.E.2d 79 (1970).

6 *State v. Fagalde*, 85 Wash. 2d 730, 539 P.2d 86, 90 (Aug. 1975).

7 Alaska, Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, New Hampshire, New York, North Carolina, Ohio, Oregon, Utah, Virginia, and Wyoming. (See also chart that follows.)

NOTES TO CHART

1. California granted a privilege to physicians, preventing disclosure of confidential information except in a "commitment or similar proceeding" (Evid. Code §§994, 1004 (1966)).

2. Psychiatrists and psychologists are granted a privilege in California preventing disclosure of confidential information unless (a) the patient is under the age of 16, (b) the psychotherapist has reason to believe the patient has been the victim of a crime, and (c) that the "best interest of the child" requires disclosure (Evid. Code §§1014, 1027, (1975 Supp.)).

3. Georgia grants a spouse the privilege not to be compelled to testify for or against the other spouse. The spouse may testify voluntarily but, in any event, the spouse may not testify as to the confidential communications (Ga. Code Ann. §§38-418(1), 38-1604 (1974)). Either privilege is available in abuse and neglect hearings.

4. Georgia granted no physician/patient privilege but allows a privilege for psychiatrists and psychologists; this privilege may be invoked to exclude the psychotherapist's testimony at a child abuse or neglect hearing (Code Ann. §§38-418(5), 84-3118 (1974)).

5. Illinois granted an absolute waiver of all privileges to the person making the report of abuse or neglect; but privileges may still be claimed by persons and professionals who do not make the report (Ill. Ann. Stat. Ch. 23 §2060 (Smith-Hurd 1976 Supp.)).

6. Iowa granted a privilege against disclosure of confidential communications to counselors as well as to practitioners of the healing arts. The privilege granted counselors probably applies to psychologists but not psychiatrists. The counselor's privilege has not been waived (Iowa Code §622.10 (1975 Supp.), §235A.8 (1969)).

7. The Child Abuse Reporting Act makes unavailable the physician/patient privilege and "similar privileges or rules against disclosure." For the purpose of this chart, that language has been interpreted to waive all the privileges analyzed. But refer to the text for a fuller discussion of the problem. The States with this statutory language are:

CONTINUED

1 OF 2

Kansas Stats. Ann. §38-719 (1973).

Mississippi Code Ann. §43-21-27 (f) (1975 Supp.).

Montana Rev. Code Ann. §10-1307 (1975 Supp.).

New Mexico Stats. Ann. §13-14-14.2 (1976).

Oklahoma Stat. tit. 21 §848 (1975 Supp.).

8. Both the psychiatrist/patient and the psychologist/patient privileges are freely

ELIMINATION OF PRIVILEGES AT HEARINGS
("No P" signifies privilege is unavailable)

State	Husband/Wife		Attorney/ Client	Physician/ Patient	Psychologist/ Patient	Comments
	Testimonial	Communications				
ALABAMA	No P	No P	No P	No P	No P	
ALASKA	No P	No P		No P		
ARIZONA	No P	No P		No P	No P	
ARKANSAS	No P	No P		No P	No P	
CALIFORNIA	No P	No P		Note 1	Note 2	
COLORADO	No P	No P		No P		
CONNECTICUT	No P	No P		No P		
DELAWARE	No P	No P		No P	No P	
DISTRICT OF COLUMBIA	No P	No P		No P	No P	See Note 11
FLORIDA	No P	No P		No P	No P	
GEORGIA	Note 3			No P	Note 4	
HAWAII	No P	No P		No P	No P	
IDAHO	No P	No P		No P	No P	
ILLINOIS	No P					See Note 5
INDIANA	No P	No P		No P		
IOWA	No P	No P		No P	Note 6	
KANSAS	No P	No P	No P	No P	No P	See Note 7
KENTUCKY	No P	No P		No P	Note 8	
LOUISIANA	No P	No P		No P		
MAINE	No P	No P			No P	
MARYLAND				No P		
MASSACHUSETTS	No P	No P	No P	No P	No P	
MICHIGAN	No P	No P		No P	No P	
MINNESOTA	No P	No P		No P		
MISSISSIPPI	No P	No P	No P	No P	No P	See Note 7
MISSOURI	No P	No P		No P	No P	
MONTANA	No P	No P	No P	No P	No P	See Note 7
NEBRASKA	No P			No P	No P	
NEVADA	No P	No P	No P	No P	No P	
NEW HAMPSHIRE	No P	No P		No P		
NEW JERSEY	No P	No P	No P	No P	No P	See Note 10
NEW MEXICO	No P	No P	No P	No P	No P	See Note 7
NEW YORK	No P	No P		No P		
NORTH CAROLINA	No P	No P		No P		
NORTH DAKOTA	No P	No P		No P	No P	
OHIO	No P	No P		No P		
OKLAHOMA	No P	No P	No P	No P	No P	See Note 7
OREGON	No P	No P		No P		
PENNSYLVANIA		No P		No P	No P	
RHODE ISLAND	No P	No P		No P	No P	
SOUTH CAROLINA	No P	No P		No P	No P	
SOUTH DAKOTA	No P	No P		No P	No P	
TENNESSEE	No P	No P		No P	No P	
TEXAS	No P	No P		No P	No P	
UTAH				No P		
VERMONT				Note 9	No P	
VIRGINIA	No P	No P		No P		
WASHINGTON				No P	No P	
WEST VIRGINIA					No P	
WISCONSIN				No P	No P	
WYOMING	No P	No P		No P		

available in Kentucky (Rev. Stat. 319.111, 421.215 (1970)).

9. The privilege granted against testimony by physicians, dentists, and nurses in Vermont is available except for "information indicating that a patient under the age of 16 has been the victim of a crime." (Vermont Stats. Ann. tit. 12 §1612 (1976 Supp.)).

10. New Jersey Stats. Ann. §9:6-8.46a(5) provide that neither husband/wife, physician/patient, social worker/client, and other related privileges shall be grounds for excluding evidence from abuse or neglect hearings.

11. In the District of Columbia, the Family Court may waive the privileges granted to spouses and doctors if the court decides that justice requires disclosure of the information. There is no privilege for psychologists (D.C. Code Encycl. Ann. §2-165 (1970 Supp.)).

RIGHTS OF PARENTS AND CHILDREN

- **RIGHTS of Parents**
- **RIGHTS of Children**

RIGHTS OF PARENTS

In general, it is recognized that parents have constitutionally protected rights in raising their children as they see fit, subject to the general welfare of the child. Parents rights are:

1. **Right to Notice**

Adequate notice of dependency and neglect hearings is required to be given to parents in order that they might meet the charges made against them.

2. **Right to Counsel**

Whether or not counsel is provided for parents in dependency and neglect cases will depend upon the particular jurisdiction involved. Some States provide for counsel; some do not. Compounding the confusion in this area is that, while several courts have held that a right to counsel in neglect proceedings is required as a matter of due process and equal protection, other courts have specifically denied that such a right exists. The issue appears to be ripe for Supreme Court consideration.

3. **Right to a Hearing**
4. **Right of Family Integrity**
5. **Right to an Impartial Hearing**
6. **Right to a Jury Trial**
7. **Right of Confrontation and Cross-Examination**

NOTE: Comments with regard to "rights" 3-7, considered under "Rights of Children" (below), are equally applicable to parents.

RIGHTS OF CHILDREN

The rights of children come from two sources. First are the rights in the U.S. Constitution which the courts have found applicable to children. Second are the rights granted to children by statute and common law. It should be noted that the exact nature and extent of these rights will vary greatly from State to State and that, at the present time, commentators are in disagreement over what is constitutionally required and what might be desirable.

1. **Right to Notice**

While a right to receive notice of dependency and neglect hearings is required to be given to parents, whether a separate right exists on behalf of the child is not clear. The utility of this right, however, clearly depends to a large degree upon whether counsel is also provided for the child.

2. **Right to Counsel**

The right to counsel for children in dependency and neglect cases varies greatly from State to State, some providing for it and some not. When provided, it appears to be provided for both the adjudicative and dispositional stages of the hearing. This right is particularly important, as effective utilization of other rights may depend upon it.

3. Right to a Hearing

A hearing is required before a child can be removed from a home, except in an emergency situation or when the child is held after an emergency removal. While this right might appear to be protective of both the child's and the parents' interests, some States allow for removal upon consent of the parents alone. In other words, in these States, this right is waivable by the parents for themselves and on behalf of the child as well.

4. Right of Family Integrity

Authority exists in some jurisdictions to the effect that before a natural family is terminated, attempts must be made to strengthen and rehabilitate the family. Statutes in some States express this in the form of a preference for care, guidance, and control within the natural home of the child. The court can, of course, condition the child's remaining in the home upon cooperation with agency personnel, mandated counseling, and correctional therapy for the parents or the family as a unit.

5. Right to an Impartial Hearing

Most States provide that the parties to a juvenile hearing are entitled to a hearing by an impartial judge.

6. Right to a Jury Trial

A right to a jury trial is provided by only a few States in dependency and neglect cases. It is unlikely that the Supreme Court will find such a right constitutionally mandated in the near future.

7. Right of Confrontation and Cross-Examination

In determining whether or not a party is entitled to the right of confrontation and cross-examination, the courts look to the potential seriousness of the impact of the hearing upon the individual. Given the gravity of a determination of neglect or abuse and the repercussions such a finding may have upon a child, it would appear that he or she should be accorded this right. Of course, the effectiveness of this right depends upon representation by counsel. Generally, it appears that when counsel is provided for the child, counsel is also allowed to examine the witnesses.

PRACTICAL AIDS

- Glossary of Legal Terms
- How to Read Legal Citations

GLOSSARY OF LEGAL TERMS

ABET—To aid or help a person to perform an act in violation of the law.

ABUSE—(1) Misuse; (2) Infliction of injury (mental, physical, or emotional); (3) Molestation. Abuse of ***discretion*** is the failure to use sound judgment in making a decision. Abuse of ***process*** is the use of the legal system in an unfair, illegal, or unconscionable way.

ADJUDICATIVE HEARING—Hearing to determine the facts in a particular case; the first stage of a bifurcated juvenile court process.

ADJUDICATORY—To be heard, tried, and determined by a judicial body.

ADMINISTRATIVE—Branch of the government that carries out the law.

ADMINISTRATIVE AGENCY—Subbranch of the government set up to carry out the law.

ADMISSIBLE—Proper to be used as evidence in reaching a decision. Evidence is admissible where it may be properly used by the trier of fact in deciding a question of fact.

ADMISSION—Voluntary statement that a fact is true.

ADMISSION BY SILENCE—Adoption of the declaration made by another by failure to object to it under circumstances indicating that an objection would be a normal response.

ADMISSIONS—Statements made by a party to an action; a hearsay exception.

