

Tips and Strategies Regarding Introduction of Evidence

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Learning Objectives

As a result of this webinar, participants will be better able to:

- Identify the types of evidence to consider in a domestic violence case
- Prepare for the admission of evidence and common objections
- Understand uses of expert testimony and how to prepare for direct or cross-x of an expert
- Respond to claims of parental alienation in custody litigation
- Make an adequate record for appeal

Working Assumption

Judicial Findings of Domestic Violence

- Are often valuable in custody cases or other future litigation
- May have more deterrent impact than a consent order
- Can also be incorporated from previous protection orders or criminal convictions

OVERVIEW

I. TYPES OF EVIDENCE OF DOMESTIC VIOLENCE

1. Lay Testimony
2. Expert Testimony
3. Privilege Issues
4. Tangible Evidence
5. Impeachment

II. PRESERVING THE CHANCE OF APPEAL

III. MOCK CROSS-EXAM

1. Testimony of Lay Witnesses

- If related, be prepared for a bias cross examination
- Watch for hearsay problems:
 - May be excited utterance
 - Present sense impression Statement for purpose of diagnosis or treatment
 - State of Mind or Intent
 - May qualify as a “fresh complaint of sexual assault in some states.
 - *Don't forget:* if “Not for the truth,” not hearsay

Looks Like Hearsay But It's Not

- Pneumonic: NOPRIV:
 - Notice
 - Operative Facts
 - Prior Inconsistent Statement
 - Res Gestae
 - Insanity of the declarant
 - Verbal Acts

Child Testimony

- Check to see if special rules for child witnesses in your state
- Request that interrogation occur in chambers
- Children are presumed to be competent. However, if under 6, may need to establish competence on the record
- Competence is established if the witness can appreciate the difference between the truth and a lie.

Testimony About History of Abuse

- PRIOR BAD ACTS: Response to character evidence objection
 - Common scheme or plan theory
 - May be required by statute, particularly if statute requires a pattern of abuse
 - Check to see if particular kinds of character evidence are allowable in your state (i.e. child sexual abuse or sexual assault)
 - Character is an element of the case, e.g., in child custody
 - Impeachment

Rehabilitation

- Must be a direct attack on the witness before rehab
- Prior consistent statement
- Reputation or opinion
- Credibility has many different meanings: Character for truthfulness vs. accuracy about this event

2. Expert Testimony

- Do you need an expert?
 - Judge uneducated about domestic violence
 - Victim minimizing abuse
 - Victim abuses alcohol or drugs
 - Instability or perceived poor parenting
 - Her failure to leave
 - Relevance of abuse to custody determination / risks to children / child abuse
 - Parental Alienation claims (see below)
 - Costs
 - Other issues that may arise

Types of Expert Testimony

- Clinically based opinion (based on interviews of parties)
 - Can assess the relationship and offer opinions about indicia of battering and its effects on these parties
- Social framework opinion (without interviews)
E.g., "Battering and its effects" (Dutton)
 - Can put clinical data in perspective, usually without any interview of the parties
 - Clarifies common misconceptions about domestic violence
 - Much more than "battered women's syndrome"

All Purpose Expert

- Hybrid of clinical and social framework experts
 - Offers clinical opinion about this circumstance
 - Puts this circumstance in the social context of battering
- Record Review (without interviews) - where numerous forensic evaluations already done; an outside expert can make sense of whole record (e.g., in child abuse case, to assess likelihood child's allegations are credible/consistent with abuse)

Parental Alienation Syndrome

- Is now raised more often than not where custody is at issue and mother seeks to limit father's access, esp if she alleges abuse
- In addition to offering expert testimony, you may want to brief this issue.
- PAS is increasingly being used in custody cases without valid scientific basis. It is important to challenge the scientific validity of the theory altogether.

Challenging the Science

- "Frye" or "Daubert" evidentiary hearing (with your own expert) is the best way to challenge the scientific validity of PAS theory; also makes the record for appeal
- The scientific critique is more difficult if the allegation is "parental alienation" instead of "PAS" (it is the "Syndrome" that explicitly invokes the false veneer of a scientific clinical condition. However "parental alienation" is often used in essentially the same manner as PAS, drawing on the same dubious literature and misconceptions.)