AFFIDAVIT—Sworn, written statement made before a person authorized by law to administer a binding oath.

AFFIRM—To confirm or agree. A court's action is ***affirmed*** when an appellate court indicates that the lower court's action was correct.

ALLEGATION—Statement or charge which one side of a legal dispute expects to be able to prove at a subsequent trial or hearing.

APPEAL—(1) Process of asking a higher court to review the actions of a lower court; (2) Also to ask a higher court to review the actions of a lower court.

APPELLATE—Referring to appeals from prior decisions. Thus, an appellate court reviews the decisions made by a lower court.

APPOINTED COUNSEL—Attorney picked by the court to render legal assistance to one unable for a variety of reasons to obtain his/her own counsel.

ARRAIGNMENT—(1) Bringing of a person before the court to hear the charges against him or her; (2) Time at which a person formally pleads guilty or not guilty to a charge against him or her.

ARREST—Taking of a person to answer criminal charges and corresponding deprivation of liberty.

ASSAULT—Intentional show of force or action which could make a reasonable person fear attack or harmful physical contact.

ASSERTIVE CONDUCT—Behavior meant to communicate a message; e.g., designating an object by pointing at it.

BAD FAITH—(1) Opposite of good faith; (2) Implying fraud or deceit; misleading; or neglect to perform an obligation prompted by a sinister motive.

BREACH OF CONFIDENCE—Any act done contrary to trust placed in a person.

BREACH OF DUTY—Failure, without legal excuse, to carry out an obligation.

BIFURCATED—In two parts or sections.

CIVIL ACTION—Lawsuit that is not criminal in nature; a court action brought to enforce a right or obtain remuneration for a wrong as opposed to government action brought to punish a person for committing a crime.

CIVIL LIABILITY—Amenable to civil action as opposed to criminal prosecution.

CODE—Collection of laws; e.g., the Code of Hammurabi or a city building code.

COERCION—Force or compulsion; making a person act involuntarily.

COMMON LAW—(1) Judge-made law as opposed to legislature-made law; (2) Changing law having English origins and resting upon tradition or custom.

COMPETENCY—(For purposes of this text) the legal capacity to testify; not synonymous with mental capacity.

COMPETENT—Properly qualified; having the proper qualifications.

COMPETENT EVIDENCE—Evidence that is (a) of a proper nature to prove the point in question and (b) *relevant.*

CONFESSION—Voluntary statement of wrongdoing.

CONFRONTATION, RIGHT OF—Constitutional guarantee requiring that a person be allowed to face his/her accusers and witnesses against him/her and to question them with regard to their accusations and observations.

CONTEMPT—(1) An affront to the court or tribunal in question; (2) An obstruction of the court's work; (3) Disobedience to a judge's command.

CONTINUANCE—Postponement of legal action, such as a lawsuit, until a later time.

CONVICTION—Finding of guilt in a criminal trial.

COURT ORDER—(1) Directive issued by the court having the authority of the court and enforceable at law; (2) Written command or directive given by a judge.

CREDIBILITY—Believability of a person, especially a witness.

CRIMINAL—(1) Person who has committed a crime; (2) Illegal; (3) Having to do with illegal conduct and the law of crimes.

CROSS-EXAMINATION—Questioning an opposing witness at a trial or hearing, usually subsequent to his/her ***direct examination.***

CUSTODIAL INTERROGATION—Questioning that takes place while a person is in the keeping of police or other officials. Custodial in this sense implies a lack of freedom or the presence of some degree of compulsion.

CUSTODY—General term indicating some form of care and keeping which is more formalized than mere possession; for example, parents normally have legal custody of their children.

DECLARANT—Person who makes a statement or assertion.

DECLARATION—(1) Unsworn statement made out of court; (2) Public statement; (3) Formal statement of fact.

DE FACTO—True in fact, in reality.

DEFAMATION OF CHARACTER—Injuring a person's reputation or character by false representations.

DEFENDANT—(1) Person being sued by a plaintiff; (2) Person against whom legal action is brought.

DELIBERATE—Done after consideration and with full knowledge; not sudden or rash; willful rather than merely intentional.

DEMEANOR—Conduct or appearance of a person, especially a witness who is tesifying at a trial or hearing.

DEMURRER—Legal pleading which alleges that the facts as represented by the opposing party, even if true, are insufficient to support a claim.

DE NOVO—(1) Anew, afresh, a second time; (2) A completely new start ignoring previous occurrences.

DEPENDENCY—State of relying on another. A child found ***dependent*** is held to be in need of aid.

DEPOSITION—Process of taking sworn testimony out of court.

DICTA—(1) Discussions of side issues or unrelated points—in a legal opinion, a discussion of points or issues not related directly to the question at hand; (2) Plural form of the word ***dictum***.

DICTUM—(1) Singular form of ***dicta***; (2) Discussion of side issues or unrelated points, particularly in legal opinions.

DIRECT EXAMINATION—Examination of a witness by the person who has called him/her as a witness.

DISCOVERY—Exchange of information between sides in a lawsuit. The four most common types of discovery are ***interrogatories***, ***depositions***, ***demand for admissions***, and ***demand for production of documents***.

DISCRETION—Power to act allowing some leeway for action. "Discretionary action" is action not mandated or compelled by some rule, order, or guideline.

DISMISSAL—Action by the judge which removes a given case from the court. Such action may be ***with prejudice***, meaning the party is barred from ever bringing the case again, or ***without prejudice***, meaning that the case could be brought at a later time.

DISPOSITION—Final result of a court proceeding, such as: dismissal, sentence, probation, fine, imprisonment.

DISPOSITIONAL HEARING—Hearing to determine the action to be taken by a court in a particular case; the second stage of a bifurcated juvenile court hearing.

DOCKET—Schedule of cases to be heard by a court.

ERROR—Mistake, made by a judge concerning a trial, which allows a party to a court action to seek review of the action by a higher court.

EVIDENCE—Information that is or might be presented at a trial or hearing. Evidence may also include physical objects used to demonstrate a fact at a trial or hearing.

EXAMINATION—Questioning of a witness, either directly or through cross-examination.

EXAMINER—(1) Name for a type of hearings officer or administrative judge; (2) A judgelike official in an agency.

EXCLUSION OF EVIDENCE—To not allow evidence to be used in a trial or hearing; often done if unconstitutional methods were used in obtaining the evidence in question as a prophylactic measure.

EXCLUSIONARY RULE—Rule of evidence that, in a trial or hearing, prohibits the use of evidence obtained in violation of constitutional rights.

EXCULPATORY—Tending to show noninvolvement, excuse, or justification. Exculpatory evidence tends to show justification, excuse, or nonparticipation in the committing of an act.

EXPERT WITNESS—One who is qualified by training or experience to give opinion testimony on a given subject.

FACT IN ISSUE—Fact about which there is some dispute. Facts not in issue are irrelevant and may not be proven.

FALSE PRETENSE—An untruth—spoken, written, or otherwise communicated—used to deceive another, especially for the purpose of obtaining his/her property.

FIRST IMPRESSION—New. A case of first impression is one that presents a question not previously handled by the court.

FRUIT—Result or product of; e.g., evidence is the fruit of a search.

GOOD FAITH—Honest; done in honesty.

GUARDIAN—Person having the legal right and duty to care for the interests of another because the latter is incapable of doing so him or herself. The arrangement is called a ***guardianship.***

GUARDIAN AD LITEM—Person, often a lawyer, to take care of another's interests. Such guardians are usually appointed to safeguard the rights of persons otherwise incapable of handling their own interests.

HEARSAY—A statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

HEARSAY RULE—Rule excluding hearsay from evidence in a court or other hearing and its numerous exceptions.

HOLDING—Judge's opinion in a case; especially the essential part of the opinion and not including ***dicta.***

IMMUNITY—Protection from legal liability. Such protection can be either total or partial.

INCARCERATION—Confinement in a jail or prison.

INCULPATORY—Tending to show involvement in an action.

INDEMNIFY—To compensate or reimburse one who has suffered a loss.

INDEMNITY—Agreement or contract to compensate or reimburse another for a loss.

INTERROGATORIES—(1) Written questions sent to the opposing party or parties in a lawsuit; (2) Written questions addressed to a witness.

INTERSTATE COMPACT—Agreement between States which has been passed as law by the States and been approved by Congress.

IRRELEVANT—Having nothing to do with the issue at hand. Irrelevant evidence is not admissible at a trial or hearing.

JUDICIAL—(1) Having to do with a court; (2) Branch of government that interprets law.

JURISDICTION—(1) Geographically, the area within which a court or public official has the power to operate; (2) Subject matters or persons over whom or over which a court or public official may exercise his/he power.

KNOWINGLY—Intentionally, with full knowledge; willfully.

LAY WITNESS—Nonprofessional in a given field. A lay witness is one who is ***not*** qualified as an expert in his/her field.

LEADING QUESTION—Question framed in such a way as to suggest the expected answer; e.g., "You eat cat food on Thursdays, don't you?"

LIABILITY INSURANCE—Insurance that will cover incurred legal liabilities arising out of a particular type of action; e.g., automobile collision liability insurance.

LIABLE—Responsible for something; having a duty enforceable at law.

MALICE—(1) Ill will; (2) Intentional harm without justification.

MANDATED—Required; e.g., a "mandated agency" is one required to act in a given situation.

MENTAL INJURY—General term used to denote emotional abuse or neglect.

MISDEMEANOR—Offense not amounting to a felony (serious offense) usually punished by a fine or short prison sentence.

MOTION—Request that the judge in a trial or hearing take some action.

NEGLECT—(1) Failure to proceed in a proper manner; (2) The absence of action where it is required.

OATH—(1) A swearing that one is bound to do something; (2) Any assertion that indicates a moral duty to perform.

OBJECTION—Process of stating that an action by the opposing side in a lawsuit is unfair or improper and asking the judge to make a decision concerning whether the action in question may be taken.

OFFICER OF THE COURT—Court employees, such as judges, bailiffs, clerks, and sheriffs. Lawyers are also officers of the court and subject to court rules.

OPENING STATEMENT—Statement made by an attorney at the start of the trial or at the beginning of his/her presentation. Opening statement summarizes attorney's position and usually what he/she hopes to prove.

OPINION—(1) Lawyer's document indicating how he or she believes the law applies to a set of facts; (2) Decision of a judge in a case and the rationale for that decision.

OVERRULE—(1) To reject; (2) To supersede. A ***case*** is overruled when the principles upon which it was decided are rejected by a higher court or by the same court at a later time. An ***objection*** is overruled when it is rejected and not given effect.

PARENS PATRIAE—Government's right and responsibility to care for minors and others unable to legally care for themselves.