Qualifying an Expert

Check local case law, but generally, an expert

- Assists the fact finder in understanding the evidence, or
- Helps determine a fact relevant to material issues
- Dealing with the objection "Not beyond the judge's common understanding"
- Need not have particular advanced degrees (but helps)
- Qualifying the expert by experience
 - Daubert, Kumho and Frye

Testimony of the Expert

- Mode of questioning
- Establishing basis for opinion
- Opinion may be based on non-admitted information
- Modes for eliciting the opinion
- Privilege issues associated with clinical expert

Cross-Examining an Opposing (or "Neutral") Expert

- Using the scientific literature
- Using facts and procedural history of case

3. Privilege

- Check state law on whether communications with helping professionals can be privileged
- Generally, privilege extends to attorneys, psychiatrists/psychologists, social workers, domestic violence advocates and medical doctors
- Careful about opening the door: if door open on some privileged information, it all can be disclosed
- If opposing counsel seeks privileged information, be sure to object or privilege is waived

Waiver of Privilege

- by client
- by mandatory reporters
- duty to warn situations
- if intrinsic to litigant's claim
- through attorney conversation with unprivileged individual

4. Corroborating Evidence

Photographs

- Foundation
 - No need for the photographer
 - Digital photography

Recordings of Phone Messages

- Check your state statute about "wiretapping" or recording without other party's knowledge
- Foundation
 - Recording device capable of taking testimony
 - Operator of the device was competent
 - Recording authentic
 - No changes or deletions
 - Identification of the speakers
 - Testimony made was voluntary without any sort of inducement

Writings

- Foundation
- Statement by perpetrator offered against perpetrator ("admission")
- Witness recognizes the handwriting as the perpetrator's or can prove that the perpetrator created document
- Source can be proven through circumstantial evidence

Police Reports

- Foundation
- Business record/Public Record (made by person with knowledge or a duty to report correctly)
- Pneumonic: PARRT
 - Person with knowledge
 - At or near the time
 - Regularly made
 - Regular business activity
 - Trustworthy
- Custodian or Business record affidavit

Medical Records

- Custodian or business record affidavit
- Business record foundation
- Account for internal hearsay

Watch for Internal Hearsay

- Internal hearsay accounted for
 - Admissions (if perpetrator)
 - Excited utterances (if victim or witness)
 - Present sense impression
 - Statements for purposes of diagnosis or treatment
 - State of mind
 - Not offered for a Hearsay purpose

Receipt of Services from Domestic Violence Provider

- Only with the victim's consent
- Privilege assertion
- Caution: Opening the door

Tangible Evidence

- E.g., torn, broken, bloody items
- Chain of custody may be an issue

Journal

- Identify it
- Testify as to its contemporaneous writing (*not* in preparation for litigation)
- Even if in preparation for litigation, can be useful for establishing dates and corroborating details of abuse
- Offered as past recollection recorded
- Or for refreshing witness

Demonstrations

- Bruises, scars, and other wounds
- Be aware of modesty concerns in open court
- Physically describing the acts of the perpetrator
- Be sure to describe verbally the acts being demonstrated for the record

Bills and Receipts

- Identify the item
- Provide a foundation
 - Business record
 - Admission

5. Impeachment

- Intrinsic impeachment Pneumonic: CBCBATS
 - **C**ontradict
 - **B**ias
 - **C**onviction
 - **BA**d untruthful act
 - **T**estimonial senses
 - **S**tatements, Prior Inconsistent (self contradiction)

Extrinsic Impeachment

- Pneumonic: BATCRO
- **B**ias
 - **A**t issue
 - **T**estimonial sense
 - **C**onvictions
 - **R**eputation and
 - **O**pinion

II. PRESERVING THE CHANCE OF APPEAL

- **Always keep possibility of appeal in mind**
- **Appeals are remarkably successful in domestic violence cases (civil and criminal)**
- **Appellate courts are often more objective and less swayed by the personalities of the parties or dynamics in the courtroom**

Making the Record for Appeal

- **If court excludes your evidence:**
 - you must make an “offer of proof” (or “proffer”)
 - It may be in writing, through the witness, or simply an oral summary by the attorney of what the evidence *would* show if admitted.
 - The proffer should also state what the relevance of the evidence is, i.e., how it would affect the outcome of the case.

Proffer, *cont'd*

- See Fed.R.Ev. 103, but check your own jurisdiction’s rules or cases.
- The exceptions to this requirement are where the evidence is clear from the context (e.g., the question you asked the witness implies the answer), or on cross-examination (where you are not expected to be able to proffer the answer).

Preserving Issues for Appeal

- **If court admits inappropriate evidence**
 - Make sure to articulate your objection (under the law of evidence in your jurisdiction) and/or make a Motion to Strike.
 - *See F.R.E. 103; Check your jurisdiction’s evidence rules or cases.*
- **If court issues an erroneous ruling, make sure your legal argument is articulated, either orally or in writing.**

Excerpt of Mock Cross-Examination of Forensic Psychologist on PAS

Additional Resources

- Jane H. Aiken and Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 Fam. L. Q. 43, (2000).*
- DV LEAP** (www.dvleap.org)
 - Can assist with appeals and other technical assistance;
 - Has briefs and other resources on PAS, custody and abuse, etc

*available on ABA Commission on Domestic Violence website (www.abanet.org/domviol)

**DV LEAP is not an OVW Technical Assistance Provider.