PARTY—Person concerned with or actively taking part in a proceeding; e.g., in a child dependency hearing, the biological parents, the child, the State department of child welfare, the State.

PENALTY—Imposed punishment.

PERJURY—Lying under oath.

PETITION—Written request to a court—especially a juvenile court—that it take action in a particular case.

PLAINTIFF—Person or agency who files a complaint or brings an action in court.

PRECEDENT—(1) Occurrence required prior to the happening of something else; e.g., prior to driving, you must possess a license—this is a condition precedent; (2) Prior court decisions relied upon in deciding a similar legal problem occurring later.

PREJUDICE—(1) Bias, leaning toward one side without reason; (2) Substantially harmful to the rights of a person (e.g., "prejudicial error"). ***Dismissed with prejudice*** means that all rights are lost; a case dismissed with prejudice cannot be brought to court again.

PRELIMINARY HEARING—Hearing held prior to the trial or major hearing—often used to clarify issues and to narrow the scope of investigation of items in dispute.

PRESUMPTION—Conclusion or an inference drawn. A ***presumption of law***, for example, is a rule that, if a certain fact pattern exists, the court must automatically draw a specified legal conclusion.

PRIOR RECOLLECTION RECORDED—Notes made at the time of an incident; a hearsay exception.

PRIVILEGE—(1) An advantage or right of preferential treatment; (2) A special advantage, not a right.

PROBABLE CAUSE—Reasonable suspicion, supported by fact, that an event has occurred. Such suspicion must be based upon facts known prior to taking actions governed by the probable cause rule.

PROBATIVE—Tending to prove something. ***Evidence*** is probative when it tends to prove a fact. ***Facts*** are probative when they tend to prove an element necessary for the court to consider.

PROFESSIONAL—One who pursues a vocation or occupation involving labor, skill, education, special knowledge, and compensation or profit. The labor or skill involved is primarily mental or intellectual

PROPONENT—Person who offers an item into evidence, calls a witness, makes a motion, or does any act likely to be opposed by another party.

PROSECUTION—To charge a person with a crime and begin criminal trial proceedings; e.g., to prosecute a thief. The process itself is called a prosecution.

REBUTTAL—(1) Presentation of contrary evidence to show that a stated proposition is not true; (2) Stage of a trial when such evidence is admitted.

REBUTTAL EXAMINATION—Questioning of a witness designed to defeat or counteract the effect of previous testimony.

RECORD—(1) Formal written account of a case; (2) The elements of a case upon which a jury may reach a decision; hence, evidence "struck from the record" may not be considered by the jury.

RECROSS EXAMINATION—Examination of a witness following redirect examination. The scope of recross examination is limited to issues covered in redirect examination. Thus, the order of examination is: (a) direct, (b) cross, (c) redirect, (d) recross.

REDIRECT EXAMINATION—Questioning of a witness following cross-examination. Such examination is limited to subjects raised in the cross-examination. Thus, the order of examination is: (a) direct, (b) cross, (c) redirect, and (d) recross.

REFEREE—Person appointed to resolve disputes. Such a person may or may not be a judge.

REGULARLY-KEPT BUSINESS RECORDS—Systematically kept records of a business activity; a hearsay exception.

REHABILITATION—Restoration of former rights or abilities, etc. Rehabilitation of a witness means to restore that person's believability after it has been put into question.

RELEVANT—Applicable to an issue at hand. Evidence must be ***relevant*** to be admissible at a trial or hearing.

REMAND—To return or send back. A case is remanded when the appellate court returns the case to a lower court for further action.

RETAINED COUNSEL—Attorney one provides for him or herself—as opposed to ***appointed counsel*** retained for a person by the court.

REVERSE—To set aside, as when an appellate court ***reverses*** the opinion of a lower court on appeal. A reversed opinion has no effect.

RULES OF EVIDENCE—Laws and principles that determine whether or not a particular item or piece of information can be considered at a trial or hearing.

RULING—Decision by a judge which settles a legal issue.

SEQUESTRATION—State of being sequestered or separated; e.g., a witness may be sequestered from courtroom during trial.

SOVEREIGN IMMUNITY—Government's freedom from lawsuits, except in those instances where the government allows itself to be sued.

STATUTORY—(1) Having to do with a ***statute*** or law; (2) Created, defined, or required by a statute.

SUMMONS—Notice informing a person of a lawsuit against him/her. The notice informs the person of the charge and the time to appear in court.

SUSPECT—To have an idea concerning; more than a guess, but less than complete certainty.

SUSTAIN—(1) To grant; (2) To support or justify. Sustaining an objection means to agree with it and give effect to it.

TERMINATION—Dissolving a relationship and ending the legal rights surrounding it.

TESTIMONY—Statements made at a hearing or trial by a witness under oath.

TRIER OF FACT—Person or persons who determine the truth of disputed facts. In a jury trial, this is the jury; otherwise, the judge or hearings officer.

UNDER ADVISEMENT, TO TAKE—(1) To consider; (2) To delay making a final decision until a later time.

VERACITY—Quality or state of being the truth. It usually refers to a witness' apparent objectivity in giving testimony at a trial or hearing.

WAIVER—Giving up of a right voluntarily.

WARD—Person, especially a child, placed under the care of a guardian. The situation is known as a wardship.

WARDSHIP—Care of a person by an appointed guardian

WARRANT—Permission given by an authorized official to arrest a person, seize evidence, or search a house or other property.

HOW TO READ LEGAL CITATIONS

Legal citations look different from those used in the literature of other professions. The citation form, however, contains the same basic information and is not difficult to understand.

Legal material is comprised of two basic categories: primary and secondary sources.

1. **Primary sources** include:

   constitutions,

   statutes,

   local ordinances, and

   judicial opinions in legal cases.

2. **Secondary sources** include:

   books and treatises,

   student textbooks,

   law review articles, and

   legal encyclopedias.

Most legal source material is found only in specialized law libraries located in law schools, county seats, and attorneys' offices. County and school law libraries are usually open to the public and are staffed by librarians who are willing to help lay people do their own research.

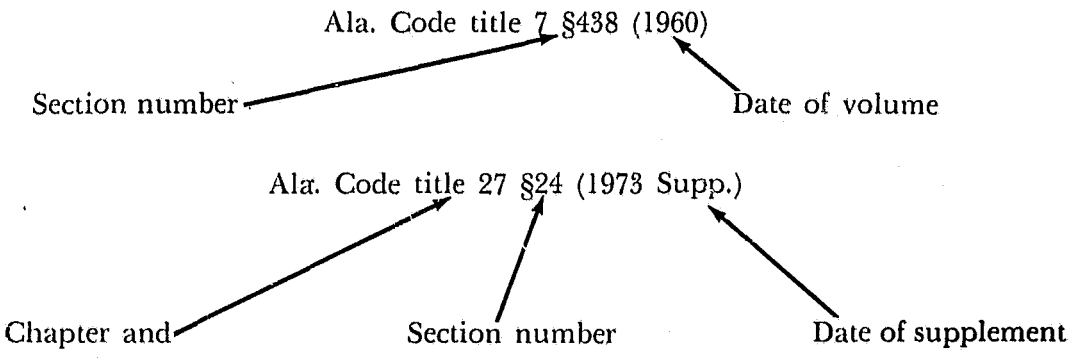
Primary Sources

• STATUTES: State statutes are referenced to the current State code or laws. The State name is always in the title. The date at the end is the effective date of the current bound volume, or of the latest supplement if the law has been amended since the bound volume was published. (The date in the citation bears no relation to the date the law was passed.)

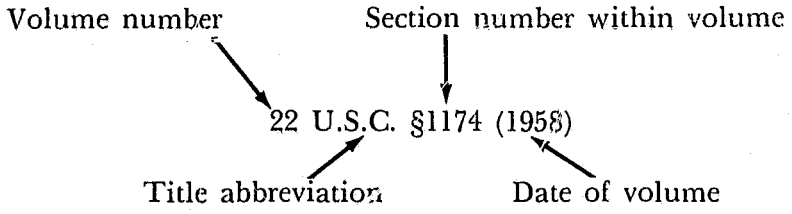
Note that one Alabama law appears in the bound 1960 volume and the other in the latest supplement. The supplement is a pamphlet added to the back corner of the bound volume of the statutes.

Federal statutes are typically cited to the U.S.C. (United States Code) or U.S.C.A. (United States Code Annotated).

Examples:



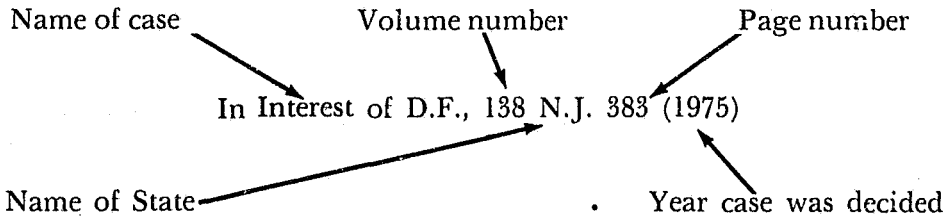
Example:



• CASES: Citations to judicial opinions in cases always include:

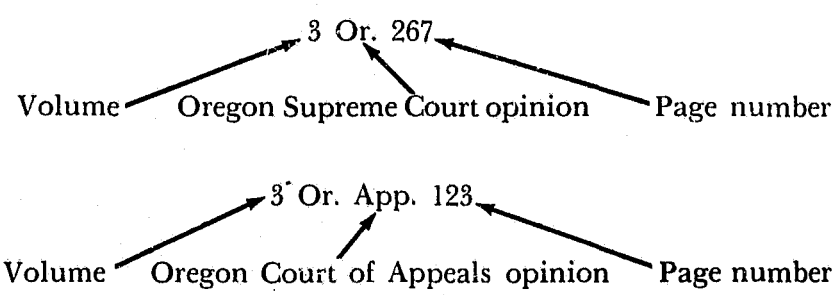
1. Case name.
2. Volume number.
3. State or court in which case was heard.
4. Page number where opinion begins.
5. Date case was decided.

Example:



In most States, only appellate court cases are reported. In a few States and the Federal courts, trial court judges write their opinions and these are reported as well as appellate court opinions. In State citations, if no particular court is mentioned or if the name of the reporter is not apparent, the decision is from the highest court in the State, usually the State Supreme Court or, in the case of New York, the Court of Appeals.

Examples:



The official case reporter is the one published by the court itself. It is identified by the State name; for example:

Oregon Reports, referred to as Or.

Oregon Court of Appeals reports, referred to as Or. App.

A few States do not publish official reporters.

Each State case also appears in one of the following privately published regional reporters:

A. and A.2d—Atlantic Reporter (and Atlantic Reporter, Second Series)

N.E. and N.E.2d—Northeast Reporter (etc.)

S.E. and S.E.2d—Southeast Reporter

So. and So.2d—Southern Reporter

S.W. and S.W.2d—Southwestern Reporter

Pac. and P.2d—Pacific Reporter

New York trial and appellate division cases also appear in N.Y.S. and N.Y.S.2d—New York Supplement. California cases are also published in Cal. Rptr.—California Reporter.

The U.S. Supreme Court is the only Federal court to publish an official reporter: U.S.—United States Reports. U.S. Supreme Court cases may also be cited to two privately published reporters:

S.Ct.—Supreme Court Reports.

L.Ed. and L.Ed.2d—United States Reports,

Lawyers Edition (and Lawyers Edition, Second Series)

Federal District Court cases appear in F. Supp.—Federal Supplement.

Federal Circuit Court of Appeals cases appear in F. and F.2d—Federal Reporter (and Federal Reporter, Second Series). The circuit or district court rendering the decision is indicated in parentheses after the reporter citation.

The date appears in parentheses at the end of the citation. Usually, only the year the case was decided is given, although, for cases less than a year old, both the month and year are noted.

Examples:

1. *People v. Damen,* 28 Ill.2d 464, 193 N.E.2d 25 (1963).

The case of ***People v. Damen*** is reported in Volume 28 of the Illinois Reports, Second Series, page 464, and in Volume 193 of the Northeast Reporter, Second Series, page 25. It is a 1963 case.

2. *Healy v. James,* 408 U.S. 169, 92 S. Ct. 2338, 33 L.Ed.2d 266 (1972).

The case of ***Healy v. James*** is a U.S. Supreme Court case that appears in the three reporters.

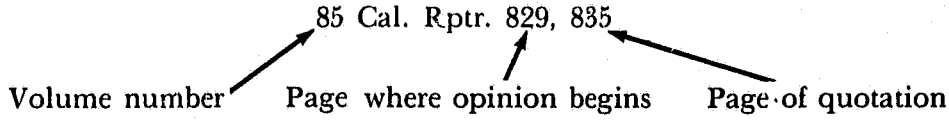
3. *United States v. Kendrick,* 331 F.2d 110 (4th Cir. 1964).

This case is found in Volume 331 of the Federal Reporter, Second Series, page 110. It is from the Fourth Circuit Court of Appeals.

4. *In re Lifschutz,* 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829, 835 (1970).

This California case is reported in three places. The extra number after the California Reporter citation is called a "jump-cite." Jump-cites indicate the page where the quoted material may be found. Jump-cites are usually given only when language is quoted.

Example:

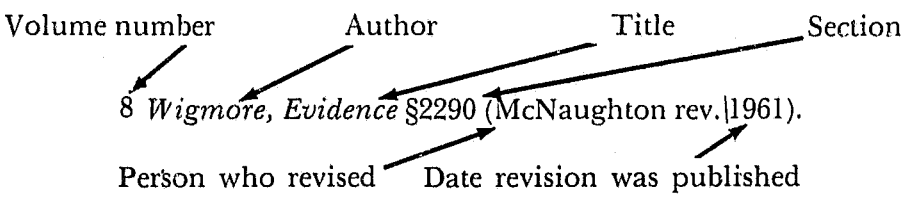


A useful feature found in many of the case reports is the "headnote." Headnotes are short summaries of the case, point by point, which appear in the reporter just prior to the text of the case itself. Headnotes also contain paragraph numbers that indicate exactly where the point, summarized in the headnote, is explained in the text of the case.

Secondary Sources

• TREATISES: Treatises are multivolume works covering one particular area of the law. Usually written by one or more scholars, treatises are relied upon by many judges and lawyers, particularly in those areas of the law where cases are in conflict. Treatises are cited by volume number, author, title, page or section number, and year. When the original has been revised, or if the referenced material appears in an annual supplement, this is indicated in parentheses.

Example:



• BOOKS, HORNBOOKS: Hornbooks are student texts, many of which are written by scholars. Such texts are properly cited as legal authorities. The proper citation for all books includes author, title, page or section number of quoted or cited material, and date of publication.

Examples:

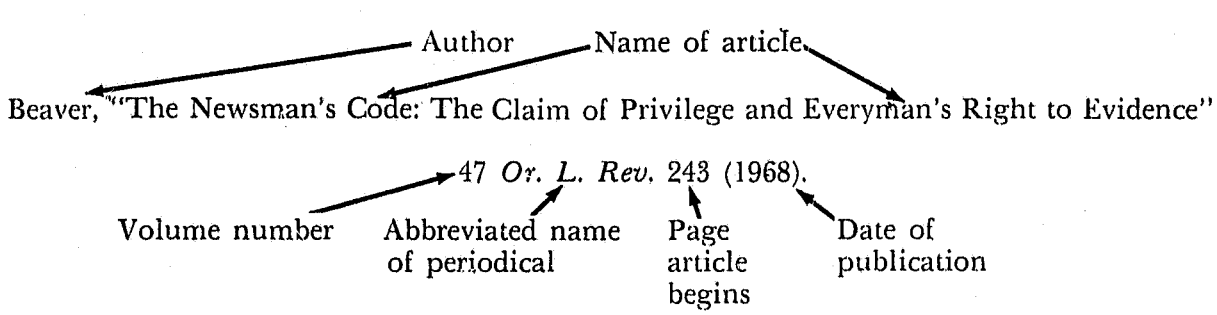
McCormick on Evidence 215 (2d. ed. 1972).

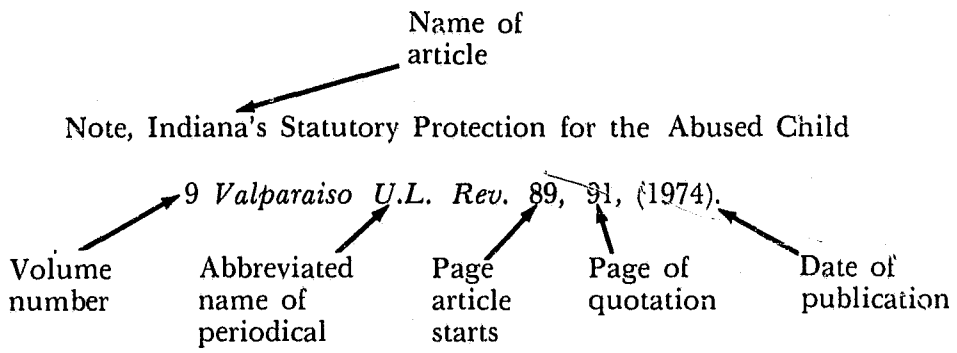
Prosser, The Law of Torts 751 (1971).

L. Kanowitz, Women and the Law (1968).

• LAW REVIEW ARTICLES AND ARTICLES IN OTHER PERIODICALS: Law reviews are the scholarly professional periodicals of the legal profession. Most law reviews are published by law schools. Proper citation includes name of author (of longer material, or "Note" or "Comment" for shorter student material), title, volume, abbreviated name of periodical, page number, and year of publication. Jump-cites are used to indicate the page number of specifically quoted material, just as in quotations from court decisions.

Examples:





Additional Reading

Pollack's Fundamentals of Legal Research (4th ed. 1973) is a detailed, easy to understand volume on proper legal citations and how to translate them, thus facilitating proper research technique.

INTERSTATE QUESTIONS

- Interstate Compact on Juveniles
- Uniform Child Custody Jurisdiction Act
- Interstate Compact on the Placement of Children

INTERSTATE COMPACTS ON JUVENILES—CUSTODY AND PLACEMENT

Interstate Compact on Juveniles

All 50 States and the District of Columbia have adopted the Interstate Compact on Juveniles.[1] This compact is designed to cover problems that arise in juvenile cases and that are potentially the concern of more than one State. The major purposes of the act have been stated as follows:

1. To provide for the return to their home State of runaways who have not yet been adjudged delinquent.
2. To provide for the return of absconders and escapees to the State from which they absconded or escaped.
3. To permit out-of-State supervision of a delinquent juvenile who is eligible for probation or parole and who should be sent to a State other than the one in which he got into trouble.
4. To authorize agreements for the cooperative institutionalization of special types of delinquent juveniles, such as psychotics and defective delinquents, when such institutionalization will improve the facilities or programs available for the care, treatment, or rehabilitation of such juveniles.[2]

In addition to the basic compact, some States have also adopted optional provisions. These are the Optional Runaway Article, the Rendition Amendment, and the Out of State Confinement Amendment.

The first provision requires that a home State authorize the return of a juvenile within 5 days at its own expense. The second covers the return of juveniles to States where they are charged with having committed a criminal act. The third allows for the institutionalization of various delinquents in States where they have been found or in which they are being supervised, after a determination by officials of the home State that such action is desirable.[3]

REFERENCES

1 *Representing Juveniles in Neglect, P.I.N.S. and Delinquency Cases in the District of Columbia,* 1975 (p. 76). (Bar Association of the District of Columbia, 1819 H Street, N.W., Washington, D.C.)

2 The Council of State Governments, *The Handbook on Interstate Crime Control,* 52, 53 (1966).

3 *Ibid* (61-63).

Additional Reading

For a full discussion of the basic compact provisions and their use, see *The Handbook on Interstate Crime Control* (see reference #2 above) pp. 52-90.

Uniform Child Custody Jurisdiction Act

Seven States have adopted the Uniform Child Custody Jurisdiction Act.[1] The primary goal of the act, which was designed to bring some order into the previously chaotic legal area of child custody, is to prevent the shifting of children from State to State and from family to family while their parents or others battle over their custody in the courts of several States.

Prior to the act, there was no certainty as to which State had jurisdiction to determine who should have custody of a child when persons

seeking custody approached the courts of several different States at the same time. There was also no certainty as to whether a custody decree rendered in one State was entitled to recognition and enforcement in another; nor was there certainty as to when a court of one State could alter a custody decree made by a court in another State.

The result of all this uncertainty was that children were shifted around and often "snatched" by persons seeking custody who hoped to find a court more sympathetic to them than to others also seeking custody. A hopeful guardian would actually go shopping for a court that would award him or her custody of the child, after which that person would snatch the child and remain in that State with the child—at least until the estranged spouse or other hopeful guardian did the same thing.

Others sought to have custody awards made by other courts altered so as to be more favorable to themselves, or even reversed. Because the law was unsettled and jurisdiction unclear, these persons were successful often enough that there was a constant stream of such litigation occurring in the courts.

Underlying the act is the idea that, to avoid troublesome jurisdictional conflicts, a court in one State must assume the responsibility of determining custody matters. Upon adoption by a State, the act becomes a part of that State's law.

The act can be put into operation by an individual State regardless of whether other States choose to follow suit. Obviously, however, the full benefit of the act, because it sets out guidelines for determining custody jurisdiction between States, will not be realized unless and until a large number of States choose to follow its provisions.

REFERENCE

1 California, Colorado, Hawaii, Maryland, North Dakota, Oregon and Wyoming. Source: *Uniform Laws Annotated Master Edition: Directory of Acts and Tables of Adopting Jurisdictions* (1976).

Interstate Compact on the Placement of Children

As of 1976, some 34 States had enacted the Interstate Compact on the Placement of Children.[1] The compact is basically an agreement between the States adopting it which facilitates the placement of children on an interstate basis with roughly the same ease as could be accomplished on an intrastate basis in the absence of the compact. The primary ingredients for achieving this are:

1. Provisions to ensure that preplacement investigations will be made and that the findings of such investigations will be given to the agencies in the State from which the placements are to be made;
2. The provision of supervisory services;
3. A fixing of financial responsibility; and
4. A fixing of jurisdiction.

All of these matters—normally explicitly provided for by a State within its own boundaries—could be unclear when a placement is made across State lines.

REFERENCE

1 California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Source: The Council of State Governments (unpublished).

Additional Reading

A good general discussion of the history and purpose of interstate compacts may be found in The Council of State Governments, *Interstate Compacts 1783-1970.* This Council periodically publishes other books and articles concerned with the subject of interstate compacts, their use and promulgation.

MORE ADVANCED LEGAL CONCEPTS

- Investigation
- Family Privacy
- Discovery
- Dispositional Stage: Discovery
- At Trial—Evidence

This section on "More Advanced Legal Concepts" elaborates on concepts referred to earlier in the manual. Some of the material, by design, is repeated in the interest of bringing together in one place the pertinent facts related to the particular concept.

INVESTIGATION

Fourth Amendment—Present Status of Search and Seizure Law

In criminal law, searches are governed by the warrant clause of the fourth amendment. The U.S. Supreme Court has consistently struck down criminal searches of persons, homes, cars, and seizures of evidence made without a properly issued warrant.

The warrant requirement is subject to only a few narrow exceptions:[1] (a) consent, (b) necessary haste, and (c) a very small class of routine searches.[2] The basic element of the consent exception is simply that a search, without a warrant or without probable cause to suspect that a crime has been or is being committed, may be conducted if consented to voluntarily by the person in question[3] or by someone authorized by that person to control the place to be searched.[4]

The necessary haste exception is the broadest of the three. This exception permits a search where the immediate situation prevents obtaining a warrant, such as when there is "hot pursuit"[5] or where the object of the search can be removed or destroyed.[6]

The routine searches allowed without a warrant in the criminal area have been strictly limited to such areas as international border crossings,[7] the premises of highly regulated activities,[8] and inventory checks of persons or objects otherwise taken into custody in a proper manner.[9] These searches are, of course, subject to the general requirement that the search be reasonable.

The search warrant in a criminal case may be issued only by a neutral judicial officer and must be supported by probable cause. The warrant must indicate specifically the place to be searched as well as what is to be seized.[10]

The primary method of enforcing fourth amendment search and seizure requirements has been through the exclusionary rule. The exclusionary rule simply excludes from consideration as evidence at trial what is found as a result of improper searches and seizures. Civil and criminal actions against officials who violate the requirements are sometimes available, but are rarely pursued.

The Supreme Court recently distinguished between searches in the criminal area and those that are administrative in nature. Since child abuse and neglect investigations can be characterized as administrative, this distinction has implications for child abuse/neglect investigative procedures.

In the 1959 case of ***Frank v. Maryland***, the Court upheld the validity of a municipal code authorizing warrantless searches by officials where they had reason to suspect the presence of a violation of the code.[11] The Court reasoned that fourth amendment protection was directed at protection from unauthorized criminal searches. The search in this case was held to be administrative—a search that, at that time, was not covered by fourth amendment protection.

Frank was overruled in 1967 by two cases: ***Camara v. Municipal Court*** and ***See v. Seattle.***[12] In ***Camara***, the Court rejected the administrative/criminal distinction which was the basis of the ***Frank*** decision and held that the fourth amendment right of privacy could be violated even where no criminal element was involved. In ***See***, the fourth amendment

protection was extended to cover places of business as well as private homes.

In 1970, the Court upheld a warrantless inspection of a locked liquor storeroom by Internal Revenue Service agents.[13] The case, however, may be of somewhat limited value in authorizing administrative searches without a warrant because the majority opinion of Justice Douglas noted that liquor industry cases are special because the liquor industry is highly regulated by government.

Wyman v. James, decided by the Supreme Court in 1971, may be considerably more significant for child abuse and neglect investigations.[14] In ***Wyman***, the court held that the warrantless visit to the house of a welfare recipient was not a search within the meaning of the fourth amendment. The Court noted that, even though the welfare visit was investigative, it was nevertheless not a "search" within the criminal law meaning of that term.

The Court distinguished ***Camara*** and ***See*** because the facts in ***Camara*** and ***See***, while having community welfare aspects, could result in criminal prosecution.[15] The only result of the plaintiff's refusal to allow the visit in ***Wyman*** was termination of welfare benefits. The Court's holding in ***Wyman*** must be viewed in the light of several factors that were specifically noted in the opinion:

1. The visit was not made by police or other uniformed authority.
2. The purpose of the visit was primarily for the welfare of the person visited.
3. The visit was not aimed at prosecution.
4. The possible sanction was termination of welfare benefits.
5. The person visited was notified in advance of the visit.
6. Administrative procedures of the welfare department emphasized the right to privacy and prohibited entry under false pretenses, visits after normal working hours, and forcible entry.

Even though the visit might disclose evidence of criminal activity (i.e., welfare fraud), the Court held this does not make it a criminal investigation, the possible sanction being the termination of benefits. The Court expressly stated that it was ***not*** deciding at this point if such evidence of criminal activity, if discovered in the course of a welfare visit, would be admissible in a criminal proceeding..

These factors in ***Wyman*** are the most pertinent guidelines currently available to agencies that engage in child abuse investigation.

REFERENCES

1 E.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (dictum); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 478-82 (1971); *Chimel v. California*, 395 U.S. 752, 762 (1969); *Katz v. United States*, 389 U.S. 347, 356-357 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Stoner v. California*, 376 U.S. 483, 486 (1964) (being among the more recent cases).

2 *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (dictum); see *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Amos v. United States*, 255 U.S. 313 (1921).

3 E.g., *Davis v. United States*, 328 U.S. 582 (1946).

4 E.g., *Frazier v. Cupp*, 394 U.S. 731, 740 (1969); but also see in this regard *Stoner v. California*, 376 U.S. 483, 488-90 (1964).

5 *Warden v. Hayden*, 387 U.S. 294 (1967); see also *Gilbert v. California*, 388 U.S. 263 (1967).

6 *Chambers v. Maroney*, 399 U.S. 42 (1970); *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *Preston v. United States*, 376 U.S. 264 (1964).

7 *Belfare v. United States*, 362 F.2d 870, 874 (9th Cir. 1966) and cases cited therein.

8 *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (dicta). The courts appear to be divided in the case of searches by school personnel of student lockers yielding evidence for use in a criminal proceeding. Some courts characterize such personnel as private persons whose searches are not subject to fourth amendment limitations. Other courts have held that school officials are government agents for the purposes of the exclusionary rule. See annotation at 49 A.L.R. 3d 978 for cases on both sides of the issue. In view of the fact that child welfare workers regularly conduct investigations on behalf of State governments as part of their job, it seems that they should be characterized as

government agents whose activities are guided by the fourth amendment.

9 See *Harris v. United States*, 390 U.S. 234 (1968) as interpreted by *Cady v. Dombrowski*, 413 U.S. 433, 444-445 (1973).

10 *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971); *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Berger v. New York*, 388 U.S. 41, 55-60 (1967); See also: *McGinnis v. United States*, 227 F.2d 598 (1st Cir. 1955).

11 359 U.S. 360.

12 387 U.S. 523 (1967) and 387 U.S. 541 (1967).

13 *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

14 400 U.S. 309 (1971).

15 *Wyman v. James*, 400 U.S. 309, 325 (1971).

Fifth Amendment—Miranda Warnings

The landmark decision ***Miranda v. Arizona***[1] has possible implications for child abuse and neglect investigations. In ***Miranda***, the U.S. Supreme Court indicated that the prosecutor in criminal cases may not use statements received while the defendant was in police custody and questioned, unless the prosecutor demonstrates that procedures were used to ensure that the defendant understood the law that he/she was not required to incriminate him or herself.[2] The procedures required are the now well-known ***Miranda*** warnings.

With respect to child abuse and neglect investigations, only one element of ***Miranda*** is important: the element of questioning while in custody (custodial interrogation).

The Court in ***Miranda*** defined custodial interrogation in the following terms: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[3]

The key elements of the Court's definition have been extensively litigated. From some cases, it can be inferred that ***Miranda*** warnings are required in child abuse and neglect investigations; other cases imply the contrary. Although the cases are inconclusive, relevant legal factors that are present in child abuse/neglect investigations can be identified and used as guidelines by human services agencies.

One major element that triggers the ***Miranda*** requirement is custody or significant deprivation of freedom of action. Even though child abuse and neglect investigations by agency caseworkers usually take place in the home, this custody/coercion factor may still be present. Under some circumstances, questioning a person at his/her residence has been designated a custodial interrogation. Such cases turn on the amount of compulsion present.

Courts have found "custody" where the person involved is neither physically restrained nor actually told that he/she is under arrest, but where, in view of the circumstances, the presence of civil authority was such that the person might believe his/her freedom of movement was restricted.[4] In general, circumstances indicating that the person being questioned is not free to leave or dismiss the investigator give rise to the requirement of a ***Miranda*** warning. A caseworker might alleviate the necessity of giving a ***Miranda*** warning by disclosing that he/she has no power to arrest the person being questioned.

The presence of a police officer during child abuse/neglect investigations could, on the one hand, necessitate ***Miranda*** warnings. On the other hand, questioning by a caseworker alone may not require the ***Miranda*** warnings. Questioning by some categories of State and Federal officials has been held ***not*** to amount to custodial interrogation. Some examples follow.

1. High school principal's questioning of a student.[5]
2. Labor department official's questioning of a defendant in an office of the department (though the Court noted that such officials are not exempt from ***Miranda*** requirements if the interrogation is custodial in nature).[6]
3. Income tax investigations[7] (though these may require warnings when the

investigation shifts from civil audit to a criminal prosecution investigation).[8]

4. Liquor violation investigations by Treasury Department officials.[9]
5. U.S. Food and Drug Administration investigators.
6. Welfare investigators investigating for fraud.[10]

The ***Miranda*** requirement applies to such persons only when circumstances indicate that the person being interviewed is under some sort or restraint,[11] ***or*** when the purpose of the investigation is criminal prosecution.[12]

In short, the following characteristics should alert the social worker to the need to give ***Miranda*** warnings:

1. Any element of apparent coercion or restraint.
2. The presence of a police officer.
3. If the investigation is directed toward criminal prosecution.

A warning, to comply with ***Miranda*** standards, must inform the person of his/her right to consult with an attorney, have an attorney present during questioning, and that, if the person cannot afford an attorney, one will be provided. The warning must also inform the person of his/her right to remain silent and that any information obtained may later be used against him/her.

REFERENCES

1 384 U.S. 436 (1966).

2 384 U.S. 436 (1966) at 444.

3 384 U.S. 436, 444 (1966).

4 *Orozco v. Texas,* 394 U.S. 324 (1969); *Reeves v. State,* 258 Ark. 788, 528 S.W.2d 924 (1975); *United States v. Bekowies,*430 F.2d 8 (9th Cir. 1970); *United States v. Phelps,* 443 F.2d 246 (5th Cir. 1971).

5 *People v. Shipp,* 96 Ill. App 2d 364, 239 N.E.2d 296 (1968); *In re Brendan H.,* 82 Misc. 2d 1077, 372 N.Y.S.2d 473 (1975).

6 *People v. Accavallo,* 57 Misc. 2d 264, 291 N.Y.S.2d 972 (1968).

7 *Frohmann v. United States,* 380 F.2d 832 (8th Cir. 1967) Cert. denied 389 U.S. 976 (1967) and cases cited therein at 836.

8 *United States v. Wainwright,* 284 F. Supp. 129 (D. Colo. 1968). *United States v. Dickerson,* 413 F.2d 1111 (7th Cir., 1969).

9 *United States v. Agy,* F.2d 94 (6th Cir., 1967) Cert. denied 389 U.S. 881 (1967); *United States v. Littlejohn,* 260 F. Supp. 278 (E.D.N.Y. 1966).

10 *United States v. Mueller,* 510 F.2d 1116 (5th Cir., 1975).

11 *United States v. Berard,* 281 F. Supp. 328 (D. Mass. 1968); *United States v. De La Cruz,* 420 F.2d 1093 (7th Cir., 1970); *United States v. Salinas,* 439 F.2d 376 (5th Cir., 1971); *United States v. Pellegrini,* 309 F. Supp. 250 (S.D.N.Y. 1970).

12 *State v. Kalai,* 56 Haw. 366, 537 P.2d 8 (1975); *State v. Williams,* 522 S.W.2d 641 (Mo. App. 1975); *Sims v. State,* 51 Ala. App. 183, 282 So.2d 635 (1973); *People v. Range,* 17 Ill. App.3d265, 308 N.E.2d 195 (1974); *United States v. Phelps,* 443 F.2d 256 (5th Cir. 1971); *United States v. Carollo,* 507 F.2d 50 (5th Cir. 1975) Cert. denied 423 U.S. 874 (1975).

Fifth Amendment—Special Cases

Very few cases involving child abuse/neglect investigations and fifth amendment rights have reached State courts of appeal. In a recent case, answers given by the father of a deceased child in response to questions by a physician were held to be admissible in the homicide trial that followed, even though a policeman was ***nearby*** at the time of the questioning and no ***Miranda*** warnings were given.[1]

In ***State v. Ryan,***[2] the admissions of a defendant to a policeman at the hospital where her child was taken were held to be admissible. The court found it unnecessary to determine whether the ***Miranda*** warnings were actually given.

Since Internal Revenue Service investigations have some of the same kind of fifth amendment problems as child abuse/neglect investigations, it is possible that the courts may compare the two areas. In both areas, noncriminal, ongoing inquiries are made which may disclose a basis for later civil and criminal proceedings.

The status of ***Miranda*** with regard to tax investigations has been the subject of critical commentary. Much of the comment suggests that ***Miranda*** warnings should be required from the outset of the initial I.R.S. interview.[3] The courts, however, have not gone as far as the commentary suggests.

The courts have split on the issue of when ***Miranda*** comes into play. One line of cases has required that the ***Miranda*** warning should be given when the I.R.S. investigation shifts from a civil audit with civil consequences to a criminal investigation.[4] The other line of authority, and apparent majority of cases, do not require even this, but hold that ***Miranda*** applies only upon custodial interrogation.[5]

The view that the ***Miranda*** warnings must be given when the investigation becomes criminal in nature is probably easier to implement in I.R.S. proceedings than in other agency investigations.

Within the I.R.S. itself are two investigative departments: one for civil investigations (Audit Division) and one for criminal work (Intelligence Division). This provides an easy dividing line between civil and criminal inquiries. While agencies investigating child abuse/neglect may not be so neatly divided, the same analysis may be applicable. The ***Miranda*** warnings should be given to the client when and if the agency or an agency representative begins to consider the possibility of criminal action. In this view, investigations for civil purposes could be made prior to giving ***Miranda*** warnings.

REFERENCES

1 *State v. Sparks*, 217 Kan. 204, 535 P.2d 901 (1975).

2 114 R.I. 343, 321 A.2d 92 (1974).

3 See "The Constitutional Rights of the Taxpayer in a Tax Fraud Investigation;" 42 *Tulane L. Rev.* 862 (1970); "Extending ***Miranda*** to Administrative Investigations," 56 *W.Va. L. Rev.* 690 (1970); "Prosecutions for Attempts to Evade Income Tax: a Discordant View of a Procedural Hybrid," 76 *Yale L. J.* 1 (1966); "The Right to Counsel in Criminal Tax Investigations Under *Escobedo* and *Miranda*: The Critical Stage," 53 *Iowa L. Rev.* 1074 (1968).

4 *United States v. Michals*, 469 F.2d 215 (10th Cir. 1972); *United States v. Wainright*, 284 F. Supp. 129 (D. Colo. 1968) and cases cited therein; *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969).

5 *United States v. Browney*, 421 F.2d 48 (4th Cir. 1970); *Spahr v. United States*, 409 F.2d 1301 (9th Cir. 1969) cert. denied 396 U.S. 840 (1969); *Hensley v. United States*, 406 F.2d 481 (10th Cir. 1968); *United States v. Sgueri*, 398 F.2d 785 (2d Cir. 1968); *United States v. Mains*, 378 F.2d 716 (6th Cir. 1967) cert. denied 389 U.S. 905 (1967), and cases cited therein.

FAMILY PRIVACY

An indication of how the courts may decide cases where family privacy and the child's welfare conflict may be found in the numerous cases in which courts have balanced the parents' religious freedom against the child's right to medical treatment. In such cases, the crucial factors are:

1. The parents' constitutional right to religious freedom.
2. The life-threatening nature of the child's condition.

Courts are in substantial agreement that when a child's life is in imminent danger, the State may intervene over the objections of the parents in order to provide necessary medical treatment.[1] Often such cases turn on a finding of neglect or dependency and this finding gives the court jurisdiction over the child.[2] When the life of the child is at stake, even religious objections may be overriden.[3]

When, however, the child's life is not in danger, courts are not always willing to allow the State to order medical care over parental objections.

> **. . . as between the parent and the state, the state does not have an interest of sufficient magnitude outweighing a parent's religious beliefs when the child's life is *not immediately imperiled* by his physical condition.**[4]

A minority of courts find parental rights outweigh those of the child when the child's life is not in immediate peril. For example, in one State when a child's guardian refused to allow surgical correction of a speech defect, the court did not find dependency, even though the objection to medical treatment was not based on religious grounds.[5]

In another case, parental belief in "self-healing through natural forces" was found a sufficient objection to override a county health department's recommendation of corrective surgery for a child with cleft palate and harelip.[6] The majority of courts, however, rule in favor of medical treatment over parental objections, even when the child's life is not endangered.[7]

REFERENCES

1 See, in general, 30 ALR 2d 1138 ff. for an annotation of cases on this point; also *Jehovah's Witnesses of Washington v. King County Hospital*, 278 F. Supp. 488 (D.C. Wash. 1967; affirmed 390 U.S. 598 (1967)).

2 E.g., *In re Vasko*, 238 N.Y. App. Div. 128, 263 N.Y.S. 552 (1933); *Mitchell v. Davis*, 205 S.W.2d 812 (Tex. Civ. App. 1947).

3 *People ex rel Wallace v. Labnenz*, 411 Ill. 618, 104 N.E.2d 769 (1952). Cert. denied 344 U.S. 824.

4 *In re Green*, 292 A.2d 387 at 392; emphasis as in original text.

5 *In re Frank*, 41 Wash.2d 294, 248 P.2d 553 (1952).

6 *In re Seiferth*, 309 N.Y. 80, 127 N.E.2d 820 (1955).

7 In general, see 52 ALR 3d 1118 for an annotation of cases on this point; see also *In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918 (1972) distinguishing *Seiferth; In re Karwath*, 199 N.W.2d 147 (Iowa 1972) also distinguishing *Seiferth;* and *Muhlenberg Hospital v. Patterson*, 128 N.J. Sup. 498, 320 A.2d 518 (1974).

DISCOVERY

Discovery is the system of pretrial procedures which enables the parties involved in a court proceeding to find out about the positions taken by the other parties and the facts which those parties believe support their positions.

The methods used in discovery include interrogatories (written questions to be answered by the party to which they are submitted), physical examinations of evidence and persons, oral depositions (statements taken under oath), the surrendering of copies of documents, and requests for admission.

The advantage of using discovery procedures is that the legal system functions better when all parties know in advance the basis for each other's position. Advance knowledge of this nature can help a social worker prepare efficiently for trial. At the same time, discovery procedures have the disadvantage of introducing an element of delay into the legal proceedings.

No consistent rule has been developed to cover the use of discovery in child dependency cases.

Established discovery procedures exist for both criminal and civil cases; juvenile courts could presumably follow the rules for either. It is not clear, however, into which category juvenile hearings fall. The U.S. Supreme Court has specifically declined to categorize the juvenile process as either civil or criminal, calling this approach "wooden" and unproductive.[1] Juvenile proceedings, therefore, are without clearly defined rules of discovery.

In the juvenile delinquency area, which is only a little better defined, the courts are also inconsistent. Most courts do not allow full civil discovery procedures here, but some do allow for discovery somewhat more liberally than is found in criminal cases.[2] Still other courts have held that discovery is not part of the juvenile process and that it is "ill-advised to suggest engrafting pre-trial discovery procedures" upon juvenile courts.[3]

Some courts leave the use and extent of discovery procedures up to the discretion of the juvenile court judge.[4] Still others have simply held that pretrial discovery is not available unless provided by court rule, statute, or constitutional requirements.[5] In short, the rules covering pretrial discovery in juvenile delinquency cases are inconsistent, varying greatly from jurisdiction to jurisdiction.[6]

In view of the state of discovery in delinquency proceedings, it is not surprising that very little can be said definitively about discovery in dependency hearings. But here the problem is more a lack of case law.

Only one jurisdiction, New York, has reported cases on the subject. ***Matter of Curtis B.*** involved abuse and neglect.[7] In ***Curtis***, the parents attempted to initiate discovery proceedings by submitting written interrogatories to the New York Welfare Department. (In a civil proceeding, the welfare department could be ordered to answer such interrogatories.) When the department refused to answer, the parents brought action. The court held that discovery was applicable and appropriate to the case and that the welfare department must provide ***some*** of the information requested. In ***Carolyn D.***, the parents were held entitled to ***all*** records of physical examinations of their child to assist them in preparing their case.[8] The general rule that emerges from these cases, however, is that, in New York, the application of discovery is to be decided on a case-by-case basis.

In both cases, the parents were allowed to discover information which might be used against them: about witnesses, including the hospital involved, and persons who asked and were asked about the child's injuries.

REFERENCES

1 *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) at 541.

2 "Discovery Rights in Juvenile Proceedings," *U. S.F. L. Rev.* 333 (1973).

3 *District of Columbia v. Jackson*, 261 A.2d 511, 512 (D.C. App. 1970).

4 *People ex. rel. Hanrahan v. Felt*, 48 Ill. 2d 171, 269 N.E.2d 1 (1971); *Z. v. Superior Court of Los Angeles County*, 3 Cal. 3d 797, 91 Cal. Rptr. 594, 478 P.2d 26 (1970).

5 *Saunders v. District of Columbia*, 263 A.2d 58 (D.C. App. 1970).

6 See "Discovery Rights in Juvenile Proceedings," *supra*, at 341.

7 52 Misc. 2d 400, 275 N.Y.S.2d 997 (1966).

8 65 Misc. 2d 752, 317 N.Y.S.2d 784 (1970).

DISPOSITIONAL STAGE—DISCOVERY

No general rule exists for discovery at the dispositional stage of child abuse and neglect cases.

The rule of the only recent relevant case is probably limited to New York State in that it was based on a specific N.Y. statute under which the New York Family Court may keep confidential the psychiatric reports used by the court in the dispositional phase of a dependency hearing.[1]

Analogies with the dispositional stages of delinquency and child custody proceedings suggest that, in the future, the court may allow access to investigate reports on due process grounds.[2]

REFERENCES

1 *In re J.* 38 AD2d 711, 329 N.Y.S.2d 349 (1972); New York Family Court Act §1047 (1973).

2 See, for example, *In re Poulin*, 100 N.H. 458, 129 A.2d 672 (1957); *Baldwin v. Lewis*, 300 F. Supp. 1220 (E.D. Wisc. 1969) reversed on other grounds 442 F.2d 29 (7th Cir. 1971), a detention hearing case; *Williams v. Williams*, 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955); *Oltmanns v. Oltmanns*, 265 Minn. 377, 121 N.W.2d 779 (1963); *McGuire v. McGuire*, 140 So.2d 354 (1962), modification of custody; *In re A.W.*, 230 So.2d 200 (Fla. App. 1970); *Mazur v. Lazarus*, 196 A.2d 477 (D.C. App. 1964).

AT TRIAL—EVIDENCE

The Hearsay Rule

In a legal proceeding, two basic kinds of decisions are to be made: questions of law and questions of fact. Questions of law are decided by the judge; questions of fact, by the jury. In a nonjury trial, questions of fact are decided by the judge or referee without the aid of a jury. Most juvenile cases are nonjury trials.

Trier of fact is a shorthand term for the person or persons charged with the responsibility of arriving at a decision about the facts of a case. *Trier of fact* may refer to a jury, a judge sitting without a jury, or a referee.

Courts have developed rules about the kinds of evidence the trier of fact may use in making decisions (Rules of Evidence). If an attorney thinks an opponent is presenting evidence which violates one of these rules, the attorney can, by objecting, ask that the evidence be excluded. The attorney states: "I object, Your Honor."

One of the most common objections that an observer is likely to hear during a trial is that a certain piece of evidence, or a certain portion of testimony, is "hearsay." Usually the objection is made when the witness on the stand reports what someone else said or did, rather than what the witness said or did. The main characteristic of hearsay evidence is that it is secondhand.

The basic problem with secondhand evidence is reliability, since it is virtually impossible to ensure the accuracy and truth of hearsay. The secondhand evidence may be wrong or it may be a mistake, and, since the person who is stating the evidence heard it from someone else, he or she cannot vouch for the truth of its content.

Secondhand information has little value as proof. Therefore, most hearsay evidence is excluded from testimony and cannot be used by judge, jury, or referee in arriving at a decision.

In most States, hearsay testimony must be promptly objected to; otherwise, it will not be excluded. Courts impose on the objecting attorney a duty to identify the particular defect in the testimony and to give the judge valid grounds for excluding the evidence.[1]

If the attorney fails to object, the trier of fact may consider the hearsay evidence along with nonhearsay evidence in determining the facts, giving the hearsay testimony whatever weight he or she considers correct.[2]

A few States hold the view that hearsay, by itself, has no value as proof whatsoever; therefore, it may not be considered in the decision-making, whether or not an objection is raised.[3]

If the judge sustains the objection, the witness is prohibited from repeating the out-of-court statement. If the witness has already testified, the judge will order the hearsay struck from the record so that, formally, it can no longer be used as a basis for decision.

The hearsay rule applies only to adjudication hearings. It is not applicable to temporary custody or dispositional hearings.

REFERENCES

1 *State v. Horton,* _____IA. _____, 231 N.W. 2d 36 (1975).

2 *Jones v. Spidle,* 446 Pa. 103, 286 A.2d 366 (1971); *United States v. Harris,* 437 F.2d 686 (D.C. Cir. 1970); *Letendre v. Hartford Accident and Indemnity Co.,* 21 N.Y.2d 518, 289 N.Y.S.2d 183, 236 N.E.2d 467 (1966).

3 *Handley v. Limbaugh*, 224 Ga. 408, 162 S.E.2d 400 (1968); *Orr Chevrolet, Inc. v. Courtney*, 488 S.W.2d 883 (Tex. Civ. App. 1972).

Learned Writing (Hearsay Exception)

Books and articles are clearly hearsay (since it is impossible to cross-examine a piece of paper). The information in a book that is offered as evidence is secondhand. Nevertheless, the learned writing exception to the hearsay rule permits the use of scholarly, professional publications at trial.

Professional publications are typically used in the cross-examination of witnesses, particularly of experts. The cross-examination may attempt to discredit the expert's opinion by showing that the witness' opinions differ from those generally accepted in the profession. Also, the cross-examiner may use a professional publication to show that an expert who relied upon the publication in testifying was really unfamiliar with its contents.

Generally, books and articles are not admitted as evidence of the truth of their contents. Only a very limited kind of written information is viewed by courts as evidence of facts, and this information is confined primarily to industrial data.[1]

Courts developed the rule allowing learned writings into evidence—despite their hearsay characteristics—because an author's testimony is often necessary to test or support the opinions given in court by expert witnesses and because it is generally inconvenient or impossible to bring authors to court.[2]

A learned writing is considered reliable because the professional writer's work is subject to criticism by the professional community. In addition, even if bias in favor of an author's point of view is possible, the probability of a professional publication favoring a particular litigant is low.[3]

Professional writing that qualifies under this hearsay exception includes:

(1) Standard professional textbooks (for example, *Gray's Anatomy* or *Encyclopedia of Social Work*).

(2) Scientific reports, such as those published in scientific journals.

(3) Published professional standards; for instance, a police tactical manual on the use of firearms. Professional social work standards or manuals developed by State agencies or by national organizations, such as the Child Welfare League of America, may qualify.

REFERENCES

1 *McCormick* at 744.

2 6 *Wigmore on Evidence* §1619 (3d. ed. 1940).

3 *Ibid.*, §1692.

Definition of Hearsay

Hearsay is a statement (1) not made in court, (2) not made so the declarant could be cross-examined; and (3) offered in court as evidence of the truth of its content.[1] Because hearsay is a complex concept, it is necessary to analyze each of the parts of its definition.

● **It is a statement**, and a statement is a declaration or a communication, either spoken or written. Or a statement can be conduct that communicates a message to the people observing the conduct.[2] For example, if a person nods his or her head, this is conduct communicating "yes" to people who can observe it.

Hearsay involves two people: the person who originally made the statement—spoken, written, or by conduct—and the witness who repeats it in court. The person who first makes the communication is called the declarant.[3] The witness tells in court what the declarant communicated.

The declarant must ***intend*** the statement to be a communication for it to be considered hearsay. It is easy to recognize when a declarant intends a spoken or written statement to be a communication, since the intention to com-

'municate is present when the person first speaks or writes the message.

Conduct can also be an intended communication. However, it is more difficult to judge if the communication of conduct is intended.

Conduct is intended if the actor ***deliberately*** intends the act to communicate a message.[4] In the law, this is called "assertive conduct." Pointing a finger at a person in a police lineup is assertive conduct that can be hearsay because it is intended by the actor as a communication of recognition of the person.[5]

If the conduct is not deliberately intended to communicate a message, it is ***not*** hearsay in California and in Federal courts.

Although in some conduct no communication is intended, an observer may still draw inferences from it.[6] A person shivering outside is an example of "nonassertive conduct." The shiverer probably intends no communication; but an indoor watcher might infer from the shivering that it was cold outside. However, it is also possible that the shiverer might be suffering from influenza or might have just seen a car narrowly avoid hitting a pedestrian. If 25 people shivered, the inference of low temperature is stronger, but it still is not the only possible inference that can be drawn from the observation.

• **The statement is made outside the presence of the trier of fact.** If the statement is made outside of court, the trier of fact is unable to evaluate the statement.

Normally, judges and juries evaluate the personal credibility of a witness as a part of the factfinding process. This credibility or believability depends on such factors as the witness' perception, memory, articulateness, veracity, and demeanor.[7]

Perception, which refers to how accurately the witness perceived the event, depends on factors such as:

(a) distance from the event,

(b) outside interference or distractions,

(c) witness' physical condition,

(d) witness' perceptual disabilities (if any),

(e) time of day or night.

For instance, was the neighbor who reported the abuse close enough to really determine whether the parent intentionally knocked the child down or whether a disciplinary spanking accidentally carried too much force?

Memory, which involves how well the witness remembers what was perceived, can be distorted by excitement over the incident, or by the simple passing of time. For instance, if the neighbor who saw the incident then viewed a sensational television report about it, his or her memory could be distorted by the report's sensationalism.

Articulateness, which entails the witness' ability to communicate an experience to others correctly, depends on factors such as lack of hesitation in the narration; use of accurate, understandable language instead of professional jargon or "street" slang; and willingness to provide supporting details as well as general statements. Our hypothetical neighbor-witness would be more believable if he or she specified how many times the child was hit and on what parts of the body, rather than referring to the beating only as being "knocked about."

Veracity refers to the witness' apparent objectivity; it includes questions such as apparent personal involvement or lack of a reason to lie.[8] If the neighbor who allegedly saw the abuse had a long-standing and well-known dislike for the parents, this bias could color his/her testimony, making it less believable.

Demeanor is the witness' voluntary conduct on the witness stand—the "sweaty palms and shifting eyes" approach to trustworthiness. A witness who is excessively nervous or too carefully coached on the stand may be less believable than one who provides coherent, understandable testimony from memory.

The problem with hearsay is that the trier of fact cannot use these factors to evaluate the believability of the person who first made the

statement. Only the witness in the courtroom who is repeating the statement can be evaluated, and this witness has only secondhand knowledge of the event.

Suppose the witness in court is a social worker reporting ***what a neighbor said about a family***. Even though the worker may have heard the neighbor correctly, clearly recalls the interview, articulates precisely what was said, and has no reason to lie, the trier of fact still has no way to evaluate the neighbor's credibility. The neighbor may have incorrectly observed or may have a reason to lie. It is the absent neighbor's communication that is being used as evidence, not really the social worker's. Therefore, the judge is left without any means of deciding whether the neighbor is believable or not, since only the worker observed the neighbor.

• **The declarant was not under oath.** A witness testifying in court is required to swear or affirm that the truth will be told. The purpose of the affirmation is to impress upon the witness the importance of testifying truthfully. The oath functions, first, to call to mind religious or moral prohibitions against lying and, second, to remind the witness that giving false testimony while under oath is a crime carrying severe punishment.[9]

The person who originally made the statement was not under oath when it was made. Therefore, the out-of-court declarant was under no reminder or compulsion to tell the truth.[10]

• **The declarant was not subject to cross-examination.** The reliability of testimony is usually tested by cross-examination of the witness. In the Anglo-American judicial system, cross-examination is the primary method for exposing falsehood, error, or weakness in testimony, for the benefit of the trier of fact.[11]

The right to cross-examine witnesses, which originated in Renaissance England, is guaranteed by the sixth amendment to the U.S. Constitution and by most State legislatures. The Constitution reads: "In all criminal prosecution, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The right of confrontation and cross-examination is considered to be a ***fundamental right***, not merely a privilege or a technical rule of law.[12] The State may not withhold this right from a criminal defendant,[13] a juvenile in a delinquency proceeding,[14] or a party in a civil proceeding.[15] If the right is withheld, the case may be reversed. Some States have also enacted statutes that expressly grant juveniles in nondelinquency matters the right to confront and cross-examine witnesses.[16]

The legal rule excluding hearsay evidence from trial is designed to protect many of the same values underlying the right to confront witnesses and to cross-examine them.

Persons in cases have the right to be judged on hard facts personally observed rather than on rumor, suspicion, or secondhand information that may be unreliable. However, because some secondhand (hearsay) information may be reliable, it can be used in cases without violating the constitutional right of confrontation or cross-examination.[17] Even in criminal prosecutions, evidence that is shown to be reliable and trustworthy will be admitted as an exception to the hearsay rule.

• **The statement is offered as evidence to prove that what it says is true.** The hearsay rule will exclude hearsay testimony only if the secondhand, out-of-court statement is being used in court to prove that what the statement communicates is true.[18] The rule does not operate against testimony offered for other purposes.

This element is best explained by examples:

> EXAMPLE 1: The witness is a classmate of an allegedly neglected 7-year-old and testifies:
>
> > **Kathy came to school on March 10 and during recess I heard her tell the teacher this story: that her parents had gone away 4 days earlier and left Kathy and her younger brother alone. She also said that they ran out of food after 2 days and hadn't eaten**

since then. I guess the parents came home, but, on April 2, I heard Kathy tell the teacher that the same thing had happened again.

This testimony is inadmissible as evidence to prove the truth of its content: that the parents, in fact, twice left the two young children unattended and without food for long periods of time. This hearsay evidence is unreliable as proof because the witness might not have heard Kathy properly or might be embellishing the story, or there might be a reasonable explanation, or maybe Kathy just made up the apparent abandonment to explain being late to school.

This testimony also could be admitted as proof of other facts; for instance, that Kathy was in school and not truant on March 10 and April 2, or that the schoolteacher had notice of a reportable case of child neglect. Kathy is not on the witness stand. Her classmate is repeating Kathy's statement secondhand.

EXAMPLE 2: Same as Example 1, except that the witness is the schoolteacher repeating what Kathy said.

Admissibility of the statement is not affected by the fact that the teacher to whom Kathy spoke is recounting the incident. The teacher is still repeating Kathy's statement secondhand; therefore, the teacher is giving hearsay testimony. The statement is still unreliable to prove that the parents, in fact, neglected their children.

If the court considers Kathy a party in the hearing, the testimony of either the classmate or the teacher is admissible even though it is hearsay. The court allows the hearsay evidence under the ***Admissions Exception to the Hearsay Rule*** (see section on hearsay exceptions). Some States (for instance, Oregon) consider allegedly neglected children to be parties in neglect and termination of parental rights hearings.[19]

EXAMPLE 3: Witness says:

When I saw Bill here in Eugene on July 21, he told me he just got back from a trip to sign some business papers in San Francisco.

The hearsay is not admissible to prove Bill took a trip to San Francisco or signed business papers there or anywhere. It is admissible, however, as proof that Bill was alive on July 21, or to show that, at least for part of that day, he was in Eugene, Oregon. These two facts about Bill are personally known to the witness from firsthand experience.

EXAMPLE 4: The witness is an election worker in a "ballot-stuffing" case and testifies:

The defendant Brown appeared before me at the polls and asserted he was Epstein. He presented Epstein's identification. He also stated he lived within the precinct, had lived there for 3 years, and had not voted yet that day.

The testimony is fully admissible for the purpose of showing that the statements were made, even though the State must have additional evidence to convict Brown of illegal voting activities.[20]

EXAMPLE 5: The witness is a school security officer at a delinquency hearing. The officer is justifying his search of a student (Terry) that resulted in the seizure of a loaded revolver:

Terry's schoolteacher called me in the morning and told me he heard Terry and a classmate whispering about holding up a neighborhood market. It seemed to be part of a club initiation. Anyway, the teacher said he watched the two go to Terry's locker, which was right outside the classroom, and take a gun and hide it in Terry's coat pocket. So I went right over to the school building and searched Terry and found the gun.

This testimony is not hearsay when offered to prove the officer's right to search the student (probable cause).[21] It shows the effect on the officer of hearing the story and goes to prove why he acted as he did.

If a statement induces another to act in a certain way, it is not hearsay if used in a pro-

ceeding to show why the act was committed.[22] The statement overheard by the teacher and repeated secondhand by the security officer cannot be used to prove conspiracy between the two boys or that the teacher observed the removal of the gun.

Generally, if evidence is admissible for one purpose, it will not be excluded because, for another purpose, it is hearsay.[23]

REFERENCES

1 Based on *McCormick* at 584; *Federal Rules of Evidence*, Rule 801. These and all citations to the Federal Rules are based on 2 *Moore's Federal Practice Rules Pamphlet* (1975).

2 *Federal Rules of Evidence*, Rule 801(a).

3 *Federal Rules of Evidence*, Rule 801(b).

4 Waltz, Jon R., *Criminal Evidence*. Chicago, Ill.: Nelson-Hall, Co., 1975. (p. 65.)

5 *United States v. Ross*, 321 F.2d 61 (2d Cir. 1963); cert. denied 375 U.S. 894, 84 S.Ct. 170, 11 L.ed.2d 123.

6 *Waltz, op. cit.* (p. 66).

7 *McCormick* at 581; *Waltz, ibid*, (p. 63).

8 *Government of the Virgin Islands v. Aquino*, 378 F.2d 540 (3rd Cir. 1967).

9 Perjury is generally considered a felony subject to heavy penalties. Compare 1 to 14 years in prison in California (Cal. Penal Code §§118, 126 (1970)); up to a $2,500 fine and/or 5 years imprisonment in Oregon (Or. Rev. Stats. 162.065, 161.605(1975)); $5,000 fine and/or 1 to 5 years in prison in New Mexico (N.M. Stats. Ann. §§40A-25-1, 40A-29-3 (1953)); up to 7 years imprisonment in New York (N.Y. Penal Law §§210.15, 70.00 (McKinney 1975)).

10 *McCormick* at 582; *Federal Rules of Evidence*, Rule 603, Advisory Committee's Note, cited in *Moore's* at 607.

11 *Anderson v. United States*, 417 U.S. 211, 94 S.Ct. 2253, 41 L.ed.2d 20 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.ed.2d 297 (1973)); *McCormick* at 43. Sequestration of witnesses is the second major truth-testing mechanism.

12 *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.ed.2d 923 (1965); *People ex rel Banks v. Robinson*, 35 Ill. App.3d 16, 341 N.E.2d 26, 28 (Dec. 1975).

13 *Pointer v. Texas, ibid.*

14 *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.ed2d 527 (1966).

15 *United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971); cert. denied 405 U.S. 954; rehearing denied 405 U.S. 1048.

16 E.g., Connecticut, Illinois, New Mexico, Tennessee, Wyoming.

17 *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.ed.2d 489 (1974).

18 *Anderson v. United States, supra.*

19 *State v. McMaster*, 259 Or. 291, 296, 486 P.2d 567 (1971); Rule 26(a), Uniform Juvenile Court Act, cited in *State ex rel Juvenile Dept. of Multnomah County v. Wade*, 19 Or. App. 314, 527 P.2d 753, 757 (1974).

20 *Anderson v. United States*, supra at 220.

21 *In re Brian W.*, 367 N.Y.S.2d 539, 48 A.D. 2d 660 (1975).

22 *McCormick* at 589-590.

23 *McCormick* at 585 *et. seq.*

Additional Reading

Binder, David F., *The Hearsay Handbook*. Colorado Springs, Colo.: Shepard's Inc., 1975.

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We must have *faith* in many things in providing these services:

Faith in the ability of people to change their way of life.

Faith that most parents want to be good parents. . . .

Faith in people's capacity to overcome enormous difficulties.

Faith in our profession as one that understands, accepts, grows.

Most of all, faith in ourselves—in our capacity for warmth and understanding and in our ability to develop helping relationships.

Mildred Arnold—from notes on "Protective Services for Children," used at the West Coast Regional Conference of the American Public Welfare Assn., Sacramento, Calif., Sept. 21, 1955.

END